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European University Institute
Department of Law

ASSIMILATED JUSTICE

For the Actors Affected by the International Core Crimes

Towards a Legitimate Assimilated Justice Paradigm

Of Criminal and Restorative Justice Aims

Jessica Jonsson

Thesis submitted with a view to obtaining the title of
Doctor of Laws
of the European University Institute

**"Justice should not only be done, but should manifestly and undoubtedly
be seen to be done"**

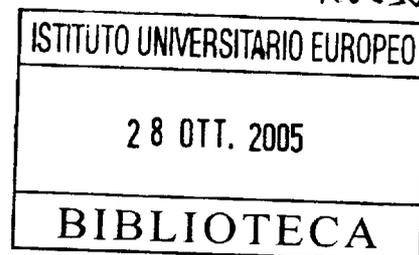
[Lord Hewart, 1923]

**Supervisor: Professor Neil Walker, EUI
External Supervisor: Professor Jeremy Sarkin,
University of the Western Cape,
Cape Town**

Florence, September 2005



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FOREWORDS

The quotation from Lord Hewart preceding these forewords summarizes the objective of this study:¹ to build the foundations for a holistic perspective of justice, whereby justice is only fully achieved once the offender, the victim, and the local community have been acknowledged, that is, once justice has evidently been done. The narrower project of the present study focuses on aspects where international and national justice must not only be done, but should be seen to be done, with regard to victims. With an international perspective on justice, the scope of the study is further confined to injustices involving crimes recognised by, and included in the statutes of international criminal courts, that is, victims of the crimes of genocide, crimes against humanity and war crimes. Because of the large scale of injustices international crimes often result in, the study proposes an assimilation of international criminal justice with truth-telling and reconciling mechanisms of restorative justice. Assimilated justice is proposed, in order to achieve the objective of the study, and hence not only prosecute and punish, or only establish a truth telling and reconciling institution, but to do all that, within the same justice paradigm. This constitutes the foundation of this study. The intention of the proposed foundation, Assimilated Justice, is to solve problems of restricted justice processes and ignorance of the actors involved in and affected by international core crimes, that is, impunity.

The present study may differ a little from a continental-style dissertation that identifies an area of investigation, proceeds with particular problems and ends with a conclusion. In contrast, this study argues for a thesis and provides support for it. Thus, the thesis ‘emerges’ through the chapters and this is also the main purpose of the dissertation. The present study may therefore resemble a more Anglo-American dissertation, than a continental one. However, the research that has gone into the study also pays attention to continental scholarship.

The research and the writing of this study would not have been possible without the assistance and support by numerous individuals and institutions. I would like to express my indebtedness to members of the Faculty of Law of the European University Institute, particularly Marlies Becker and the collective of researchers at the same institute, as well as those scholars who have participated in conferences and workshops. Law librarians all over the world and particularly in Italy, Sweden and South Africa are thanked. Without the help of such individuals administrative and other hurdles would not have been overcome. Through their support, among other things, I was able to visit and carry out research at many different institutions.

¹ Reference to Lord Hewart's document can be found at http://www.academicdb.com/justice_should_not_only_be_done_but_should_manife_5528/

I would like to thank specifically the persons whose support has been particularly invaluable. My supervisor, Professor Neil Walker, has throughout the research provided availability, encouragement, guidance and an incredible amount of patience. My external supervisor, Professor Jeremy Sarkin has had to spend several hours discussing different aspects of the research and its style. My supervisors' friendly and optimistic views made my work rewarding, also much thanks to the readings of different drafts and valuable feedback given. I wish to extend my thanks to the language department of the European University Institute. Without their work, these pages would never have been legible.

Finally, it goes without saying that the research project and the production of this book would not have been possible without the contributions from bodies that value the importance of research. I am indebted to the foundations that awarded me with their scholarships.

I record my deep appreciation for support and love from my family, who have stood by me.

Kampala, 31 August, 2005

The research for this book was completed in November of 2004 and materials only available after that date have not been taken into account.

Keywords: Criminal Justice, International Criminal Court, International Crimes, International Law, Restorative Justice, Truth Commission, South African Truth and Reconciliation Commission, Victim, Community, Truth, Prosecution, Reparation, Reconciliation

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5. TRUTH COMMISSIONS
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ABBREVIATIONS

A/	Document of the General Assembly of the United Nations
ACHR	African Charter on Human and Peoples' Rights
Add.	Addendum
AJIL	American Journal of International Law
All Er	All England Law Report
Art(s).	Article(s)
AYIL	Australian Yearbook of International Law
BYIL	British Yearbook of International Law
CILJ	Cornell International Law Journal
CRIM.L.F.	Criminal Law Forum
CLP	Current Legal Problems
CLS	Current Legal Studies
Conv.	Convention
E/...	Document of the Economic and Social Council of the United Nations
E/CN.4/...	Document of the Commission on Human Rights of the United Nations
ECHR	European Convention for the protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council of the United Nations
Ed. Eds.	Editor(s)
Edn.	Edition
EILR	Emory International Law Review
EJCCCL & CJ	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	European Journal of International Law
ETS	European Treaty Series
EU	European Union
FLR	Fordham Law Review
GA	General Assembly
GAOR	General Assembly Official Records
HCHR	(UN) High Commissioner for Human Rights
HLR	Harvard Law Review
HILJ	Harvard International Law Journal
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
HRY	Human Rights Yearbook
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law

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ICLQ	International Comparative Law Quarterly
ICLR	International and Comparative Law Review
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTs	International Criminal Tribunals
ICTY	International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
IACHR	Inter-American Court of Human Rights
ILM	International Legal Materials
ILQ	International Law Quarterly
ILR	International Law Review
IMT	International Military Tribunal
JCIL	Journal of Comparative and International Law
JIL	Journal of International Law
JPE	Journal of Political Economy
JSMP	Judicial System Monitoring Programme
JWPO	Journal of World Public Order
LCP	Law and Contemporary Problems
LQR	Law Quarterly Review
LSI	Law and Social Inquiry
MLR	Modern Law Review
MYILS	Michigan Yearbook of International Legal Studies
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
OAS	Organisation of American States
OAU	Organisation of African Unity
OED	Oxford English Dictionary
OJ	Official Journal of the European Union
PCIJ	Permanent Court of International Justice
Prep.Comm.	Preparatory Commission of the ICC
Princip.	Principle(s)
PSQ	Political Science Quarterly
Res.	Resolution
Rev.	Revision
RIDP	<i>Revue Internationale de Droit Penal</i>
SA	South Africa
SC	Security Council
SLR	Stanford Law Review
TC	Truth Commission

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Transl.	Translation
TRC	Truth and Reconciliation Commission
TS	Treaty Series
UCLR	University of Chicago Law Review
UN	United Nations
UN GA	United Nations General Assembly
UNGA Res.	United Nations General Assembly Resolution
UNHCR	United Nations High Commissioner on National Minorities
UNHRC	United Nations Human Rights Committee
UNSCR	United Nations Security Council Resolutions
UNTS	United Nations Treaty Series
Vol.	Volume
WLR	Weekly Law Review
YILC	Yearbook of International Law Commission
YLJ	Yale Law Journal

CHAPTER 1: INTRODUCTION

“Not the torturer will scare me, or the body’s final fall,
nor the barrels of death’s rifles, or the shadows on the wall,
not the night when to the ground the last, dim star of pain is hurled,
but the blind indifference of a merciless, unfeeling world.”
[Not the torturer, H. Rasmussen, transl. E.Gress²]

Lately, the paradigms of criminal justice and restorative justice have been given new roots. On the international arena, the criminal justice paradigm has grown with the creation of the International Criminal Court.³ On the national arena, the restorative justice paradigm has likewise been given a lot of attention, in particular with regard to the South African Truth and Reconciliation Commission.⁴ At the same time, a new paradigm may be emerging, evident in attitudes of peace negotiators and states in recent transition, toward the need for *both* criminal accountability and “restorative confrontation” with the country’s past, thus supportive of the concept of assimilated justice. “Assimilated justice” is concerned with truth, justice, and reconciliation for the offender, for the victim, and for and in the community. Assimilated justice is concerned with both a universal dimension, reflecting the rule of law and universal principles; and a dimension of particularism, reflecting restorative and collective values and needs of the local community. In short, assimilated justice is an attempt to combine the paramount elements of criminal justice and restorative justice, in order to add legitimacy to the justice process and to the actors, necessary in order to provide both

² Written for Danish Amnesty, 1979, at <http://www.amnesty.ie/user/content/view/full/3075/>

³ *Ad hoc* international criminal tribunals (referred to as ICTs) have been established in the last decade. The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the ICTY) was established by SCRes 827, 25 May 1993. The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, the ICTR, was established by SC Res 955, 8 Nov.1994. The International Criminal Court (referred to as the ICC) was established in 1998, its Statute of the International Criminal Court was adopted in Rome on 17 Jul.1998, UNDoc.A/Conf.183/9. The ICC Statute confirms that states are the primary actors in international law, see article 17 (from hereon art.17), Rome Statute of the ICC (referred to as the ICC Statute). States are furthermore the primary actors for the prosecution of the crimes under the jurisdiction of the ICC, *i.e.* the international core crimes (referred to as the international core crimes in this study). See Appendix 1 for definition of the crimes within the jurisdiction of the ICC and see generally Bassiouni, 1998; Cassese, 2001, 2002 (Eds.), 2003; Holmes, 2002.

⁴ The South African Truth and Reconciliation Commission is referred to as the SA TRC, see Promotion of National Unity and Reconciliation Act, No.34, 1995, at www.truth.org.za International and national truth commissions (referred to as TCs) have been established in *e.g.* El Salvador, Argentina, Chile and South Africa. They represent a significant institutionalisation of restorative justice, as identified by *e.g.* Snyder, 1995; Berat & Shain, 1995; Nino, 1996. Both the ICC and the SA TRC will be given extra attention in this study, due to the impact they have had and may have with regard to criminal and restorative justice.

a retrospective focus on justice and accountability; and a prospective focus on reconciliation and democracy. Such a focus is argued to be necessary where international core crimes have been committed, as stable justice and democracy are often lost, and there are thus inherent limitations and practical problems that restrict justice processes in such circumstances, often in states in transition. In order to fight impunity and reduce restricted justice, assimilated justice advocates for a combination of certain aims, of which some stem from the criminal justice dimension, reflecting universal principles that seek to protect the rights violated. Other aims stem from the restorative justice dimension, reflecting local particularities.⁵

Current affairs, and the very recent past indicate that restorative and criminal justice are not necessarily two distinct systems of justice; nor are the purely international system, the internationalised domestic system, the domestic criminal or the domestic restorative systems necessarily in conflict. For example, Rwanda, Sierra Leone, and Timor-Leste all reflect, to different extents, a paradigm shift towards assimilated justice, referred to as processes of *quasi*-assimilated justice, by integrating different mechanisms, such as special courts and truth commissions, to deal with the justice process. These examples are used, in this study, in order to indicate a move towards a new paradigm of assimilated justice. However, the emerging practice may be proof of a tentative development of assimilated justice theory, where different persons do different things, in order to reach truth, justice, and reconciliation, in the absence of fully assimilated justice commitment and objective. Emerging practice may also be accidental, due to the strength in the growing systems of both criminal justice and restorative justice. To some extent at least, the ideal of assimilated justice finds support in developing practice, and, in the same way, a more conscious adoption of assimilated justice models can support and extend developing practice. Legitimate assimilated justice must be more than an unconscious combination of multiple justice system. It represents a new praxis of conscious integration of the fundamental aims, of both criminal *and* restorative justice, as one whole. This conscious assimilation of the systems is necessary in order to guarantee the application of the fundamental aims, and the recognition of the actors, through fully assimilated justice.

1.1. PROBLEMS OF THE THESIS

⁵ Transitional justices can gain from stable democratic systems and criminal justice systems where no normal criminal pattern or system exists. However, although lessons can be learnt from such a legal dimension, the local particularities of the state in question must be similarly recognised, whereby the two dimensions must co-exist, in equilibrium.

The problem this thesis is faced with is of both moral and legal importance, for the actors and, first and foremost, the victims, in order to do justice and to ensure that justice can be seen to have been done,⁶ *i.e.* to secure permanent justice and reconciliation. The problem is also of practical relevance, given the latest international criminal justice developments, in the form of the international criminal court, continuous restorative justice applications, and the introduction of processes of *quasi*-assimilated justice.

History can teach us, and should have taught us that criminal justice is not always readily available or suitable to deal with international crimes, at least not single-handedly.⁷ While the international criminal justice system is developing, it is not capable of prosecuting and punishing all the offenders, or hearing and repairing all the victims, or reconciling the general community. It appears that academic writing and political developments in the international context, have, over the last ten or twenty years, mainly focused on the duty to prosecute and punish, to some extent neglecting other important aims of international justice. However important prosecutions are they cannot be viewed as the only means serving to end impunity or to begin a process towards justice. With the establishment of the ICC, the right to reparation has been given new roots in international criminal justice, and this deserves plenty of academic and political attention.⁸ However, the limitations of the criminal sanction, which is not properly able to safeguard the local community and the fundamental aim of reconciliation, together with other restrictions, evident with regard to the criminal justice's primary fundamental aims of just-desert punishment and deterrence, in relation to domestic accountability mechanisms and granted amnesties, must be acknowledged.⁹ The fact that the trials of the ICTs, and future ICC trials, are not held in the territory of the crime, often for reasons of neutrality and security, and therefore requires vast resources, in order to investigate and hear witnesses, is just one of the difficulties encountered with the international criminal justice system. Such difficulties make it slow, expensive, and its inherent dimensional restrictions make it unable to recognise the needs and rights of the victims and the community.

The problem is, however, not merely one of the international criminal justice system. History can also teach us that domestic states are often incapable, and sometimes unwilling, to

⁶ Referring to the quote from the beginning of the study: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done", Lord Hewart, 1923, which sums up the focus of the thesis.

⁷ The same would appear true for domestic criminal justice systems. With regard to the focus of the thesis, where domestic states cannot, and/or will not prosecute and rely on their legal system, domestic criminal justice systems are not referred to *per se*.

⁸ See generally the ICC Statute, art.75; ICC Rules of Procedure and Evidence; and see ahead chapters (ch.) 3, 6. Reparation, in the form of restitution, exists in the *ad hoc* international criminal tribunals.

⁹ This is so whether one refers to the domestic or the international criminal justice system.

prosecute and punish the perpetrators of international crimes and to repair the victims.¹⁰ In states in transition, for example, the presence of the previous regime and its influence on the transitional state, the lack of resources, and the lack of effective institutions are some of the main problems facing states that have suffered these crimes. This is why it is important that domestic states make provisions for domestic courts to prosecute and, in general, apply international law and universal principles and cooperate with the international system. At the same time, it is important that domestic and international criminal justice is able to assimilate more locally sensitive, restorative justice mechanisms, which aim more broadly at truth, reparation and reconciliation. This last important factor is the essence of assimilated justice.

On the other hand, recent history can also teach us to recognise the shortcomings of restorative justice. Not only for the lack of prosecutions and punishment, but also for the lack of quality, and fairness control in e.g. investigations and decisions, and as regards granted amnesties. Most truth reports are followed by recommendations for the government to endorse, but without guarantees of implementation. Blanket amnesties are a threat to justice, as are one-sided truth reports and unfulfilled promises to launch prosecutions and make reparations. Important to note, most of the granted blanket amnesties of the past have been met with great criticism.¹¹ For example, the Salvadoran Supreme Court ruled invalid the application of amnesty laws passed after the issuing of truth reports, in situations where it would frustrate the ability to seek redress and other fundamental rights guaranteed in the Salvadoran constitution.¹² Many international human rights bodies and instruments have likewise condemned blanket amnesties, and this affirms new values and rejected old ones, laid down in international documents.¹³ These lessons promote the proposed assimilation of criminal justice with restorative justice mechanisms.

The problem we are faced with is thus that while both the system of criminal justice exists, and the system of restorative justice exists, these two justice systems appear to run in parallel, rather than working together, as an integrated justice process. Even in situations of *quasi*-assimilated justice, there is not *one* justice system with *one* legitimate justice process.

¹⁰ For the reason that the international justice system relies on the support and cooperation of domestic states, following principles of national sovereignty, the UN Charter, e.g. art.2 and other, restricting reasons of both international and national character; the problems met at the domestic level are of concern also to the international community. With regard to the international core crimes that qualify for universal jurisdiction and allow national and international courts to legitimately exercise jurisdiction over these crimes, the international community is hence not able to fully rely on domestic states to fulfil their obligations. See e.g. Joiner, 1998.

¹¹ This topic is discussed in detail in ch.2, with further references given. See generally Kritz, 1995; Shelton, 1999; <http://web.africa.ufl.edu/asq/v4/v4i3a2.html>; Campbell, 2000; <http://web.africa.ufl.edu/asq/v4/v4i3a2.htm>.

¹² http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993_VI_VII.html. See generally Cuya, 1999, on TCs in Latin America; and see El Salvador's Commission on the Truth for El Salvador report, 1993.

¹³ See ch.2.

Both the criminal justice and restorative justice systems aim to create justice and hinder impunity, through the application of certain fundamental aims, some of which are mutually shared. But neither criminal, nor restorative justice appears to sufficiently safeguard the fundamental aims, or the actors (those involved and affected by the crime, as well as by the justice process). These fundamental aims and actors are proposed as the basic co-ordinates on the map of fully assimilated justice for the international core crimes.

The overall goal of this study is to demonstrate the need for assimilated justice for the actors of international core crimes,¹⁴ and to show what the essential components of such a paradigm would be. Both as a theoretical exposition, and as a matter of empirical demonstration, the goal is to create a legitimate foundation of assimilated justice, based on certain fundamental aims that, it is believed, better acknowledge each of the actors involved. Neither criminal, nor restorative justice systems sufficiently safeguard the fundamental aims, or the actors involved in, and affected by, international crimes.

1.1.1. SOME BASIC DEFINITIONAL QUESTIONS

This dissertation argues for a thesis, and provides support for it, allowing the thesis to emerge through the chapters. This is the main point of the dissertation. The goal is to endorse truth over denial and justice over impunity, through developing assimilated justice.¹⁵

Clarification as to the focus of this study will be given in the next section,¹⁶ but in order to add clarity to the goal of the present study, the concepts of “impunity”; “international core crimes”; and “assimilated justice” are briefly explained ere.

“Impunity” is, in this study, broadly defined as the *de jure* or *de facto* impossibility of holding the offenders individually *criminally accountable*, and to include the *victim*, and the *community* (victims at large). This entails establishing the truth, prosecuting and punishing the offender, attempting to deter the offender and other actors, ordering that reparations be made to the victims, and attempting collective community reconciliation. Impunity is thus, in this study, understood as a lack of accountability measures, non-respect for the fundamental aims of the overall regulatory system,¹⁷ and failure to treat with equal priority all the key actors involved.¹⁸

¹⁴ See below.

¹⁵ See generally Méndez, 2001.

¹⁶ See this chapter, Methodology; Ideology.

¹⁷ *I.e.* the system as a whole, in relation to which assimilated justice is performed, as a combination of criminal justice and restorative justice.

¹⁸ Impunity is further discussed in ch.2, 7.

The widely accepted crimes incorporated into the latest international criminal law treaty of the ICC are referred to as “international core crimes”.¹⁹ The international core crimes have been outlined in treaties and customary law practice and have lately been codified by the ICTs and the ICC.²⁰ The ICC Statute incorporates the international core crimes of genocide, crimes against humanity, war crimes and other grave breaches of the Geneva conventions, held to be primary international crimes due to their horrific nature.²¹ The treaty and customary law crimes of genocide, crimes against humanity and war crimes are thus international core crimes, which incur individual criminal accountability, based on their atrociousness and, according to Ratner, their generic nature.²²

¹⁹ International criminal law norms assign individual criminal accountability and although we do not talk of international civil law, international non-criminal accountability is just that, see e.g. Packer, 1968; Appendix 1.

²⁰ See e.g. the Hague Convention on the Laws of War, 1864, 1907; the Charter of the IMT 1945; Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Berlin, 20 Dec. 1945, Official Gazette CC.No.3, Berlin, 31 Jan.1946; Charter of the IMT, London, 8 Aug.1945; Charter of the Military Tribunal for the Far East, Tokyo, 19 Jan.1946; the Conv. on the prevention and punishment of the crime of Genocide, 9 Dec.1948; the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, all of 12 Aug.1949, (referred to as the 1949 Geneva Convs.); Additional Protocols to the 1949 Geneva Conventions; the ICTY 1993; the ICTR 1994; the ICC 1998; Jones, 2000. Crimes Against Humanity were referred to at the Trial of the Major War Criminals before the International Military Tribunal, Nuremberg (*Nürnberg*), 1946; see also the Apartheid and Torture Conventions of 1973 and 1984 respectively. See ahead, ch.3, 5.

²¹ The international core crimes refer to the most serious crimes, protected under international law. See the Revised final report prepared by Mr Joinet, Question of the impunity of perpetrators of human rights violations (civil and political), E/CN.4/Sub.2/1997/20/Rev.1. See Appendix 1 for ICC definitions of the international core crimes. Art.5 “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. (2) The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted...”; 5(2)”...in accordance with articles 121 and 123 defining the crime [of aggression] and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”. The inclusion of other crimes in the ICC statute was discussed, with reference to e.g. international terrorism and international trafficking of narcotic drugs and psychotropic substances, at the ICC Rome Conference 29 Jun. 1998, Doc.A/CONF.183/C.1/L.27/Corr.1; 17 Jul. 1998, Doc. A/CONF.183/9. However, the only other crime that will be included, once a definition has been agreed upon, is the crime of Aggression. For more on the crime of Aggression, see e.g. Chomsky, *N. Rouge States: The rule of force in world affairs*, South End Press, 2000.

²² The generic nature can e.g. be to only qualify specific acts when committed within a certain context. The crime of genocide e.g. requires the specific acts to be aimed against a specific group with the intent to destroy it, or else the act will not qualify as a crime of genocide. Crimes against Humanity are carried out in a systematic manner and, when done during armed conflict, the acts may also amount to war crimes. See generally Ratner, 1997, p.12. The morally repugnant character of the international core crimes, endorsed by all as gross violations of fundamental human rights, is the main reason for these crimes acquiring this solemn status of “core” crimes and the fundamental entitlements violated by genocide, crimes against humanity and war crimes should rightly be agreed upon to belong to the category of universal and fundamental human rights. These norms are peremptory; duties rather than optional commitments that supersede any treaty to the contrary and non-compliance should lead to state responsibility. *Jus cogens* is the elevated legal status implying above all a duty not to grant impunity to the violators of such crimes. For an outline of the emergence of *jus cogens* see e.g. Cassese, 2001, pp.133, 138, 147 for a discussion on how and when to invoke the peremptory norms; *Belgium v. Spain*, ICJ 1970; ICJ Reports 1996; *Kupreškić* case, ICTY, 14 Jan.2000; Dawson, 2000.

Genocide, often referred to as the crime of crimes,²³ was laid down in the significant Genocide Convention, prescribing prosecution in domestic courts in the anticipation of an international criminal court as early as 1948. However, the recognition of exterminations of racial, religious or social groups as an international crime was already acknowledged in the indictment of the major German war criminals, at Nürnberg, in 1945.²⁴ Genocide requires discrimination against a national, ethnic, racial or religious group, with a requisite intent to destroy that group, whether in whole or in part.²⁵

Crimes against humanity are represented by systematic atrocities of a very serious nature, carried out by some type of influential or controlling group against any civilian population, on national, political, ethnic, racial or religious grounds, regardless of whether committed in international or internal armed conflict.²⁶ Crimes against humanity are largely customary law based,

²³ Genocide has been describes as “the ultimate crime and the gravest violation of human rights it is possible to commit”, in Whitaker, 1985, p.14, E/CN.4/Sub.2/1985/6. The term genocide stems from *genos*, from Greek, translates into “clan”, “group”, “family”; and *occidio*, or “*cide*”, from Latin, translates into “extinction”, “extermination”, “kill”. Jewish-Polish lawyer Raphael Lemkin coined the term in 1943 and his efforts to have the crime of genocide recognised as a crime under international law after the Holocaust led to the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec.1948. See more in Cassese, 2003, pp.96.

²⁴ At the IMT trials, 8 Oct.1945, genocide was defined as “intended and systematic *genocidio*, that is extermination of racial and national groups of civilian population in certain occupied territories in order to destroy certain races and layers of nations and peoples, racial and religious groups...”, see Trial of the Major War Criminals Before the IMT, 1947, Vol.I, p.43; and see Lemkin, 1946, pp.371, 1947, pp.145.

²⁵ Art.2, Genocide Conv. defines genocide as: “ Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures to prevent births within the group; (e) Forcibly transferring children of the group to another group.” (Identical to art.4 ICTY) Hence, it is the intent (that is, the state of mind that is intrinsic, according to Black’s Law Dictionary, West Publishing co, 1990). Political, economic and social groups were deliberately excluded from the ambit of the crime of genocide, as set out in the Genocide Convention, art.2, although GARes.96, of 1946 spoke of political grounds. “An obvious necessary condition for genocide appears to be the presence of a racial, ethnic or religious ideology which sanctions a non-universalist conception of the human species, and makes mass-murder easier to accomplish. These belief-systems may be more important than technological capacities for managing mass-killings, as it is the discipline of the killers, rather than their instruments, which may best account for the scale of genocides”, McGarry & O’Leary, 1993, p.8. See *Prosecutor v. Akayesu*, where the ICTR, in a landmark ruling, convicted the Hutu mayor of Taba of genocide and crimes against humanity, the first case to put into practice the genocide convention, ICTR 2 Sep.1998; *Prosecutor v. Jelusic*, 1999; *Prosecutor v. Rutaganda*, ICTR 1999.

²⁶ Crimes against humanity involve knowingly committing, as part of a widespread or systematic attack directed against any civilian population, e.g. murder, enslavement, extermination, deportation, torture, or persecution, see art.7, ICC Statute; art.5 ICTY Statute; UNDoc.A/CONF.183/9, 1999. According to the *Tadic* precedent, customary international law may not require a connection between crimes against humanity and any conflict at all, *Tadic* case, ICTY 1996, supported by GARes.95(I), 1948, where no reference is made to international or internal armed conflict; art.1(b) Conv. on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968; Preliminary Remarks by the ICRC on the setting-up of the ICTY, 25 Mar.1993; art.7 ICC omits the IMT nexus of armed conflict. It also appears irrelevant whether or not the crime is perpetrated for purely personal motives, although crimes against humanity may not be committed by a private individual, but rather part of a group as influential and controlling as a government, ICC art.7; Ratner, 1997. A previous understanding of the crimes appear to have required state action or at least plans instigated or directed by a government or by any organization or group, but the IMT Charter and following case law were quiet on the subject. See e.g. ILC Report 1954. “Customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity”, *Tadic*, ICTY, 1999, #292. There may thus be

and were referred to before the two World Wars; incorporated into the Hague Convention of 1907 on the Laws and Customs of War; and the notion was given shape through the IMT Charter.²⁷ The crimes of rape and sexual assault have been included in the ICC Statutes as a crime against humanity.²⁸

War Crimes are based on humanitarian law,²⁹ codified in the widely accepted four 1949 Geneva Conventions, after their Nürnberg application.³⁰ In addition to the war crimes definition

variations between the mens rea requirements for various crimes against humanity. E.g. the mens rea requirement for persecution may be higher than for other crimes against humanity. See *Prosecutor v. Kupreskic*, 14 Jan.2000, #634-36 <http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>; Robinson, 1999, pp.43.

²⁷ The birth of the notion of crimes against humanity was used in the 1915 genocide of Armenians, referred to as crimes against humanity, see e.g. Cassese, 1997; Ratner, 1997; *Nicaragua v. USA*, 14, ICJ 1986. The IMT Charter, art.6(c) defines crimes against humanity “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country perpetrated.” The application of the Nürnberg (or Nuremberg) precedent never reached codification under the notion of crimes against humanity, but the Nürnberg precedent aided the customary law implication that such crimes must be punished and the meaning has been clarified with help from the ILC draft code of crimes against the peace and security of mankind. See *Trial of the Major War Criminals Before the IMT, 1947, Vol.XXII, p.413.*

²⁸ Rape was not new law when it was included in the ICTY statute, but the inclusion clarified codification of the laws and customs of war. See Bassouni, 1996; ICC art.7; and ICTY art.5. The law of rape in armed conflict is governed by the Hague Convs. art.46; art.27 fourth Geneva Conv. and the minimum standards of Common art.3 in internal armed conflict. Rape can also be a crime of genocide, see art.2 Genocide Conv; ICC art.6; and war crimes, ICC art.8.

²⁹ *Jus in bello* is divided into the Laws of Geneva (1949) and Laws of the Hague (1907). The former focus on protecting specific classes of war victims, civilians, and the latter regulate means and methods of combat. The latter, older laws are vague with discretionary procedures for implementation, while the former Laws of Geneva are non-derogable. A reason for this is that the 1899 and 1907 Hague Conventions were developed before the major development of human rights law and with a stronger national interest preserved. “We shall fail to understand the true character of the law of war unless we are to realise that its purpose is almost entirely humanitarian in the literal sense of the word, namely to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose.” Lauterpacht, 1952, p.363; and see Meron, 1986. See also Pictet, 1985; Schindler, D. & Toman, J. (Eds.) 1988. The general purpose of laws of war is humanitarian, and the Geneva Conventions basically protect civilians.

³⁰ See Appendix 1 for definitions of the crimes within the jurisdiction of the ICC; Pictet, 1985. IMT Charter, art.6(b) defines war crimes “namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.” See *Trial of the Major War Criminals before the IMT, 1947, Vol.XXII, p.413.* The ICRC defined “civilian” vaguely in the first three Geneva Conventions, the fourth convention lacking a definition. The general concept is to protect persons who are not, or are no longer engaged in hostilities, incl. wounded, sick, shipwrecked, prisoners of war and civilians. This list is not exclusive. Additional Protocol I, of 1977, art.50 provides advice on protection of civilians. Fourth Geneva Conv. art.4 defines protected persons: “Those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a state which is not bound by the Convention are not protected by it. Nationals of neutral states that find themselves in the territory of a belligerent state, and nationals of a co-belligerent state, shall not be regarded as protected persons while the state of which they are nationals has normal diplomatic representation in the state in whose hands they are...” Of course not all civilians can or should be protected, see e.g. the ICTR charging a civilian with numerous counts of genocide, crimes against humanity, and violations of common art.3 of the Geneva Conv. in the *Rutaganda* case, 1999. Protocol III, art.2 of the Convention on Prohibition on Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects, 1980, refers to concentration of civilians, particularly those who are on the move, as refugees, evacuees, or nomads. Other categories of persons that need and are protected by the Geneva Conventions are the wounded, sick and shipwrecked (art.12 common to first and second Geneva Convs.); prisoners of war (the third Geneva Conv. makes extensive and elaborate

introduced by the Nuremberg Charter,³¹ the Geneva Conventions introduced crimes known as “grave breaches”.³² Grave breaches include “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly.”³³

Torture, besides amounting to a crime against humanity when carried out in a systematic or widespread manner, may also amount to a war crime, when carried out in war by a private individual against a protected individual forming part of the enemy.³⁴ When the criminal act of

provisions for the protection of prisoners of war (POW). Art.4 defines a POW as someone who as fallen into the power of the enemy); and, under customary international law, detained persons (art.1, Add.Prot.I, 1977.)

³¹ Further defined by art.3, ICTY, which provides that such violations shall include, but not be limited to (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and science; (e) plunder of public and private property. Art.3 ICTY incorporates Common art.3 of the Geneva Convs. *i.e.* customary international law applicable in all armed conflicts.

³² Art.2 “grave breaches” of the ICTY was held applicable as the conflict was throughout referred to as international by the UN SC; the independent republics of former Yugoslavia ratified the Geneva Convs; and with regard to the internal armed conflicts, common art.3 applied due to the agreement signed in May, 1992 between the parties to the conflict. See this discussed in the ICTY case of *Tadic*, Appeal Chamber, #79; *Application of Genocide Convention* case, 1993; Meron, 1987, p.348. Generally the grave breaches provisions of all four conventions apply to international armed conflict, see comment by Ratner, at <http://www.crimesofwar.org/thebook/intl-vs-internal.html>

³³ Arts.50-51 of first and second Geneva Conv. respectively, and third conv. art.130 add: “compelling a prisoner of war to serve in the forces of a hostile power; wilfully depriving a prisoner of war of the rights of fair and regular trial, and taking hostages.” Art.147 of the fourth Geneva Conv. adds to arts.50, 51 the prohibition of unlawful deportation, transfer or confinement of a protected person; and see art.85 of Add.Prot.I. (Identical to ICTY statute art.2 grave breaches). Additional protocols on international and national armed conflict followed the four 1949 Geneva Conventions, as did conventions on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968. Art.1 of the 1968 Conv. articulates that no statutory limitation is possible with regard to war crimes (as defined by the Nuremberg Charter and the grave breaches of 1949 Geneva Conventions); crimes against humanity (acc.to Nuremberg Charter); apartheid; and genocide. Additional Protocol II and Common article 3 to the Geneva Conventions concern the protection of persons in internal armed conflicts. Article 4 of Additional Protocol II lists the essence of war crimes, grave breaches and crimes against humanity and constitutes a minimum standard of protection. Arts.1, 4 of Add. Prot.II and common art.3 would appear to require that the level of violence in an internal armed conflict must reach a certain minimum threshold, and generally excludes internal disturbances and tensions not considered armed conflicts. The *Tadic* case has further clarified that grave breaches of war crimes are conducted in armed conflict, *i.e.* whenever there is a resort to armed force between states or armed violence between governmental authorities and organised armed groups or between such groups within a State, in *Prosecutor v. Tadic*, 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, #72. Minimum standards of Common art.3 applies to both international and internal armed conflicts, as a norm of international customary law and treaty law, ICTY art.3; *Nicaragua* case, 1986, p.113. See Add. Protocol I and II, 1977, ICRC ratification www.icrc.ch/icrcnews.

³⁴ When torture is committed as a single act it must necessarily be so committed in connection to the State to distinguish it from a common crime that is not covered by international criminal law, *e.g.* a man torturing a woman, see *Prosecutor v. Kunarac*, 22 Feb.2001, ICTY. The crime of Apartheid is a crime *per se*, protected by its own convention, and is also included as a crime against humanity under treaty law, *e.g.* art.7(2)(h) ICC: ““The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”; Apartheid Conv. 1973. Apartheid can also qualify as a “grave breach”, art.85 Add.Prot.1977 to the 1949 Geneva Conventions. Apartheid cannot in any way be excused, as it is in itself a breach of the laws of war, amounting to a human rights crime, art.85, Geneva Conv. Add. Protocol I, 1977. Apartheid is however not a customary law crime *per se* incurring individual criminal accountability, but a state crime. It is however included as a crime against humanity under customary law when carried out on mass scale in atrocious form, see Cassese, 2001.

torture does not amount to either a war crime or a crime against humanity, it may still amount to an international crime. “[T]he term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”³⁵

“Assimilated justice” is concerned with truth, justice, and reconciliation for the offender, for the victim, and for and in the community. Assimilated justice is concerned with holding the offender criminally accountable, as well as responsible for, and answerable to the victims and the community, within *one* holistic justice paradigm. Assimilated justice seeks to oppose impunity, most immediately through prosecution, made possible through the achievement of the fundamental criminal justice aims of truth, just-desert punishment and deterrence. The criminal justice aims must be concerned with removing the threat, which the offender may pose or create, measured in proportion to the crime. A legitimate justice system cannot do justice in the face of injustice without focusing on the victim to whom the injustice was done. Assimilated justice must therefore also be

The term apartheid, linked with gross violations of human rights, stem from UN usage, e.g. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res.1 (XXIV) Aug.1971. The SA TRC confirmed that apartheid is a crime against humanity, condemning gross human rights violations such as killing, abduction, torture and severe ill-treatment, central to apartheid. Apartheid has throughout UN history been referred to as an atrocious system without linking it to individual acts of abuses, and although gross violations of human rights also include such crimes as murder and torture, the SA TRC Act, that gave rise to the specific qualified amnesties, referred to individual criminal accountability of individual acts. The SA TRC defined gross violations of human rights as wrongs inflicted by one person on another, and not as (collectively) inflicted by a country, as state-sponsored systematic crimes against racially defined and violently disfavoured groups, and thus failed to help in the understanding of the crime of apartheid amounting to abusive acts in a specific political and racial context, see Asmal, 1997: “Whereby injustice is no longer the injustice of apartheid: forced removals, pass laws, broken families. Instead the definition of injustice has come to be limited to abuses within the legal framework of apartheid: detention, torture, murder. Victims of apartheid are now narrowly defined as those militants victimized as they struggled against apartheid, not those whose lives were mutilated in the day-to-day web of regulations that was apartheid. We arrive at a world in which reparations are for militants, those who suffered jail or exile, but not for those who suffered only forced labor and broken homes.” Mamdani, 1996, and see TRC final report, Vols.1, 4 containing the findings of the Commissioners’ nine sectoral hearings in which apartheid was held to operate in business; labour; the religious community; the legal community; health sector; media; prisons; military service; children and youth; and women. In Mar.2003, 2 final vols. of the SA TRC report were presented, where the TRC noted that the 21,000 identified victims were “only a subset of a much larger group” and “given the systemic abuse committed during the apartheid era, virtually every black South African can be said to be a victim of human rights abuses.” Sunday Argus, 23 Mar.2003, p.6. See generally Alexander, 2000, pp.895; Dawson, 2000. The terrorist attack against the US on 11 Sep.2001 has had repercussions for the development of international law, with some intellectual and political support for defining certain acts of terrorism as a crime against humanity, <http://www.un.org/News>; Cassese, A. 2002, p.2.

³⁵ See art.1(1) of the Torture Conv. of 1984 for the international crime of torture, as distinct from torture as a category of crimes against humanity or war crimes.

concerned with deterring and repairing the harm done, according to the notion of “making right the wrong”. Yet any system, national or international, restorative or criminal, must deal not only with the accountability of the offender and reparation of the victim, but must also deal with long-term grieving, forgiveness, and rehabilitation, *i.e.* reconciliation. Doing nothing in response to international crimes can never be the solution, because it only adds to the harm done to the victims, thus feeding a culture of impunity, which, in turn, encourages future abuses. Assimilated justice must, therefore, also be involved in a long-term reconciliation effort by the offender, the victim, and the community. To be able to fulfil these aims, the process must firstly seek to assert the truth. Thus, in short, assimilated justice is an attempt to combine the paramount elements of criminal justice and restorative justice.

1.2. METHODOLOGY

The present study does not intend to identify one particular area of investigation, proceed with particular problems, and end with a conclusion. In contrast, this study argues for the thesis of assimilated justice, and provides support for it. As mentioned in the forewords, the thesis will transpire in the chapters that follow.

To reach the goal of legitimately safeguarding the fundamental aims, and the actors involved in, and affected by, the international core crimes, through a justice process that is able to take on board both criminal and restorative justice aims and processes, an assimilation of the two justice systems is proposed. This assimilation is proposed through a value-oriented approach to a rights-based process of justice, *i.e.* a fully assimilated justice for the international core crimes.

The value-orientation behind this approach urges a focus on fundamental aims: truth, just-desert punishment, deterrence, reparation, and reconciliation. The legitimacy of assimilated justice is believed to be embedded in these fundamental aims, which not only aspire to important values, but which are also able to acknowledge the affected actors. The right to punish in its traditional context of the state is a positivist claim to a right, of the state, to punish those who have wronged the state and its subjects (*i.e.* grounded in the authority of the state as the ultimate source of law and justice). The punitive power belongs to the state monopoly, as the (*de jure*) representative of the community, and state interests in punishing, deterring, and remedying have, throughout history, taken over from the interests of the individuals involved (*i.e.* the offender, the victim, and the community). Competing with this are the private interests of the subjects, of the right to know the

truth, to have access justice, and to be repaired.³⁶ Where international crimes have been committed, entire communities are victimised, and the position taken in this study is that collective truth and reconciliation are needed, in combination with the criminal justice values of individual truth, just-desert punishment, deterrence and reparation. A criminal justice system should deter crime and the fear of crime while distributing truth and justice, safeguarding rights, and fostering trust in law and society. The victim must be central to this vision, due to his individual rights, both for his own sake and also in order to ensure confidence in the legal system. “Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law.”³⁷ Reconciliation involves the pacification of relations, between the offender and the victim, and, at a later stage, relations within the general community as a whole. Reconciliation is, therefore, in one sense the ultimate or cumulative aim, in the context of the offender-victim relationship. In the absence of stable national institutions, the semi-autonomous character of the international system can support the task of ensuring societal continuity, through reconciling the victim and the offender. Applied to states in transition, which often choose models of restorative, rather than criminal, justice, where the collective good is valued as being as important as individual-centred ends are in criminal justice, assimilated justice may be able to prioritise both the individual and the collective.

The rights-based approach focuses on acknowledging the positive rights of the actors, within both the criminal justice system and the restorative justice system, in order to safeguard their interests.³⁸ A specific focus is accorded the victims, who have been structurally marginalized in the traditional paradigm of criminal justice. On a personal level, the reason for the thesis is based on concern for these victims, within both an international criminal justice process, as well as in restorative justice processes. This requires re-thinking international justice and assimilating criminal justice with other justice processes that seek to recognise the victims, and their individual and collective rights and needs. Specific instruments provide evidence of the capacity of both criminal and restorative justice processes not only to focus on the victim, but also to give further support to the application of the fundamental aims.

In a model of assimilated justice (with both restorative *and* criminal justice norms), a relationship is formed, where the three actors: Community (victims at large, general community, and state); Offender, and Victim, are all represented. This relationship will be used in discussing

³⁶ While reconciliation has also been an aim of the state, relative neglect of societal and individual interests, particularly those of victims, militates against its achievement; ch.3.

³⁷ Art.8 of the Universal Declaration of Human Rights, 1948.

³⁸ The approach focuses on the actors involved in and affected by the international core crimes, more specifically the crime of genocide, crimes against humanity, war crimes, and their grave breaches of the Geneva Conventions; ch.2.

with regard to the fundamental aims, in reference to which actor(s) the specific fundamental aim in focus centres around.

The fundamental aims were chosen due to their origin in criminal and restorative justice, their potential dual focus on the individual and the collective, and the belief that these fundamental aims incorporate other important values of justice. Truth is the fundamental aim with the widest application, able to focus on the offender, the victim, and the community. To some extent truth acts both as a manifestation of, and a means towards the fundamental aims of just-desert punishment, deterrence, reparation, and reconciliation. Both just-desert punishment and deterrence emphasise the offender. In order to be able to affect the community positively, so as to enable societal change, the criminal justice system must show the victims and the community that the crime has been properly acknowledged, and that the offender has been held accountable. Reparation is specifically aimed at the specific victim and, to a lesser extent at the community, collectively, taking on the role of the victims at large. Reconciliation mainly focuses on the community, the state, and its subjects, collectively. However, in order to succeed, the fundamental aim of reconciliation must primarily, as will be seen, use its dyadic dimension, (*i.e.* its individual victim-offender focus). As regards the connections and overlapping between the fundamental aims, quite apart from the several instrumental roles of truth in achieving the other aims, more specific connections may be noted that indicate a valuable inter-relationship between the aims and the actors. Just-desert punishment to some extent acts as a deterrent; deterrence may pave the way for reconciliation and reparation; reparation may qualify as a form of punishment, and sometimes a precondition of effective deterrence and reconciliation; and reconciliation has deterring and repairing effects.

The present study takes as starting point the state of the world legal order as it is, *i.e.* the study acknowledges and deals with problems as they are found in the existing systems of international criminal justice and national restorative justice. The study will not therefore attempt to provide solutions to these problems within the current systems. For example, proposals for total reform of criminal justice systems are not feasible. The present study is concerned with an alternative justice paradigm, where supranational organs (such as the ICC for the prosecution and punishment of genocide, crimes against humanity, and war crimes) and states, are the primary actors. The study invites the reader to possibly re-think concepts such as impunity and the systems of international criminal justice and restorative justice, on a doctrinal level. But the study will not take on the activity of re-constructing law or reality.

Fully assimilated justice is based on assimilating the fundamental criminal and restorative justice aims, in the light of existing institutional architectures, and emerging tendencies of selected criminal and restorative justice institutions, in the sphere of international justice. The research of the

study focuses on the international criminal court, with reference to the preceding *ad hoc* international tribunals, equipped with criminal jurisdiction and other, international and domestic institutions, known as truth commissions, that are sometimes set up to deal with such violations.³⁹ A closer look at restorative justice is taken with regard to restorative justice fundamental aims and institutions. This is done in order to establish how the fundamental aims can be applied together, and how they might co-exist in a system of justice representative of both criminal and restorative paradigms, and concerned with offenders, victims, and communities affected by international core crimes. Modern restorative justice in South Africa is considered, as is the “hybrid” form of criminal and restorative justice in Rwanda, and *quasi*-assimilated justices, found in Timor-Leste, and Sierra Leone.

The thesis of this study is that restorative justice processes, often domestic in character, can be assimilated with criminal justice, in order to further the justice process, where individual criminal accountability is concerned. The merit of bringing restorative justice into the international justice frame is not just because it prioritises the values of truth and reconciliation. It is also valuable because the lack of guaranteed coercive institutional means in the international legal system,⁴⁰ indicates that the effectiveness of the overall framework depends all the more so upon the active involvement and consent of the offender, the victim, and the community. The inclusion of victims within a multi-institutional, but assimilated framework appears a more suitable solution than the view that victims are better dealt with outside the criminal justice system, where no criminal accountability can be attached, and the remedy of prosecution cannot be sought.

In order to achieve assimilated justice one cannot, and should not, be faced with a stark choice. The question should not be whether criminal jurisdiction should be exercised, or whether reconciliation should be the focus thus favouring the restorative justice values of truth and reparations. Rather, an assimilation of both is necessary. Neither the “prosecute at any cost”, nor the “forgive and forget” absolutes are convincing, as a preoccupation with one, at the expense of the other, involves de-prioritising some of the fundamental aims of the international justice system. It also means that too little attention will be paid to one or more of the actors involved. For example, if the absolute “prosecute at any cost” were respected, the courts and the criminal justice system

³⁹ Although the actors and especially the victims are more visible in human rights law and indeed more visible in civil rather than criminal actions of a domestic character, generally, the criminal justice system is nevertheless argued to be a vital framework for pursuing the more victim-centred aims of reparation and reconciliation. This can be seen in the growing number of international law instruments that assign victim rights, which are assimilated with the other fundamental criminal justice aims of prosecution and deterrence, e.g. the ICC. However, important human rights mechanisms should not be ignored, but always pursued, especially in advancing victims’ rights.

⁴⁰ Civil courts, policing, administrative mechanisms that often aid the actors in stable domestic legal systems have not found support and financial means at the international level or in unstable domestic states in transition.

would not be able to spend time and money on hearing and caring for any more victims than necessitated by successful prosecution. And if the other absolute were pursued, the actual offender would then be forgiven and forgotten without facing any of the consequences of his actions. The offender would thus gain from committing the crime, and the victim(s) could feel obliged to forgive, without any means of reparation. From a purely practical perspective, it is ludicrous to choose between these two extremes. Few, if any, would vote for blanket amnesty, to let bygones be bygones, when it comes to the international core crimes.⁴¹ It would, at the same time, be absurd to think that each offender could be prosecuted, with comprehensive respect for the rule of law, nationally or internationally.

With regard to style, two points are made. Concerning footnotes, the source of the legal instrument, literature and case law is referred to in alphabetical order, starting with the most recent work, in the bibliography chapter. Where available, website addresses are given in the first footnote. Where a quote is included or specific reference is given, relevant pages are referred to in the specific footnote.

Although the choice has been made to refer to a subject, *e.g.* with regard to an offender, or a victim as 'he' (rather than 'he or she'), this is done only for reasons of concision, and in order to avoid unnecessary obstruction to the flow of the text.

1.3. IDEOLOGY

This part clarifies what the present study must focus on, in line with the ideology of the study. One major problem for this study is that in discussing an assimilation of criminal justice with national restorative justice mechanisms in the fight against impunity, it is necessary to start with a clear understanding of the concept of "impunity". Ideally, all notions of impunity, and all existing suggestions on how to prevent impunity, would be studied. For example, the entire human rights corpus involves mechanisms recommending different solutions to the problem of impunity, as do criminology. However, if I were to insist on an approach whereby most disciplines of justice were to be included in the study, one would have to invest an impossible amount of time and space to this project. One account of action has therefore been chosen; assimilating criminal and restorative justice, and developing the thesis on this basis. Generally, justice options include international and national prosecutions; truth and investigation commissions; national lustration laws; national civil

⁴¹ Except, of course, for those involved in criminal regimes.

remedies and international compensation mechanisms. Hence, out of the accountability options listed, the study does not look at lustration laws,⁴² civil remedies,⁴³ or human rights mechanisms.⁴⁴

This thesis does not include the more indirect mechanisms of international or regional human rights bodies.⁴⁵ The omission of human rights mechanisms is justified for two reasons in the main. The first is the already stated pragmatic reason; there is just not enough time or space to allow for a complete study of all disciplines of justice that would further improve and counterbalance an assimilation of justice systems. The second justification refers to the primary focus on improving the accountability process with regard to international core *crimes*.⁴⁶ The second level of this justification refers to the importance of being able to make reference to and identify the offender (of the crime), claiming individual criminal accountability and to not only recognise state responsibility. However, I concur with the view that international criminal law “is an essentially hybrid branch of law: it is public international law impregnated with notions, principles, and legal constructs derived from national criminal law and human rights law”,⁴⁷ and I can therefore not *exclude* human rights law. Assimilated justice is viewed as a function of necessity, as filling the gap between the different dimensions of the criminal and restorative justice systems, where impunity gatecrashes. In a flexible model of assimilated justice however, the reach of human rights mechanisms should ideally also be referred to,⁴⁸ where human rights have a more attenuate relationship with impunity. So, the structure of the thesis is such that I am not committed to establishing a *general* theory for the purpose of fighting impunity, in the wider context. This may solve the problem of expansion, and limit the study to a focus on understanding and integrating

⁴² Purging processes remove persons, whom were involved in violations *e.g.* committed by a prior regime, from office, and bar such persons from authoritative positions. Lustration laws have mainly taken place in some Eastern European countries, as political sanctions. Although punitive in effect, the stigma that follows purges is not only accounted for by the guilty party, but also by innocent third parties. Prosecutions are not common in such situations. See generally Joyner, 1998; Shelton, 1999.

⁴³ Victim compensation is important and so is civil legislation that allows victims to bring suit. For a great overview of national and international remedies, see Shelton, 1999. Shelton has already perfectly outlined the essence of non-criminal remedies and remedies not linked to the establishment of individual criminal accountability, whereby it is more suitable to refer to her work than to spend time on issues not of immediate relevance to this study.

⁴⁴ See below.

⁴⁵ However, some reference is made to different human rights instruments. Obviously a complete study would also include the wealth of human rights bodies and compare the human rights mechanisms, but the concentration lies on *crimes* to which individual criminal responsibility has been attached, and not human rights violations. While the TCs do not *per se* use criminal jurisdiction, it is often not excluded as a further step towards justice, and TCs incorporate some of the values the ICTs aspire to and represent a mechanism many national systems use. For a great overview of national and international remedies and the human rights *corpus*, see Shelton, 1999, and generally on human rights, see Alston, 1999; Steiner & Alston, 2000.

⁴⁶ Because the gross violations of human rights that this study focuses on qualify as international crimes, incur individual criminal accountability and a general duty to punish the offenders, it is essential to focus on *crimes* rather than *violations* of human *rights*.

⁴⁷ The view belongs to Cassese, 2003, p.19.

⁴⁸ Assimilated justice, as a flexible franchise model, which this thesis intends, should, of course, be further improved with the inclusion of more human rights mechanisms.

aims and values belonging to international criminal justice and restorative justice. However, it does not absolve me from all responsibilities of accounting for the implications of other theories, and here I have in mind problems such as the victim, and community rights and mechanisms. I have chosen not to dive into such problems, but only deal with the most essential points that affect my thesis. Besides reasons such as the constraint of time and space, I do not want to distract from the main argument.

This research is not concerned with considering restorative justice as a serious alternative to stable democratic criminal justice systems, institutions, or aims, with regard to the international core crimes. The methodological perspective of the study derives from traditional justice paradigms, to the extent that a crime is considered to have taken place if so previously declared by an authoritative governmental or international body, in line with the developments of the last few decades of public prosecutions, and in line with the view that certain crimes, including the international core crimes, represent a violation of national and international law, security, and peace. In short, the present study's justification and ideology of criminal justice "accepts the need for criminal law in order to safeguard the interests of individuals, the State, and collectivities, but it emphasizes the protection of individuals from the abuse of power – whether by state officials or by groups or other individuals."⁴⁹ To this should be added the international community, who, according to the ideology of this study, has the right to exercise the power of punishment, as a collective as well as through each member state, when the crime committed is of international concern.⁵⁰

In fact, the reference to international criminal *justice* refers to the rule of law dimension of the thesis, representing norms of international human rights and humanitarian law.⁵¹ The position I take is a broad conception of the rule of law, including moral notions of equality and human rights, which is complex and, to some extent at least, idealistic, making international justice difficult to conform to.⁵² Within the criminal justice system, the discipline of (international) criminal law, more

⁴⁹ Ashworth, 2003, p.33. Further explanation to criminal justice and the fundamental aim of just-desert punishment will be looked at in ch.5.

⁵⁰ See generally Cassese, 1998, and ahead, ch.4. Positivism represents the initial idea that the rule of law was put in the hands of the sovereign to protect from the rule of man and abuse of power, and law is law, whether morally supported or not, however it also incorporates a more natural law position. See Austin, 1954 and Hart, in Dworkin, 1977 on issues of positivism.

⁵¹ "It is essential, if man is not to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law", Preamble of the UDHR, 1948. Today, in practice, human rights include protective procedures that require the institutionalised rule of law, and the international criminal justice norms applicable to the international core crimes may have transcended to the rule of law. See generally Fuller, 1969; Raz, 1979; Rawls, 1971.

⁵² Legal philosophy is briefly referred to in ch.4. Recognising the substantive and moral content of international human rights and humanitarian law, the natural law position argues that law must necessarily include morality, and with regard

specifically concerned with the substantive rules of criminalization, will not be studied.⁵³ Criminal procedure of international criminal justice will, on the other hand, be looked at where this discipline indicates what standards the courts apply. Note however that this study is not a study of procedural law in general, but is only concerned with procedural aspects in which the fundamental aims are applied.⁵⁴ It must also be noted that there is not always a clear division between these disciplines. The jurisdictional power of a court to hear a case may belong to procedural law, but the rules concerning what punishment the court may assign derives from a substantive rule.⁵⁵ Building assimilated justice that guarantees the application of the fundamental aims does not necessitate attributing significance to such rules. What is necessary is to know that the international core crimes ask all states to prosecute and punish.⁵⁶ However, there are structural as well as social limitations to international criminal law that restrict its applications. Traditionally, there is a distinction between international criminal law and criminal international law;⁵⁷ the latter concerns the application of domestic law to individuals; the former concerns the relations among states that make up the international community, e.g. international obligations to establish jurisdiction and to criminalize certain acts. The international core crimes belong to the sphere of international criminal law, which is, or should be, of global application, only *applied* differently depending on the national court and legal system.⁵⁸ However, application cannot be guaranteed, and states often chose not to prosecute. It is therefore argued that the criminal justice system is unable to single-handedly solve the problem of sufficiently safeguarding the rights of offenders, victims, and the community, while at the same time applying the fundamental aims of truth, just-desert punishment, deterrence, reparation, and reconciliation. From the perspective of conceptualising justice, brief reference is made to legal philosophy, where complete justice is general legal justice in addition to particular justice.⁵⁹ I argue that the rule of law is an umbrella concept of justice, where assimilated justice integrates and promotes further interaction between the rule of law (universal and general legal justice) and the

to the protection of human rights, these norms are fundamentally of moral, ethical origin. See e.g. Aristotle, 1959; Aquinas, 1989; Dworkin, 1977.

⁵³ The international core crimes will however be introduced briefly.

⁵⁴ E.g. how the ICC applies the fundamental aim of reparation within its justice process is of interest to the present study.

⁵⁵ Certain criminological aspects are included, without giving further substance to the entire discipline.

⁵⁶ See ahead, ch.5.

⁵⁷ This distinction is more apparent in the French language, where the two disciplines are called *droit international penal*, and *droit penal international*. See Cassese, 2002, p.555.

⁵⁸ See generally Cassese, 2003. Again, this study focuses on the procedural aspects of the international criminal institutions, but also establishes what rules of procedure the international core crimes expect domestic criminal justice systems to apply.

⁵⁹ See further ch.4 and supra, Aristotle. However, legal philosophy debates concerning conceptual divergence regarding the rule of law and justice are not part of this research. See e.g. Finnis, 1980.

social and moral values of the community (local particular justice).⁶⁰ In this way, the notion of assimilated *justice* can be both backward looking, represented by criminal justice, and forward looking, represented by restorative justice.

It may appear odd not to have included the value of rehabilitation as a separate fundamental aim. Instead I have chosen to include rehabilitation within the aim of reconciliation, although it figures of course in just-desert punishment, deterrence and reparation as well, as it is often referred to in relation to the offender, but also in relation to reparation. In sum, rehabilitation has been omitted as a separate aim for three reasons. Firstly, because it is my view that it can for the most part be seen as an aspect of, or a means towards achieving, the other fundamental aims. Secondly, in any case, it is questionable how effective rehabilitation can be pursued in the case of international crimes in the absence of a coherent range of supportive policy mechanisms associated with stable domestic criminal justice systems in their treatment of domestic crimes.⁶¹ Such mechanisms are not present within the international criminal justice system or within a justice system of a state in transition. Thirdly, rehabilitation is commonly referred to as treatment of the offender, and is hence individual offender-centred; although rehabilitation is also a victim right.⁶² Often where international core crimes are concerned, there are a small number of offenders, *e.g.* high-level government officials, who are guilty of inciting the violence, and there are the secondary offenders, individually criminal accountable, but also sometimes collectively responsible, forming part of a criminal regime. In this case, individual rehabilitation appears a meaningless aim and should rather be dealt with as part of reconciliation. As will be seen, restorative justice in the case of South Africa did not specifically aim at offender rehabilitation, but focused on the healing of the victims, and this is better dealt with under the two fundamental aims of reparation and reconciliation.

The international justice system is not limited to territorial jurisdiction, but is concerned with universal jurisdiction for international core crimes. Because states have been unwilling to prosecute and punish in many cases where international core crimes have been committed, the international justice system should be able to assign criminal and restorative norms, in order not to risk further impunity by leaving certain fundamental aims such as just-desert punishment and reparation to the domestic systems to assign with discretion. Due to difficulties related to prosecuting every perpetrator of these crimes, especially for states in transition, a trend towards “restricted justice” has developed, where an assimilation of criminal and restorative justice appears

⁶⁰ *Supra*. It is argued that the social and moral aspects assimilated justice is concerned with, besides criminal justice, can be further assimilated with the rule of law, representing another dimension of it, similar to Aristotle’s particular justice, see ch.4.

⁶¹ *E.g.* Probation, community services, convict employment schemes, etc.

⁶² See ch.3.

possible. While assimilated justice may indeed provide a solution to restricted justice, it would do so through the application of the fundamental aims, and thus with the assistance of aims and mechanisms belonging to restorative justice. The study does not attempt to overcome, nor does it discuss at any length, the reasons behind existing restrictions to the application of international law.⁶³ It has likewise proved difficult to safeguard the rights and the participation of the victims, of international core crimes, both in domestic and international systems of a criminal and restorative nature. On the abstract level, this is due to institutional deficits, that is, the absence of complementary institutions that are able to deal with the surrounding dilemmas. Even if the ICC had been allocated all available resources, the dilemma of social reconciliation remains, and requires the integration of local actors collectively. The problem also highlights the fact that restorative justice is not enough. On a less abstract level, the problem exists due to a lack of political will. A recent example is the USA's refusal to endorse the ICC, thus reducing the reach of international criminal justice to the tip of the iceberg.⁶⁴ The scope of local systems is not enough, and may further endanger universal values, and individual rights, due to preferred collective particularities, that is, preferred solutions of the particular collective. Clearly, political will of both kinds, *i.e.* concerned with achieving both individual and collective aims and institutions, is necessary. As a consequence of these limitations, circumstances of transitional justices, and cases of impunity, a case of restricted, sometimes legitimate, justice has emerged in terms of accountability for the international core crimes.⁶⁵ To attempt improvement of this situation demands an analytical framework of fundamental aims, a framework that must take into account the actors, as well as an analysis of both criminal and restorative justice, in order to see what aims have been applied, and how they have been applied.

Assimilated justice does not, therefore, consist of a framework of merely criminal justice, nor of a framework of purely restorative justice. Rather, it proposes to assimilate certain fundamental aims of international justice, with the actors affected by international core crimes, in order to provide a more integrated model of justice, inclusive of the actors affected. It is argued that the international justice system, taken as a whole, and domestic justice systems should be able to assign criminal and restorative norms, in order not to risk further impunity by leaving certain

⁶³ This is an internal criminal justice problem that also deals with political and economic issues. See Joiner, 1998; Mani, 2002.

⁶⁴ Ch.2.

⁶⁵ Transitional justice refers throughout the study to an unstable justice system, whether or not the political transition has passed. See later chapter on restorative justice. This study does not include transitional justice as a separate theory or paradigm, but only refers to the condition the state is currently in as *e.g.* transitional, with a transitional justice system, and process, perhaps with an intention of "transition". For more on transitional justice, see generally Kritz, 1995; Sarkin, 1996.

fundamental aims, such as just-desert punishment and reparation, to be assigned with discretion. It is believed that, through assimilating the fundamental aims, they can be applied in a flexible process of both criminal *and* restorative justice, where international core crimes are concerned.

1.4. OUTLINE

It is not the purpose here to provide the reader with a summary. Nonetheless, a brief outline of the overall structure of this study may make it easier for the reader to follow the pattern of thought presented. The first four chapters of the study provide an analytical introduction to the thesis; defining the main problems the thesis intends to overcome; and describing the assimilated justice framework, which consists of the actors affected by the international core crimes and fundamental aims. Recognition and respect for the fundamental aims; and for the offender, the victim, and the general community, constitute the essential foundations of assimilated justice. They are furthermore argued to be insufficiently safeguarded by the two justice systems explored; criminal and restorative justice.

The present and first chapter has introduced the thesis, and its objectives. As already mentioned, the goal of the study is to assimilate certain fundamental aims, which belong to the criminal justice system, as well as to the restorative justice system, in a legitimate justice process for international core crimes. The justification for this overall goal has been explained in terms of the actors: the offender, the victim, and the community, who will be central to the assimilated justice structure, as well as in the analysis of new *quasi*-assimilated justices; the international criminal court; and restorative justice mechanisms. More specifically, the models of Rwanda, Timor-Leste, and Sierra Leone are critically assessed; as is the ICC, and the South African Truth and Reconciliation Commission. Assimilated justice is thus composed of criminal justice and restorative justice; certain fundamental aims; and individual as well as collective actors. Following this introduction, the central problem of impunity is discussed.

The second chapter seeks to justify the overall goal of the study, that is, assimilating criminal justice aims with restorative justice aims in assimilated justice for the international core crimes. This is done by identifying the major threat to justice processes, that is, the threat of impunity. Impunity is understood as “the impossibility, or improbability of holding offenders of the international core crimes individually accountable, as well as non-inclusion of the victim and the general community in the justice process”. The notion of impunity, applicable in this study, is broad in definition, and in application, and involves more than just a lack of criminal prosecutions; it includes the absence of other accountability measures that, in turn, results in non-respect for the

fundamental aims and ignorance of the actors. *I.e.* non-impunity entails establishing the truth, prosecuting and punishing the offender, attempting to deter the offender and other actors, making reparations to the victims, and attempting collective community reconciliation. Impunity entails criminal jurisdiction, and thus justifies the fundamental justice aims of legal truth, just-desert punishment and deterrence. The broad impunity definition used and aimed for in this study furthermore entails and justifies the other fundamental aims of truth, reparation and reconciliation. Impunity is thus, in this study, understood as a lack of a legitimate justice process, non-respect for the fundamental aims of assimilated justice, and failure to treat with equal respect the key actors involved. Different types of impunity threats are looked at, in connection with the SA TRC and the ICC, in order to understand the issues surrounding illegitimate amnesties, occasionally legitimate pardons, and different types of immunities. The study proposes an assimilated justice concept, made up of the assimilated fundamental aims, of both criminal and restorative justice, in order to avoid cases of impunity.

The third chapter continues to lay the foundations for assimilated justice, and provides a justification for each of the fundamental aims, and particularly the aim of reparation. Chapter three supplies a general framework in which to define the actors, *i.e.* the offender, the crime victim, and the community. Together with the traditionally recognised individual offender (under criminal justice), and the rights and needs of the victim and the community, the inclusion of the victims, through the application of the fundamental aims, adds to the legitimacy of assimilated justice. The inclusion of, and specific focus on the victims, individually and collectively defined, is based on a few of the major instruments which assign such rights. An instrumental framework is thus provided. The instrumental framework provides evidence of both criminal and restorative justice competences that not only put the crime victim in focus, but also give further support to the application of the fundamental aims. UN declarations, the ICC Statute, and special reports related to the struggle against impunity and victim rights to reparation are specifically looked at. The goal of chapter three is to identify the legal framework that lends support to the idea of including the victim, and the general community, in assimilated justice.

Chapter four introduces, explores, and justifies the fundamental aims, which are used as one more underlying foundation for assimilated justice, and which are in turn able to take into account the actors involved in, and affected by, the harm done. The chapter considers the theories behind, and the applications of each of the fundamental aims, in order to set out the legitimate foundations of each aim, with regard to the ideology of the present thesis. It explores which actor(s) each aim focuses on, in theory; the offender, the victim and/or the general community. This analysis is required to substantiate the idea of the study that if the actors are involved in the justice process,

the fundamental aims are then guaranteed their application. It is furthermore important to establish equilibrium between the fundamental aims, as they coexist, overlap and collaborate in the process of justice. This is necessary in order to confirm the claim that the assimilated application of the fundamental aims has the ability to involve the offender, the victim, and the general community in the justice process, with the outcome remaining that of fully assimilated justice.

With a solid idea of the foundation of assimilated justice; its contents, character, and possible form, invoked throughout the first four chapters, the remaining chapters continue to lay the foundations for assimilated justice. With a focus on international criminal justice institutions and on restorative justice institutions, chapter five and six briefly describe the fundamental values of each justice system. The chapters explore the existence of the fundamental aims within each system, and the existence and effect of the fundamental aims in practice. The last two chapters provide potential ways of viewing criminal and restorative justice together, in an assimilated justice process.

Chapter five begins by briefly introducing the international criminal justice system. The surrounding jurisdictional principles of the ICC and the international core crimes are looked at, highlighting the right, and possible state duty, to prosecute and punish the offenders of these crimes. In order to understand which fundamental aim(s) and actor(s) each justice system focuses on, in its justice process, the chapter evaluates the international criminal court, with brief references to the *ad hoc* international criminal tribunals. Chapter five thus explores the application of the fundamental aims, through the international justice system's prosecutorial process. A closer look at the prosecutorial process is essential, in order to demonstrate the legitimacy of the fundamental aims. Thus is established both a theoretical and a practical legitimacy basis for each aim.

Chapter six similarly introduces restorative justice and its development, in order to better understand restorative justice aims, and the application of restorative justice, through its truth discovery process. The chapter explores which actor(s) each restorative justice aim focuses on, when applied in a truth discovery process: offender, victim and/or general community, individually and/or collectively. Chapter six is shaped similarly to chapter five, exploring the application of the fundamental aims through the restorative justice system's truth discovery process. This is essential in order to demonstrate the legitimacy of the fundamental aims established in previous chapters. The chapter considers certain restorative justice institutions, namely, truth commissions, and their truth discovery process, through which the fundamental aims are applied. The South African Truth and Reconciliation Commission – believed, in many ways, to represent a new, *quasi*-judicial model of restorative justice – is looked at more closely. Reference is occasionally made to other TCs; however the examples used are merely demonstrative, with the objective of providing support for the arguments made throughout the thesis.

Chapter seven introduces some examples of what the thesis refers to as *quasi*-assimilated justice, or at least a movement in that direction. The existence of different models combining criminal justice institutions with restorative justice institutions provides a final foundation for the thesis – that of assimilated justice. A critical demonstrative approach is taken, with regard to the Rwandan model of criminal justice, and Timor-Leste and Sierra Leone’s models, which represent a new kind of internationalised, yet domestic, criminal justice. These *quasi*-assimilated institutions are analysed with regard to relevance of assimilated justice fundamental aims and actors, in relation to their reflexive institutional and objective commitment to fulfil the fundamental aims and involve the actors. The chapter considers whether such present day examples actually represent a genuine paradigm shift towards fully assimilated justice, or whether they represent rather an initial theoretical phase, or even a purely accidental shift towards assimilating criminal and restorative justice aims. In order to add further clarity to assimilated justice, this chapter emphasises what *quasi*-assimilated justice is not (yet), as opposed to what fully assimilated justice is. A look at the prosecutorial process is also taken, as is a look at the truth discovery process, in order to assess the fulfilment of the fundamental aims, and legitimately restricted justice. The second part of the chapter underlines the relevance of the assimilated justice paradigm, where restrictions to the prosecutorial process and restrictions to the truth discovery process are discussed in relation to *quasi*-assimilated justice restrictions. Legitimate restrictions are scrutinized in order to draw attention to weaknesses and limitations related to criminal justice and restorative justice. Such restrictions provide further foundation for assimilated justice.

The final chapter, chapter eight, is able to suggest, with the previous chapters in mind, some final recommendations for fully assimilated justice. The chapter concludes previous chapters’ foundation of and justification for assimilated justice, as well as the indications made on how to lessen restricted justice and practical problems. The thesis has not set out to provide a model of assimilated justice, but rather to provide conceptual foundation for assimilated justice. The nature of assimilated justice objective and commitment does not require, and is not suited to specifying a model, but rather to invite balanced internalised, collaborative, inclusive commitment of existing institutions. Such commitment must be progressive, in combination with a collective optimization of the objective to fulfil the fundamental aims and involve the actors. All the fundamental aims must be recognised, at the same time as the offender, the individual victim and the general community are included in the justice process, in equilibrium. Taking into account different impunity threats, cases of legitimately restricted justice and practical problems that both universalism and particularism face, fully assimilated justice must realistically represent a flexible franchise model that is able to adapt to local arrangements. In this way, assimilated justice can

provide both a retrospective focus and a prospective focus, supplying justice and accountability for the past, with a goal to reconcile and create stable democracy for the future.

Chapter nine provides a bibliography.

CHAPTER 2: ASSIMILATED JUSTICE IN THE FIGHT AGAINST IMPUNITY

2.1. INTRODUCTION

The purpose of this chapter is to justify the overall thesis, that is, the assimilation of criminal justice with restorative justice aims and mechanisms, in a legitimate justice process, in the fight against impunity.⁶⁶ The chapter identifies the major threat to any legitimate justice process, common to both the international criminal justice and the restorative justice systems, that is, the threat of impunity.⁶⁷ The threat of impunity is viewed as an important foundation for assimilating these systems, where the alternative assimilated justice paradigm can fill certain gaps, and thereby avert the instances of impunity. A recent UN resolution on impunity recognised the importance of combating impunity for all human rights violations that constitute crimes, and highlighted the importance of the ICC Statute, which entered into force on 1 July 2002.⁶⁸ It furthermore welcomed the establishment of the new internationalised special courts for Timor-Leste and Sierra Leone, and their respective truth commissions, in the fight against impunity.⁶⁹ The importance of impunity lies in its potential to disrupt, corrupt and actually obstruct justice, in different ways. Moreover, it is a major threat to both the international criminal and restorative justice systems. This mutually shared objective lends supports to the proposed assimilation.

The chapter explores general definitions of impunity, and proposes a broad definition, in order to avoid narrow definitions requiring only limited solutions. Through the proposed broader definition, the chapter will be able to discuss different types of impunity, such as the impunity threat that amnesties can create. As this chapter points out, “impunity” is generally understood as the lack of punitive responses to illegal acts, a propos criminal justice. As regards restorative justice,

⁶⁶ Legitimate justice is in this study understood to be assimilated justice that is answerable to the actors who are involved in and affected by the harm done, applying the fundamental aims.

⁶⁷ This study is concerned with impunity threatening justice processes dealing with the international core crimes, which pose great national, political, and international concern. Impunity is generally discussed in literature in terms of lacking justice processes that are of political, national, regional, and international concern.

⁶⁸ UNDoc.E/CN.4.RES.2002/79.

⁶⁹ UNTAET Reg.No.2000/11; Reg.No.2000/15, at www.un.org/peace/etimor/unttaet. See also the Commission for Reception, Truth and Reconciliation of East Timor, UNTAET Reg.No.2001/10, 13 Jul.2001, at www.easttimor-reconciliation.org; and at www.easttimor-reconciliation.org/Documents.htm#UNTAET_Regs; Sierra Leone Special Court, UNDoc.S/RES/1315/2000 and S/2000/915, The Truth and Reconciliation Commission Act 2000, at www.sierra-leone.org/trc.html; www.usip/library/tc/doc/charters/tc_sierra_leone_02102000.html. See also Hayner, 2001.

“impunity” is generally used in amnesty terminology. Although the two relevant justice systems and their institutions are discussed in later chapters, this chapter considers the international criminal justice institution of the ICC, and the restorative justice institution of South Africa’s TRC, with reference to impunity issues.⁷⁰ It is of vital importance to re-define impunity, in order to include more than the mere lack of criminal prosecutions, as justice, and accountability depend on many other factors as well. It is likewise important to realise that impunity can still be a threat, even when a restorative justice process is put in place to exclude a blanket amnesty.⁷¹ Together with a broad definition of impunity, the proposed concept of assimilated justice can better protect the actors involved in, and affected by, international core crimes and impunity threats. It can of course be argued that impunity does not need re-defining except to suit assimilated justice. The criminal justice discipline is perhaps not aimed at anything other than assigning criminal accountability, and the discipline of restorative justice is not designed to hold the offenders accountable. However, criminal justice systems cannot guarantee the prosecution of all offenders of international crimes,⁷² just as restorative justice mechanisms cannot guarantee that an amnesty will not be granted at a later stage. Moreover, the justice systems in question often refer to other aims, above and beyond the primary aims of *e.g.* prosecuting, in using the fundamental aim of just-desert punishment, where other values and actors may be involved, *e.g.* deterrence from future crimes. If the justice process does not succeed in fulfilling such aims, whether secondary or not, it cannot be referred to as impunity unless impunity is first re-defined. A closer look at each system of justice will serve to identify restricted justice, sometimes legitimate, but still restricted.⁷³ Military justice has been identified as a major restriction to justice, based on the cases of Latin American states in transition, where the former regime may still have the justice system in its grip.⁷⁴ It is the view of this dissertation that the threat of impunity is relevant because where no perfect justice system exists, gaps appear between the foci of the different dimensions of the two systems of justice considered,⁷⁵

⁷⁰ The ICC and the SA TRC have been chosen as two representative institutions of each justice system scrutinized in this study. The ICC is the first and only permanent institution of the international criminal justice system; the SA TRC represents, to a large extent, a new model of *quasi*-judicial truth and reconciliation commission, modelled on previous truth commissions.

⁷¹ Amnesties are discussed in a later part of the current chapter.

⁷² Nor can a domestic criminal justice system guarantee a 100% success-rate.

⁷³ The identification of restricted and legitimately restricted justice is part of the thesis and emerges throughout the chapters. Hence the identification of restrictions within the justice systems only begins in this chapter.

⁷⁴ Former regimes of Latin America have been represented by the military, see Kritz, 1995; and see generally Goodhand & Hulme, 1999.

⁷⁵ Of course gaps between the disciplines may exist even in instances where the justice systems do in fact succeed according to their intrinsic aim. In short, the focus of criminal justice is individual-offender-focus through universal values; and restorative justice focus is collective-focus through local particularities. This will be further studied in later chapters.

with regard to the international core crimes. These gaps make possible further impunity threats, and indicate why an assimilation of justice processes is necessary.

It is argued, throughout the thesis, that assimilated justice would not be a legitimate process of justice, able to protect against impunity threats, if it were not able to recognise and involve all affected actors: offender, victim and community. Briefly, “offender” refers to the person who commits; aids and abets; incites and in other ways participates in a crime; “victim” refers to the person who suffers directly from a crime; and “community” refers to the state, its citizens and victims at large who also, but perhaps indirectly, suffer from crime.⁷⁶ Legitimate justice is, in this study, defined as a process that holds the offender criminally accountable, through an institution with criminal jurisdiction, as well as including the victims and the general community in the justice process. Accountability seeks to oppose impunity, most immediately by punishment, which is made possible through the achievement of the fundamental aims of truth, just-desert punishment, and deterrence. However, the fight against impunity through assimilated justice also aims at reparation for the victims and reconciliation between the offender, the victim and the community. A legitimate justice process of assimilated fundamental aims, of both criminal and restorative justice, able to take into account the offenders, the victims and the general community is therefore justified. Impunity will be re-defined, in order to correspond to the aims of assimilated justice.

2.2. DEFINING IMPUNITY

Impunity, in its different guises, is the reason why assimilated justice is necessary. The word impunity stems from the Latin *impūnitās*, and is generally understood as non-punitive, or unpunished.⁷⁷ Impunity is also referred to as a lack of effective uncovering of the truth, a lack of public recognition of the offender, and a lack of criminal prosecution. This gives license to one or both of the evils named in the two citations below, defining impunity:

“Forgiveness that leaves perpetrators in their places of power and influence and that prevents the truth from being discovered and revealed is not forgiveness: it is impunity”⁷⁸

“Reticence in the administration of justice...sentences that, by any standard, are grossly disproportionate to the crime committed”⁷⁹

⁷⁶ The actors are further discussed in next chapter, with reference to their needs and rights.

⁷⁷ Most dictionaries of the English language refer to impunity as exemption from punishment. see e.g. the Oxford Library of Words and Phrases, III Word Origins, Oxford University Press, 1986. The Oxford English Dictionary (OED) refers to impunity as the “exemption from punishment or penalty”, Simpson, & Weiner, 1989, at www.oed.co.uk. For a concise summary of impunity, see Joyner, 1998.

⁷⁸ Méndez, 2001, p.33.

⁷⁹ UNCom.HR, UNDoc.E/CN.4/1991/20, #408.

After years of impunity and amnesty granting regimes, the UN requested Special Rapporteur Joinet to write a report on the impunity of perpetrators of human rights violations in 1991.⁸⁰ The definition of impunity reached in the final Joinet report of 1997 reads: “Impunity means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”⁸¹ By focusing on more than the mere lack of punitive sanctions, the UN definition of impunity is quite broad in definition. However, at least in terms of perpetrators of international core crimes, the necessity of appropriate penalties would exclude civil, administrative, or disciplinary proceedings. Unfortunately the definition does not refer to the positive rights, of either the victim or the community, but must be read and interpreted together with the set of principles, set out in the same report, covering the protection and promotion of human rights, through action to combat impunity.⁸² Yet, the impunity report is of special importance to the international community and the UN, as an indication that punishment and reparation should both be a priority in doing justice.

Impunity is, throughout the present study, viewed as the impossibility, or improbability of holding perpetrators of international core crimes individually accountable, and the non-inclusion of the victim and the general community in a legitimate justice process. In order not to rely on unrealistic expectations of the justice systems, the notion of impunity applicable in this study is broad in definition, and in application and involves more than the lack of criminal prosecution. It includes the lack of other justice measures that, in turn, result in non-respect for the fundamental aims and ignorance of the actors. Impunity signifies, amongst other things, a failure to provide effective remedies, as laid down in Article 8 of the Universal Declaration. “Everyone has the right

⁸⁰ See UN, Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised final report prepared by Joinet pursuant to Sub-Commission decision 1996/119, 2 Oct.1997, E/CN.4/Sub.2/1997/20/Rev.1; UN Sub-Commission on Human Rights, Res.2000/24, Role of Universal or Extraterritorial Competence in Preventive Action against Impunity, 18 Aug. 2000, E/CN.4/SUB.2/RES/2000/24; UN Commission on Human Rights, Res. 2000/68, Impunity, 27 Apr. 2000, E/CN.4/RES/2000/68; UN Commission on Human Rights, Res. 2000/70, Impunity, 25 Apr. 2001, E/CN.4/RES/2000/70 (taking note of Sub-Commission Res. 2000/24); Commission on Human Rights, Civil and political rights, including the questions of: independence of the judiciary, administration of justice, impunity, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special rapporteur Bassiouni, (throughout this paper referred to as Bassiouni principles) E/CN.4/2000/62, 2005, further discussed in next chapter; Appendix 4.

⁸¹ *Id.*, definition used by Joinet, p.17. The Impunity report will be referred to and discussed in the next chapter with regard to *e.g.* victims’ rights.

⁸² *Id.*, the right to know, the right to justice, the right to reparations. It is supported by the report on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, (Bassiouni principles) 2005.

to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law.”⁸³ Barring impunity entails establishing the truth, prosecuting and punishing the offender, attempting to deter the offender and other actors, ordering reparations to the victims, and attempting collective community reconciliation. At least part of this study’s broader definition of impunity, and some of the ingredients of the remedy against it, that is, assimilated justice, were ordered by the Inter-American Court of Human Rights, in 1988.⁸⁴ Simply fighting impunity interpreted in a narrow punitive sense, by punishing the offender, is not enough in order to satisfy the individual victim or the community. Recognition of the actors adds to the stability and respect for the justice system and the justice process in question, by being both backward-looking, and forward-looking.⁸⁵ Without actor recognition, peace and order cannot be guaranteed. Just-desert punishment is therefore viewed as a necessary, but insufficient fundamental aim of assimilated justice, in order to combat impunity. The other fundamental aims - truth, deterrence, reparation, and reconciliation - are, therefore, viewed as essential ingredients, with the purpose of completing the legitimate justice process, by including all the actors.⁸⁶

The existence of impunity is, of course, structurally related to both the international justice system and the lack of strong institutionalisation in states in transition. This puts even more pressure on the fundamental aims of assimilated justice. The dynamics of the international justice system are very different to a stable national justice system and stronger reliance upon the involvement of the offender, the victim, the community, and their interaction is necessary in order to claim legitimacy and success. However, the dynamics of the international system may not be so different from a national system of transitional justice, where - as in the cases of, for example, South Africa, Chile, and Guatemala - restorative justice norms were applied in place of a failing, corrupt, or otherwise weak criminal justice system.⁸⁷ A lack of guaranteed coercive sanctions in the international, and in transitional systems, entails that legitimacy and success can only be found in the inclusion of the offender, the victim, and of the community. Moreover, impunity has grave consequences in circumstances of transition, where international core crimes are concerned; perhaps more so than in

⁸³ Art.8 Universal Declaration of Human Rights, 1948.

⁸⁴ In the *Velasquez-Rodríguez* case, 1988, #174, the court, with regard to serious human rights violations, interpreted the ACHR to include a state duty to seriously investigate, identify, punish offenders, and compensate victims.

⁸⁵ Criminal justice is referred to as mainly backward-looking, through its focus on the rule of law and just-desert punishment of the committed act. Restorative justice is mainly forward-looking, through its focus on peace, truth and reconciliation.

⁸⁶ The UN Sub-Commission on Promotion and Protection of Human rights (former Sub-Com. on the Prevention of Discrimination and Protection of Minorities) has pressed the issue of victims, individually and collectively. 3 important studies have been produced, by Van Boven and Joinet in 1997, and by Bassiouni in 2000. See previous footnotes and see ahead, ch.3.

⁸⁷ See e.g. Kritz, 1995; Hayner, 1996, 2001; Cuya, 1999; Sarkin, 2004. The causes relating to restricted and transitional justice are not further discussed, but see ch.1, 6-7 for more on restricted justice.

the case of established systems of democratic states, involving less serious crimes. This may be so because such national systems can often rely on other institutional means, and in such circumstances, isolated cases of impunity will have fewer destabilising effects on the political order, than is the case for impunity of international crimes.⁸⁸ The effectiveness and the legitimacy of a justice system that has to deal with the international core crimes depends on existing mechanisms, on the capacity of such mechanisms, and on individual as well as public confidence in the system. “A country without a well-developed consciousness in the respect, promotion and defense of human rights, produces ineffective legislation for the protection of these rights.”⁸⁹ It is thus important to individualise the system, and avoid abstract, non-representational systems, while also being able to recognise the local and collective national identity. It is therefore argued that there exists a practical responsibility, as well as a moral duty, to give specific focus to the victim, to the community, and to general actor involvement in the justice process.⁹⁰

2.2.1. AMNESTY – FUNCTIONAL IMPUNITY

Amnesty is often used in impunity terminology and often refers to different instances of impunity. However, there are different types of amnesties, and they may not all qualify as impunity threats. It is therefore important to define and separate different types of amnesty.

Amnesty generally refers to an official act that bars future prosecution. Granted amnesties may therefore represent functional impunity. In legal terminology, there is a difference between amnesty and pardon. An act of amnesty relieves the offender of all legal memory, while a pardon only relieves the offender from serving the sentence.⁹¹ The granting of amnesty generally indicates the intention to obliterate the crime. An amnesty is a “legal norm which, for an indefinite number of cases, either revokes (or reduces) the lawful punishment of convicted offenders, terminates continuing proceedings or prevents cases coming to court at all”.⁹² There is an obvious difference between an amnesty and a pardon, and, as a pardon still requires a functional justice system and a

⁸⁸ If e.g. the national police force does not bring an offender to justice or the offender is not criminally charged, social services may deal with the offender and the victims. The argument that impunity feeds impunity is well founded amongst academics and practitioners, especially in terms of international core crimes, where entire groups, peoples or even nations are affected. Where the authorities do not react to such crime, peace, stability and respect for the justice system cannot be expected.

⁸⁹ Report of the Chilean National Commission on Truth and Reconciliation, 1991, see Correa, J. *Dealing with Past Human Rights Violations: the Chilean case after Dictatorship*, in Kritz, 1995.

⁹⁰ See ahead, ch.3.

⁹¹ According to Black’s Law Dictionary “amnesty” is the abolition and forgetfulness of the offence, “pardon” is forgiveness, see Garner, B.A. (Ed.) 7th ed, West Group, 1999; The OED defines “amnesty” as forgetfulness, oblivion; an intentional overlooking; An act of oblivion, a general overlooking or pardon of past offences, by the ruling authority.

⁹² Schätzler, J.G. *Handbuch des Gedankenrechts*, 1992, in Christodoulidis, 2001, p.3.

started accountability process, legitimacy of the justice system and its process may not be lost after an issued pardon. Blanket amnesties, (e.g. general amnesties of the entire previous regime) closely relate to this legal language of automatic oblivion of the past, while an individually granted amnesty (represented by the South African TRC process)⁹³ may equate to a pardon. There does not appear to be much real difference between a pardon and an individually granted amnesty, if they are both the result of honest and real truth investigations with an acknowledgment of guilt, which serves to do away with the punishment. Amnesties may also be conditional upon the crimes committed,⁹⁴ which further accentuate the importance of truth investigations. Discussed in more details in the next chapters, it suffices to say here that the actual truth process is of importance, especially to restorative justice processes. If the process is able to view and use the fundamental aim of truth both as an instrumental aim, as well as an end in itself, it is comparable to a *quasi*-judicial process. A process of criminal justice includes processing instrumental truth investigation, evidence, and corroboration, actually quite similar to the process chosen by the restorative SA TRC. This is why the SA TRC restorative justice process of individually granted amnesties is referred to as *quasi*-judicial. The essence of the amnesty is thus to be found in its origin. In communities that have suffered international core crimes, and periods of international violence and injustices, the willingness and the capacity to provide a just and fair system may not exist, or they may not exist together. If a state is willing, yet unable, a restorative justice truth commission may be set up, as an attempt to do justice, without going as far as to demand reformation of the legal system.⁹⁵ Alternatively, the international community may be invited to assist.⁹⁶ States that are neither willing, nor able, or a state that is not willing, but able, still necessitates international involvement, for example by bringing cases to the ICC, in order to avoid impunity or at least illegitimate amnesty.⁹⁷ If the amnesty is the result of an honest and true process of justice, it may not qualify as an impunity threat. Still, conventions that prescribe a duty to prosecute also require states to provide effective and appropriate penalties,⁹⁸ in which case the issuing of pardons would also violate the duty to

⁹³ See next part of the current chapter.

⁹⁴ E.g. only political offences could be amnestied in South Africa, see ahead.

⁹⁵ South Africa may be an example of this type of willingness, yet inability to reform and include the judiciary. See ahead; Mani describes the South African scenario, with reference to the rule of law, as “illegitimate but functional”, and differentiates between this and “corrupt and dysfunction”, and “devastated and non-functional”, 2002, p.73. I argue that reform is necessary in all three situations, but that as long as the legal system subsists it can, to some extent, support a legitimate restorative justice process and any granting of amnesty.

⁹⁶ Rwanda invited the international community to assist in reforming the legal system, see ch.5.

⁹⁷ See ahead. Other examples are discussed in ch.5, with regard to internationalised domestic courts, and TCs. Besides political will, which must be overturned by popular demand, which in essence requires the involvement of the community in the justice process, shortcomings include legal and material issues.

⁹⁸ E.g. Genocide Conv. art.V; Torture Conv. art.4.

punish.⁹⁹ Thus, even when intended to aid peace agreements, the use of amnesty and other measures of clemency must be limited. In fact, according to the final report on the question of the impunity of perpetrators of human rights violations,¹⁰⁰ states should first meet their obligations, which include investigation, prosecution, and reparation, before any type of amnesty can be issued.¹⁰¹

Differentiating between amnesty and pardon, or general and individual amnesties, the threat of the former is the greater to international justice, *i.e.* the continuous usage of *de jure* impunity.¹⁰² This can be in the form of a blanket amnesty, clemency, and other immunity laws, by which prosecution is avoided. Although impunity and amnesties are generally seen as wrong,¹⁰³ governmental officials have nevertheless been able to act under the protection of different immunities for centuries in oppressive states. In the name of truth, justice, and national reconciliation, the granting of amnesties has sanctioned the avoidance of the duties and responsibilities of offenders and governments, and has stalled and stopped applications of fundamental rights of victims and communities.¹⁰⁴ “Impunity is perhaps the single most important

⁹⁹ This also explains why the fundamental aim of just-desert punishment goes past the value of prosecution, with the intention to fully realise the duty to prosecute and punish, see ch.4. During the drafting of the ICCPR it was noted that no lighter penalty or amnesty should apply to offenders of genocide or crimes against humanity, see UNDoc.A/C.3/SR.1007, 1960, UK remarks. In the *Velásquez-Rodríguez* case, 1988, appropriate punishment was likewise ruled essential for violations of rights of the Inter-Am.CHR and with regard to the Chilean TC, the Inter-Am.Com.HR. held that necessary punishment was lacking the justice process and that the investigations and reparations made were not enough, Report 36/96, #77.

¹⁰⁰ See Principle (Princip.) 25, restrictions and other measures relating to amnesty, in Joinet, 1997.

¹⁰¹ Id. Princip.18, states must “investigate the violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations. Although the decision to prosecute lies primarily within the competence of the State, supplementary procedural rules should be introduced to enable victims to institute proceedings on either an individual or a collective basis, where the authorities fail to do so, particularly as civil plaintiffs. This option should be extended to non-governmental organizations with recognized long-standing activities on behalf of the victims concerned.) (b) They shall be without effect with respect to the victims' right to reparation, as referred to in principles 33 to 36; (c) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have merely exercised this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay; (d) Any individual convicted of offences other than those referred to in paragraph (c) of this principle who comes within the scope of an amnesty is entitled to refuse it and request a retrial, if he or she has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, or if he or she has been subjected to inhuman or degrading interrogation, especially under torture.”

¹⁰² Where “normality is criminalized and criminality normalised” Brundtland, in Asmal, 1997, p.55.

¹⁰³ Most human rights law disqualify blanket amnesties by requesting states to investigate and prosecute and respect the principle of individual criminal accountability. See generally the UN Impunity report by Joinet, 1997; UN Sub-Commission on Human Rights, Preventive Action against Impunity, 2000; UN Commission on Human Rights, Impunity, 2000; UN Commission on Human Rights, Impunity, 2001; UN Commission on Human Rights, Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Bassiouni, 2000, 2005. See also Orentlicher, 1991, Mendez, 1997, Ratner, 2001.

¹⁰⁴ See Kritz, 1995 and Ambos, 1997, for lists of countries with granted amnesties. Even with an impressive account of international law prescribing prosecution, numerous states have granted amnesties, *e.g.* Argentina, 1986. See also

factor contributing to the phenomenon of disappearances. Perpetrators of human rights violations...become all the more irresponsible if they are not held to account before a court of law.”¹⁰⁵ One recent example of amnesty is the internationally supported Angolan cease-fire agreement signed on April 4, 2002 after 27 years of civil war, with the aim of aiding a demobilisation of the guerrilla army and national reconciliation.¹⁰⁶ The UNITA rebels accepted the parliament’s offer to issue a blanket amnesty for all civilians and soldiers, Angolan or foreign, who committed crimes against the security of the Angolan state. The amnesty extended to those who were imprisoned during the war and to those who deserted from the Angolan army.¹⁰⁷ Amnesties are mostly granted in countries dominated by military power with military justice, where military defendants have enough power to *e.g.* refuse to testify.¹⁰⁸ The laws of war, armed forces, and military orders go hand in hand, and the hierarchical structure that military justice represents makes military impunity almost a hidden rule, a code of practice in *e.g.* many South American countries.¹⁰⁹ Therefore, the necessary initial change is often to the social and political structures of the country. Following such transition, towards peace and democracy, comes the justice system and legal order, with enhanced accountability.¹¹⁰

International law establishes certain human rights as non-derogable and this implies a duty to protect such rights under national criminal law.¹¹¹ In response to the number of amnesties and flights from justice, international law today prohibits amnesties applicable to the crimes of genocide, torture, and grave breaches of the Geneva conventions, as these conventions include an explicit duty to prosecute or extradite.¹¹² From a criminal law point of view, different mitigating factors have always existed and been accepted, but it is clear that no statute of limitation or other limiting factors are allowed concerning the international core crimes.¹¹³ Following the right to

Argentina 1998; Chile, 1978, El Salvador, 1993; Report on the Consequences of Impunity, UNDoc.E/CN.4/1990/13, in Kritz, 1995.

¹⁰⁵ UN Com.HR, Report of the working group on enforced or involuntary disappearances, UNDoc.E/CN.4/1991/20, #406.

¹⁰⁶ 3 Apr.2002, *Angolan parliament grants amnesty to UNITA*, at http://www.afrol.com/News2002/ang013_unita_amnesty.htm

¹⁰⁷ Similar to amnesties of deserters and those “wrongly” imprisoned by previous regimes, Romani granted an amnesty in 1990 for those convicted of political offences under the previous regime, 4 Jan.1990, in Shelton, 1999.

¹⁰⁸ See generally Orentlicher, 1991; Ambos, 1997. Proposed prosecutions in Argentina led to rebellions in the 1980s.

¹⁰⁹ See generally Kritz, 1995, for case-studies on many South American amnesties.

¹¹⁰ See ch.4, for a discussion on peace and order.

¹¹¹ *Supra*, *e.g.* the ICCPR art.4; ACHR art.27, prohibiting amnesties also in a state of emergency. However, because of the state practice of granting and recognising amnesties, a general customary law duty to prosecute, applicable to all serious human rights violations, cannot be ascertained. With regard to the international crimes of genocide, war crimes and torture, amnesties are clearly prohibited in the treaties, *supra*.

¹¹² Genocide Conv. art.4; Geneva Conv. I, art.49; Geneva Conv. II, art.50; Geneva Conv. III, art.129; Geneva Conv. IV, art.146; Torture Conv. art.7.

¹¹³ See ch.6; ICC arts.27, 29, prohibiting statutes of limitation with regard to the international core crimes; Conv. on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968, which has not however

justice, as laid down in the guiding principles for the protection and promotion of human rights through action to combat impunity,¹¹⁴ certain restrictions apply to amnesties believed to contribute to reconciliation.¹¹⁵ No perpetrator of international core crimes should be granted amnesty until states have investigated the violations, taken apt measures in respect of the offenders, by ensuring prosecution and punishment, providing the victims with reparations, and taking preventive steps.¹¹⁶ No amnesty shall apply regarding the victim's right to reparation and no amnesty shall be granted with regard to unlawfully detained persons.¹¹⁷ Furthermore, a person has a right to refuse an amnesty and request retrial.¹¹⁸

The human rights records of many states have improved, and international law and the international criminal justice system can today punish those officials who might otherwise continue to commit grave crimes, and hide behind different immunity applications.¹¹⁹ However, international law cannot yet be said to impose a direct duty not to grant amnesty, but a general duty to not recognise granted amnesties is evolving.¹²⁰ The failure of the UN-led Salvadorian truth commission of 1993 to avoid the issue of a general amnesty raised was strongly condemned worldwide, compelling El Salvador to re-open some cases.¹²¹ The Dayton agreement of 1995 was able to steer clear of granting amnesties in the former Yugoslavia, and the 1996 Guatemalan amnesty law was the first in South America not to apply to international core crimes.¹²² This demonstrates that with the international community's involvement, a strong position on amnesties can be taken and certain international core crimes can be prosecuted, although *de facto* impunity continues to slow down justice processes. *De facto* impunity occurs when state mechanisms are manoeuvred to ignore

had much success, with only a small number of signatories, see Marchisio, 1998. See also the *Barbie* case, 1985, where *la Cour de Cassation* held that the prohibition of statutes of limitations, with regard to crimes against humanity in this case, could apply retroactively; Princip.6, Bassiouni principles, 2005, see ahead, ch.3.

¹¹⁴ Princip.25, Joinet impunity report 1997; also Sub-Commission on Human Rights, Role of Universal or Extraterritorial Competence in Preventive Action against Impunity, 2000; Commission on Human Rights, Impunity, 2000; Commission on Human Rights, Impunity, 2001; and Final report of the Special rapporteur Bassiouni 2005 (Bassiouni principles).

¹¹⁵ *Id.* Other amnesties should not be allowed, see Princip.23, and 25, Joinet.

¹¹⁶ The report refers to "serious crimes under international law", and covers war crimes, crimes against humanity, genocide, and grave breaches of international humanitarian law, *Id.* Joinet, definitions, p.17.

¹¹⁷ Princip.25, Joinet, 1997.

¹¹⁸ *Id.*, Princip.25. The UNHCHR Resolution of 2002 furthermore states that amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes, UNDoc.E/CN.4.RES.2002/79.

¹¹⁹ *E.g.* through the ICC and of course primarily through domestic states.

¹²⁰ *E.g.* in the case of *Pinochet*, a self-granted amnesty was not raised as a defence to bar extradition, see *R. v. Bow Str. Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte*, No.3, 2 All ER 1999; Scharf 1996, 1998.

¹²¹ Kritz, 1995, p.546. See generally Cuya, 1999, on TCs in Latin America and El Salvador's Commission on the Truth for El Salvador report *From Madness to Hope: the 12-Year war in El Salvador: Report of the Commission on the Truth for El Salvador*, 15 Mar.1993

¹²² *Ley de reconciliación nacional*, Decreto No.145-96, 18 Dec.1996, Guatemala; State practice regarding amnesties and pardons, US Dept.of State, at www.gopher.igc.apc.org:70/00orgs/icc/natldocs/prepcom4/amnesty.us Another example is the Chilean amnesty that was declared illegal in 1998. See Inter-Am.ComHR Annual Report, OEA/Ser.L/V/II.98; Scharf, 1996.

certain acts. Refusals to investigate; asylum seeking; and extradition exemption are just a few examples of the routes to *de facto* impunity. Amnesties and immunities - or as they are referred to in transitional justice language, impunity pacts - do not deter and do not make abusive leaders step down.¹²³ In contrast, general amnesties can be interpreted as a silent approval of previous criminal action and therefore should not be seen as an appropriate tool towards a different future. The example of President Mugabe of Zimbabwe represents a case where an abusive leader starts preparing for retirement when national and international opposition becomes strong and who, at the same time, is offered some kind of impunity pact by other leaders.¹²⁴ If we want to live in a world that tells the general community and the individuals who commit war crimes, genocide, and crimes against humanity that they will be held individually accountable for these crimes, the usage of amnesties and other immunities must stop, or they may, when used in the illegal sense of an impunity pact, induce further abuses and abusers. "That four great nations, flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgement of law, is one of the most significant tributes that Power has ever paid to Reason."¹²⁵

2.2.2. AMNESTY AND THE SOUTH AFRICAN TRUTH & RECONCILIATION COMMISSION

While there have been a series of truth commissions in the last 30 odd years, representing many models of restorative justice, the South African Truth and Reconciliation Commission is a recent model that, to some extent at least, combined many previous models.¹²⁶ As far as amnesties are concerned, truth commissions are sometimes equipped to grant them, but governments have granted most amnesties of the past.¹²⁷ Some of these amnesties tend to be carrots, supplied by the state in return for some concession, maybe by the offender, such as purges, public apologies and acknowledgment of the truth. Such clemency is applied in the belief that it will aid reconciliation and that the amnesty will not hinder the legal accountability process. However, what has happened in many of past reconciliation efforts is that impunity has prevailed through the granting of amnesty and a decree, ordering reconciliation, often without any further efforts made in order to establish the

¹²³ The incentive to step down from power is more often fashioned by the opposition's threat of force, retirement, or the likelihood of losing an upcoming election.

¹²⁴ See generally www.swradioafrica.com; www.zwnews.com

¹²⁵ Jackson, R.H., of the IMT, 1945.

¹²⁶ See Appendix 5 for a list of TC development in the 1990s. Also, see ahead for more details on the SA TRC.

¹²⁷ In a state of transition, not able or perhaps not willing to rely on a stable judiciary, the fight against impunity is sometimes fought through TCs and, sometimes, through prosecutions. See later chapter on restorative justice; Krütz, 1995. This study does not include transitional justice, but only refers to the condition the state is currently in (e.g. with a transitional justice system and process, perhaps with an intention of "transition"). Transitional justice refers throughout the study to an unstable justice system, whether or not the political transition has passed.

truth, prosecute the offenders, make reparations to the victims, and continuously support reconciliation.¹²⁸ Restorative justice mechanisms, such as truth commissions, or commissions of inquiry, are separated from the judiciary and do not rely on the legal system and court orders.¹²⁹ Unless the government is fully committed to the justice process, there are not guarantees that the recommendations made by the restorative justice mechanisms will in fact be carried through, or that the process will not be followed by a general amnesty, further discussed in chapter six. Without the rule of law determining the legitimacy of the process, the moral, and social commitments made to the restorative justice process make up the legitimacy of the process. Continuous reliance on such moral and social support, by the community, is thus vital. However, such support is likely to wane and can be lost entirely if the actors are failed.¹³⁰ The actors may then lose the necessary moral and social belief in the process if their needs and rights are not acknowledged or promises remain unfulfilled. Consequently, even when a state has made an honest attempt at setting up a truth commission of restorative justice, a later granted amnesty, by the government, or even by the truth commission, can threaten the outcome of the entire justice process.

As already mentioned, the present chapter looks at the South African amnesty process, believed to represent a new *quasi*-judicial restorative justice model. It bypassed criminal prosecutions while still trying to achieve the fundamental aims of truth, deterrence, reparation, and reconciliation.¹³¹ The developments in the granting of individual amnesties, through its truth discovery process, may not present a real impunity threat, but rather equates to the issuing of pardons. The “amnesty-accountability” process, of the SA TRC, required that those responsible to apply personally for amnesty, within a certain time, on a certain form.¹³² The very important and novel *quasi*-judicial amnesty element of the TRC became relevant once a crime had been established, based on the victims’ narratives, investigations, and personal offender applications. The applicants had to appear in public hearings, confess, give full disclosure of the facts, and acknowledge the truth.¹³³ Criminal procedure protection was provided to the amnesty applicant, making incriminating evidence inadmissible in court. When responsibility was established and full disclosure had been met, if applicable, according to the criteria set forth in Section 20 of the TRC

¹²⁸ See Appendix 5 for TC development in the 1990s.

¹²⁹ Restorative justice TCs are thus non-judicial.

¹³⁰ By, e.g. granting a blanket amnesty.

¹³¹ Further discussed in ch.7.

¹³² Promotion of National Unity and Reconciliation Act of 1995, see behind and ahead, ch.6.

¹³³ The Amnesty Committee received amnesty applications from 7,115 offenders. All decisions were published in the Government Gazette. Most of the applicants were already serving prison sentences for such crimes committed within the time period the Act prescribes, and if granted amnesty, the penal sanction was lifted. A smaller number, those never caught or sentenced, had to step forward and confess and, if granted amnesty, the possibility of a penal sanction was eliminated.

Act, amnesty was granted.¹³⁴ Extensive hearings and reports demanded full disclosure of all the facts relevant to the case and applicable offences, and the truth that came out of this led to a public confession, publicly acknowledged responsibility, and amnesty. After corroborating evidence (through, e.g. victims narratives, forensic evidence), the requirement of full disclosure enabled the TRC to establish whether the responsible (offender) had failed to fully disclose facts. If this was so, the TRC could continue questioning, and extend investigations, in order to establish as much of the truth as possible. The Amnesty Committee of the TRC had to decide whether the particular offence was associated with an applicable political objective - based on whether the offence was advised, planned, directed, ordered, or committed within South Africa between the specific dates, by or on behalf of either a publicly known political organisation, liberation movement, state agency, or member of the security forces, in light of the specific criteria set forth in the TRC Act.¹³⁵ The criteria included an examination of the motive, context, gravity, and objective of the offence, whether the offence was committed under direct order or approval, and whether the offence was committed for either personal gain or out of personal malice, ill will or spite directed against the victims. Any person acting for personal gain, or out of personal malice, ill will or spite directed against the victim was excluded from the amnesty process.¹³⁶

There was strong support within the TRC and in South Africa in general, for the belief that a fully-fed carrot in the guise of an amnesty was a necessary encouragement to establish truth and reach reconciliation. The Amnesty Committee acted as the tribunal of first and last instance, allowing only review and no appeal of its decision by a court of law, from cases decided by it. This exclusion of both civil and criminal court processes, once amnesty had been granted, became an issue over which the commission was taken to court.¹³⁷ In the *AZAPO* case, the parties tried, unsuccessfully, to stop the amnesty process.¹³⁸ It was held that the constitution could limit the right of access to justice of the victims, (and other parties), without violating international law,¹³⁹ as standards authorising a right to access to justice have to be balanced against other, more urgent needs.¹⁴⁰ Perhaps, according to the Constitutional Court, the most urgent need was to create some stability. Justice Mohamed of the Constitutional Court explained that full amnesty was essential to

¹³⁴ Drafted by the former president of the European Commission of Human Rights, Norgaard, C.A. (§20(3)(f)(ii) Promotion of national Unity and Reconciliation Act of 1995) See more on the SA TRC in Sarkin, 1996, 2004 and ahead, ch.6.

¹³⁵ §20(3)(f)(ii) Promotion of national Unity and Reconciliation Act of 1995.

¹³⁶ *Id.*

¹³⁷ *Id.* §20.

¹³⁸ *Azapo v. TRC*, 4 SA L.R. 1996 & 8 BC L.R. 1015 (CC), 1996; TRC Report Vol.1, Ch.7.

¹³⁹ See e.g. the Geneva Conventions of 1949 and generally human rights law, where e.g. the right to access to justice is a basic human right.

¹⁴⁰ Such urgent needs may relate to poverty issues, reconstruction of housing, and education.

the settlement of truth and reconciliation under the circumstances of South Africa.¹⁴¹ “The Act seeks to address this massive problem by encouraging these survivors and dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly...and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know, is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment, which they undoubtedly deserve if they do. Without that incentive, there is nothing to encourage [perpetrators] to make the disclosures and to reveal the truth.”¹⁴²

Following the final two additions to the TRC final report,¹⁴³ President Mbeki, in April of 2003, responded to the issue of how to deal with those offenders who did not come forward to apply for amnesty. The President gave his word that no blanket amnesty would be granted.¹⁴⁴ However, the President described a similar, *de facto* immunity tool, by which those responsible could testify in exchange for criminal indemnities of plea bargains, or immunity from prosecution. Victim support group, Khulumani, strongly objected to this new provision of immunising offenders who basically ignored, or skipped the amnesty process, saying that “we still have TRC victims being victimised by the perpetrators.”¹⁴⁵ At the same time, in accordance with final TRC recommendations, a unit to oversee apartheid-era prosecutions has been established.¹⁴⁶ Only the future can tell to what extent South Africa will provide further justice for apartheid victims.

Nevertheless, the view that an individually granted amnesty may not in fact pose a real impunity threat (at least not when it is the result of a *quasi*-judicial process similar to that of the SA TRC) has in fact been confirmed by Secretary-General of the UN, Kofi Annan. When the Secretary-General was giving the opening speech for the ICC, he confirmed the general view that the individually granted amnesties of South Africa do not appear to pose a real threat of impunity; “like South Africa’s, it is inconceivable that...the court would seek to substitute its judgement for that of

¹⁴¹ Former Chief Justice Mr Mohamed, in the *Azapo* case, 1996, p.683.

¹⁴² *Id.*

¹⁴³ 7,094 individuals applied for amnesty; 1,160 were granted amnesty, Graybill, L. & Lanegran, K., 2004, at http://web.africa.ufl.edu/asq/v8/v8i1a1.htm#_edn37

¹⁴⁴ e-TV News, 16 Apr.2003; Cape Times, 17 Apr. 2003, p.4.

¹⁴⁵ Cape Times, 17 Apr.2003, p.4.

¹⁴⁶ Established by the national director of public prosecutions, Mr Ngcuka. The unit is headed by Mr Ackermann, who prosecuted the apartheid regime’s chemical and biological warfare chief Mr Basson. Prosecution has to present independent witnesses and evidence but may also use testimonies presented at TRC hearings.

a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.”¹⁴⁷

2.2.3. AMNESTIES AND IMMUNITIES BEFORE THE INTERNATIONAL CRIMINAL COURT

The establishment of the international criminal court means that considerations concerning domestic settlements, amnesties, and other reasons for not prosecuting, will be important in the ICC's fight against impunity.¹⁴⁸

While some of the amnesties and immunity queries that will come before the ICC may stem from military justice systems, such impunity threats are not the only way to receive exemption from prosecution. One instance is the US resolution to the Security Council, exempting US forces from prosecution, on the basis of article 16 of the Rome Statute, which refers explicitly to Chapter VII of the UN Charter.¹⁴⁹ Article 16 is basically intended for use on a case-by-case basis, and provides for a 12-month temporary deferral of criminal prosecutions where it may be an obstacle to peace to exercise such jurisdiction, once the ICC has established jurisdiction.¹⁵⁰ Article 16 requests are thus not meant to be a tool for the Security Council to prevent action, but as a response to specific ICC proceedings. However, the US resolution ignored the case-by-case requirements of article 16, and allowed for blanket amnesty to be accorded to an entire group of people, action otherwise prohibited by article 27,¹⁵¹ and causing the surrender of the ICC to the Security Council. The US resolution met with strong opposition, along the same lines held here, intimating that the US exemption amounted to impunity, allowing for a prosecutorial exemption for war crimes, crimes

¹⁴⁷ UNDoc.SG/SM/6686, 1 Sep.1998; ICC art.53 allows the Prosecutor of the Court some discretion in determining whether to investigate and prosecute. For more on the ICC, see ch.5 and the next part of the current chapter.

¹⁴⁸ The fight against impunity is in fact incorporated in the Preamble of the Rome Statute of the ICC, 1998.

¹⁴⁹ Res.1422, adopted Jul.2002, renewed Jun.2003, Res.1487, which grants immunity to personnel from ICC non-states parties involved in UN established or authorized missions for a renewable twelve-month period. Art.16: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” The UN Charter art.39 requires the SC to find a threat to peace, which it never did with regard to this resolution.

¹⁵⁰ Art.16 presupposes the existence of a particular investigation or prosecution that relates to a specific incident. Art.15 holds that the Pre-Trial Chamber must authorize the commencement of a specific investigation, and that all prosecutor inquiries, up to this point are not investigations, only preliminary examinations. Only after Pre-Trial Chamber authorization of an investigation is the Security Council entitled to request a deferral under Article 16. The structure of the ICC (Rome) Statute underscores the requirement that any Security Council deferral request must respond to a specific case. Furthermore, art.17 provides another safety net, as no case is admissible in the ICC if it already has been or is being investigated or prosecuted by a State which has jurisdiction over it, unless that State is unwilling or unable genuinely to investigate or to prosecute.

¹⁵¹ Art.27 expressly prohibits making distinctions on the basis of official capacity and hence ensures that no person is above the law. Otherwise, impunity will be made possible.

against humanity, and genocide.¹⁵² In June 2004, the SC reversed its decision not to renew the resolution, and instead provided for a year in which to phase out the arrangement.¹⁵³ Remarks made by the US representative to the UN, held that the US was comfortable with the outcome as article 98 agreements were under negotiation.¹⁵⁴ Besides refusing to sign the treaty of the ICC, the US has approached governments world-wide, asking them to enter into such "article 98 agreements", *i.e.* to not surrender US nationals accused of genocide, crimes against humanity and war crimes to the ICC.¹⁵⁵ *I.e.* immunity for American forces before the ICC has been proposed by the US under ICC article 98 "impunity agreements".¹⁵⁶

The ICC will only, in accordance with the principle of complementarity, prosecute where the state in question is unwilling or unable to prosecute.¹⁵⁷ If ICC member states sign agreements whereby they agree to not prosecute or surrender offenders to the ICC, immunity from prosecution may become a reality. Africa has moved in the direction of reducing the authority of amnesty laws, declaring that national amnesty laws do not stop an individual from pursuing a case with the ICC, even if the offender has been pardoned.¹⁵⁸ While not completely abandoning amnesty laws, African legislators have acknowledged the importance of accountability in emphasising public confessions,

¹⁵² 30 Sep.2002 the EU decided that the agreement proposed by the US was contrary to the ICC Statute and treaty commitments of the EU member states. A similar opinion was voiced by Amnesty International, and even the UN Secretary-General, who asked that this resolution would not be renewed, 12 Jun.2003 and again 17 Jun.2004, International Justice Tribune.

¹⁵³ The decision not to renew the exemption was believed to be a result of the publicised treatment of detainees in Iraq and Afghanistan. This UN SC decision was described as the Bush administration's biggest setback, requiring the US to now need the UN. See *e.g.* www.nytimes.com/2004/06/24/; www.washingtonpost.com/wp-dyn/articles

¹⁵⁴ Mr Cunningham, at http://www.un.int/usa/04_110.htm

¹⁵⁵ Belgium changed its universal jurisdiction law in 2003, due to US pressure, hindering Belgium from indicting foreigners for war crimes. The US appears to fear the principle of universal jurisdiction, which could bring about prosecutions against US officials and citizens in domestic courts in general, and the ICC could further such prosecutions of US soldiers and officials. In Jul.2003, 48 countries had signed such agreements, *e.g.* Romania, Israel, Afghanistan, the Dominican Republic, Gambia, Honduras, the Marshall Islands, Mauritania, the Federal States of Micronesia, Palau, Tajikistan and Uzbekistan have signed article 98-agreements with the US, granting immunity to US forces from the ICC; Wirth, 2001; and see generally Amnesty International reports, at www.amnesty.org/ai/index; Human Rights Watch reports, at www.hrw.org/press/2003

¹⁵⁶ Art.98 (1) "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. (2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

¹⁵⁷ See ICC Preamble and art.1. ICC art.17(1) holds a case inadmissible before the ICC if "(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."

¹⁵⁸ During a meeting in Oct.2004 in Kampala, Uganda, 1350 legislators and MPs from *e.g.* Angola, DRC, Ghana, Kenya, Mozambique, Rwanda, South Africa, Tanzania and Uganda discussed the future of amnesty laws in Africa, at <http://allafrica.com>; www.pearlofafrica.wl.co.ug

which can then lead to pardons.¹⁵⁹ Many African states have decided to refer matters to, and cooperate with the ICC. For example, President Kabila of the DRC requested the OTP of the ICC to investigate allegations of crimes falling within the jurisdiction of the ICC, in April 2004.¹⁶⁰

The Rome Statute of the ICC does not mention amnesty, but it was to some extent discussed in the preparatory committees.¹⁶¹ All arguments raised in favour of allowing for exceptions in jurisdiction concerning amnesties granted by democratic states were all rejected.¹⁶² There is no reason to believe otherwise than that the exclusion of amnesty in the Statute was anything other than deliberate, and that the focus was on continuing to develop a firm duty to prosecute and punish. The ICC Preamble states that “The most serious crimes of concern to the international community as a whole must not go unpunished...it is a duty of every state to exercise criminal jurisdiction over those responsible for international crimes.”¹⁶³ Nonetheless, the ICC Statute is vague enough to allow for flexibility, if future circumstances encourage the recognition of certain amnesties, and the position cannot be firmly established until the ICC rules on the matter. Dugard has pointed out some possible circumstances in which an amnesty could be recognised by the ICC.¹⁶⁴ The most likely, or rather least unlikely option where amnesty could be recognised as a defence would be for the prosecution to use the facts of the particular amnesty at its discretion, in the interests of justice, or for the judges to take the amnesty into account, at the sentencing stage, as a mitigating factor.¹⁶⁵ Other options could include the previously discussed SC deferral, under chapter VII of the UN Charter, if it would constitute a threat to international peace to ignore the amnesty¹⁶⁶ or *non bis in idem* defence might possibly apply, if the amnesty process qualified as judicial, or at least *quasi-judicial*.¹⁶⁷ In addition, there is the article 17 and complementarity possibility of declaring a case inadmissible, when a state has already investigated the case, honestly

¹⁵⁹ <http://allafrica.com/stories/200410181431.html>

¹⁶⁰ After decades of violence throughout the DRC, the step taken by President Kabila is an important move in the fight against impunity. Due to its current state of disarray, the national justice system cannot be relied upon and the OTP of the ICC must assure itself of the basis for an investigation, at <http://www.pambazuka.org> The transitional period of the DRC has furthermore created a TC meant to consider political, economic, and social crimes committed between 1960 and 2003, in order to establish truth and reach reconciliation.

¹⁶¹ List of documents of the report of the Prep.Comm. of the ICC, at <http://www.un.org/law/icc/prepcomm/julaug/docs2nd.htm> (PCNICC/1999/L.4; PCNICC/2002/3, GAOR A/51/22, A/CONF.283/2/add.1).

¹⁶² Id. and see generally Scharf, 1998; Wedgwood, 1999; Hafner, 1999.

¹⁶³ Preamble ICC Statute, #4-6. With regard to the crimes that oblige states to prosecute, under both treaty and customary law, a special provision would have had to be included if certain amnesties were to be recognised as a defence.

¹⁶⁴ Dugard, in Cassese, 2002, p.701.

¹⁶⁵ Art.15 allows the prosecutor to decline a case *proprio motu*, art.53(2)(c) allows the prosecutor to conclude that prosecution is not in the interest of justice. See Dugard, in Cassese, 2002.

¹⁶⁶ Art.16.

¹⁶⁷ Art.20. The process would have to signify that the offender had basically been tried with the intent to be brought to justice. This could refer to a *quasi-judicial* individual amnesty process, where the final amnesty granted is more like a pardon, see SA TRC.

and professionally and decided not to prosecute.¹⁶⁸ The ICC's power to judge at its discretion when an amnesty may facilitate reconciliation, and when it violates important rights may recognise the validity of an amnesty that has been granted by an independent, transparent truth process, similar to South Africa's.¹⁶⁹ In this case, ICC article 53 may apply, allowing the prosecutor to decide whether the investigation is in the best interests of justice, and in coming to such a decision, the 1997 UN impunity report may be of help.¹⁷⁰ Special Rapporteur Joinet laid down principles supporting the right to truth, to justice, and to reparation, and establishing certain minimum requirements for extrajudicial commissions of inquiry, as well as restrictions on the application of granted amnesties.¹⁷¹ Basically, until the state has investigated, taken appropriate measures in respect of the offenders, ensured prosecution and punishment, provided reparations to the victims, and taken precautionary measures, nobody shall be legitimately granted an amnesty.¹⁷² While a blanket amnesty, similar to the Salvadoran general amnesty that was granted after the Salvadoran truth commission issued its report, would probably not pass scrutiny,¹⁷³ limited, individually granted amnesties, styled after the SA TRC may. "The purpose of the clause in the Statute [of the ICC allowing it to intervene where the state is unwilling or unable to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and that victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future."¹⁷⁴

Another type of amnesty or immunity that may prevail over prosecution, besides an individually granted amnesty, is state immunity. Such immunity is a derivative of state sovereignty to protect the state and its state officials' sovereignty and dignity. In general two types of legally established and recognised immunity exist.¹⁷⁵ State officials enjoy lifetime *ratione materiae* immunity for official state acts. *Ratione personae* immunity is greater in scope and protects from any foreign jurisdiction at any time. Such personal immunity is only for a small number of state

¹⁶⁸ Art.17(1)(b)&(2)(c), as long as that decision was not taken as a result of unwillingness or inability.

¹⁶⁹ See Kofi Annan's speech at the opening ceremony of the ICC, quoted earlier.

¹⁷⁰ Joinet, 1997.

¹⁷¹ Id. and next chapter.

¹⁷² Id., Princip.18.

¹⁷³ Shelton, 1999.

¹⁷⁴ Kofi Annan, speech held at Wits University Honorary PhD presentation, 1 Sep.1998. However, whether and to what extent the actual *victims* have in fact inherited power is uncertain. Without real and effective reparation made to the direct victim, it is in this study argued that the victim has not been fully recognised in the justice process.

¹⁷⁵ The ICC only has jurisdiction over individuals, and it is this derivative state official immunity that art.98 ICC relates to. For more on the subject of immunity, see generally Wirth, 2001; Ratner, 2001.

officials, heads of state and certain ministers, while abroad, and while holding office.¹⁷⁶ Because of the extent of protection, it ceases when the official post is no longer held, and only immunity *ratione materiae* remains for official acts. However, just as most laws are restricted in application, sometimes due to state immunities, so are state immunities limited by law.¹⁷⁷ “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law”.¹⁷⁸ The quote sums up the Nürnberg precedent, repeated in the statutes of the international criminal justice institutions, that no matter the position of the offender, such a position should not be used as a defense.¹⁷⁹ “The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*) ...[E]xceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.”¹⁸⁰ However, considering the *Pinochet* case,¹⁸¹ immunity *ratione personae* may protect against prosecution for international core crimes committed by a sitting head of state, but this may not be the case for immunity *ratione materiae*.¹⁸² A case recently before the ICJ, where a Cabinet Minister of the DRC was issued an arrest warrant for war crimes and crimes against humanity in Belgium, did not confirm a strict prohibition of immunities.¹⁸³ The DRC claimed

¹⁷⁶ See *Pinochet* case, 1999; *DRC v. Belgium*, 17 Oct.2000, www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_20020212.pdf, see ahead for more details of this case.

¹⁷⁷ No rights or obligations may be absolute and while universal jurisdiction and individual criminal accountability principles are subject to restricted justice applications, immunities protecting from prosecutions may not either be absolute.

¹⁷⁸ “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Nürnberg Trial Proceedings, IMT Vol.22, p.466.

¹⁷⁹ IMT Charter, art.7; Control Council law no.10, art.II(4)(a); Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, art.7; ICTY Statute, 1993, art.7; ICTR Statute, 1994, art.6; ICC Statute, 1998, art.27.

¹⁸⁰ *Prosecutor v. Blaskic* 1997, #41, art.7(2) ICTY. Functional immunity of a state official thus seems ruled out with regard to genocide, crimes against humanity and war crimes. This rule is laid down in treaties, of which some have been referred to.

¹⁸¹ Augusto Pinochet’s immunity is yet again under examination by Chile’s Appeal Court, Nov.2004. The UK House of Lords only commented on torture in the 1998 case and accepted state immunity for charges of murder and conspiracy to murder. Furthermore, General Pinochet was a former head of state, 2 All ER, 1999, 111, and see 10 EJIL, 1999. The *Pinochet* case constitutes state practice and *opinio iuris*, see ICTY Appeals Chamber Decision in *Prosecutor v. Tadic* case, 1996, where words (*opinio iuris*) were held as important as deeds in interpreting the existence of customary practice. See Roht-Arriaza, 1995, p.47; and generally Akehurst, 1974-5; Meron, 1989; Simma, 1995.

¹⁸² *Pinochet*, 1999, House of Lords, see e.g. Lord Hutton, Lord Saville, Lord Millet, Lord Phillips; White, 1999; See below, *DRC v. Belgium*, ICJ, 2000; and see *Nederlandse Jurisprudentie*, 2001, No.51, at www.icj.org/objectives/decision.htm; *Al-Adsani v. United Kingdom*, 21 Nov.2001, at <http://www.echr.coe.int> where a narrow majority decided that, in civil proceedings, state immunity had to be upheld. But see dissenting judges, holding that the decision would have been reversed had the proceedings been criminal proceedings against an individual for an alleged act of torture, #60.

¹⁸³ 17Oct.2000, at www.icj-cij.org/icjwww/idocket/ICOBE/ICOBEframe.htm; www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_20020212.pdf. Belgium’s 1993 War Crimes Act (16 Jun.

diplomatic immunity and a lack of Belgian jurisdiction. The ICJ ruled that Belgium's universal jurisdiction law of 1993 for genocide, crimes against humanity, and war crimes infringed conventional and customary international law, under which temporal immunity (*ratione personae*) of diplomats and heads of state was allowed.¹⁸⁴ "The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties...It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."¹⁸⁵ The ICJ hence added Foreign Ministers to the list, stating that immunity for high-ranking officials was firmly established, due to practical necessity.¹⁸⁶ On the question of whether there are any exceptions to the rule where an official is suspected to have committed war crimes or crimes against humanity, the ICJ simply stated that no such exception could be found.¹⁸⁷

This chapter will not deliberate on the definition of international core crimes or the principles of individual criminal accountability and universal jurisdiction.¹⁸⁸ But, the fact that immunity may possibly protect against prosecution for crimes against humanity and war crimes is

1993, amended 10 Feb.1999) was well advanced in the containment of impunity, universal jurisdiction and state responsibility to try those guilty of the international core crimes complementary to the ICC. In Feb.2003 Belgium's *Cour de Cassation* ruled that Israel's Prime Minister Sharon could be tried for war crimes under the country's universal competence law, after he leaves office, in AFP 13 Feb.2003. Under US pressure, Belgium amended its law 23 Apr.2003 to avoid lawsuits of foreigners not in Belgium. In Oct.2003 the Netherlands enacted a new war crimes law enabling prosecutors to bring charges against Dutch residents suspected of the international core crimes. It includes a reference to crimes against humanity for the first time, as defined in international law. It grants immunity to heads of state and diplomats in office, and hence differs from the controversial Belgian law that allowed national courts to prosecute foreign suspects, even when they are in other countries, 2 Oct.2003, at www.cicc.org; Cassese, 2002.

¹⁸⁴ Custom is a source of international law, along with "consent of states", and "natural law". "International custom, as evidence of a general practice accepted as law", ICJ Statute, art.38; Schachter, 1968, p.300.

¹⁸⁵ Id., ICJ judgement, #54, 58.

¹⁸⁶ Id., #51; Schreuer & Wittich, 2002.

¹⁸⁷ Id. See Conv. on Diplomatic Relations, 18 Apr.1961; Conv. on Consular Relations, 24 Apr.1963. The ICJ went against its own judgement where it had held that "[e]ven if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom", the *Lotus* case, Judgment No. 9, 1927, P.C.I.J., Series A, No.10, p.28.

¹⁸⁸ In avoiding being repetitive, the subject on immunity is dealt with here, in relation to *de facto* impunity and will therefore not be repeatedly discussed in the chapter on international criminal justice. The principles of individual criminal accountability and universal jurisdiction are further discussed in ch.5, where reference is made to this chapter in terms of restricted justice, and domestic criminal justice limitations on the principle of universal jurisdiction.

important, with regard to this chapter's focus on impunity threats.¹⁸⁹ Legally recognised immunities do not *per se* qualify as impunity threats, but when national courts choose not to prosecute, the immunity defense could be interpreted as a *de facto* amnesty, depending on the reasons behind the recognised immunity, and the decision not to prosecute. At the same time, the treaty law prescribing prosecution and punishment of the international core crimes does not allow immunities, and immunity for the crime of genocide¹⁹⁰ and for the crime of torture under the Torture Convention¹⁹¹ also appears prohibited under customary law. This confirms the fundamental aim of just-desert punishment and the need for an international criminal forum.¹⁹² The ICC is of importance, not only to safeguard fundamental criminal justice aims, but also to prosecute the offenders of the international core crimes, who may still be able to rely on immunity in domestic criminal justice application.¹⁹³

In the recent case brought by the DRC, the ICJ confirmed that SC organs, e.g. the ICTs can derogate from immunity principles, under chapter VII of the UN Charter, for the protection of international peace, as can states by way of a treaty.¹⁹⁴ During the establishment of the ICC, the focus was clearly on avoiding impunity through the international criminal law principles of universal jurisdiction, individual criminal accountability, and member states' cooperation and

¹⁸⁹ Geneva Conventions 1949; Additional Protocols I & II. With regard to war crimes in international conflict, armed forces are not allowed immunity *ratione materiae*. Art. 146, fourth Geneva Conv: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Armed forces act as state officials in international conflict, so there is no reason to conclude otherwise than that immunity *ratione materiae* is denied. Armed forces agreements, (e.g. NATO agreements) do not contain immunities but concurrent jurisdiction so where the sending state does not exercise its jurisdiction, the receiving state may. Other types of agreements can give members of the forces diplomatic status. Whether and to what extent immunity protection against the prosecution of war crimes in internal armed conflict exist is less clear. What is clear is that crimes of common art.3 and Add. Protocol II, art.4 are part of international treaty law of the ICTY, art.3, see *Tadic Interlocutory Appeal* ICTY, 1995; ICTR, art.4; *Akayesu* ICTR 1998, the ICC, art.8; and see UN SC recognising individual criminal accountability in the civil conflicts of East Timor, SC Res.1272, 25 Oct.1999; Sierra Leone, SC Res.1315, 14 Aug.2000.

¹⁹⁰ Art. IV of the 1948 Genocide Conv. confirms that genocide offenders shall be punished "whether they are constitutionally responsible rules, public officials, or private individuals"; *Israel v. Eichmann*, 36 I.L.R. 1968.

¹⁹¹ 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art.2(2) rejects all justifications for torture, and actually refers to a necessary authoritative person, acting in an official capacity, authorizing the act. It further rejects public emergency and state of war. Art.1 of the Torture Conv. defines torture with greater scope than the crime against humanity of torture, as the convention also comprises isolated acts of torture whereas crimes against humanity can be committed only in the context of a widespread and systematic attack, see art.7 ICC.

¹⁹² Even if there is legitimate immunity and amnesty with regard to the international core crimes, a general obligation exists to prosecute and punish the offenders of these crimes and the fundamental aim of just-desert punishment does not require a firm duty in order to function as a fundamental aim, further discussed in ch.4.

¹⁹³ Member states of the ICC have accepted the jurisdiction of the ICC, art.27, whether or not the national courts accept claims of universal jurisdiction, and a duty to prosecute. Domestic restrictions on international criminal law applications are not, as stated in ch.1, part of this study. However, they are referred to and used as examples of restricted justice, and justify the important inclusion of international criminal justice in assimilated justice.

¹⁹⁴ E.g. the ICC; Ratner, 2001, p.142; Schreuer Wittich, 2002; 2002 ICJ Reports, at www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_20020212.pdf

responsibility for punishing international core crimes.¹⁹⁵ Member states to the ICC have waived existing and future immunities for the purpose of ICC prosecutions,¹⁹⁶ but immunities *ratione personae* for war crimes and crimes against humanity may still find validity in national courts choosing not to prosecute for international core crimes. Furthermore, as discussed in relation to the US proposed immunities, article 27 of the ICC does not protect against immunities of non-state actors, and thus, if any immunity *ratione personae* for war crimes or crimes against humanity would appear before the ICC, the court may lack jurisdiction to deal with it.¹⁹⁷ However, with regard to article 98, the ICC is not barred from issuing a request if the agreement between the member state and the third state is seen as illegal. It is the ICC that decides upon the international law obligation's validity, and very few state officials of non-state actors should thus enjoy immunity *personae materiae*. This means that future prosecutions will be possible and that they may still act as a deterrent.

2.3. CONCLUSION

This chapter has identified the threat of impunity that underscores the need for assimilated justice. It is however beyond the purpose of this thesis and this chapter to cover exhaustively the different kinds of amnesties and their causes.¹⁹⁸ While different definitions and descriptions of impunity exist, they all seem to refer to some deliberate exclusion of responsibility through a punitive or non-punitive process. In order not to exclude the fundamental aims of either the criminal justice process or the restorative justice process, this thesis defines impunity as the impossibility, or improbability of holding offenders individually accountable, and the non-inclusion of the victim and the general community in a legitimate justice process.

We have seen how the most relevant face of impunity, *i.e.* amnesty, and its different guises threaten criminal justice, and also how the granting of amnesties can threaten honest attempts at justice. As later chapters will highlight, restricted application of justice exists in both systems of justice relevant to this study. In order not to rely on unrealistic expectations of these systems, this chapter has explained how the impunity notion must be broad in definition and in application. If impunity refers to more than a lack of criminal prosecutions, and to more than the granting of a

¹⁹⁵ See ICC Statute and supporting documents, *e.g.* UN Sub-Commission on Human Rights, Role of Universal or Extraterritorial Competence in Preventive Action against Impunity, 2000; UN Commission on Human Rights, 2000; UN Commission on Human Rights, 2001; Joinet, 1997; Bassiouni principles, 2000.

¹⁹⁶ Art.27 ICC.

¹⁹⁷ Again, see art.98 ICC, earlier cited with regard to the immunity proposed by the US. In terms of article 98 agreements where the actors are also state actors to the ICC, article 27 waives immunities.

¹⁹⁸ For a good account of amnesties and TCs, see Kritz, 1995; Hayner, 1996, 2001; Sarkin, 2004.

blanket amnesty, and also includes the lack of different accountability measures that result in non-respect for the fundamental aims, and ignorance of the actors, the remedy must then include the fundamental aims and the actors. The inherent impunity focus on criminal, and punitive action supports the need for criminal justice, and due to mainly domestic impunity threats in the shape of amnesties and immunities, the importance of international criminal justice is obvious.

The TRC of South Africa may represent a new model of both the restorative justice process, and of individually granted amnesties, which pass through a thorough and professional investigation process. But there are many different types of amnesties and immunities, which we have seen in this chapter. In order to distinguish between the honest attempts to do justice and the intentional exclusion of justice, it has proven important to differentiate between amnesties (blanket amnesties) and pardons (individually granted amnesties). The ICC will most probably have to deal with cases where such differentiation is necessary, as it may not be able to exclude both, as that could lead to a lack of state supported action. The distinction between amnesties and pardons, or between legitimate and illegitimate restrictions on justice, is important, not only for the ICC, but for any justice process. Legitimately restricted justice, further discussed in chapter seven, must be recognised for its attempt to face whatever the practical problems are, without viewing it as an ideal. Assimilated justice is argued to lessen such restrictions, with the assimilated justice objective to fulfil certain fundamental aims and involve the affected actors, adding legitimacy to the justice process. The SA TRC process could qualify as legitimately restricted justice, where an honest attempt at fulfilling many of the fundamental aims can be seen, although criminal accountability was to a large extent avoided. Similarly legitimate, yet restricted justice can exist where domestic states, or the ICC, chose to prosecute, but cannot, for reasons such as an immunity or a pardon,¹⁹⁹ prosecute all offenders. While a narrow, classic definition of impunity would not apply if punitive action has been taken, this thesis argues that there may nonetheless be far too many unfulfilled fundamental aims, and many actors who have not seen justice done. Where, for example, a large amount of the local community has participated in the atrocities,²⁰⁰ it is often impossible to hold everyone accountable, which is one reason why amnesties are granted. However, amnesties often stem from hierarchically negotiated impunity pacts.²⁰¹ This creates difficult problems for future reconciliation and the reintegration of the offenders back into the community (an important goal especially in terms of reconciliation) will be difficult, especially if the majority of the community views the amnesty as unfair and unjust. The legal relevance of an amnesty depends, to a great

¹⁹⁹ This will be looked at in more detail in a later chapter. It is only referred to in this chapter to further explain the important distinction between different impunities.

²⁰⁰ Not an uncommon characteristic of the international core crimes.

²⁰¹ E.g. by military regimes or criminal leaders.

extent, on the justice process that grants the amnesty. Criminal justice assumes the role of instrumental truth, through which evidence of guilt, criminal accountability, and an appropriate sentence can be established, and acknowledged,²⁰² after which a pardon may be issued. The effect of the individually granted amnesties in South Africa may be of similar relevance, while blanked amnesties will only aid impunity, as they are so declared and ordered, without a prior investigation. Truth commissions have generally been set up as an exclusive institution of restorative justice applicable to the transitional state. TCs can also be set up in order to respond to the social harm that cannot be repaired by criminal sanctions but only by extra-criminal compensatory means, of a reparative and reconciling nature. The genuine work of such institutions goes hand in hand with the aim of establishing the truth.²⁰³ At least some parts of the affected society will demand truth and justice to be done, but if amnesty is authorised, further injustices and avoidance of sanctions may be the reaction - impunity feeds impunity, by reason of disappointment with the authorities.²⁰⁴

In short, the recent ICJ case between the DRC and Belgium may have invalidated the general view previously held that no immunity could be invoked for international core crimes. It appears that still incumbent state officials, such as the head of state, foreign ministers, and perhaps diplomatic agents, may enjoy full personal immunity. This development is unfortunate, because when immunity prevents prosecutions, the fundamental aims of just-desert punishment and deterrence, and other aims that criminal law protects are at great risk, and intensifies restricted justice. This risk applies to international criminal law and criminal justice in general, and puts the greater interests that internationally recognized core crimes protect, *i.e.* international justice, stability, and order at risk. Even if immunity does not become an issue before the ICC, immunities remain possible threats, as the prosecution of most offenders remains a matter for national criminal justice. In cases where immunity is genuinely issued and legitimately protect, assimilated justice could further the legitimization, for example through a flexible model able to focus on the actors from different angles.²⁰⁵ It can be concluded that, unless abrogated in a treaty, personal immunity may protect against certain international core crime prosecutions.²⁰⁶ Thus, the only immunity

²⁰² See ahead, ch.4 for the fundamental aim of just-desert punishment, and again, ch.6.

²⁰³ UN ECOSOC Com.HR, 1996 #471: "cases of disappearance cannot be considered clarified until the whereabouts of the victims are known." More on the truth discovery process of TCs, ch.6.

²⁰⁴ See generally, Orentlicher, 1991; Kritz, 1995; Shelton, 1999.

²⁰⁵ *E.g.* supplying restorative justice mechanisms, perhaps able to discover a wider truth and acknowledge responsibility of a great amount of offenders.

²⁰⁶ See Vienna Conv. on Diplomatic Relations, 1961 T.S. vol.500, p.95, at <http://www.un.org/law/ilc/texts/diplomat.htm#abstract>; Vienna Conv. on Consular Relations and optional protocols, 1963, T.S. Nos.8638-8640, vol.596, pp.262-512, at <http://www.un.org/law/ilc/texts/consul.htm> excluding acts which are illegal under international law and immunity *ratione materiae* is granted only for acts performed in the exercise of such functions, no diplomatic or consular immunity *ratione materiae* exists for acts illegal under international law such as the commission of the international core crimes. According to art.53 "a treaty is void if, at the time of its conclusion, it

against prosecutions of the core crimes would be immunity *ratione personae*, granted to few officials, and only while holding office.

The effect of impunity in relation to international core crimes can be felt at all levels of the community. It should not be thought of only at the very local level where the crime was committed, nor only in relation to the actual offender and victim. The social, cultural, and political situation will not go unaffected. Society as a whole, as well as the individual victim is injured when international crimes are committed, and the denial of the truth, justice, reparations, and efforts towards reconciliation in such cases can have a particularly negative impact on the institutions of law. "Respect for law generally is likely to suffer if it is widely known that certain kinds of conduct, although nominally criminal, can be practised with relative impunity".²⁰⁷ Continued respect for, and acceptance of judicial powers, and legal authority more generally, depend on the perceived and actual fairness, and integrity of the system.²⁰⁸ The participation and respect for the actors generally, and particularly the victims, individually and collectively, may, simply put, help change the social structure and, in that way, pave the way towards legal reform.²⁰⁹ Justice is international and universal as well as national and local. The universalism of justice and a common understanding of justice, involving accountability, have been driven by the international community's development of fundamental human rights abuses to qualify as international crimes. Accountability has been developed to entail individual criminal accountability for certain human rights crimes, with universal jurisdiction, enabling states to pass national laws that authorize national courts to try offenders of the international crimes.²¹⁰ However, identified impunity threats continue to exist, and it has to be concluded that both the criminal justice and the restorative justice systems may, due to different impunity threats, often be subject to restrictions. "International justice for local crimes of global dimensions"²¹¹ must, for justice to survive, involve the individual actors and the general community implicated and affected, and for this reason an assimilation of criminal and restorative justice is proposed.

conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."; Art.64, Emergence of a new peremptory norm of general international law (*jus cogens*) "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Vienna Conv. on the Law of Treaties 1969, T.S. vol.1155, p.331; Vienna Conv. on the Law of Treaties between States and Intern.Organizations or between Intern. Organizations, 1986, at <http://www.un.org/law/ilc/texts/treaties.htm>; <http://www.oas.org/legal/english/docs/Vienna%20Conv.%20Treaties%20InternOrg.htm>

²⁰⁷ Packer, 1968.

²⁰⁸ Sturm, 1991.

²⁰⁹ Individual reparation must be considered, to restore the position of the victim to a situation similar to what it was, before the crime was committed against him. See ahead, ch.3.

²¹⁰ See later chapter.

²¹¹ Dieng, 2001, p.6.

In order to fight impunity, and the impossibility, or improbability of holding offenders of the international core crimes individually accountable, and non-inclusion of the victim and the general community in a legitimate justice process, a focus on the offender is required. The fundamental aims of just-desert punishment and deterrence, offender-focused aims, have thus been given some foundation already in this chapter. The fundamental aims of truth, reparation, and reconciliation have also been given some foundation, through the highlighted importance of truth discovery and the granting of amnesty. The latter aims will find further support in the following chapter, on justice for the actors. The fundamental aims of assimilated justice, both of a criminal justice character and of a restorative justice character, can then be explored in chapter four, in order to continue laying the foundations for assimilated justice.

CHAPTER 3: THE ACTORS IN CRIMINAL & RESTORATIVE JUSTICE

3.1. INTRODUCTION

In order to hold offenders of the international core crimes individually accountable, and to include the victim and the general community in a legitimate justice process, it is necessary to understand who these actors are, particularly the individual and collective victims (often the most neglected) and what rights they may have.²¹² In order to involve all the actors affected and implicated in the international core crimes, fundamental aims that are able to recognise the victims are suggested, in order to add to the classic criminal justice focus on the individual offender, generally recognised through the fundamental aims of just-desert punishment and deterrence. In line with the overall purpose of creating assimilated justice, it is argued that crime victims deserve, and require inclusion, more so than the offender, whose rights have been developed and recognised by criminal justice. Furthermore, the rights of the community can also be provided for by crime victim instruments that focus on collective victim rights. A specific focus on crime victims is thus taken in this chapter, based on the instrumental framework provided.

The goal of this chapter is to provide evidence, of both criminal and restorative justice competences for the recognition and inclusion of the victims. This further explains and justifies the

²¹² In line with the focus of the thesis and the usual restrictions in terms of time and length, the chapter concentrates on identifying the victim(s). No particular attention is spent on identifying the rights and needs of the offender, who is defined and considered through the criminal justice system.

need for assimilated justice that puts the crime victim in focus,²¹³ and it also lends support to the application of victim and community focused fundamental aims.

This chapter outlines the general advancement of offender, community, and more specifically crime victim rights, by focusing on the major instruments assigning such rights. The chapter will not examine how these rights and provisions are carried out. Later chapters, on criminal and restorative justice processes, will identify how the prosecutorial process of the ICC and the truth discovery process of the SA TRC realise the fundamental aims and recognise specific actors.

Identification of the legal framework that supports the inclusion of offender, victim, and community, in assimilated justice, is done through United Nation declarations and special reports, related to the fight against impunity and victim rights, as well as ICC provisions. The instrumental criminal, as well as restorative justice competences that will be considered are argued to put the actors in focus, and support assimilated justice. This is used as yet another legitimising ground for the inclusion of the actors in assimilated justice, consisting of the fundamental aims. Together with recognised individual offender and collective community rights, the inclusion of crime victims, through the application of the fundamental aims, should add to the legitimacy of assimilated justice. Consideration is given to how the promotion of essential actor-rights demands also promotes assimilated justice. In the assimilation of restorative justice with criminal justice, it is believed possible to identify the collective, valuable with regard to international crimes and criminal regimes.

The chapter begins by defining the actors. The instrumental framework of criminal and restorative justice competences is next introduced, concentrating on the Bassiouni Basic Principles of 2000 and on the ICC. The final part of the chapter is devoted to actor justice, rights, and needs, in assimilated justice.

3.2. DEFINITION OF OFFENDER, VICTIM AND COMMUNITY

²¹³ Without trying to create imbalance between the actors or indeed the fundamental aims; see ch.4.

“When Hitler attacked the Jews I was not a Jew, therefore, I was not concerned. And when Hitler attacked the Catholics, I was not a Catholic, and therefore, I was not concerned. And when Hitler attacked the unions and the industrialists, I was not a member of the unions and I was not concerned. Then, Hitler attacked me and the Protestant church – and there was nobody left to be concerned.”²¹⁴

In order to avoid such ignorance and general lack of awareness as referred to in the above extract, each actor involved and affected, individually and collectively, by the international core crimes must be defined. A definition of each actor will furthermore assist the focus of assimilated justice, and the specific focus of each fundamental aim.

3.2.1. OFFENDER

The offender has been defined and given rights for many years through criminal law and in criminological studies.²¹⁵ As regards international law and international core crime offenders, an offender under international law is a person who is judicially identified as criminally responsible. While non-judicial institutions such as truth commissions may consider individuals responsible for committing international crimes,²¹⁶ they lack the necessary functions of the judiciary in order to identify legal individual criminal accountability and therefore do not refer to the responsible as the accused or the offender.²¹⁷ As the thesis argues for a combination of both criminal and restorative justice, in assimilated justice, it is not the intention to exclude prosecutorial process, but rather to require it, by referring to those responsible as offenders.²¹⁸ That is, an individual who qualifies for individual criminal accountability,²¹⁹ as defined by *e.g.* the ICC statute.

²¹⁴ Niemöller, M. 1968, German Protestant Pastor, 1892-1984, at <http://www.history.ucsb.edu/faculty/marcuse/niem.htm>

²¹⁵ See ahead, ch.5, individual criminal accountability.

²¹⁶ Although the investigations carried out by the TCs of El Salvador and South Africa brought judicial consequences for those found responsible for acts qualifying as criminal offences, in terms of whether or not to be granted amnesty, it does not mean that they were judicial institutions. In Ethiopia the Chief Special Prosecutor's Office both compiled the historical record, and indicted and charged members of the former military dictatorship of Mengistu Haile Mariam for genocide, war crimes and other serious criminal offences. However, there was still a legal distinction between the two tasks. See Amnesty International, Jul.1996, at <http://web.amnesty.org/library/Index/ENGAFR250111996?open&of=ENG-ETH>

²¹⁷ The notion of offender will be used throughout, even in situations where it actually refers to the accused, *i.e.* before judgement, see *e.g.* the ICC Statute, referring to the accused. Responsibility, gross violations of human rights, and political objective were criteria for the SA TRC to define responsibility, set out in the National Unity and Reconciliation Act, 1995, S.1, 20. See behind, ch.2.

²¹⁸ Indeed the term ‘accused’ could also be used, however, with regard to the inclusiveness of the fundamental aim of just-desert punishment, ch.4, the accused is referred to as the actual guilty party. Nor is the intention to exclude a restorative process, but in order to fulfil the fundamental aims, particularly those offender-focused fundamental aims of

Article 25 of the ICC identifies the offender under its jurisdiction as a natural person who commits a crime within the jurisdiction of the ICC.²²⁰ Such a person shall be individually responsible and liable for punishment “for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.”²²¹

Official capacity is irrelevant, as are immunities,²²² and military commanders shall be criminally responsible for crimes within the jurisdiction of the ICC committed by forces under their effective command control.²²³ A person under the age of eighteen does not qualify as an offender

just-desert punishment and deterrence, it is necessary to hold the responsible legally accountable. See ahead, next chapter.

²¹⁹ See ch.5, development of individual criminal accountability under international criminal law.

²²⁰ Pursuant to the provisions of the ICTY Statute, arts.6-7. See Appendix 1 for the crimes in question.

²²¹ Art.25(3) ICC; Art.25(4) ICC “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”

²²² Art.27(1) ICC “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

²²³ Art.28 ICC “In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to

under international criminal law,²²⁴ and other grounds for excluding criminal responsibility, such as mental disease, are listed in article 31 of the ICC Statute.²²⁵ Otherwise, an important qualifying element is *mens rea* (mental intent), the details of which are identified alongside each crime. “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”²²⁶

Classic criminal justice considers criminal responsibility with an individual focus. It is sometimes necessary to add to this individual focus, the collective focus, which may be of relevance in connection to perpetrators of international core crimes. In relation to the local context, when and where the crimes were committed, circumstances of collective responsibility arising from criminal

prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. 2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

²²⁴ The age is determined based on the time of the alleged commission of a crime, art.26 ICC; see the qualification of Juveniles, UN Rules for the Protection of Juveniles Deprived of Their Liberty, GA Res.45/113, in the Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, 1992.

²²⁵ Art.31(1) ICC “In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court; (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph; (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control. 2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it. 3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.”

²²⁶ Art.30 ICC “(2) For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.”

regimes, may well exist.²²⁷ Assimilated justice requires a connection to the local community as it depends on the ability to acknowledge and deal foremost with the victims, the offenders and the local community; and also the fundamental aims. As the next chapter will show, the fundamental aims have both an individual and a collective focus, and the position of the offender must therefore also be looked at from a collective point of view by the justice process. This is particularly important with regard to the restorative part of the justice process, where the collective community's involvement in past atrocities must be acknowledged in order for reconciliation to be made possible.²²⁸ In addition, a restorative process of truth discovery, with a mandate to investigate the truth surrounding the international crimes committed, can assist with the necessary link to the local community and a collective perspective.²²⁹

Where there is no distinction between offender and victim, or there are a great number of offenders, for example in situations where two sides have been fighting endlessly with mutual gains and losses, Rosenberg refers to this as a "criminal regime". In situations where there is a distinction between offenders and victims, "a regime of criminals" can be referred to.²³⁰ Tallgren refers to offenders belonging to criminal regimes in a collective manner. "The offender is likely to belong to a collective, sharing group values, possibly the same nationalistic ideology."²³¹ Refusal to commit such acts professed as necessary by a collective could be considered as socially deviating behaviour,²³² where the offender is likely to belong to a collective. By identifying the actors' roles within a social context, assimilated justice will discover whether the offenders were connected through some collective, whether they still are, and who they are. This can in turn aid the reconciliation process, and efforts can be made to publicly identify the collective criminals and acknowledge collective responsibility. As professed by some social scientists, individuals cannot always fully control their own actions in the context of collective, often disastrous, circumstances.²³³ Arendt holds that even the most radical of evil is, owing to its ordinary nature, banal in the places where it occurred.²³⁴

²²⁷ See ahead, ch.6 with regard to collective criminality and UN War Crimes Commission, History of the UN War Crimes Commission and the Development of the Laws of War, p.291, 1948.

²²⁸ See more on the fundamental aim of reconciliation in ch.4, and restorative justice, ch.6.

²²⁹ A TC objective is generally to create a historical record of gross human rights violations, to address impunity, and to promote healing and reconciliation, through investigations, hearings and a publicised report. See ch.6.

²³⁰ Rosenberg, 1995, p.400.

²³¹ Tallgren, 2002.

²³² Tallgren, 2002, p.575; Drumbl, 2000.

²³³ Id. and see Fletcher & Weinstein, 2002; Mamdani, 2001.

²³⁴ Arendt, 1994, 1998; Santiago Nino, 1996. Rwanda is one example where thousands of individuals came together collectively, connected by the same ethnicity and ideology and, in a period of 100 days, kill hundreds of thousands. See generally Drumbl, 2000; Sarkin 1999, 2001; Mamdani, 2001.

The notion of collective responsibility is peculiar to legal logic, and must not be confused with legal guilt (or culpability),²³⁵ which is truly individual and refers to a committed act or active role. A feeling of guilt does not necessarily mean responsibility, as it is often used metaphorically, as a sign of bad conscience. Notions of “we are all guilty” of, for example, slavery, the holocaust, or apartheid, may refer to responsibility, but does not refer to actual legal guilt, as guilt necessitates both *actus reus* (an active role) as well as *mens rea* (mental intent).²³⁶ Collective responsibility is not to be confused with criminal accountability and the identification of collective responsibility would not serve the fundamental aim of just-desert punishment, but derive from the fundamental aim of truth, and assist the fundamental aims of deterrence and reconciliation. This will be further discussed in the next chapter.

A notion of collective offenders is thus not possible, however this does not rule out collective responsibility, or indeed the importance of it. Arendt considers collective responsibility to involve holding someone responsible for something they have not done, because somehow the reason for the responsibility is the involvement in, or membership of, a collective that cannot be undone by a voluntary act.²³⁷ “When Napoleon Bonaparte became the ruler of France, he said: I assume responsibility for everything France has done...In other words, he said, all this was done in my name to the extent that I am a member of this nation and the representative of this body politic. In this sense, we are always held responsible for the sins of our fathers as we reap the rewards of their merits; but we are of course not guilty of their misdeeds, either morally or legally, nor can we ascribe their deeds to our own merits.”²³⁸ Acknowledging such collective responsibility through a legitimate justice process may initiate individual as well as collective recognition of each and everyone’s role in past injustices and this may be an important aspect of a reconciliation process.

Theologian Jaspers has developed four categories of guilt: criminal, political, moral, and metaphysical guilt, out of which a judicial process can only determine individual criminal guilt (accountability).²³⁹ Jaspers’ usage of the term “guilt” is therefore only acceptable concerning individual criminal accountability of the individual offender, according to the criteria set by international law. The definition of the individual offender, as a natural person, over the age of 18, who qualifies for individual criminal accountability is identifiable by the prosecutorial process,

²³⁵ *I.e.* individual criminal accountability.

²³⁶ The advancement of individual criminal accountability renounces collective accountability and collective punishment, *e.g.* 1949 fourth Geneva Convention, arts.33, 34 “No protected person may be punished for an offence he or she has not personally committed”; art.6 Add.Prot.II of 1977 laying down the principle of individual responsibility and its corollary – there can be no collective penal responsibility for acts committed by other members of a group.

²³⁷ Arendt, H. *Labour, work, action*, in Bernauer, 1987, pp.29.

²³⁸ *Id.* p.45.

²³⁹ Jaspers, 1948, discussed guilt in relation to what the German society needed to deal with the guilt from the Nazi period, see Kritz & Finzi, 2001.

maybe in addition to some moral, political, and metaphysical responsibility, possibly collective in nature, and perhaps identifiable by a more restorative part of the justice process.

3.2.2. VICTIM

Defining the victim is important, because the victim forms an important foundation of, as well as justification for assimilated justice. The victim's place is discussed in this chapter, by establishing who the crime victim is and what legal rights exist for these individuals, rights which in turn must be applicable in assimilated justice. The fundamental aims looked at in the next chapter will also underline the importance of the victim, through each fundamental aim.

An easy definition of a crime victim does not exist. This is not only because the different circumstances of each affected party must be taken into consideration in determining the identity of the possible victim(s), but also because such a definition has not been of any immediate importance to the criminal justice system, which has instead concentrated on defining the offender.²⁴⁰ However, crime victims are of importance today, even within the international criminal justice system. At a concrete political level, criminal law is constantly addressing crime, having to invent or re-invent tools of primary crime control. Such tools have mostly been modelled with the offender at the forefront of the mind, but today there is a tendency to use these tools to better address the victim, both in criminal and restorative justice systems.

The ICC is to some extent taking on the role of non-existing international civil law institutions, transferring certain rights onto the victims.²⁴¹ "The victim should be treated with respect in the criminal justice system".²⁴² Many of the crime victim rights, discussed in detail later in this chapter, stem from the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985, Council of Europe recommendations, and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of 2000.²⁴³

²⁴⁰ Wasik, 1999. See ch.4, 7 on the inherently different dimensional focus of criminal and restorative justice.

²⁴¹ ICC arts.43(6), 57, 75 and 79, Rule 85.

²⁴² European Council Recom.No.R(85)11 on the position of the victim in the framework of criminal law and procedure; and e.g. Recom.No.R (87)21 on assistance to victims and prevention of victimization; and Recom.No.R.(96) 8 on crime policy in Europe in a time of change.

²⁴³ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (referred to as the 1985 Victim Declaration); UN Special Rapporteur Mr van Boven prepared 3 versions of the Basic Principles and Guidelines on the Right to Reparation for Victims, E/CN.4/Sub.2/1993/8; E/CN.4/Sub.2/1996/17; E/CN.4/1997/104. See also the already mentioned work of Mr Joinet, Special Rapporteur of the Sub-Commission on the Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political), Basic Principles and Guidelines on Impunity, E/CN.4/Sub.2/1997/20; E/CN.4/Sub.2/1997/20/Rev.1; Final report of the Special Rapporteur, Mr Bassiouni, the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental freedoms, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, (Bassiouni Basic Principles) E.CN.4/2000/62.

According to the crime victim definition that stems from the same instruments, *i.e.* the 2000 Bassiouni Basic Principles, and the 1985 Victim Declaration, “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”²⁴⁴ The criminal law reference to the “injured party” is synonymous with the victim who has suffered directly by the violation.²⁴⁵ As most direct victims of international crimes are deceased, or disappeared, the indirect victim, and other beneficiaries are important, as the direct victim’s heir is possible to compensate.²⁴⁶ A “victim” may therefore also include a dependant or a member of the immediate family.²⁴⁷

The ICC definition of crime victims is not unlike the Bassiouni definition. According to the ICC, crime victims are “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court...victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”.²⁴⁸ The reference to the collective belonging to organisations or institutions would seem to refer to collective victims.

The SA TRC Act similarly defines victims as persons who, individually or collectively, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of a gross violation of human rights; or as a result of an act associated with a political objective for which amnesty has been granted. Relatives or dependants of victims are included, as are persons who, individually or collectively, suffered such harm, as a result of such person intervening to assist persons covered in the first paragraph.²⁴⁹

Adoption of the Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, 19 Apr.2005, UNHCHR Res.2005/35, E-CN_4-RES-2005-35, (Bassiouni Princip.) Appendix 4.

²⁴⁴ Bassiouni Princip.8. Italics added to highlight the dual focus of the individual crime victims as well as victims at large, general community.

²⁴⁵ The *Sunday times* case, 1981.

²⁴⁶ Heir is often children, spouse, parents, *X v. UK*, 1982.

²⁴⁷ Princip.8, Bassiouni principles 2000.

²⁴⁸ ICC Rule 85 of the Rules of Procedure and Evidence and arts.43(6), 57, 75 and 79.

²⁴⁹ Art1(xix),1995 SA TRC Act, *supra*.

As no real contradiction appears to exist in utilised victim definitions, and as gross human rights violations include the international core crimes,²⁵⁰ the Bassiouni definition will be used throughout this study.²⁵¹

Obvious difficulties, related to cost and remoteness of injury, mean that limitations must be set as to which subjects are defined as victims. Evidently, not all victim rights can apply to the collective, e.g. in terms of entire communities being financially compensated. It is furthermore of importance to the actors, and particularly the victims, to know that the justice process can identify each actor. Based on earlier discussion, with regard to collective responsibility, the role of the victim before, during, as well as after the crime was committed may be taken into consideration. Criminology has brought the victim into the 'offence scenario' more generally depicting many crimes as interactive.²⁵² This limitation developed out of an economising logic, which, although always sensitive to criticism, may not be as vulnerable to such criticism with regard to domestic crimes, as with the international core crimes, which always result in a great number of victims. Victim blaming - accusing the victim of some responsibility - on the international arena, concerning the international core crimes, may involve a more precarious active political ideology, as it may have to deal with sensitive issues of, for example, ethnicity.²⁵³ This identification may be relevant with regard to defining the victim, differentiating the victim from the offender, and the community, or even restricting compensation to the "innocent victim".²⁵⁴ However, guilt must only be judged according to the criminal law notions of *mens rea* (mental intention) and *actus reus* (the criminal action) and the victim's association to the offender should remain irrelevant.²⁵⁵ One criticism of the "innocent victim" terminology is that it aims implicitly at establishing victim responsibility. Yet, for all that, victims in stable social orders are generally seen as having suffered from violent crime through a deliberate and unprovoked act by the offender. Perhaps it is avoidable to stereotype victims, and their actions and involvement in a community that may be viewed as largely immoral or criminal, by recognising certain collective responsibility. Still, the issue of innocence has to be

²⁵⁰ Bassiouni principles 2000, Princip.4 affirms that violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute, to punish, and to assist states and international judicial organs in the investigation and prosecution of these violations. Serious crimes under international law covers war crimes, crimes against humanity, including genocide, and grave breaches of international humanitarian law, according to the definition used by Mr Joinet, in E/CN.4/Sub.2/1997/20/Rev.1 Question of the impunity of perpetrators of human rights violations (civil and political).

²⁵¹ Special Rapporteur Mr Bassiouni revised and unified previous UN reports of 1997 by Mr Joinet and Mr van Boven, earlier referred to. The prior drafts were examined in light of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res.40/34, pertinent provisions of the Rome Statute of the International Criminal Court, A/CONF.189/9. For further references and comments, see E/CN.4/1999/65; E/CN.4/2000/62, and ahead.

²⁵² Fattah, 1983; Arnold, 1988.

²⁵³ Belonging to a certain ethnic group is often a factor related to the international core crimes.

²⁵⁴ Yet, criminal law sanctions must be flexible enough to take into account the individual victim's actions and needs.

²⁵⁵ According to Princip.9, Bassiouni principles, 2000.

case sensitive, and the proper approach must ensure that belonging to one social, ethnic, or cultural group is not enough to imply guilt or even loss of innocence.

Even if the criminal justice prosecutorial process could identify involved and affected local communities, or collective victims, other elements of the local context, such as collective responsibility may also exist, and should be established, in order to better utilise the fundamental aims. Assimilated justice may assist by supplying a restorative justice addition to the universal dimension and including further knowledge of the local communities, the harm they have suffered and the cause of it.

In line with the above definitions used, victims are referred to in the individual and the collective. Therefore, the direct victim(s), and the individual victim who is either a dependant or a member of the immediate family or household of the direct victim,²⁵⁶ are defined as victims.

The important work of the UN Commission on Human Rights and the Bassiouni principles is indeed the victim-oriented point of departure from the general community, at local, national, and international levels. Of course its intention is not to limit the definition of the victim, but to affirm human solidarity and compassion with victims of violations of international human rights and humanitarian law. By further recognising collective victims, humanity at large is recognised. As the international core crimes are often state supported crimes that leave a great number of victims, where the human rights of entire communities of the population have been violated, the community must also be defined and recognised by the justice process.²⁵⁷

The community itself, or sections of it, must thus not qualify as the collective of victims, but rather as the collective community, where harm was suffered.²⁵⁸

3.2.3. COMMUNITY

Following on from earlier discussions concerning the importance of acknowledging the actors, the involvement and the suffering of the local community - often also the victims at large a propos the international core crimes - must, for the same reasons, be recognised, for the reasons given above. It has been established who the offender is, and who the victim is. It has also been

²⁵⁶ And incl. those individual victims who qualify as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm, according to Princip.8, Bassiouni principles, 2000.

²⁵⁷ Quiroga, 1988.

²⁵⁸ The Guatemalan Criminal Procedure Code defines victim as (1) the direct victim of the crime; (2) their spouse by marriage or common law, parents, and children; (3) representatives of a community against whom the crime was committed; or (4) certain organization in representation crimes that are collective in nature, art.117, *Codigo Procesal Penal*.

established that there can be no collective of offenders, only a responsible collective, and that a collective of direct victims can be included in the crime victim definition, regarding collective victim rights. However, the community *per se* has an important role, especially when it comes to legitimacy of the justice process, which depends on collective trust and support.²⁵⁹ It is not only the relationship between offender and victim that has to be changed; the relationship between offender and the community also requires change, as may the domestic state's relationship to all the other actors.²⁶⁰ As one of the foundations for assimilated justice is to achieve further involvement of the actors, the argument concerning the inclusion of the actors will, in line with the rest of the thesis, expand through the chapters.

In relation to the fundamental aims, the community is the focus of the aims' collective ambit. Truth necessitates the involvement of the general community for a social and collective notion of truth, on which to build the future; general deterrence requires knowledge of the general community; as do certain means of collective reparations; and reconciliation depends on it.²⁶¹ Based on what has been discussed with regard to collective responsibility and collective victims, the general community may not only have suffered from the crimes, but there may also be cases of responsibility sharing (collective responsibility). In relation to international law and the prosecutorial process, each offender necessitates the individual focus of the fundamental aims of truth and just-desert punishment, for justly assigned punishment. Prosecutions, by focusing on individual guilt, are not equipped to effectively investigate the context of state-sponsored mass atrocities. Mass atrocities involve complex layers of institutional guilt and, sometimes, widespread collective responsibility. Through assimilated justice, a restorative process may assist with this collective focus, through *e.g.* a TC. The collective focus of truth, together with the other fundamental aims, could add a larger picture of whether a criminal regime existed. If Tallgren's description of the offender's collective appears, after investigation of the local context, where the offender belongs to a collective that shares group values of a criminal nature, possibly the same nationalistic ideology,²⁶² there may be evidence of collective responsibility on behalf of that community. It is thus important to understand the local circumstances, in order to identify the different needs of each community.²⁶³ It is also important not to confuse collective responsibility,

²⁵⁹ See ahead, ch.4.

²⁶⁰ See *e.g.* Minow, 1998; Aukerman, 2002. The criminal law, enacted by the legislature, is part of the legal definition of crime as an offence against the state and the community, even if those offenses involve individual victims. This is further discussed with regard to the fundamental aim of just-desert punishment.

²⁶¹ See ahead next chapter.

²⁶² Tallgren, 2002.

²⁶³ *E.g.* the Guatemalan TC clarified in its final report that much of the civil war included genocide against the Mayan population, based on state supported policy of racist feelings of superiority and manipulative efforts by the state to portray the Mayans as the collective enemy of the state and of white or Ladino Guatemalans, see Guatemala, Memory

which may extend beyond community membership, with legal guilt.²⁶⁴ Each community may have suffered, and had collective rights violated, and this should be recognised.

International crimes include gross action against local communities, or the entire civilian population, and collective rights are thus affected.²⁶⁵ Before discussing what collective rights exist and may be affected by international core crimes,²⁶⁶ a broad definition of the groups of people that make up the community is important, without linking it to victim-hood, but rather to the recognition that many of whom make up the community have suffered harm. The community refers to the holistic notion of the collective, whose cooperation and support is necessary and can thus be defined as the local collective, of which many have suffered harm and impunity.²⁶⁷

Most victim surveys, of criminological and restorative nature, focus on both the individual as well as the collective victim.²⁶⁸ Because the victim definitions refer to the individual crime victim, the direct victim's immediate family, as well as the collective victims,²⁶⁹ the community is defined in relation to the local collective.²⁷⁰ When individual harm has been suffered, the individual will fall under the definition of victim, linked to victim-hood. Harm and impunity can also affect groups, or collectives, and even entire societies, states and their citizens, where violations are massive. This broad community definition is thus necessary, representative of the local collective, whose support is vital to any justice process.

3.3. INSTRUMENTAL FRAMEWORK OF ACTOR RIGHTS – WITH A PARTICULAR FOCUS ON THE VICTIMS

Continuing the actor, and specifically the victim focus, the above definitions indicate the importance of highlighting what individual and collective victim rights exist, in combination with indirect collective rights of the community. In order to do so, this section considers instruments that

of Silence, p.1 of the conclusions of the Report of the Commission for Historical Clarification, at <http://hrdata.aaas.org/ceh/reports/spanish.toc.html>

²⁶⁴ On the issue of collective guilt, see generally Penrose, 2000; Fletcher, 2002.

²⁶⁵ Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (economic, social and cultural rights), by Mr Guissé, Special Rapporteur, E/CN.4/Sub.2/1997/8.

²⁶⁶ E.g. the Inter-Am.CHR has stated that a right, e.g. the right to truth, may take on a collective character, intended to benefit the public as a whole. An individual can still assert that right, *Bamaca Velasquez v. Guatemala*, 2000, at <http://www.corteidh.or.cr>

²⁶⁷ Taking the victim definitions into consideration, combined with a realistic notion of the community, this definition is based upon the Bassiouni Princip.8, 2000, in combination with the Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (economic, social, cultural and collective rights), E/CN.4/Sub.2/1997/8.

²⁶⁸ Sebba, 1982, 1998.

²⁶⁹ *Sunday times* case, 1981. Heir is often children, spouse, parents, see *X v. UK*, 1982; Victim Declaration 1985; Bassiouni principles 2000.

²⁷⁰ I.e. victims at large.

provide victim rights,²⁷¹ with specific focus on the year of 1985, and its Victim Declaration, as well as the guidelines issued by Special Rapporteurs Joinet, van Boven, and Bassiouni, in 1997 and 2000, respectively.

The last few decades have been filled with extensive suffering, caused by the international core crimes, but also progress, in terms of supportive rights-instruments. The selected instrumental framework has been included because it highlights the development of criminal, and restorative justice aims, trying to safeguard rights of the actors. Institutions supporting this progress have been seen in the domestic context, in states in transition, *e.g.* establishing TCs. The SA TRC drew from Latin American and East European experiences and attracted a great deal of international attention. In the international community, preparatory work at the UN has led to international tribunals and a permanent International Criminal Court.²⁷² The framework indicates emerging and promising principles, both criminal and restorative in nature, in support of affirmative obligations, not only to punish certain crimes, but also to establish the truth and offer reparations.²⁷³ Founded on the instrumental framework and developing institutions, the punishment debate has, for example, developed into separate, yet interrelated, principles of just-desert punishment, rehabilitation, and deterrence, much due to criminal justice taking into account criminological and restorative justice studies. Civil law and restorative justice claims to restitution have developed into a variety of reparations. The opportunity for assimilated justice is to assimilate these different instruments and institutional developments, resulting in the ability to acknowledge the rights of the actors, and the fundamental aims, in one justice paradigm.

The instruments referred to are not all part of international law, in fact only the covenants, conventions, and protocols are binding treaties. The different UN resolutions and declarations are all recommendations, but they reflect internationally supported values, and intended standards for implementation, and consequently all the documents carry profound moral connotations.²⁷⁴ These values are comprehensive and far-reaching, and by assimilating them in an all-embracing process of justice - aiming for truth, just-desert punishment, deterrence, reparation and reconciliation - their potential will not only exist in theory.

²⁷¹ Reference to offender rights and instrumental development in this area will only be referred to in the footnotes. Community rights will be discussed with reference to certain collective victim rights.

²⁷² The institutions referred to are discussed in later chapters.

²⁷³ See *e.g.* *Velásquez Rodríguez* case, 1988; Orentlicher, 1994; Roht-Arriaza, 1995; van Boven, 1997; Joinet, 1997; Bassiouni, 2000.

²⁷⁴ GA resolutions may become customary international law over time; ECOSOC resolutions have the incentive to be incorporated into domestic law to become binding through being internationally approved and endorsed; UN declarations are recommendations for domestic states to act upon, see generally Brownlie, 1990. UN resolutions and statutes can equate with international treaties, see *e.g.* *Prosecutor v. Tadic*, Judgement in sentencing Appeals, 2000, at <http://www.un.org/icty/tadc>

3.3.1. PRIOR TO THE 1985 VICTIM DECLARATION

As early as 1885 were two international conferences held on the topic of victim and offender rights.²⁷⁵ However, while specific offender rights were developed,²⁷⁶ the positive rights of victims of international crimes and collective community rights had to wait a hundred years for the ball to really start rolling. Certain restorative justice principles were normatively incorporated into international law, in the Hague Convention of 1907, under which Germany was obliged to pay reparations. The reparations were held punitive in effect and deterrent by reason of their impeding Germany's ability to afford another war.(!)²⁷⁷ It was also recognised, in the same convention, that limited resources could limit the obligation to pay compensation, but that Germany would still be held morally, politically, and legally responsible for the war.²⁷⁸ Such post-war reparations as referred to in the Hague Convention of 1907 designated the citizens of Germany, and the new state of Israel, as beneficiaries. The obligation to make reparations was seen as a state duty, without concurrent positive victim rights to demand reparation. National obligations for the state to compensate its citizens led to reparations for victims of other states. Further duties to criminalise, prosecute, and punish offenders were confirmed at Nürnberg, through the International Military

²⁷⁵ International Congress on Criminal Anthropology, Rome 1885; International Prisons Conference, Paris 1885.

²⁷⁶ For a collection of such, see e.g. the Standard Minimum Rules for the Treatment of Prisoners, ECOSOC, 1957; Declaration of the 4th UN Congress on the Prevention of Crime and the Treatment of Offenders, ECOSOC, 1971; Caracas Declaration, 6th UN Congress on Prevention of Crime and Treatment of Offenders, 1980; Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, ECOSOC, 1984, all in the UN Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice 1992, at <http://www.uncjin.org/Standards/Compendium/compendium.html>; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; and in UN Commission on Crime Prevention and Criminal Justice, Use and application of United Nations standards and norms, E/CN.15/2002/3, 26 Feb.2002, p.12; ICT Statutes, 1993, 1994; ICC, 1998.

²⁷⁷ S.3 Hague Convention IV Respecting the Laws and Customs of War on Land, 1907; Treaty of Versailles, 1919, art.3 "A belligerent Party which violates the provision of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Art.4 provides for the right to demand indemnity for losses sustained in cases of violation.

²⁷⁸ Treaty of Versailles, art.232; The *Chorzów Factory Case*, 1928, p.29, confirmed that "It is a principle of international law, and even a general conception of law, that any breach of an engagement invokes an obligation to make reparation. ...reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself." State responsibility can result from actions directly attributable to the State through its agents (original responsibility) or from actions that only indirectly involve the State (vicarious responsibility), p.47; "The essential principles contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

Tribunal of 1945.²⁷⁹ In 1948, the Genocide Convention further acknowledged individual criminal accountability, and international criminal jurisdiction; “persons charged with genocide...shall be tried by a competent tribunal of the State in the territory in which the act was committed, or by such international penal tribunals as may have jurisdiction.”²⁸⁰ The Universal Declaration of Human Rights recognised, the same year, a right to a remedy. “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”²⁸¹ International humanitarian law and the protection of civilians were recognised in the four 1949 Geneva Conventions.²⁸² “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or another High Contracting Party in respect of grave breaches involving such acts as wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”²⁸³

These duties and developing rights were further expanded by the International Convention on the Elimination of All Forms of Racial Discrimination in 1965. “State Actors shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”²⁸⁴ Article 2(3) of the 1966 International Covenant on Civil and Political

²⁷⁹ International Military Tribunal for the Prosecution of War Crimes (IMT), Nürnberg, London Agreement, 1945; International Military Tribunal for the Far East, Tokyo Agreement, 1946. In 1947, the International Law Commission began work on an international criminal code. The international criminal law development is further discussed in ch.5.

²⁸⁰ Genocide Convention, 1948, art.5.

²⁸¹ Universal Declaration of Human Rights 1948, art.8.

²⁸² Geneva Conv. for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, see arts.50,51; Geneva Conv. for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, arts.51, 52; Geneva Conv. relative to the Treatment of Prisoners of War, arts.130, 131; and Geneva Conv. Relative to the Protection of Civilian Persons in Time of War, arts.147, 148; Additional Protocol 1 to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, art.91 “A Party to the conflicts which violates the provisions of the Conventions or of this Protocol shall...be liable to pay compensation”; Add. Protocol II, art.6(5) “at the end of the hostilities, the authorities shall endeavour to grant the broadest possible amnesty”; Past abuses transcended to the responsibility of new regimes. The Luxembourg Agreement of 1952 dealt with the duty of defeated WWII nations to pay reparations to other actors, and an enormous victim impetus, claiming reparation.

²⁸³ Art. 148, fourth Geneva Convention.

²⁸⁴ Art.6, International Convention on the Elimination of All Forms of Racial Discrimination, 1965; UN Declaration on the Elimination of All Forms of Racial Discrimination, 1963 GA.RES.1904.XVIII, art.7(2) “Everyone shall have the right to an effective remedy and protection against any discrimination he may suffer on the ground of race, colour or ethnic origin with respect to his fundamental rights and freedoms through independent tribunals competent to deal with such matters.”

Rights furthered the recognition of victim rights, and the concurrent state duties “(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”²⁸⁵ The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also confirmed the right to reparation. “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation”.²⁸⁶

In addition to the aforementioned international instruments,²⁸⁷ which influenced and brought about the 1985 Victims Declaration discussed below, restorative justice movements, such as mediation programs of the 1960s and 1970s in the USA and Canada, lent support to the victim-rights movement.²⁸⁸ In 1985, two drafts of a declaration of basic principles of justice for victims were produced and later discussed, at the UN 7th Congress, before being adopted by consensus in the 3rd Commission of the GA. Less than three weeks later it was formally approved by the GA.²⁸⁹

²⁸⁵ See the ICCPR, 1966, art.9(5) “...enforceable right to compensation.”, art.14(6) “...compensation is due in accordance with law or with national law...”; Optional Protocol to the ICCPR 1966, arts.1-5 Complaints procedures; Second Optional Protocol to the ICCPR, abolition of death penalty, 1989; International Covenant on Economic, Social and Cultural Rights, 1966. In the Proclamation of Tehran, 1968, the international community reaffirmed its determination to put an end to gross denials of human rights and to intensify efforts and initiatives at the national and international levels in the area of human rights; a UN Voluntary Fund for Victims of Torture was set up in 1981, GA/RES/6/151; Convention on State Compensation, Council of Europe, 1983; Guidelines for measures on behalf of victims of crime and abuses of power, Report of the Secretary-General E/AC.57/1984/14; Written statement Submitted by the International Association of Penal Law, the International Society of Criminology, the International Society of Social Defence, NGOs, E/AC.57/1984/NGO1, Feb 1984; Report of the Interregional Prep Meeting for the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders on Topic III “Victims of Crime”, A/CONF.121/IPM/4 July 1984.

The UN Congress on the Prevention of Crime and the Treatment of Offenders issued ECOSOC declarations in e.g. 1971, 1980, regarding Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, ECOSOC, 1984.

²⁸⁶ Art.14(1), Torture Convention, 1984.

²⁸⁷ See e.g. the Council of Europe resolutions and recommendations on victim reparations in Europe. Council of Europe RES(77)27, 1983; Council of Europe Recom.No.R.(85) The victim should be treated with respect in the criminal justice system; Recom.No.R.(85)11Victim’s position in the framework of criminal law and procedure; Recom.No.(87)21 Assistance to victims and the prevention of victimization.

²⁸⁸ See ch.4, 7.

²⁸⁹ Report of the Secretary-General, Survey of redress, assistance, restitution and compensation for victims of crime, 1985. Offender rights were also developed, e.g. in the Milan Plan of Action, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985; Model Agreement on the transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners, 7th UN Congress, 1985; GA/RES/40/32/ adopting the

3.3.2. THE 1985 VICTIM DECLARATION

The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power has been referred to as “a Magna Carta for victims”,²⁹⁰ and, although not binding, the goal of promoting victim needs and rights under international law very much began with this declaration. It was further recommended by the GA that the principles be guaranteed through measures at national, regional and international level.

Part A of the Declaration defines the crime victim²⁹¹ and four basic standards of redress that states should realise; access to justice, fair treatment and participation,²⁹² restitution by the offender;²⁹³ compensation by the state;²⁹⁴ and health, social and legal assistance.²⁹⁵ The declaration is based on the idea that the offenders should contribute, by making fair reparation (recompense) to their victims and state-sponsored-compensation for victims and their families should essentially only be made available where this fails.²⁹⁶ Reparation was thus defined as the return of property (restitution), or payment for the harm suffered. “The establishment, strengthening and expansion of

Recommendations of the 7th Un Congress on the Prevention of crime and the Treatment of Offenders, Dec.1985; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA, 1988; see generally the 1992 Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice at <http://www.uncjin.org/Standards/Compendium/compendium.html>; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; and in UN Commission on Crime Prevention and Criminal Justice, Use and application of United Nations standards and norms, E/CN.15/2002/3, 26 Feb.2002, p.12.

²⁹⁰ 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; see generally Danieli, 1999, p.53.

²⁹¹ Princip.1. Victims are “persons who, *individually or collectively*, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.” This may include “immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” Princip.18, victims also means “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.” Italics added to highlight individual and collective focus.

²⁹² Princip.4-7, victims are entitled to prompt redress for the harm that they have suffered. They should also be informed of their rights in seeking redress.

²⁹³ Princip.8-11, offenders or third actors should make fair restitution to the victims, their families or dependents, and should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. Governments should review their practices, laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions. In cases of substantial harm to the environment, restitution should include restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community. Where public officials or other agents acting in an official capacity have violated national criminal laws, the victims should receive restitution from the State. The state or Government successor in title should provide restitution to the victims.

²⁹⁴ Princip.12-13, when compensation is not fully available from the offender or other sources, states should endeavour to provide financial compensation

²⁹⁵ Princip.14-17, victims should receive the necessary material, medical, psychological and social assistance and support, through governmental, voluntary, community-based and indigenous means.

²⁹⁶ Princip.12.

national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.”²⁹⁷ Thus, even in cases of non-state-sponsored crimes and in cases where the state is not accountable, the state should compensate.

1985 marked an important year where the Victim Declaration spoke of mediation and conciliation, appealing to states using such processes to make sure that the needs and wishes of the victims are acknowledged in the proceedings where the victims’ personal interests are affected.²⁹⁸ The Guiding Principles for Crime Prevention and Criminal Justice also spoke of unrestricted access to the legal system and development of more readily accessible methods of administering justice, such as mediation, arbitration, and conciliation courts.²⁹⁹ The undeniable importance of the Declaration is still criticisable, as the implementation progress has been slow to say the least.³⁰⁰ It took the International Law Commission 27 years to agree on a draft international criminal code and 17 years for the General Assembly to adopt it.³⁰¹ The war in former Yugoslavia ended such lengthy work. Only two years after the adoption of the draft international criminal code, the Security Council unanimously decided to establish the first international tribunal. In response to atrocities in former Yugoslavia, and Rwanda, the international *ad hoc* tribunals were set up.³⁰² This evolution further promoted the rights of the offender and to some extent those of the victim.³⁰³ Moreover, the ICT Statutes indicated international endorsement of individual criminal accountability, and the state duty to prosecute and punish offenders of the international crimes.³⁰⁴ The international law development of victim rights is further discussed in relation to the Bassiouni principles.

²⁹⁷ Princip.13.

²⁹⁸ Princip.7.

²⁹⁹ Guiding Principles for Crime Prevention and Criminal Justice, ECOSOC E/1986/INF/4 Res. on implementation of the conclusions and recommendations of the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, III Basic Principles of Justice for Victims of Crime and Abuse of Power; UN 8th Congress Res. on the Protection of the human rights of victims of crime and abuse of power, ECOSOC E/1986/92; See generally the 1992 Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, and specifically pp.19, 212-3, at <http://www.uncjin.org/Standards/Compendium/compendium.html>; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; and in UN Commission on Crime Prevention and Criminal Justice, Use and application of United Nations standards and norms, E/CN.15/2002/3, 26 Feb.2002, p.12.

³⁰⁰ See ahead UN Special Rapporteurs Joinet, Van Boven, and Bassiouni.

³⁰¹ Started in 1947, finished in 1974; GA adoption of draft in 1991.

³⁰² Chapter VII, art.39 UN Charter allows the UN Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”; ICTY Statute, 1993, at http://www.un.org/icty/basic/rpe/IT32_rev14.htm; ICTR Statute, 1994 at <http://www.ictor.org/rules.html>.

³⁰³ See ICT articles on victim and witness rights in a later part of this chapter, and ch.5; Recommendations on the Four Substantive Topics of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1995, at <http://www.restorativejustice.org/resources/policy/inter/un/foursubstantive>.

³⁰⁴ See ahead, later chapter.

3.3.3 THE 1997 JOINET AND VAN BOVEN GUIDELINES

Four years after the 1985 Victim Declaration, the UN Special Rapporteur Mr Van Boven was asked to undertake a study on the status of the right to reparation of victims, from an international perspective.³⁰⁵ Eight years later, Mr Van Boven had prepared such a draft,³⁰⁶ and in 1997, UN Special Rapporteur Mr Van Boven presented the Basic Principles and Guidelines on the Right to Restitution, Compensation, and Rehabilitation, for Victims of Gross Violations of Human Rights and Fundamental Freedoms.³⁰⁷ In the same year, UN Special Rapporteur Mr Joinet also presented his report on Impunity of Perpetrators of Violations of Human Rights.³⁰⁸ Differing from

³⁰⁵ He was asked by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The early 1990s were filled with implementation measures, following the 1985 Victim Declaration. See e.g. Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, ECOSOC Res.1989; Victims of Crime and Abuse of Power, ECOSOC Res.1990; Recommendations on international cooperation for crime prevention and criminal justice in the context of development, GA 1990; Guidelines for the Prevention and Control of Organised Crime & Measures against International Terrorism; E/CN.4/RES/1993/38 UN extension of Voluntary Fund for Victims of Torture. Also, in terms of the offender, the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, in 1990 issued many model treaties: Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property, recommended by 8th UN Congress on the Prevention of Crime and Treatment of Offenders, 1990; Model Treaty on Extradition, GA, 1990; Model Treaty on Mutual Assistance in Criminal Matters, GA, 1990; Model Treaty on the Transfer of Proceedings in Criminal Matters, GA, 1990; Model Treaty on the transfer of Supervision of Offenders Conditionally Sentenced or Released, GA, 1990; Basic Principles for the treatment of Prisoners, GA, 1990; GARes.45/113 1990 UN Guidelines on the Role of Prosecutors, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders; UN Standard Minimum Rules for Non-Custodial Measures, Tokyo Rules, GA, 1990; UN Manual of the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1991. See Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice 1992 for the collection, at <http://www.uncjin.org/Standards/Compendium/compendium.html>; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; UN Commission on Crime Prevention and Criminal Justice, Use and application of United Nations standards and norms, E/CN.15/2002/3, 26 Feb.2002, p.12.

³⁰⁶ Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms E/CN.4/Sub.2/1993/8, 2 Jul.1993, first draft; E/CN.4/Sub.2/1996/17, 24 May 1996, second draft; E/CN.4/1997/104, 16 Jan.1997, third and final report.

³⁰⁷ This was followed by a request to UN Special Rapporteur Mr Bassiouni to lead the re-drafting and implementation measures for the 1985 Victim Declaration E/CN.4/1999/65 Progress Report by Mr Bassiouni on Reparation. Special Rapporteur Bassiouni was also requested to take into account the already discussed impunity report by Mr Joinet, Special Rapporteur of the Sub-Commission on the Impunity of perpetrators of violations of human rights (civil and political). See E/CN.4/Sub.2/1997/20, 26 Jun.1997, first draft; E/CN.4/Sub.2/1997/20/Rev.1, 2 Oct.1997, second and final report.

³⁰⁸ Id. E/CN.4/1997/104, 16 Jan.1997; E/CN.4/Sub.2/1997/20/Rev.1, 2 Oct.1997; see also UN Draft Manual for the Third Expert Meeting on the Treatment of Crime Victims, 1997, at <http://www.world-society-victimology.de/wsv/index.aspx?page=19&nr=3>. The Manual's provisions 1, 2 and 3 define victim as in the 1985 Victim Declaration and applies to all crime victims, without any distinctions such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin and disability. Provision 4 stipulates that crime victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress. Judicial and administrative mechanisms should be established, according to Provision 5 to enable victims to be redressed through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. See also E/CN.15/1997/16/Add.1 Commission on Crime Prevention and Criminal Justice Use and Application of the Declaration of Basic Principles of Justice for victims of crime and abuse of power.

the Victim Declaration, which concerns victims of domestic criminal law and abuse of power,³⁰⁹ the 1997 guidelines focus on violations of human rights and international humanitarian law, with reference to international norms.³¹⁰

While the Van Boven Principles focused exclusively on the issue of reparation for victims, the Jointet Guidelines discussed the topic of reparations as an important component to combat impunity. The Jointet and van Boven Guidelines were in agreement with respect to the essential elements of victim reparation, although they did vary in their definitions before the final Jointet report adopted the van Boven principles.³¹¹ The elements are further detailed in the final 1997 guidelines, where restitution means restoring the victim's liberty, citizenship, and employment. Compensation refers to economically assessable damages, *e.g.* pain, harm to reputation; and rehabilitation involves the provision of medical, psychological, legal and social services.³¹² The final definition of the elements of reparation is established based on the Bassiouni Basic Principles of 2000, which were only recently adopted,³¹³ but the background work to those principles, the van Boven and Jointet guidelines differ slightly with regard to the state duty to afford reparation.³¹⁴ The van Boven report is generally better defined, and relies on international law, and includes the right to reparation after violations of human rights and international humanitarian law.³¹⁵ In the report of Mr Jointet, principle 36 implies a duty on the part of the state to provide reparation and to create the possibility of seeking redress from the perpetrator.³¹⁶ The state shall take appropriate measures to ensure that the victims cannot again be confronted with violations, which undermine their

³⁰⁹ The Victim Declaration does not provide for reparation unless these norms are incorporated in domestic legislation, Princip.1, 18-19.

³¹⁰ Princip.1, both guidelines.

³¹¹ See Jointet, 1997, Princip.36 refers to #41, which in turn refers to the 1996 van Boven Guidelines.

³¹² van Boven Guidelines, Princip.12-14; Jointet Guidelines, Princip.36.

³¹³ Adoption of the Bassiouni Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, 19 Apr.2005, UNHCHR Res.2005/35, E-CN_4-RES-2005-35, (Bassiouni Princip.) *E.g.* Princip.19-21 discuss restitution, compensation, and rehabilitation.

³¹⁴ The 1997 van Boven Guidelines, Princip.1-2 impose a duty under international law to respect and to ensure respect for human rights and international humanitarian law, including the duty to prevent violations, to investigate violations, to take appropriate action against the violators, and to afford remedies and reparation to victims. According to the final Jointet Guidelines, any human rights violation gives rise to a right to reparation, implying duty on the part of the State to make reparation and the possibility of seeking redress from the offender, Princip.33.

³¹⁵ Van Boven Princip.1, 3-4. The Jointet Guidelines are silent on what law is to be applied, and the right to reparation is only mentioned with regard to human rights violations, Princip.33-34.

³¹⁶ The right to reparation shall cover all injuries suffered by the victim; it shall include individual measures concerning the right to restitution, compensation, and rehabilitation, and general reparation measures such as measures of satisfaction and guarantees of non-repetition, Princip.39 Jointet. The Victim Declaration puts primary responsibility to make restitution on the offender, except where a state official is involved, where the responsibility shifts to the state. Furthermore, as already affirmed, when the offender is unable to compensate, the duty is on the state, Victim Declaration Princip.8, 11-12.

dignity.³¹⁷ Access to available national and international forums is provided without specification³¹⁸ and exercise of the right to reparation can be pursued individually and collectively.³¹⁹

In the van Boven report, the review of case law of the Human Rights Committee concerning the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment underlines a definite link between effective remedies to which the victim is entitled, and remedies aimed at the prevention of the recurrence of similar violations. The landmark decision regarding South American disappearances, the *Velásquez-Rodríguez* case, is referred to in the van Boven report.³²⁰ The Inter-American Court of Human Rights gave special attention to important aspects such as the obligation to make reparation in relation to the obligation to prevent, to investigate, and to punish. Honduras had not prevented, investigated, or prosecuted the offenders, nor had the victims been recognised. The *Velásquez-Rodríguez* case did not only put international criminal justice clearly on the menu of human rights protection, but also promoted restorative justice values, such as the victims' right to truth and to reparation. The duty to make reparations was held to involve both moral and material compensation.³²¹ Subsequent cases followed in the same reparatory footsteps, enforcing victims' rights, which have often been recognised on the back of the failure of national criminal justice to prosecute and punish, often preferring to grant amnesty.³²²

The victim rights that the ICC Statute recognises and protects will be discussed in relation to the Bassiouni Basic Principles of 2000, but instruments discussed above have greatly influenced the ICC preparatory work.³²³ The ICC Statute honours the focus on victims in its Preamble. "During this century millions of children, women and men have been the victims of unimaginable atrocities

³¹⁷ *Id.*, Joinet, Princip.45.

³¹⁸ van Boven Guidelines, Princip.4; Joinet Guidelines, Princip.34.

³¹⁹ van Boven Guidelines, Princip.5-6; Joinet Guidelines, Princip.34, 36.

³²⁰ The *Velásquez-Rodríguez* Case, Inter-Am.Ct.H.R. Ser.C. No.4, 1988; *Id.*, van Boven reports.

³²¹ *Id.*, #39. This judgement is also important from a cultural perspective, as official wrongs are not compensated in South American legal culture.

³²² *E.g.* Decision on Full Stop and Due Obedience Laws, Report 28/92, Argentina, 1992; Report 29/92, Uruguay, 1992; The Chilean TRC set up in 1991 also mirrored this remedial development of accepting wrongs of prior regimes, as did Argentina's *Nunca Más* Commission.

³²³ At the first sessions of the Prep.Comm. to the ICC, it was decided that the subject of victims would need comprehensive examination of previous instruments, in order to include crime victims in the ICC proceedings, ICC Prep.Comm.16-26 Feb.1999; For background material and sources, see *e.g.* Victim conference Paris 26-29 Apr. 1999; 2nd session 26-13 Aug.1999; Amnesty International Report, IOR 40/06/99 Apr.1999 "The International Criminal Court: Ensuring an Effective Role for Victims". Further material of use to the preparatory committees of the ICC were, *e.g.* E/CN.4/1998/34 Views and comments received from States on the note and revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and international humanitarian law; A/CONF.187/8 10th UN Congress, Offenders and Victims: accountability and fairness in the criminal justice process; Recom.No.R(99)19 of the Council of Europe Concerning Mediation in Penal Matters; Communication on Crime Victims in the EU: Reflections on Standards and Action (COM(1999)349 final); UN Manual on the use and application of the 1985 Declaration, E/CN.15/1998/CRP.4/Add.1; UN Guide for Policy Makers on the Implementation of the 1985 Declaration, E/CN.15/1998/CRP.4; UN Guidelines on the Role of Prosecutors, adopted 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, GARes. 45/113, 1990.

that deeply shock the conscience of humanity”, and provide international protection of rights, something that had been proposed as early as 1872!³²⁴ General international cooperation, in criminal matters, was also given further tools.³²⁵ The international community also played a role in setting up a Special Court for Timor-Leste,³²⁶ as well as a Special Court and a Truth Commission for Sierra Leone.³²⁷

3.3.4. THE BASSIOUNI BASIC PRINCIPLES AND THE ICC STATUTE

The Bassiouni Basic Principles of 2000 are based on the previously discussed instruments and from here on will be used as the authority on victim rights.³²⁸ The Basic Principles on victim rights to justice and reparation are another foundation for assimilated justice, with important values that should be incorporated by a legitimate justice process that has as its objective the fulfilment of the fundamental aims and involvement of the actors.

The Bassiouni Basic Principles define the victim as follows: “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute

³²⁴ Gustave Moynier, transl. by the ICRC, see Hall, C. *The first proposal for a Permanent International Criminal Court*, in IRev.Red Cross, No. 322.

³²⁵ E/CN.15/2000/NGO/1, UN Commission on Crime Prevention and Criminal Justice Recommendations for UN 10th Congress; E/CN.4/RES/2000/68 Impunity; E/CN.4/RES/2000/41 Follow-up of Mr Bassiouni’s report; Draft Resolution on the Basic Principles of the use of Restorative Justice Programmes in Criminal Justice, UN Com.on Crime Prevention and Criminal Justice, Apr 2000; A/CONF.187/NGO/7 Restorative Justice Handbook, Apr.2000; CONF.187/13 10th UN Congress on the Prevention of Crime and the Treatment of Offenders, Bill of Rights for Victims, Apr 2000; Compensation to victims at the ICTs, Letters from President of ICTY to Secretary-General to Security Council, Oct.Nov.2000;European Council Convention on Mutual Legal Assistance in criminal matters, especially in the area of combating organized crime, laundering of the proceeds from crime, and financial crime, Aug.2000; EU Judicial Coordination Unit to Combat Serious Organized Crime, Eurojust, Aug.2000; S/2000/1063, The 2001 framework decision by the EU Council obliges member states to adapt national law, in order to afford protection to victims of crime, “in particular on crime victims”, and their access to justice, and their right to compensation for damages, including legal costs, Council Framework Decision 2001/220/JHA, on the standing of victims in criminal proceedings, art.1. Also “national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims”, and to promote restorative justice mediation in criminal justice. Art.10 “Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure, Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.” Art.17 asks Member States to bring into force the laws, regulations and administrative procedures necessary to comply with art.10 before 22 Mar.2006. The Council framework decision stresses that the victim provisions are not limited to prosecutorial processes, but should be present, and able to assist victims before, and after the process.

³²⁶ UN SC/ES/1272, 1999, Resolution on Special East Timor Court, see ahead.

³²⁷ UN SC/RES/1315, 2000, Resolution on Special Sierra Leone Court; SC/2000/917 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone; SC/2001/40 Draft Statute for the Special Court for Sierra Leone; SC/2001/722 Establishment of a Special Court for Sierra Leone, including the creation of a Trust Fund for donor contributions to the Special Court. These institutions will be further considered in a later chapter on assimilated justice.

³²⁸ Final Report on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, E/CN.4/2000/62 was adopted as the Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, 19 Apr.2005, UNHCHR Res.2005/35, E-CN_4-RES-2005-35, (Bassiouni Princip.)

gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”³²⁹ This definition is similar, yet more detailed than Rule 85 of the ICC’s Rules of Procedures and Evidence, as we saw in the first part of this chapter.³³⁰ While the ICC definition is based on violations of the international core crimes within the jurisdiction of the court, principles 4 and 5 of the Bassiouni principles make clear that the violations, of international human rights and humanitarian law, must constitute a crime under international law.³³¹

In categorising someone a victim, states, organisations and private enterprises agree to treat such persons with respect and compassion and ensure that appropriate measures are taken for their safety.³³² The Bassiouni principles emphasise state responsibility regarding reparations. These reparations should be proportional to the gravity of the violations and the harm suffered, and the state shall provide reparation to victims for its acts or omissions constituting violations of international human rights and humanitarian law norms. In cases where the violation is not attributable to the state, the offender should provide reparation to the victim, but, again, where the offender is unable or unwilling to meet these obligations, the state should endeavour to provide reparation to victims through, *e.g.* establishing national funds for reparation to victims and seek other sources of funds wherever necessary to supplement these.³³³ Realistically, individual resources will be difficult, if not impossible to procure, and concerning the international crimes of genocide, crimes against humanity, and war crimes, state involvement is not rare. Also, it is important to remember collective reparations, which will hardly ever be possible to obtain from the offender(s).³³⁴ One reason behind the setting up of the ICC Victim Trust fund is in order to provide

³²⁹ Princip.8, Id. Bassiouni Princip.

³³⁰ ICC Rule 85 defines crime victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court...victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes” The ICTY Rules of Procedure and Evidence, amended 12 Dec.2002, Rule 2(a) defines victim as “a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.” The provisions of the ICTs will only be referred to in the footnotes, in comparison to the ICC and the Bassiouni principles. The provisions of the ICTs are similar and only the ICTY provision will be referred to.

³³¹ The international core crimes carry universal jurisdiction and are part of international human rights and humanitarian law and the ICC does thus not contradict the Bassiouni principles. See ch.5 for more on universal jurisdiction.

³³² Bassiouni Princip.10; ICC arts.43(6)&68 and Rules 85-99.

³³³ A state shall enforce its domestic judgements for reparation against private individuals or entities responsible for the violations. States shall endeavour to enforce valid foreign judgements for reparation against private individuals or entities responsible for the violations. In cases where the state or government under whose authority the violation occurred is no longer in existence, the state or government successor in title should provide reparation to the victims, see Princip.15-19, E/CN.4/2000/62, Bassiouni Princip.

³³⁴ Princip.15-20, Bassiouni Princip.

such reparation when the offender cannot.³³⁵ However, no reparation, whether provided for by states or third party organisations can substitute reparation made by the offender, as an additional symbol of remorse, respect, and willingness to rehabilitate and reconcile. Provisions of the ICC enabling the court to order money and other property, through fines and forfeiture, with the help of state parties, to the Trust Fund and reparation orders, are therefore encouraging.³³⁶ Article 75 allows victims to request reparations, but the discretion remains with the court, that may order individual or collective reparations.³³⁷ Rule 98(3) entitles the court to order “that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.” Article 75 shows progression in this area since the ICT Statutes are only able to order restitution of property and aid compensation through national courts.³³⁸ The ICC furthermore confirms the relevance of state responsibility concerning reparations, where the state parties to the ICC treaty essentially move their responsibilities through the court. The ICC provisions have created the opportunity to put into practice the principles behind article 8 of the Universal Declaration of Human Rights, and other instruments that govern victims of international human rights and humanitarian law violations, and to set new examples for other courts.³³⁹

The Bassiouni principles oblige states to make sure their national laws are in accordance with international law; to take appropriate legal and administrative action; to prevent and

³³⁵ ICC art.75 “1.The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exception circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, or other interested persons or interested States. 4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1. 5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article. 6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”; Rules 150-153 allow an appeal of the Trial Chamber’s reparation order, art.79 victim trust fund will be looked at in more detail in ch.5 and see Rule 98; ICTY art.22, Rule 34, 69, 75, 106(A) “The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim. (B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation. (C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.”

³³⁶ Arts.75, 79(2), 109, Rule 148.

³³⁷ ICC Rule 97.1; see Donat-Cattin, D. Reparations to victims, in Triffter, 1997, p.967. See more on the Victim Trust Fund (VTF) in ch.5.

³³⁸ Rules 88(B), 105-106, ICTs.

³³⁹ See behind, instrumental framework and e.g. art.8, UDHR; Princip.20, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions: “the families and dependants of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable time”; art.19, UN Declaration on the Protection of All Persons from Enforced Disappearances; art.14 (1), UN Torture Conv.

investigate violations; to take action against the offender in accordance with international law; to provide the victim with access to justice, irrespective of who is the ultimate bearer of the responsibility and to provide for reparations to the victims.³⁴⁰ Thus, when international crimes have taken place, states are under a general duty to prosecute, punish, make reparation, and cooperate with states and appropriate international judicial organs in carrying out these duties.

The Bassiouni principles use the term “reparations” as a generic term - including an individual as well as a collective right - which incorporates all forms of redress; restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparation shall whenever possible restore the victim to the original situation, including freedom, legal rights, social status, family life, citizenship, return to the place of residence, restoration of employment, and the return of property.³⁴¹ Reparation includes restitution, compensation and rehabilitation in the ICC Statute and these elements of reparation are looked at from both an individual and collective position, including the community,³⁴² with the help of the Bassiouni principles.³⁴³

Restitution basically means restoring the victim to his original situation, before he suffered harm, and includes the restoration of liberty, legal rights, social status, family life, citizenship, return to one's place of residence, restoration of employment, and return of property.³⁴⁴ This element of reparation has a collective, community connotation, through its social status and societal approach.³⁴⁵

³⁴⁰ Princip.1-3, Bassiouni principles.

³⁴¹ Princip.15-23, Bassiouni principles.

³⁴² A collective that, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, have collectively suffered indirect harm, including emotional suffering, economic loss or impairment of fundamental collective legal rights, Bassiouni Princip.8 in combination with the final report by Guissé, behind, E/CN.4/sub.2/1997/8; With regard to collective victims, the ICC provides for a common counsel, who will represent the victims. The common counsel will be chosen by the victims or by the ICC, art.43, Rules 89-93.

³⁴³ The ICC also refers to reparation in a generic way, art.75(1) “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation...” However, neither the ICC Statute nor its Rules assist with definitions. The ICTs are not as advanced as the ICC regarding victim rights, but the ICT rules of procedure and evidence provide protection for the victims and witnesses, and “such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.” art.22, ICTY; and see arts.15 ICTY, art.14 ICTR “The judges of the International Tribunal shall adopt rules of procedure and evidence for...the protection of victims and witnesses and other appropriate matters...”. The statutes of the ICTs provide that “the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress to their rightful owners. Rule 106 provide for restitution of property, where a judgment has found the offender guilty of a crime, which has caused injury to the victim, it must be transmitted so the victims can “bring an action in a national court or other competent body” to obtain compensation. ICTR, art.23; ICTY art.24; ICTR Rule 106 (ICTY Rule 105) has never been used by the ICTR, see Vandeginste, S. *Victims of Genocide, Crimes against Humanity and War Crimes in Rwanda: The legal and institutional framework of their right to reparation*, in Torpey, 2003.

³⁴⁴ The list is not exclusive, see Princip.19, Bassiouni principles; ICC art.75, Rules 94, 218.

³⁴⁵ “In view of the massive and systematic violations of which the third-world peoples have been victims in the recent past, such as slavery, colonization and cultural looting, it is obvious that there could only be a global remedy, the purpose of which is to re-establish these peoples in their communal rights by returning to them the goods of which they have been unlawfully dispossessed.”, #136, Joinet, behind, E/CN.4/Sub.2/1997/8.

Compensation shall restore economically assessable damage,³⁴⁶ e.g. physical or mental harm, lost opportunities, material damages, loss of earnings, harm to reputation or dignity, costs required for legal or expert assistance, medicines and medical services, and psychological and social services. The element of compensation is directed towards direct victims and can, *per se*, be claimed by a collective of victims. Financially compensating the community is generally done through the state duty to provide restoration, rehabilitation and satisfaction.

Rehabilitation, when referred to as an element of reparation, is a victim-focused right that includes social, legal, medical, and psychological services.³⁴⁷ Such collective rights are more readily accessible to the community.

The right to satisfaction and the guarantee of non-repetition should include termination of the violations;³⁴⁸ verification of the truth and public disclosure of the truth;³⁴⁹ investigation of the bodies or disappeared;³⁵⁰ assistance in their identification and reburial in accordance with the cultural practices of the families and communities; an official declaration or a judicial decision restoring the dignity and legal and social rights of the victim;³⁵¹ an apology and acceptance of responsibility; judicial or administrative sanctions against those responsible;³⁵² commemorations and tributes to the victims; an accurate account of the violations that occurred;³⁵³ the prevention of recurrence of such violations.³⁵⁴ Satisfaction and guarantees of non-repetition are collective in nature and broad in definition, referring to a transition towards democracy, rule of law, peace and accountability. They refer to state obligations, and it is not strange that the prosecutorial process of the ICC does not incorporate these elements. Satisfaction and guarantees against non-repetition basically absorb the fundamental aims, referring to certain ingredients of truth (investigating and acknowledgment of the truth); just-desert punishment (bringing the offender to justice); deterrence (preventative and protective measures); reparation (collective community restoration); and reconciliation (public participation and acknowledgment). The components and focus of the fundamental aims are continued in the next chapter.

Basically, the crime victim's rights entail access to justice and award of reparation, if the claim is held valid. Principle 12 of the Bassiouni principles clarifies that the victim's right to access

³⁴⁶ Princip.20, Bassiouni principles; ICC art.75, Rules 94, 173-175.

³⁴⁷ Princip.21 Bassiouni principles; ICC art.75, Rule 94.

³⁴⁸ The ICC does not refer to the reparative element of satisfaction and guarantee of non-repetition. However, the ICC Preamble refers to prevention, and ending impunity. "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes..."

³⁴⁹ See generally ICC arts.54, 69-70, Rules 66-67.

³⁵⁰ E.g. ICC arts.13, 15-18, 86, 93.

³⁵¹ E.g. ICC arts.50, 76, 83, Rules 18, 145-148.

³⁵² See e.g. Chapter 7 of the ICC Rules, although sanction can simply refer to the prosecution of the accused.

³⁵³ *Id.*, and e.g. art.76.

³⁵⁴ Princip.22-23, Bassiouni principles.

justice includes all available judicial, administrative or other public processes under existing domestic law as well as under international law. Obligations arising under international law to secure the individual or collective right to access justice, and fair and impartial proceedings should be made available under domestic laws. To that end, states should “Take measures to minimize the inconvenience to victims, protect their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims”.³⁵⁵

The two revolutionary aspects of the ICC are the participation of victims in the trial, other than as witnesses, and the right to seek reparation, discussed in relation to the prosecutorial process fulfilment of the aim of reparation, in chapter five. The ICC Statute and its Rules of Procedure and Evidence provide both participatory and protective measures for the victims who appear before the court. The Statute and its Rules also provide extensive participation and protection rights of the offender, in accordance with criminal justice rules and procedures.³⁵⁶ For reasons earlier laid out, offender rights are not discussed at any length.³⁵⁷ The ICC shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims.³⁵⁸ The responsibility of the Registry, and its Victims and Witnesses Unit, is directed towards all who

³⁵⁵ Princip.12(b), Bassiouni principles.

³⁵⁶ Most provisions of the ICC Statute and its Rules refer in one way or the other to rights of the accused, as the criminal trial is set up with the offender in focus.

³⁵⁷ Limitation to focus and text, combined with assimilated justice concentration on victims make out the basic reasons.

³⁵⁸ Art.68 “1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 2, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. 2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness. 3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence. 4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6. 5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. 6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.” See e.g. art.14(3)(e) ICCPR “To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”, rights of the accused.

appear before the Court; and others who are at risk on account of testimony given.³⁵⁹ It is hence important for the victims to appear before the ICC, to be able to claim the right to reparation. The protective measures involve long-term (after trial) as well as short-term (trial) protection, and assistance with e.g. medical and psychological (trauma, sexual violence, security) needs. Witnesses are to be assisted with regard to where to obtain legal advice, particularly in relation to their testimony; and gender-sensitivity.³⁶⁰ With regard to victim participation, the court decides when the legal representatives of the victims can be considered, once the victim has made written application to the Registry, asking to participate.³⁶¹

The right to a remedy, in the face of a violation of international human rights and humanitarian law, includes all available international processes.³⁶² International mechanisms and rules often only allow an application for remedies once local remedies have been exhausted and often they do not expressly visualize such action.³⁶³ However, as it can be difficult to establish which domestic remedies exist and are functional in the context of international crimes, Bassiouni principle 14 clarifies that “the right to an adequate, effective and prompt remedy against a violation of international human rights or humanitarian law includes all available international processes in which an individual may have legal standing and should be without prejudice to any other domestic remedies.”³⁶⁴ The recognised collective victims have a right to reparation, through the discussed

³⁵⁹ Rule 17, and see Rules 16-19.

³⁶⁰ Rule 17. Due regard shall be taken to the particular needs of children, elderly persons and persons with disabilities. Concerning the ICTs, Rule 34, ICTY provides for a Victims and Witnesses Unit, to recommend protective measures for victims and witnesses and counselling and support, in particular in cases of rape and sexual assault, at http://www.un.org/icty/basic/rpe/IT32_rev14.htm with UNDoc.IT/32/Rev.6, as amended Jul.1998. The Statutes of the ICTs are mainly the same, with the additional article in the ICTY Statute and the ICTR Statute’s arts.19(1) & 21 correlate to arts.20 & 22 of the ICTY Statute. See <http://www.ictor.org/rules.html> with UNDoc.ICTR/3/Rev.1, as amended June, 1998. Similar to Rule 17 of the ICC, Rule 34 of the ICTR further provides “physical and psychological rehabilitation” and that the staff should “develop short and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family...” Rule 74, ICTY can provide confidential identity and Rules 69, 75 and 79 of the ICTs add structure for the protection, incl. in-camera proceedings, nondisclosure to the public of any records identifying the victim, closed circuit television, or the use of pseudonyms. Closed sessions can be ordered by the Trial Chamber for the reason of public order, morality, safety, security or non-disclosure, and the protection of the interests of justice. The ICTR modified Rule 69(c) resolves the conflict between the rights of the accused and the rights of the victims concerning confidential identity. See ahead, ch.5.

³⁶¹ Art.68, Rules 89-93, ICC. The victims' counsel may submit his observations to the court, request further investigation, object to the manner in which the latter was conducted and issue an opinion as to whether the case falls within the jurisdiction of the Court and on the admissibility of the complaint. The legal representative may also intervene in the proceedings to make the victim's concerns known to the Court, and to stress their views to the Chamber in respect of all capital issues. The victim's representative can be chosen by the victim or the Chamber and who can also be paid for with the court's assistance, if the victims are unable to do so, Rule 90.

³⁶² Princip.12-14, Bassiouni principles.

³⁶³ Shelton, 1999. A right to a remedy may still be derogable in certain circumstances, arts.2(3), 4 of the ICCPR; ECHR *Akdivar and Others v. Turkey*, 1996, derogable rights.

³⁶⁴ The ICC similarly states that “Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.” art.76(6). In 2003, Special Rapporteur van Boven issued an Optional Protocol to the Convention against Torture, confirming that the exhaustion of domestic remedies to act and allege violations are not

provisions of both the Bassiouni principles and the ICC.³⁶⁵ The elements of reparation can be referred to as either symbolic or material, where compensation fits the latter. Restitution, rehabilitation and satisfaction are generally symbolic, as well as collective in nature. Collective reparation can help pay for restitution of property, care, education of orphans, community rehabilitation, and other basic needs of survivors of the horrendous crimes. According to the UN report on collective rights,³⁶⁶ victims and passive subjects of violations can be communities or individuals. Victims are those who have directly and personally suffered the harm arising from the violations, or those who can prove that they have suffered harm, material or moral.³⁶⁷ Many international legal instruments incorporate the principle of combating impunity with regard to the violations of economic, social, cultural and collective rights, *e.g.* the right to development.³⁶⁸ The UN report on collective rights emphasises state responsibility to combat impunity, prosecute and make reparations, based on international law, so that the former can be punished and the damage done to the latter can be appropriately repaired.³⁶⁹ Reparation for harm resulting from violations of economic, social and cultural rights will vary according to whether the rights violated are collective

necessary, with regard to acts torture in this specific report, at www.hshr.org/dec52003aunenglish.htm; www.unhcr.ch/html/menu2/7/b/torture/torquest.htm; www.hshr.org/legalcapacity.htm

³⁶⁵ *E.g.* Princip.8, 13, Bassiouni principles; arts. 75, 79 ICC

³⁶⁶ Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), Special Rapporteur El Hadji Guissé, E.CN.4/Sub.2/1997/8, only dealt with economic, social and cultural rights, violations of those rights and collective rights, irrespective of their offenders, whether states, private organisations or individuals.

³⁶⁷ Id. #135; 1985 Victim Declaration.

³⁶⁸ Id. E.CN.4/Sub.2/1997/8, state responsibility for state crime, can, according to the International Law Commission, result from a serious and large-scale violation of an international obligation, *e.g.* those prohibiting slavery, genocide or apartheid. According to international law, particularly elaborated since the Nürnberg Tribunal, crimes against humanity include gross actions against any civilian population, whether in the context of an armed conflict or outside it. According to the Preamble of the Hague Convention, 1907, populations remain under the protection and the rule of the principles of the law of nations. The duty to prosecute and punish crimes under international law rests primarily with the state on the territory of which the crimes were committed, and in which the perpetrators can be apprehended, although universal jurisdiction assists by supplying other institutions and jurisdictions.

³⁶⁹ Id., #21-23, 33-34. The Preamble of the UN Charter states that the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights" and "to promote social progress and better standards of life in larger freedom." Art.1(3) stipulates that one of the purposes of the United Nations is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Art.55 adds: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"; the UDHR, art.22, everyone "is entitled to realization, through national effort and international cooperation ..., of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". The Preambles common to the two International Covenants on Human Rights, 1965, 1966, recognize that, in accordance with the UDHR, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

or individual. In the case of collective rights, the penalties must be of an essentially reparative nature.³⁷⁰

Finishing this section of chapter three, the instrumental framework has highlighted how the development of criminal and restorative justice aims at safeguarding rights of the offender, the crime victim and the community. The framework indicates emerging and promising principles to not only prosecute and punish the offenders of the international core crimes, but to also establish the truth, and to offer reparations, individually and collectively. 1945 (IMT), 1948 (Genocide Convention), and 1949 (Geneva Conventions) were important years, especially for the international core crimes and the development of individual criminal accountability, and, consequently, offender rights. These have been further promoted by the ICTs, in 1993, and 1994, and again in 1998, by the ICC.

For the individual and collective crime victims, and the general community who suffered harm, 1985 (Victim Declaration), 1997 (UN Guidelines on Impunity and Reparation), 1998 (ICC), and 2000 (Bassiouni principles) have been important years. Individual and collective rights to reparation and the right to trial participation before the ICC have been particularly important. Ultimately, whether the reparation is individual or collective, symbolic or material depends on who requests it, and what the granting authority deems suitable.

The different elements of reparation do not necessarily have to be sought separately, and many do not depend on legal proceedings, but rather on the ability of the political organs of states to readily supply preventive and reparative mechanisms and funding. Without specific provisions guaranteeing particular institutions and processes that will assist the victims and communities, the actors and more specifically the victims, are faced with difficulties. Proposed assimilated justice, of both individual and collective focus involves prosecution, in accordance with the state obligation to investigate and deal with the offender, in connection to the international core crimes; and, at the same time, guarantees deterrent, reparative and reconciliatory mechanisms.

3.4. ACTOR JUSTICE

The fundamental aims are further examined in the next chapter, with regard to a potential individual and collective focus on the actors, which is maintained to be essential for assimilated justice, in order to combine what will be discussed in later chapters, that is, the individual focus of

³⁷⁰ Id., #39.

criminal justice with the more collective focus of restorative justice.³⁷¹ Prior to that, the last parts of chapter three attempt to determine what essential actor-rights and needs assimilated justice or any legitimate justice process should be able to recognise.³⁷² The focus also determines what essential duties assimilated justice must assign the state and the justice system.³⁷³ In fact, the basic actor rights give rise to duties of the state and the justice system.³⁷⁴ However, with a focus on the actors, and without a reliable and fair domestic legal system that already represents the basic needs and rights of the actors, this chapter assigns assimilated justice such basic rights. The application of the fundamental aims is believed capable of recognising such rights, through the focus of the fundamental aims, which serves to furthermore highlight necessary duties.³⁷⁵

Understanding the actors according to their definition and learning that both individual and collective rights of different kinds exist results in an awareness that the optimal justice process requires both an individual as well as a collective focus, in order to recognise the actors and the full potential of the fundamental aims. The actors would be at an advantage if they themselves and their needs and rights could be recognised within one process, represented by criminal and restorative justice aims. Unless the criminal justice process can be assimilated with a more restorative process, it will be difficult to supply assimilated justice that can hold the offender criminally accountable, while also including the victims and the wider community within a single justice process. This may result in further impunity, understood as a lack of accountability measures, non-respect for the fundamental aims, and ignorance of the actors.

Through the application of the fundamental aims, actor justice can be recognised, which in turn necessitates ingredients of social justice at all levels of the assimilated justice application. This is of particular importance in a community where the individual and collective needs of the actors

³⁷¹ Recognising the individual offender, the individual and collective crime victims, the community and their rights through the application of the fundamental aims should add to the legitimacy of an accountability process of assimilated justice. In relation to international core crimes, the ability to identify collective responsibility, through assimilated justice with a collective focus, is furthermore possible.

³⁷² The focus remains on human rights, applicable to assimilated justice, and these basic rights include civil-political, socio-economic, and cultural rights.

³⁷³ A focus on duties is really just an alternative to a rights-approach, without much difference, as both rights and duties require implementation and enforcement.

³⁷⁴ The duty to recognise and satisfy the rights remains with the state. The needs preempt the rights, which rely on social or distributive justice. Rights and duties have been discussed and developed, in distributive justice legal philosophy, since Aristotle, 1986, Rawls, 1971, see ahead next chapter and see Miller, 1979, 1991; Sadurski, 1985; and in international justice, see Brownlie, 1990; Steiner & Alston, 2000.

³⁷⁵ See ch.4 and later chapters.

have not been recognised.³⁷⁶ The prerequisite involvement of rights and needs is discussed in chapter four, in relation to assimilating the fundamental aims.³⁷⁷

3.4.1. VICTIM RIGHTS

Twenty years have passed since the 1985 Victim Declaration and obvious limitations, such as political will, must be overcome for individual and collective rights to be properly applied by any justice process. However, it is hoped that with the latest Bassiouni principles of 2000,³⁷⁸ there is uniformity and consistency concerning the definition of victim, elements of reparation and individual as well as collective victim rights. These concepts were to a large extent consistent in the 1985 Declaration, in the 1997 van Boven and Joinet reports and were all subject to revision in the Bassiouni principles, and in the ICC.³⁷⁹

In the fashioning of assimilated justice, the various different impacts of crime on groups and individuals must be taken into account. Otherwise, each actor cannot be correctly represented. Victims may be recognised on the basis of geographical, economic, social, race and gender characteristics and these can assist in identifying the susceptibility of both the individual victim and of the community at large.³⁸⁰ Such identification and knowledge may enhance the understanding of the actors, their needs, and their reaction to crime. Through the connection to the local community and context, assimilated justice can escape the danger of standardising the victim.³⁸¹ This is true also for collective victims and community suffering.³⁸² Again, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international

³⁷⁶ This can be presupposed in states with a past filled with international core crimes and a weak or inexistent fair and just representation of the actors by the state.

³⁷⁷ Where a theoretical exposition is taken to renegotiate the social contract, demonstrating how assimilated justice can recognise the fundamental aims that are believed to recognise the basic needs and rights of the actors, in relation to a legitimate justice process of international justice: truth, just-desert punishment, deterrence, reparation, and reconciliation.

³⁷⁸ And other practices, of courts (vindicating the victims needs and rights by focusing on the offender) and TCs (finding truth in the name of the victims) that focus on the victims.

³⁷⁹ Victim Declaration, 1985; van Boven Guidelines 1997; Joinet Guidelines 1997; Rome Statute of the ICC, 1998; Bassiouni principles, 2000, *supra*.

³⁸⁰ Victim surveys of a criminological nature are not further included in this thesis, however, as with other doctrines related to criminal justice and human rights violations, such normative framework could of course further benefit assimilated justice.

³⁸¹ See Minow, 1998, and Mani, 2002, discussing the danger of defining victims. In circumstances of international core crimes, and possibilities of a great amount of involved individuals, both in causing and in suffering harm, collective victims translate to the entire society, according to Minow, p.82. Mani suggests less focus on victim and offender, referring to them as survivors, p.121.

³⁸² See later part.

humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”³⁸³ Victim and community studies are often based on indirect or secondary victims,³⁸⁴ also acting as witnesses, as many victims do not survive international core crimes. Such surveys may thus lack personalised details of the primary impact of the crimes. They should nonetheless be taken note of, as indirect victims’ harm is arguably also primary to the international core crimes. Surviving victims’ suffering may involve severe trauma, as they are forced to live indefinitely with the memories. Other important characteristics of the victims that the justice systems will have to deal with are their continuing vulnerability, great material need, and lack of a local, regional, or national support system.³⁸⁵ Most victims of the international core crimes are uneducated, illiterate, and poor. Most regions where such violations take place are under-developed, culturally diverse, often ethnically or culturally divided, and dependent on the international community’s support.³⁸⁶ There is generally a need for reparations, in the narrow, individual sense, and in the broad, collective sense, with the objectives of prevention and reparation, at least repairing some of the mental suffering and financial losses. Previously considered instruments anticipate such needs and further recognise the need to know the truth surrounding the atrocities and see the offender brought to justice. This is done through obliging the state to investigate, prosecute, and repair.³⁸⁷

For a justice process to know what to prescribe, the individual needs and rights must be assessed by the process,³⁸⁸ taking into account the impact of the crime on the individual victim. While the type of impact generally depends on the crime and the victim, genocide, crimes against humanity and war crimes result in individuals and collectives suffering physical and emotional harm, and financial losses.³⁸⁹ Emotional or psychological distress often comes in the form of fear, shock, shame and, even guilt.³⁹⁰ Such distress is shown in criminological studies to exist mainly in

³⁸³ Bassiouni Princip.8.

³⁸⁴ Incl. the individual crime victim, groups of direct victims and the victims at large, *i.e.* the community.

³⁸⁵ Mawby, R. I. *Victims’ Needs or Victims’ Rights: Alternative Approaches to Policy-making*, in Maguire & Pointing, 1988; van Dijk, 1986.

³⁸⁶ Many of the mechanisms available to victims from countries with developed welfare such as practical help, guidance and general security information are most of the time not available to victims of the international core crimes. The welfare systems of the developed world are mainly represented by NGOs operating in under-developed countries. *E.g.* Rwanda and East Timor were both victims to international core crimes, with ethnic divergence and a lack of stable democracy and judicial institutions.

³⁸⁷ Based on *e.g.* *Velásquez Rodríguez case*, 1988; Inter-Am.Com.HR Reports on Argentina and Uruguay, 1992; Orentlicher, 1994; Roht-Arriaza, 1995; UNHRCOM. UNDoc.CCPR/C79/Add.46, 1995; CCPR Gen.Comment 20; van Boven, 1997; Joinet, 1997; Bassiouni principles, 2000.

³⁸⁸ By perhaps treating needs as means that must be protected by a criminal justice system, *e.g.* the need to truth and justice can translate into the right and duty to prosecute and punish. See Sadurski, 1985.

³⁸⁹ Due to the generic character of these crimes.

³⁹⁰ See *e.g.* Zedner, 1994; Shapiro, 1997.

the immediate aftermath of the crime, with psychological effects, besides any obvious physical injury. Long-term suffering is mostly attached to crimes of a very personally intrusive or violent character, such as rape.³⁹¹ Obviously, the international core crimes can be characterised as very personally intrusive and violent, with both short-, and long-term effects, and it should be possible to envisage a certain amount of the victims' needs. This should produce a number of readily available reparative mechanisms of assimilated justice. As most of the core international crimes affect victims who are perceived of as a collective or even representing the general community,³⁹² knowledge of victims of typical domestic crimes may not be very helpful. However, the need to know and understand the different actors further justifies assimilating criminal justice tools with restorative justice tools. In a representative manner of assimilated justice, the justice process may then supply an additional collective focus, which inherently requires knowledge of the local context. However, studies of the individual victim are still important, especially concerning sexual offences and must, in order to assign individual reparation, be part of the justice process.

The assumption that victims of the international core crimes suffer all kinds of individual and collective harm would appear to be accurate, bearing in mind the gruesome nature of the international core crimes. In response to the victims' needs,³⁹³ crime victim rights refer to a variety of services, as previous parts of this chapter have established.³⁹⁴ In listing a number of victim needs, reciprocal rights are supplied, summarising the rights from earlier listed instruments. Generally, the basic needs and rights of the victims can be identified as:

- A need to be heard - to tell the truth / The right to access justice, which includes: the right to be treated with respect and recognition; the right to be informed; the right to counsel; the right to participate in the decision-making process.³⁹⁵
- A need to have their dignity restored – to acknowledge the wrong and make legitimate the suffering / The right to access the factual information concerning the

³⁹¹ Zedner, 1994.

³⁹² See *e.g.* Rwanda and the genocide against the entire Tutsi population; and SA's apartheid regime.

³⁹³ Based on earlier listed instrumental framework and <http://www.victimology.nl>; Shapiro, 1997. These rights are often enshrined in domestic legislation or in a Bill of Rights in developed countries. See US Dept. of Justice, 1982 Report of the US President's Task Force on Victims of Crime, final report, vi: [Victims] "discover instead that they will be treated as appendages of a system appallingly out of balance. They have learned that somewhere along the way the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it."

³⁹⁴ 1985 Victim Declaration; ICC 1998; Bassiouni Princip.11 "Remedies for violations of international human rights and humanitarian law include the victim's right to: (a) Access justice; (b) Reparation for harm suffered; and (c) Access the factual information concerning the violations; and see the National Crime Victims' Rights Week, Apr.19-25, 1998, where *e.g.* a right to attend trial; speedy trial; notification of developments in the case; give victim-impact testimony; and restitution were listed. Office for Victims of Crime, U.S. Dep't of Justice, 1998.

³⁹⁵ Bassiouni principles refer to the Rome Statute of the ICC in its Preamble and see Princip.12; ICC Rules 89-93 provide more specific participation provisions and see ICC arts.43, 68.

violations, which includes: the right to be referred to all available and adequate support services; the right to protection.³⁹⁶

- A need to be repaired – symbolically and materially / The right to reparation for harm suffered, which includes: the right to restitution, compensation, and rehabilitation.³⁹⁷

These victim needs and rights are both individual and collective. Furthermore, the all-embracing right to satisfaction and guarantee of non-repetition is recognised, pertaining to termination and prevention of violence, investigations, public acknowledgment of the truth, offender sanctions and victim remembrance and basically absorbs many of the ICC provisions.³⁹⁸ In relation to assimilated justice, it is of interest to highlight suggestions to the establishment of extra-judicial commissions of inquiry,³⁹⁹ in connection with prosecutions and the right to know the truth. Such a truth commission could further assist with the deterrent and reconciliatory means referred to under the right to satisfaction and guarantee of non-repetition. In many ways representative of restorative justice mechanisms, chapter six delves into such truth commissions.

Taking into account the number of victims that the international core crimes cause and the many needs and analogous rights the individual and the collective victims have, the dual focus of assimilated justice, comprising criminal justice for the individual and restorative justice mechanisms for the collectives, should be able to recognise and assist the actors. If it is able to identify the basic needs and rights of both the individual victim and the collective victims, combined with the realization of the fundamental aims, legitimacy would be added to its accountability process. The ability to recognise the individual and collective representatives of the actors extends, of course, also to the offenders and the community.

3.4.2. OFFENDER RIGHTS

Although the thesis does not explore the needs and rights of the offenders in any great detail, the offender is nonetheless a vital part to the fight against impunity. Therefore, the offender -

³⁹⁶ Bassiouni Princip.12(b); ICC Rules 87-88 provide more specific protection provisions.

³⁹⁷ Princip.19-23, Bassiouni principles 2000; ICC Rules 17-19.

³⁹⁸ Bassiouni Princip.22-23. See previous part where similar ICC provisions are indicated.

³⁹⁹ The Impunity Guidelines of Joint 1997, #19 “Extrajudicial commissions of inquiry have two main aims: first, to dismantle the machinery which has allowed criminal behaviour to become almost routine administrative practice, in order to ensure that such behaviour does not recur; second, to preserve evidence for the courts, but also to establish that what oppressors often denounced as lies as a means of discrediting human rights advocates all too often fell short of the truth, and thus to rehabilitate those advocates.” and Princip.5-12; The Bassiouni principles do not directly refer to such commissions, however Princip.2(b) “Adopting appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice”, and *e.g.* princip.12.

defined as a natural person over the age of 18, who qualifies for individual criminal accountability according to the crimes he is accused of having committed - must be identifiable by the justice process.⁴⁰⁰

The classic criminal justice dimension, with its intrinsic individual offender focus, may not always be the most suitable focus for justice in terms of the international core crimes, where entire communities are concerned. However, this classic criminal justice dimension, with its prosecutorial process, originates from domestic common and civil law traditions that have focused on the individual offender and his due process rights and this individual focus is today supported by an extensive normative structure.⁴⁰¹ The prosecutorial process cannot easily be replaced and should not be, as the international core crimes carry the obligation to prosecute and punish the offenders.⁴⁰² The prosecutorial process is hence set up with the primary motive of identifying the offender, while protecting his due process rights, in order to justly prosecute and punish, according to the fundamental aims of truth, just-desert punishment, and deterrence.

In terms of international core crimes and the local circumstances of collective involvement in the crime, unless criminal justice is enabled to widen its focus and feel its way through the multi-layered context of the crimes, the local circumstances and actors, may not be improved or given a sense of justice. The international criminal norms that protect the rights violated by the international core crimes may appear globally accepted, since the norms seek to protect against heinous crimes. However, where the local context contains criminal regimes that do not perceive such norms as morally legitimate norms, acceptance of the prosecutorial process may be hindered or responded to with impunity. Offenders belonging to criminal regimes are often social members of a strong collective ideology⁴⁰³ and, if the criminal collective cannot be dealt with by the justice process, there may be a real threat of further atrocities and impunity. "Criminal law that could be obeyed only by exceptional individuals is hard to justify."⁴⁰⁴ While the criminal justice process may be able to prosecute some, and perhaps even all of the offenders involved in this collective, it can be a difficult, if not impossible task. Furthermore, even if this task is fulfilled, the circumstances behind the criminal ideology may have to be dealt with by reaching out to the collective. Criminal justice

⁴⁰⁰ According to ICC art.25.

⁴⁰¹ See generally the 1992 Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, for instruments relating to the offender, *supra*; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>

⁴⁰² See ahead, ch.4 and behind, ch.2.

⁴⁰³ See generally Tallgren, 2002; Fletcher & Weinstein, 2002.

⁴⁰⁴ Tallgren, 2002, p.573.

struggles with notions such as criminal regimes and collective responsibility.⁴⁰⁵ In order to know first, whether a criminal regime actually exists, second, who its members are and what the ideology consists of, and thirdly, what exact tools are necessary in order to properly end it, and work towards reconciliation, the justice process could gain from mechanisms within the local context. These mechanisms must be able to understand the local context and collective responsibility. At the same time, offenders of international core crimes usually originate from, and find themselves in a similar environment to the victims' environment, discussed earlier. Poverty, unstable democracies and a lack of judicial institutions may well be a direct result of the criminal regime and, inversely, the criminal regimes may themselves have emerged as a result of the setup. The consequence is that the prosecutorial process may be held away from the local circumstances and realistic expectations would include selective prosecution of some offenders, in relation to some crimes, with the establishment of individual criminal accountability. Local mechanisms are thus only made more important.

Justice mechanisms that appear to focus on the local context, from a less individual perspective, instead struggle with the notion of individual criminal accountability. Restorative justice represents a different, more socially restorative dogma, as a later chapter will indicate. For these inherent reasons, the offender is not in focus, but collective notions of truth and responsibility are, especially with regard to collective responsibility.⁴⁰⁶ In relation to the international core crimes, the offender is of importance, both individually and, in some circumstances, also collectively. Assimilated justice may be able to deal justly with the offender, while not ignoring aspects of collective responsibility. The potential collective focus of the fundamental aims may additionally be realised by the assimilation, whereby, for example, deterrence and reconciliation efforts can be made towards the local community.

The difference between individual and collective responsibility correlates, to some extent, to the distinction between personal, moral, and legal justice, as compared to public, social, and political justice. This distinction is partly represented by the criminal justice system versus the restorative justice system. Collective responsibility refers to the good of all,⁴⁰⁷ the political qualities of society, in line with the historic development of citizens as part of something bigger. Individual responsibility (and guilt), on the other hand, refers to the individual soul, in line with historic religious development. "In the center of moral considerations of human conduct stands the self; in

⁴⁰⁵ Again because criminal justice was set up with the motive of dealing with the individual offender and international criminal justice only identifies individual criminal accountability. These issues are further discussed in the next chapter, under the fundamental aim of just-desert punishment and ch.5 international criminal justice.

⁴⁰⁶ Other fundamental aims are also involved in the restorative justice focus, see ch.6.

⁴⁰⁷ At least philosophically, although it may well refer to responsibility for something bad.

the center of political considerations of conduct stands the world.”⁴⁰⁸ The spread of the “collective guilt” notion is in line with the aim of restorative justice to reach reconciliation, as it extends solidarity to the guilty or at least to some extent serves to pardon the guilty. However, it is worth repeating, there can be no collective legal guilt. Also, the finding of collective responsibility shall not change a person’s status as a victim, according to the Bassiouni principles. “A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”⁴⁰⁹

Thus, the offender, his needs and his rights, are individual and can, with the guidance of the ICC Statute,⁴¹⁰ be summarised as:

- A need to be heard / The right not to be subject to arbitrary arrest, detention, search or seizure; the right to a public and fair hearing; to know the nature of the charges and evidence, in a non-foreign language;⁴¹¹
- A need for assistance / The right to counsel; to have adequate time and facilities for the preparation of the defence; and to choose counsel;⁴¹²
- A need to be treated in a fair and just manner / The right to presumption of innocence; to be tried without undue delay; the right not to be compelled to testify or to confess guilt and to remain silent;⁴¹³
- A need to participate – a need to defend / The right to be present at trial; to conduct the defence in person or through counsel; to examine witnesses; to raise defences; present admissible evidence; and not to have imposed on him any reversal of the burden of proof or any onus of rebuttal; the right to disclosure of evidence in the Prosecutor's possession which shows the innocence of the accused, mitigates the

⁴⁰⁸ Arendt, H. in Bernauer, 1987, p.47.

⁴⁰⁹ Princip.9, Bassiouni principles.

⁴¹⁰ Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, 1992; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; ICTY Statute, 1993; Sebba, 1998; Rome Statute of the ICC, 1998; UN Crime and Justice Information Network, Centre for International Crime Prevention Office for Drug Control and Crime Prevention, at <http://www.uncjin.org/Standards/UNRules.pdf>. Art.6 ECHR “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” Many of the rights refer to the *accused* as the right refers to pre-judgement stages of the trial.

⁴¹¹ Art.67 and 67(1)(a), (f) “To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented are not in a language which the accused fully understands and speaks”, ICC; Art.21(1), 21(2), 21(4)(a), (f) ICTY.

⁴¹² Art.67(1)(b) ICC; Art.21(4)(b) ICTY

⁴¹³ Art.66, 67(1)(c), (g) ICC; Art.21(3), (4)(c)(g) ICTY.

guilt of the accused, or which may affect the credibility of prosecution evidence; and a right to appeal.⁴¹⁴

While the needs of the offender may be responded to differently, depending on the justice process, the rights refer to the competences of the prosecutorial process only. The objective maintained throughout the thesis is to complement the prosecutorial process, in order to widen the offender's accountability towards his victims, individually and collectively, and to prevent impunity. It is thus not believed that restorative justice mechanisms should process individual offender rights.⁴¹⁵ But, where criminal justice is not able to recognise such notions as *e.g.* collective responsibility, legitimacy may be put at risk and, in addition, peace, order, and justice. Through assimilated justice, criminal justice could process notions of collectivism that may be applicable to the actors involved in international core crimes.

3.4.3. COMMUNITY RIGHTS

In the preceding part on victim rights, most of the listed and discussed needs and rights also refer to the community or the victims at large. To avoid repetition, the needs and rights of the community are only briefly discussed. The community plays an important role in assimilated justice and also in restorative justice, which, with its social normativity, focuses on the collective.⁴¹⁶ The fundamental aims also depend on the actor involvement. Without the community, there will *e.g.* be no reconciliation.⁴¹⁷ Concerning collectiveness and circumstances where the entire community has, to some extent, been involved in both the cause of the harm, and the suffering, it will not be of assistance to refer to the community as either collectively responsible or victimised, as it may be both.⁴¹⁸ Again, using South Africa as an example, the collective responsibility of those that supported, and to some extent perhaps even assisted the criminal regime, cannot be interpreted as criminally responsible, without being so tried, individually. Those that have suffered direct harm can be defined as victims, individually and collectively. Those that cannot, or choose not to,⁴¹⁹ may want to identify with their community. A common identification with the entire society as survivors, supported by Mani,⁴²⁰ as survivors, to some extent encompasses the moral and political

⁴¹⁴ Art.67(1)(d), (e), (i), art.67(2), part 8, art.81 ICC; Art.21(4)(d), (e), art.25 ICTY.

⁴¹⁵ However, ch.7 may provide some restorative justice means of dealing with the individual offender.

⁴¹⁶ See later chapter on restorative justice, and behind, for a discussion on the lack of collective criminal justice focus.

⁴¹⁷ This is further discussed with regard to the fundamental aims, next chapter.

⁴¹⁸ In *e.g.* SA, the apartheid regime caused harm to communities that can be viewed as both collective victims and the community at large.

⁴¹⁹ As not everyone may want to be defined as a victim. Again, see Mani, 2002, referring to victims as survivors, p.123.

⁴²⁰ *Id.*

aspects of collective guilt⁴²¹ and could perpetuate rather than reduce suffering if the individuals are not allowed differentiation.⁴²² Collective responsibility and/or suffering, and not guilt, can better be recognised and healed through assistance in the community. It is therefore of importance to allow the actors to be defined together, as a collective, with the recognition of the fundamental aim of reconciliation.

According to the UN report on collective rights,⁴²³ victims at large or passive subjects of violations can be both communities and individuals who have suffered the harm arising from the violations or those who can prove that they have suffered harm, whether material or moral.⁴²⁴ In order not to confuse the community with victim-hood or the collective victims, the community is broadly defined as the local collective, a group where many have suffered harm and impunity, whose support is necessary for a legitimate justice process. The similarities between collective victims and community basically mean that the identification of the actor, his needs and his rights, all depend on knowledge of the local environment, and what harm the community suffered.⁴²⁵

Based on the earlier discussions, community needs have more of a collective and symbolic character than victim needs,⁴²⁶ and such measures may be assessed more effectively by mechanisms with a collective and local focus.⁴²⁷ The needs to know the truth, be guaranteed non-repetition and be given means towards reconciliation are vital for community and national development and means towards such needs are broadly incorporated into the right to satisfaction.⁴²⁸ Community needs and rights can be summarised as:

⁴²¹ Earlier referred to by Jaspers in Neier, 1998. See earlier part on offenders and see ahead, ch.4.

⁴²² Of course, with regard to humanitarian assistance and development aid, the entire society is generally viewed as a society in need, whether labelled as survivors or not.

⁴²³ Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), Special Rapporteur Guissé only dealt with economic, social and cultural rights, violations of those rights and collective rights, irrespective of their offenders, whether states, private organisations or individuals.

⁴²⁴ Id. #135 and the 1985 Victim Declaration.

⁴²⁵ The ICC appears to have foreseen this, to the extent possible for the court to grant a collective award, depending on the local circumstances. "The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund" Rule 98(3), (4), ICC.

⁴²⁶ As e.g. the community has not suffered direct physical harm.

⁴²⁷ In the case of violated collective rights, the penalties must be of an essentially reparative nature, according to Mr Guissé, 1997, #39. The reason for this is, as discussed earlier, the incapacity to compensate all those who have suffered harm caused by international crimes, individually.

⁴²⁸ #42, Joinet, 1997, "On a collective basis, symbolic measures intended to provide moral reparation, such as formal public recognition by the State of its responsibility, or official declarations aimed at restoring victims' dignity, commemorative ceremonies, naming of public thoroughfares or the erection of monuments, help to discharge the duty of remembrance. In France, e.g., it took more than 50 years for the Head of State formally to acknowledge, in 1996, the responsibility of the French State for the crimes against human rights committed by the Vichy regime between 1940 and 1944. Mention can be made of similar statements by President Cardoso concerning violations committed under the military dictatorship in Brazil, and more especially of the initiative of the Spanish Government, which recently

- A need to know/ the right to know the truth;⁴²⁹
- A need to have their dignity restored – to acknowledge the wrong and move towards reconciliation / The right to access the factual information concerning the violations; the right to satisfaction and guarantees of non-repetition.⁴³⁰

The broad right to satisfaction and guarantees of non-repetition is recognised, pertaining to a state duty of termination and prevention of violence; investigations; public acknowledgment of the truth; offender sanctions; and victim remembrance,⁴³¹ perhaps in relation to some type of extra-judicial truth commission.⁴³² The 1985 Victim Declaration recognised informal measures for the resolution of disputes, such as mediation and arbitration, to help overcome the collective social harm suffered as a result of the crime.⁴³³ The UN Guiding Principles for Crime Prevention and Criminal Justice also speak of unrestricted access to the legal system and development of more readily accessible methods of administering justice, such as mediation, arbitration and conciliation courts.⁴³⁴ These principles and rights support and add legitimacy to the assimilation of restorative justice with criminal justice.

Closing this section on actor justice, criminal justice may be appropriate to deal with individual offenders, through a normative framework that defines and protects the offender, and certain rights in relation to a fair trial. To some extent the ICC also defines and protects the victim, and certain victim rights, in relation to the right to truth, access to justice, participation and reparation. Some of the victim provisions even recognise collective victims and a chance to receive

conferred the status of ex-servicemen on the anti-Fascists and International Brigade members who fought on the Republican side during the Spanish civil war". Princip.22-24, Bassiouni principles.

⁴²⁹ Princip.1-4, the right to know. "This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right. Two series of measures are proposed for this purpose. The first is to establish, preferably as soon as possible, extrajudicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations." Joint, 1997; Princip.12, 24 Bassiouni principles; Arts.54, 68, 75, Rules 89(4), 90(2), 93 ICC.

⁴³⁰ Bassiouni Princip.12, 15-24; Arts.43(6), 68(1), (6), Rules 17-19, 97-98, ICC, may affect individuals whom have not necessarily appeared before the court.

⁴³¹ Bassiouni princip.22-23.

⁴³² Joint 1997, #19 "Extrajudicial commissions of inquiry have two main aims: first, to dismantle the machinery which has allowed criminal behaviour to become almost routine administrative practice, in order to ensure that such behaviour does not recur; second, to preserve evidence for the courts, but also to establish that what oppressors often denounced as lies as a means of discrediting human rights advocates all too often fell short of the truth, and thus to rehabilitate those advocates.", Princip.5-12.

⁴³³ Princip.7, Victim Declaration, 1985.

⁴³⁴ Supra 1992 Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, p.19; 212-3; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>

means of reparation. The international community has, through the UN and the international criminal justice system, issued victim guidelines to assist victims' access to justice⁴³⁵ and only the future can tell to what extent the ICC will recognise victims.

The extensive research that has gone into the Special Rapporteurs' different reports, principles and final rights now requires realisation. Highlighted needs and parallel rights have matching duties. These must be executed by states, through a justice system that is able to take into account individual and collective actors. The instruments referred to all imply duties on states and every state is obliged to respect, ensure respect for and enforce international human rights and humanitarian law norms.⁴³⁶ This obligation includes a duty to take appropriate legal and administrative measures to prevent and investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law; and provide the victims with effective access to justice and reparation. These duties exist, irrespective of who is responsible for the violation.⁴³⁷ State parties to the ICC are under an obligation to cooperate with the ICC, once the ICC has jurisdiction, according to the principle of complementarity.⁴³⁸ According to universal jurisdiction norms,⁴³⁹ which the Bassiouni principles recap, "violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations."⁴⁴⁰ All things considered, each actor depends on the willingness of states to fight impunity.

Recognition of the actors is another foundation for assimilated justice and another means to fight impunity. In addition, the actors necessitate assimilated justice, through mechanisms able to define the actor, estimate the appropriate needs and supply the required rights. In line with the duty to apply the fundamental aims in equilibrium, discussed in the next chapter, is included the duties necessary for the recognition of actor rights.

⁴³⁵ *E.g.* UN Handbook on Justice for Victims, 1999; The ICC, Amnesty Intern., 2000; Reporters without Borders, The ICC: The Rome Statute ratification and implementation handbook, 2003.

⁴³⁶ Princip.1, Bassiouni princip.

⁴³⁷ *Id.* Princip.3, Bassiouni princip.

⁴³⁸ *E.g.* arts.1, 54, 57, 93, 109, and generally Part 9, the ICC Statute.

⁴³⁹ Princip.6-7 Bassiouni principles furthermore confirm that statutes of limitations "shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law. Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms."

⁴⁴⁰ Princip.4. Princip.5. "To that end, States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law and appropriate legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies and to provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses."

3.5. CONCLUSION

The goal of this chapter was to discover legal instruments that lend support to the offender, the community, and particularly the victim. Evidence of the needs and rights of the actors and particularly the victims exist, albeit without firm acceptance by states. In conclusion, the 1985 Victim Declaration, the 1992 Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, the 1998 Rome Statute of the ICC and the Bassiouni principles are the basic instruments used to highlight and legitimise offender, victim and community rights.⁴⁴¹

The fundamental aim of reparation, as an internationally recognised right, was mentioned as early as 1948.⁴⁴² From 1985 onwards, the international community began adopting and recommending principles related to individual and collective rights. Based on this development, the individual offender has been defined as a natural person, over the age of 18, who commits, aids and abets, incites and in other ways participates in a crime, and who qualifies for individual criminal accountability,⁴⁴³ according to the elements of the crimes he is accused of having committed. The individual and collective victims have been defined a victim where “as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person’s fundamental legal rights...the victim may also include a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.”⁴⁴⁴ The community has been defined broadly, as a group that has collectively suffered indirect harm. These definitions and individual as well as collective needs to know the truth, access justice and be repaired further explains and justifies an assimilated justice process, which puts the crime victim in focus, but it also gives further support to the application of more victim and community focused fundamental aims.

Offender rights have been developed and, more specifically just-desert punishment. The victim has likewise, however only recently, been given a role in the legitimisation of criminal justice. Recognition of collective victims and the community may add further legitimacy, and, in

⁴⁴¹ Victim Declaration 1985; the Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, 1992; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; ICC Statute, 1998; Bassiouni principles (incl. van Boven 1997, Joinet 1997) and see listed instrumental framework.

⁴⁴² In the UDHR, art. 8 (if not earlier, in S.3 of the 1907 Hague Convention).

⁴⁴³ Art.25, ICC.

⁴⁴⁴ Princip.8, Bassiouni principles.

order for these actors' needs and rights to be realised,⁴⁴⁵ the chapter has indicated a need to assimilate restorative justice mechanisms with criminal justice. Assimilated justice can add legitimacy to the actors, by recognising and involving the actors and their rights, in assimilated justice. This is further discussed at the end of chapter four.

The latest UN Basic Principles on victim rights to justice and reparation confirm the existence of a duty to prosecute or extradite, and lay down principles for states on how best to guarantee the application of state obligations in the domestic systems, in accordance with international law. The state obligations include taking appropriate legal and administrative measures, in order to prevent violations, investigating and prosecuting the offender, and providing effective and prompt reparation to the victims.⁴⁴⁶ The state duties can also be approached from a focus on the rights, which points towards a judicial process, as an entitlement by the actors to exercise their rights through.⁴⁴⁷ It must be recognised that criminal justice must provide a fair process for the offender, the victim, and the community, and balance the interests of all the parties. Today victims have rights, both individual and collective and not just needs.⁴⁴⁸ The combination of extensive and demanding duties, especially on states in transition away from gross human rights abuses, and correlating rights can find expression in the mechanisms provided by assimilated justice.

Assimilated justice could add legitimacy to the justice process, and hence also to the actors, by supplying the fundamental aims; the rights and needs of the actors; and the state duties.⁴⁴⁹ It is also important, once again, to highlight that even if criminal justice could process and enforce the rights and the duties that are called into effect by the international core crimes, criminal justice could not single-handedly safeguard the individual and collective rights and needs of the actors or indeed the fundamental aims.⁴⁵⁰ If criminal justice were to be put to such a test, it could result in justice being done for only a few individuals, with the unfortunate possibility of impunity threats, in the form of an unprotected collective community and an inability to promote truth, justice and

⁴⁴⁵ And the fundamental aims of truth, reparation, and reconciliation, see ahead.

⁴⁴⁶ See behind, Princip. 1, 3-6, Bassiouni principles.

⁴⁴⁷ Extensive discussion exists in legal philosophy on the relationship between rights and duties, however not further discussed here. The position taken here is that rights and duties must co-exist as they are interrelated, and basic human rights require both positive intervention and prevention by the state; Dworkin, 1977; Miller, 1979; Brownlie, 1990; Steiner & Alston, 2000.

⁴⁴⁸ The cornerstones being the 1985 Victim Declaration, the van Boven and Joinet reports of 1997, the ICC of 1998, and the Bassiouni principles.

⁴⁴⁹ See ch.4, where needs and rights of social, distributive justice is treated as a necessary prerequisite to assimilated justice, and part of the philosophical demonstration of renegotiating the social contract in order to achieve the assimilated justice goals in states where no legal or fair justice exist. The state can therefore not represent the actors and the community.

⁴⁵⁰ Which are scrutinized in the following ch.4.

reconciliation. Restorative justice, with its more social and community-based agenda,⁴⁵¹ may assist criminal justice with the addition of a collective focus. However, without including the criminal justice system's individual focus, individual rights, especially those of the offender, may be overlooked for collective and local particularities. The aspiration of criminal justice to create and uphold law and order is partly done through its primary aims of just-desert punishment and deterrence. Such objectives must, in relation to the international core crimes, be accepted and applied, not only with regard to their normative application,⁴⁵² but also so as to demonstrate with authority to the world that offenders of such crimes must be brought to justice. Further facilitating actor participation through the criminal justice system is possible; however mechanisms with restorative and collective capacities should be welcomed, in order to promote community involvement. Restorative justice means are recognised as beneficial means towards repairing, healing, and reconciling the actors.⁴⁵³ Such means must not be seen as representing the other extreme of criminal justice, but rather as another foundation for assimilated justice and as another means of fighting impunity. Many international legal instruments incorporate the principle of combating impunity and the collective notion is not new. According to international law, particularly as elaborated since the Nürnberg Tribunal, crimes against humanity include gross actions against communities and even entire civilian populations.⁴⁵⁴ To hold the offender accountable to his victims and achieve a legitimate justice process, justice is not only established and reached through the fundamental aims of truth, just-desert punishment, and deterrence, but also by establishing effective individual and collective reparation and reconciliation. All such aims must remain a fundamental goal of international justice, even if unachieved. The time has come for these fundamental aims to be further elaborated.

CHAPTER 4: FUNDAMENTAL AIMS OF ASSIMILATED JUSTICE

4.1. INTRODUCTION

⁴⁵¹ Further discussed in a later chapter. However, ch.4 treats aspects of social justice as a prerequisite to assimilated justice for the actor rights and needs.

⁴⁵² Of *e.g.* universal jurisdiction.

⁴⁵³ See *e.g.* Victim Declaration, 1985 and the Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, 1992; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>

⁴⁵⁴ Guissé, 1997. According to the preamble of the Hague Convention, 1907, populations remain under the protection and the rule of law of states. The duty to prosecute and punish crimes under international law rests primarily with the state on the territory of which the crimes were committed, and in which the perpetrators can be apprehended, although universal jurisdiction assists by supplying other institutions and jurisdictions.

The overall focus and objective of the thesis is to develop support for assimilated justice, by means of assimilating criminal justice with restorative justice mechanisms.⁴⁵⁵ So far, different types of impunity have been identified, all of which pose a threat to justice processes, by preventing or restricting them. Certain types of amnesty and immunity can be distinguished as legitimately restricting justice, usually by partly limiting the prosecutorial process. Such impunity threats, the exclusion of prosecutorial processes and the inability to hold offenders of the international core crimes individually accountable give credence to the need for assimilated justice. Assimilated justice is able to hold the offender individually accountable, according to universal legal principles, while also recognising the victim and the community. Assimilated justice broadens the notion of impunity by including ignorance of the victim and the community within its scope; it thereby avoids narrowly defining impunity and focusing exclusively on the prosecutorial process. Through the assimilation of restorative justice with criminal justice, assimilated justice can, in the face of impunity threats and restricted justice, provide a justice process that is flexible in its application of criminal justice aims and of restorative justice aims. Laying the foundations of assimilated justice, the actors, who must ultimately be the beneficiaries of the justice process, have been identified, and a more specific focus given to the victims. The actor's needs and rights find support in the fundamental aims, which also serve to clarify the corresponding duties discussed in this chapter. The recognition and involvement of the actors in assimilated justice adds legitimacy to the process, to some extent through the mere recognition of the actor and his needs and rights, but also through certain fundamental aims, whose values work towards actor recognition and assimilated justice. The actor needs are treated as a necessary prerequisite to assimilated justice, a base on which to renegotiate the concept of justice, in order to achieve the assimilated justice goals in states in which no legal or fair justice system exists.⁴⁵⁶

The purpose of this chapter is to continue laying the foundation for assimilated justice and to establish further legitimacy by ascertaining the fundamental aims of the assimilated justice objective.

To accomplish this, the fundamental aims are introduced and discussed through their underlying theories and applications. Two sets of factors are thus presented: the theory of each aim;

⁴⁵⁵ Again, in short, assimilated justice is understood as legitimate justice that is answerable to the actors who are involved in and affected by the harm done.

⁴⁵⁶ Where the state can therefore not automatically represent the actors and the community in a fair and equal manner; Rawls, 1971, p.60. Distributive justice of rights to some extent presupposes liberty and equality, which can be difficult in terms of states in transition. See Sadurski, 1985. Assimilated justice conceptualises justice, with a right-based approach in mind, within both the rule of law dimension, and the local particular restorative justice dimension. See ahead, last section of this chapter.

and their application, with regard to the actors, as necessary principles for the establishment of legitimately assimilated justice.

The first factor contains the fundamental aims of truth, just-desert punishment, deterrence, reparation, and reconciliation. Justice seeks to oppose impunity, most immediately via prosecution and punishment, which are made possible through the achievement of the first three fundamental aims introduced: truth, just-desert punishment and deterrence. However, it is suggested by this research that the fight against impunity through assimilated justice must also aim at reparation for the victims and at reconciliation between the offender and the victim, between the offender and the community, and finally within the community. The fundamental aims of reparation and reconciliation are therefore added to the fundamental aims of truth, just-desert punishment and deterrence. These aims are argued to be comprehensive in their reach. Thus, although other classifications are possible, it is believed that everything which may be of value within the criminal justice system, and within the restorative justice system, is capable of being subsumed within these categories of fundamental aims.⁴⁵⁷ Accepting a plurality of aims, assimilated justice also accepts different ways of organising these, by recognising different classificatory schemes. Criminal justice systems may refer to an internal hierarchy of just-desert punishment; restorative justice may refer to reconciliation. However, assimilated justice does not rely on a monist position with one overarching aim, from which all else flows. Rather, a continuum of pluralism reflects a progressive and flexible model, where a diversity of values can be captured. This is true where the fundamental aims overlap conceptually, *e.g.* just-desert punishment presupposes or implies a degree of deterrence. This is also true where the fundamental aims have a symbiotic relationship between them, in empirical terms, where assimilated justice cannot pursue one aim strongly, without pursuing the others.

The fundamental aims also find support in the instruments discussed in the previous chapter. The instrumental framework indicates promising principles of both a criminal and a restorative nature, which support state obligations to, for example, punish certain crimes, to establish the truth, to make reparations and recognise positive actor rights, including the right to truth, to justice and to reparations.⁴⁵⁸ In the Declaration and Programme of Action that followed the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the importance of telling and acknowledging the truth was emphasised, as were the fundamental aims

⁴⁵⁷ *E.g.* the value of rehabilitation, for some an independent aim, can be subsumed under the aim of just-desert punishment and/or deterrence; but also, with regard to the victim and the community, under the aims of reparation and reconciliation.

⁴⁵⁸ See *e.g.* Victim Declaration, 1985; *Velásquez Rodríguez* case, 1988; van Boven, 1997; Joinet, 1997; Bassiouni, 2000.

of deterrence, punishment, reparation, and reconciliation.⁴⁵⁹ The fundamental aims are presented as a legitimising basis for assimilated justice, because they are considered apposite to safeguard the actors affected and involved. In addition, the fundamental aims originate from both criminal as well as restorative justice.⁴⁶⁰ Assimilation will thus be less difficult as the foundation will be shared by the two justice systems that also happen share the fight against impunity and to deal with the same actors.

The second factor contains the application of the fundamental aims, and the search for a balanced application between the aims and the offender, the victim, and the community. What links the fundamental aims is the involvement of the actors in the application of each fundamental aim.⁴⁶¹ Thus, the selection of the fundamental aims are justified, based on the ability to bring out the tension between victim-focused and offender-focused aims and the relative neglect of the former, besides the comprehensiveness of the aims. Ignoring any of the actors, their truth, their suffering or their right to justice, is effectively the same as pronouncing that actor (or those actors) irrelevant. If the community views the justice process as unjust, the process will not be supported and, without support, the moral legitimacy of the justice process is lost. If the offender is not included, accountability can be proclaimed but it will lack punitive, deterring or reconciling results. If the

⁴⁵⁹ Durban Declaration and Programme of Action, 2002. In the Declaration, see e.g. #98 “We emphasize the importance and necessity of teaching about the facts and truth...” #99 “...affirm that, wherever and whenever [human rights crimes and violations] occurred, they must be condemned and their recurrence prevented.” #101 “...as a means of reconciliation and healing, we invite the international community and its members to honour the memory of the victims...” #102 “We are aware of the moral obligation on the part of all concerned States and call upon these States to take appropriate and effective measures to halt and reverse the lasting consequences of those practices.” #104 “...reaffirm as a pressing requirement of justice that victims...should be assured of having access to justice, including legal assistance where appropriate, and effective and appropriate protection and remedies, including the right to seek just and adequate reparation or satisfaction for any damage suffered...” #106 “We emphasize that remembering the crimes or wrongs of the past...unequivocally condemning...and telling the truth...are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity.” Programme of Action #54(a) “To recognize that sexual violence which has been systematically used as a weapon of war...is a serious violation of international humanitarian law that, in defined circumstances, constitutes a crimes against humanity and/or a war crime...(b) To end impunity and prosecute those responsible for crimes against humanity and war crimes...as well as to ensure that persons in authority who are responsible for such crimes, including committing, ordering, soliciting, inducing, aiding in, abetting, assisting or in any other way contributing to their commission or attempted commission, are identified, investigated, prosecuted and punished.”

⁴⁶⁰ These aims are chosen as they represent some of the primary aspirations of each justice system. Criminal justice seeks to investigate the truth relevant to just-desert punishment, and deterrence; restorative justice generally seeks to establish the truth, and work towards reparation, and reconciliation. In order not to blur the primary aims of assimilated justice, other aims, e.g. rehabilitation, later discussed, are viewed as secondary, and to some extent included in the fundamental aims. For general information on different justice disciplines, see e.g. these websites for a collection of works:
<http://www.wvu.edu/~lawfac/jelkins/legstudforum/masthead/links/links-disciplines.html>;
<http://sosig.esrc.bris.ac.uk/sociology/>;<http://www2.fmg.uva.nl/sociosite/topics/>;
<http://aio.anthropology.org.uk/aio/AIO.html>

⁴⁶¹ The basic actor rights give rise to duties of the state and the justice system, ch.3. Through the application of the fundamental aims, the actors are recognised and involved, which in turn necessitate ingredients of social justice at all levels of the assimilated justice application. The duty to recognise and satisfy the rights remains with the state. The needs preempt the rights. Rights and duties have been discussed and developed in distributive justice philosophy since Aristotle, 1986; Rawls, 1971; see ahead.

victims are not taken into account, justice may be unduly subservient to the interests of the offender, possibly creating a desire for revenge. This is of particular importance in a community where the individual and collective needs of the actors have not been recognised.⁴⁶²

This chapter considers which actor each aim focuses on, and whether the focus is individual or collective. This is required in order to support the involvement of the individual offender, individual and collective victims, as well as the collective community, with the goal of establishing assimilated justice, able to safeguard the parties affected by international core crimes. This should subsequently guarantee the application of the fundamental aims. Assimilated justice thus reflects a repository category, which describes, in aggregate form, the good which can be produced if the fundamental aims are pursued.

The three actors: offender, victim and community, are referred to in a relationship.⁴⁶³ The chapter begins by considering each of the fundamental aims, beginning with the fundamental aim of truth. In order to attain the goal of finding a balanced application of the fundamental aims and hence also the actors, the potential focus of the application of each aim is highlighted. Once each fundamental aim has been considered, the chapter will look at the fundamental aims in equilibrium, where the legitimacy of assimilated justice will be considered with the assistance of a philosophical renegotiation of the social contract.⁴⁶⁴

4.2. TRUTH

The first of the fundamental aims of assimilated justice to be discovered is the aim of truth. It is important to begin with this aim, as truth is the source of the facts needed to prosecute and punish; to assign deterrent measures; to know who to repair, for what; and finally to understand the measures needed to forge a reconciliation. Besides treating truth in this instrumental manner, where truth serves the other fundamental aims (as a means to other ends), it will be seen how truth is also important for its expressive quality (as an end in itself).

The first part of this section reflects on the notion of truth, in relation to which of the actors truth can potentially focus on. The second part reflects on the notion of truth in relation to memory

⁴⁶² Which can be presupposed in states with a past filled with international core crimes and a weak or inexistent fair and just representation of the actors, by the state.

⁴⁶³ Once more, offender refers to the person who commits, aids and abets, incites and in other ways participates in a crime; victim refers to the person who suffers direct harm from the crime; and community refers to the victims at large, the state and its citizens who also, but indirectly, suffer harm, see behind, ch.3.

⁴⁶⁴ Where a theoretical exposition is taken to renegotiate the social contract, demonstrating how assimilated justice can recognise the fundamental aims that are believed to recognise the basic needs and rights of the actors, in relation to a legitimate justice process of international justice: truth, just-desert punishment, deterrence, reparation, and reconciliation.

and then moves on, in the third part, to the importance of truth being acknowledged. The fourth and final part of this section on truth considers the fundamental aim of truth in relation to assimilated justice, where truth functions as both expressive and instrumental.

The concept of truth requires examination, as truth holds a great capacity for enhancing the legitimacy of a justice process. Truthful truth, according to Habermas,⁴⁶⁵ is a concept that belongs to all the actors, is dependent on the involvement of all the actors' narratives, and is therefore authorised by all the actors. Moreover, it may provide a foundation for the other fundamental aims, which might be said to depend in some way on the establishment of truth. For example, the aim of just-desert punishment or the aim of reparation cannot legitimately be applied and enforced without first knowing the truth. Furthermore and in accordance with the priority of including the victims in the justice process, truth may significantly benefit the victims. For example, truth expressed and acknowledged may serve as symbolic reparation and can assist in the restoration of dignity.

At the same time, truth in the abstract may be difficult to relate to and therefore some examination of its application is called for. This will later aid our exploration of the way in which truth is affected by different justice processes.⁴⁶⁶ "Truth is so commonly used that it seems to be a transparent notion, clear to all who are involved or interested in redressing past abuses, but 'truth', like 'justice' and 'reconciliation', is an elusive concept that defies rigid definitions."⁴⁶⁷

4.2.1 INCLUSIVE TRUTH: INDIVIDUAL AND COLLECTIVE FOCUS

Truth is a far-reaching fundamental aim and in the abstract it has the potential to serve and involve all the actors, without necessarily giving a dominant focus to any particular actor. In fact, its inclusiveness to some extent depends on this broad actor involvement.

Truth may supply the community with the individual responsibility of the offender and any possible collective involvement, as well as an acknowledgment of the suffering of the victims and of the community. Truth may recognise reasons not to punish the offender or to mitigate the sentence and, if the offender chooses to contribute to the truth, the offender may feel alleviated of some guilt, which can in turn assist later reconciliation. Truth may hence ease the rehabilitation process, besides working as a deterrent. The offender's contribution to the truth will, of course, also aid the truth investigation and it may give the victim and the community further insight to the violation. The victim's contribution to the truth may, besides supplying both offender and

⁴⁶⁵ Habermas, 1998; 2002.

⁴⁶⁶ See later chapters.

⁴⁶⁷ Parlevliet, 1998, p.142.

community with further insight, also be the beginning of self-remedy and forgiveness. The local community can also contribute to the truth surrounding the crimes by furthering the understanding of any social, political or other factors involved in a larger picture of the truth.

In fact, if truth relied predominantly on one of the actor's understanding of the truth and it were to be acclaimed as truthful, despite lacking one or more of the various narratives represented by the actors involved, it could lead to significant repercussion. Without being able to contribute to inclusive truth, which is the most collectively acceptable version of many subjective narratives, truth loses out on many of its potential effects.⁴⁶⁸ If the larger community does not accept the version of truth so proclaimed, it suggests that a narrow notion of offender-assessed truth has been settled for. This truth will not be able to serve as a healing or reconciling instrument for the victims, and may risk outright rejection. This in turn signifies failed social justice and a lack of moral legitimacy.

Truthful truth must be legitimate and must above all correspond to the facts.⁴⁶⁹ Second, it must be normative in that the investigator and the investigated (that is, the person receiving the statement as well as the person making the statement) are both able to make evaluative judgements.⁴⁷⁰ Third, the statement (the truth told) must be sincere.⁴⁷¹ The first point of departure would refer to forensic truth, in which the different narratives have been compared and corroborated with factual investigations. The second point illustrates the fact that the notion of truth is process-sensitive and requires professionals to assess and manage the truths received, testified to, and investigated. Third, sincerity is vital at all levels. The sincerity of the facts is ascertained through the forensic investigations and the sincerity of each individual's narrative is ascertained through professional evaluation. The third point is that the final version of the truth, *i.e.* the inclusive truth that will be told and acknowledged must also be sincere, and be managed accordingly, which is a public responsibility on behalf of the authorising public institution.

Hence, the overall achievement of the truth is dependent on the type of justice and, more specifically, the truth process applied.

Besides the potential of absorbing all the actors in the essence of truth, truth is also individual and collective. It is individual through each person's individual truth narrative. Individual truth can become collective, through inclusive truthfulness. Collective truth can exist *per se*, in a

⁴⁶⁸ As is later discussed in some detail, truth can serve as both an end and as a means to other ends.

⁴⁶⁹ *I.e.* it cannot be concerned with fantasy or makebelieve.

⁴⁷⁰ Consequently, special caution must be taken with regard to *e.g.* minors or mentally ill giving statements.

⁴⁷¹ On truthful truth, see Habermas, 1984; 1986; 1998; 2002; Kelsen, 1966, 1989.

close-knit familiar collective community that e.g. shares the same ideology, is able to perceive the same experiences, and has through this closeness become one.⁴⁷²

Additionally, truth does not just exist, waiting to be processed, but is primarily dependent on an internal subjective process of recollection. The importance of memory will be discussed next.

4.2.2 MEMORY AND TRUTH

"Forgetting lengthens the period of exile! In remembrance lies the secret of deliverance."⁴⁷³ Truth depends to a great extent on memory, which, in turn, rests on various factors. To know what to search for in our memory, we have to be selective and this selectivity is present in the initial question concerning Habermas' reflection on factual truth - what incidents are we searching to remember?⁴⁷⁴ It is a phrase that "lends [the past] form, diachrony, temporal succession, a quality in the spectrum of classifications, representation on the scene of various imaginaries and sentences."⁴⁷⁵ As the citation illustrates, selectivity is present in the succession of various reflections and personal evaluations of the past. Thus, memory of the past will never be able to reflect the actual past and, as a result, nor will truth. If every recollection is subjective then, as suggested by post-modern philosophy, there can be no objective truth and it would thus be dangerous to rely only on narrative truth without comparing and evaluating it against the uncovered and investigated forensic truth.⁴⁷⁶ Van Dongen captures the notion well: "I do not believe in truth, I believe in perceptions...People have a certain impression of how reality is, which is their perception of reality; they call it objective reality themselves, but essentially, it always is subjective reality. Thus, for most people there is no wedge between reality and perception: perception *is* reality."⁴⁷⁷

"Truth" may mean the "most acceptable perception" of truth, *i.e.* inclusive truth. Memory is the perceived truth of the individual and can become collective through the influence of others. This can be imagined in victimised societies where, after years of instability and atrocities, the individual may doubt his perception and the memory becomes vulnerable to the influence of others' expressed memories. Yet, in order to be inclusive, it must be the most widely acceptable truth, through examined truthfulness, according to the steps earlier referred to. It is thus not enough to influence

⁴⁷² See earlier chapter, discussing collective responsibility and criminal regimes.

⁴⁷³ Words by Hasidism, Bal Shem Tov, in Hartman, 1986, p.103, 111.

⁴⁷⁴ *Id.*

⁴⁷⁵ Lyotard, *Heidegger and the Jews*, 1990, p.12, quoted in Christodoulidis, 2001, p.213.

⁴⁷⁶ See e.g. Grenz, 1996; Foucault, in Gordon, 1980.

⁴⁷⁷ Reflections by Van Dongen, in Parlevleit, 1998, p.146. Truth is necessary, especially after the international core crimes, in states, often in transition, that struggles with a commonly shared past, and must move towards a shared future.

the individual memory with external memory or for individual truth to become collective truth, if that collective is not representative of a memory shared by society at large. “The victimized populations are often clear about what abuses took place and who has carried them out... Given this knowledge, the importance of truth commissions might be described more accurately as *acknowledging* the truth rather than *knowing* the truth.”⁴⁷⁸ Hayner’s comment probably refers to the importance of grasping and acknowledging victim statements as part of the truth, in order to achieve inclusiveness. However, Hayner’s comment may also refer to the collective victims’ knowledge as representative of a collective truth, born out of individual memory that has been influenced by others, of the same collective. This must not be confused with inclusive truthful truth, as the victims’ knowledge of the past has not been legitimised and may actually only rely on memory. In countries such as Argentina, Chile, and El Salvador uncovering the truth was necessary because the systems of disappearances and torture in these countries hid the facts and denied the truth.⁴⁷⁹ In countries such as the former Yugoslavia where multiple truths representing each ethnicity may exist, “adjusting” the truth into the most widely acceptable version may likewise be necessary.⁴⁸⁰

Truth is individual and collective and is also realised in these ways. Truth is not just there, existing in the open, and it does not just surface into something collective by the acknowledgment of one version. As with all truths, it means nothing and serves no-one until the individual faces the truth about himself through self-knowledge. Once this has been undertaken and the individual owns his memory, the individual notions can become an acceptable collective version of the truth. “As far as forgetting is concerned, this memory of the memorial is intensely selective; it requires the forgetting of that which may question the community and its legitimacy. This is not to say that memory does not address this problem; quite the contrary. It represents, may and must represent, tyranny, discord, civil war, the mutual sharing of shame, and conflicts born of rage and hate. It can and must represent [them] in a discourse that because of the single representation it makes of them, ‘surmounts’ them.”⁴⁸¹

The importance of allowing for individual reflections that may lead to a broader picture of an acceptable collective truth must be emphasised for its inclusiveness. Likewise, as truth is

⁴⁷⁸ Hayner, 1994, p.607.

⁴⁷⁹ See generally Cuya, 1999, on TCs in Latin America and Argentina’s National Commission on the Disappeared report *Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas*, 20 Sep.1984; Chile’s National Commission for Truth and Reconciliation *Report of the Chilean National Commission on Truth and Reconciliation* (the Rettig Report) Feb.1999; El Salvador’s Commission on the Truth for El Salvador report *From Madness to Hope: the 12-Year war in El Salvador: Report of the Commission on the Truth for El Salvador*, 15 Mar.1993

⁴⁸⁰ 22 Feb.2002 Serbia and Montenegro inaugurated the Truth and Reconciliation Commission to investigate war crimes committed in Slovenia, Croatia, Bosnia and Kosovo.

⁴⁸¹ Id., Lyotard, p.7, in Christodoulidis, p.223.

believed to be instrumental to reconciliation and other fundamental aims, it must be emphasised how essential it is to build reconciliation on the basis of individuals who are the proprietors of the truth and who are members of the larger community.

4.2.3 TRUTH ACKNOWLEDGMENT

“Truth is the first casualty of war”⁴⁸² and must therefore be the first priority in the retreat from war and the establishment of justice.

The importance of truth acknowledgment was referred to in the earlier quote by Hayner⁴⁸³ and is intertwined with the entire truth process, from individual memory to inclusive truthful truth. Knowledge and acknowledgment of the truth is promoted by a truth discovery process or truth investigation. The individual discovery of truth may be achieved through psychological counselling and analysis, reliant on an individual and internal acknowledgment. A witness may no longer be able to live with what he has experienced or witnessed or what he has knowledge of and has kept quiet about. By acknowledging it, he denies the denial and may be ready to have this publicly known. It may also come about through external revelations, expressed through truth investigations. It is important, especially after the occurrence of human rights atrocities that everyone knows and acknowledges the emerging truth. “Let the history we lived be taught in the schools, so that it is never forgotten, so our children may know it.”⁴⁸⁴

Truth can be dangerous, both individually and collectively and, when a truth discovery process is started, mechanisms must be put into place to prepare for the support needed to channel the truth. This refers to the second phase of legitimising the truth,⁴⁸⁵ where truth requires normative and professional attention; both the investigator and the investigated must be able to make evaluative judgements.

Once established, it is important not to let the truth become nothingness (again) by not caring for it. “Silence lost its way when a hand opened the doors to the voice.”⁴⁸⁶ For the purpose of enabling truth acknowledgment, and maybe for this purpose alone, as it is a vital purpose, the establishment of a truth discovery process, e.g. a TC may have to become a legal requirement, at least in states that cannot rely on other institutions. The previous chapter identified a right to know

⁴⁸² Allister Sparks, reporting on War on Iraq, e-news, SA, 27 March 2003.

⁴⁸³ “[T]he importance of truth commissions might be described more accurately as *acknowledging* the truth rather than *knowing* the truth” Id. p.607.

⁴⁸⁴ Testimony given to the Guatemalan Commission for Historic Clarification, Prologue, Memory of Silence, 1999, at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html>

⁴⁸⁵ *Supra*, Habermas, 1998; 2002.

⁴⁸⁶ Francisco Morales Santos, *Al pie de la letra*, Memory of Silence, Guatemala Truth Report, 1999.

the truth and a state duty to establish the truth regarding past atrocities.⁴⁸⁷ According to the UN Sub-Commission for the Prevention of Discrimination, it is incumbent on the state to preserve memory: “A People’s knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfilment of the State’s duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.”⁴⁸⁸

If truth can wield this enormous power of changing a conception or even a memory of the past, we must agree with Adorno that “[e]nlightenment about what happened in the past must work, above all, against a forgetfulness that too easily goes along with and justifies what is forgotten”.⁴⁸⁹ Truth, once established, must aim towards the future and towards reconciliation with true acknowledgment of the past. Truth is too valuable a commodity in itself to be treated *only* as an end, although the value of expressive truth may be just that. Truth may well be transformed or instrumentalised in the service of general deterrence and social reconciliation for example.⁴⁹⁰ Unless it is used as part of a process whose objective includes other aims apart from truth, it may easily become nothingness.

Denial of truth is not rare and certainly not incomprehensible in cases where impunity, lies and injustice have been the predominant culture. It is not until the individual and the collective community are faced with truth acknowledgment, *i.e.* multiple reports, cases and actual individual narratives that denial becomes difficult. However, denial is never made impossible, as Cohen’s accounts of denial indicate.⁴⁹¹ Cohen deals with personal and political reactions to information and images about inhumanities, cruelty and social suffering. The blocking out, turning a blind eye, shutting off, not wanting to know, are all expressions of denial, according to Cohen. “Maximum deniability” may occur when governments deny their responsibility for atrocities and this is why institutions, such as truth commissions, try to overcome cultures of denial, suppressing past horrors.⁴⁹² There is also the “passive bystander” - denial by those who stand by and do nothing - and this may include omissions by the international community. It is also why organisations like Human Rights Watch try to overcome our indifference to distant suffering and cruelty.⁴⁹³

⁴⁸⁷ See previous chapter and *e.g.* Princip.25, Bassiouni principles, 2000.

⁴⁸⁸ Cited in Hayner, 1996, p.173.

⁴⁸⁹ Adorno, T. *What Does Coming to Terms With the Past Mean?* p.125, in Hartman, 1986.

⁴⁹⁰ For truth to aid the other fundamental aims, affirmative action is required, on behalf of the justice process, in which the truth is then instrumental.

⁴⁹¹ Cohen, S. 2001. *E.g.* alcoholics who refuse to recognize their condition, or the wife who doesn’t notice that her husband is abusing their daughter, are supposedly “in denial”.

⁴⁹² *Id.* 2001.

⁴⁹³ *Id.* Cohen refers to this as “compassion fatigue”.

Nevertheless, the wider the truth and the more it covers, with truth acknowledgment of the crimes and identification of the actors, the more difficult it is to sustain such denial.

4.2.4 TRUTH IN PROCESS: EXPRESSIVE & INSTRUMENTAL

We have seen how truth is individual and collective, beginning with an internal memory acknowledgment that can lead to an inclusive truth account of different narratives, weighed against factual evidence, which must be acknowledged in order to avoid denial. Truth is also dual in motive, being both an end in itself (expressive truth) and a means to other ends (instrumental truth). Depending on the focus of the justice process, the fundamental aim of truth can be realised in different ways. Truth in process is explored in order to know what potentials, out of this fundamental aim, the actors can best benefit from under assimilated justice.

Expressive truth, besides being just that, truth expressed, is a transformable means into other ends. Although it is difficult to perceive of a justice process that would not require the fundamental aim of truth in an instrumental manner, expressive truth should first be recognised for its own ends. Expressive truth is informative, and the effect of the information it expresses depends on whom it affects. It may be shaming, deterrent and healing all at the same time, but for different actors. The truth-discovery process of restorative justice is often set up with the aim to establish the truth, an aim satisfied once truth has been expressed. However, truth overlaps with and to some extent brings about other aims the TC may have been mandated to satisfy, *e.g.* aims of reparation and reconciliation. If the aim of truth is viewed in this manner, in which all actors participate in the composition of truth or are at least able to concur on one collective perception of the truth, the very discovery of truth may deter by the fact that the pure knowledge of atrocious violations may help prevent future violations. The truth may also shame the offender and it may heal the actors,⁴⁹⁴ through the knowledge and acknowledgment of what actually took place. At the same time, expressive truth may reconcile, through the fact that all actors have already come together intentionally to create a common past with a better knowledge of one another. Expressed truth may also have the effect of symbolic reparations.⁴⁹⁵ Examples of such expression are published truth, public offender confession and apology. The articulation and dissemination of truth may not only

⁴⁹⁴ If the offender's narrative is made through public confession of the atrocious acts, for no other reason than to establish the truth, truth is not instrumentally used to establish responsibility or any other aim. It may however be difficult to get offenders to confess and add to the truth outside the legal system, without some value-added instrument, such as amnesty.

⁴⁹⁵ Any other type of reparation requires affirmative action, where truth assists in an instrumental manner to indicate whom the victim is, and what elements of reparation appear necessary. See earlier chapter for different elements of reparation.

help the immediate victim's mental state, as a form of reparation, but also the community. The very process of discovering truth may have therapeutic and conciliating effects, as may the articulation and dissemination of the truth. A society that lives with falsehood and the repression of truth loses its perceptions of what is right or wrong, good or bad. Thus, the actual truth discovery process, with the end result being truth expressed, is an important value, as well as being a right and a duty, that not only necessitates the recognition of all the actors, but it may also assist all the actors, as the different parts of this section indicates. This emphasises how process-sensitive the notion of truth is and how important it is for all actors to experience involvement and some ownership of the truth.

Instrumental truth means that the notion of truth serves as a means towards other ends. If the restorative justice process is mandated to, for example, identify responsibility and make recommendations towards reparations and reconciliation, the focus of the truth discovery process changes. The individuals become more relevant and the process necessitates an in-depth individual focus relevant to each particular crime or case. If responsibility is declared, it must be accompanied by legal fact-finding elements, to ensure that guilt is not attached to an innocent individual. The collective focus is also important, where the truth discovery is required to focus on truthful facts relevant to the collective needs for reparation and reconciliation.

In the context of criminal justice, the fundamental aim of truth is instrumental, legal truth, established in a legal fact-finding prosecutorial process. It is individual truth instrumental to a specific case, in which the evidence is examined to produce factual knowledge (*i.e.* forensic truth). Such individually focused instrumental truth is necessary in order to justly and fairly indict, prosecute and punish. As part of a prosecutorial process, truth justifies and influences the fundamental aim of just-desert punishment. To a lesser but still important extent, instrumental truth also explains and leads the way towards the fundamental aim of deterrence and individual and collective needs to reparation. The truth acknowledgment is made public through acknowledging it in public trials and judgements, reinforced and supported by legal authority. This legal authority invites fewer challenges and doubts concerning the truthfulness of the truth acknowledged compared to truth reports issued by truth commissions, which may lack governmental support to execute the recommendations of the report.⁴⁹⁶ However, the instrumental truth of a prosecutorial process is only investigated with regard to its applicability and relevance to one particular case and it may not be as difficult to achieve collective acceptance. Legal truth must also go through steps of legitimisation and the testimonies of the individuals are corroborated against the forensic truth. Expressive value of the legal truth may exist *per se*, but it is not investigated for that purpose and

⁴⁹⁶ More on this in later chapters.

tends to have a much narrower agenda. A collectively acceptable inclusive truth for the entire community is not relevant to the prosecutorial process. The fundamental aim of truth is thus an instrumental prerequisite for pronouncements based on the criminal justice fundamental aims of just-desert punishment and deterrence. In this case, truth triggers guilt. Through finding truth, one may also find guilt; while it is not true to say that, by finding guilt, one finds all relevant aspects of the truth. Depending on the process within which truth is a fundamental aim, guilt may be no more than a declaration of the established truth (truth-discovery process) or, alternatively, the guilt may be acted upon (prosecutorial process). In a restorative justice process, the guilty are often so proclaimed without being so evaluated and determined before a court; the truth discovered is believed to serve more or less automatically as a punishing, deterring, repairing and healing end in itself. In the case of criminal justice, the guilt is evaluated according to the truth that is found relevant to the case. The truth discovered is thus proven to depend to a large extent on the focus of the process.

4.2.5. TRUTH IN ASSIMILATED JUSTICE

The process from an individually remembered past to a widely and collectively acceptable version of truth is long and difficult and must be initiated immediately by the justice process. The potential reach of the fundamental aim of truth depends on whether the process is one of criminal or restorative justice. It has been established that truth expressed can be an end in itself and it can also be a means to other valuable ends. A restorative justice truth-discovery process may just ask for the truth expressed. A broad and collectively acceptable inclusive truth will be the more vital concern and would entail the involvement of the actors, if the fundamental aim of reconciliation is also intended. A criminal justice prosecutorial process necessarily focuses on the truth relevant to each individual case. The truth investigation is primarily instrumental to the fundamental aim of just-desert punishment and, to some extent, to the fundamental aim of deterrence and individually focused means of reparation.⁴⁹⁷ Truth is a fundamental aim that must be acknowledged, individually and collectively and legal authority lends further legitimacy to the truth established. The dual aspects of truth are present from the beginning of the process, through individual remembrance, to individual realisation and acceptance, to a possible collective community acceptance.

What is certain is that truth is essential to all processes of justice and that the legitimacy of the fundamental aim of truth depends on the way in which it is processed, since the focus of the

⁴⁹⁷ With regard to international criminal justice and the ICC Statute where the victim right to reparation is recognised.

justice process determines the amount of actor involvement, the reasons for that involvement and the manner. Truth is also representative of a need and a right held by the actors,⁴⁹⁸ and a parallel duty owed by the state and the justice system.⁴⁹⁹

Rather than putting the rich potential of the fundamental aim of truth at risk, a combination of both expressive and instrumental truth would legitimise the fundamental aim. The ideal of assimilated justice would then be able theoretically to combine and involve the actors and their individual truths in a truth discovery investigation of both social and legal truth. Assimilated justice would furthermore be able to handle the truth discovery professionally and normatively. With legal authority it would be able to acknowledge specific individual legal truth, as well as a more social and collectively acceptable notion of truth.⁵⁰⁰

The truth discovery and investigation process' primary task, and also the most difficult, is the evaluation of truth; in relation to individual criminal accountability, the forensic (factual) truth is essential; in relation to a collectively acceptable notion of truth, the inclusive social truth is essential. Forensic truth is the main objective of instrumental truth in a prosecutorial process that is further evaluated against corroborated evidence.⁵⁰¹ Expressive truth in a truth-discovery process is inherently more collective than individual, as it is not equipped like a judiciary to evaluate evidence and facts case by case but focuses rather on a larger picture in which individual cases and testimonies may be included. While a certain amount of the legal truth established in an individual case relating to individual criminal accountability may disturb aspects of the broader inclusive truth establishment, rationally there can be no contradiction or one of the truths is untrue.⁵⁰² The more individual focused legal truth, which will be sought out immediately in order to indict and prosecute, may be established during the truth discovery of the more social and collective truth. As a result, the legal truth may actually assist the social truth, by *e.g.* indicating certain violations that may conceal collective responsibility or state involvement, which the truth investigation of the

⁴⁹⁸ "This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future..." Joinet, 1997, Princip.1-4.

⁴⁹⁹ "...Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right. Two series of measures are proposed for this purpose. The first is to establish, preferably as soon as possible, extrajudicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations." Joinet, 1997, Princip.1-4.

⁵⁰⁰ Hence a relationship with all the actors equally involved, as theoretically truthful truth must be able to create a feeling of ownership and concurrence of all.

⁵⁰¹ Forensic truth requires reliable data and evidence, but records and reliable memories are often missing after atrocities, which could encourage a more actor-, and specifically victim-focused truth investigation.

⁵⁰² Of course not all individual narratives can be true, or be part of the collective truth, and concerning the past, we may have to agree to disagree on certain aspects.

prosecutorial process cannot thoroughly examine.⁵⁰³ Combining historic, geo-political and social attributes with individual narratives provides a larger picture that may be pacifying and socially reconciling. It is however also important to recognise that the only way to avoid or at least bring suffering and a general feeling of collective responsibility to an end is to establish individual guilt, with legal truth and authority. Legal attributes establishing the truth are of vital importance also in other respects. A rational legal process can aid a rational living memory and avoid or lessen moralistic attributions of responsibility becoming the collective memory. Guilt will be less problematic and less questionable when authoritatively established, and a legal process should thus always be involved in establishing the truth. As discussed in earlier chapters, because impunity threats can possibly restrict justice processes, it is important to enable assimilated justice to take as many directions as possible. Moreover, because of the nature of the international core crimes, a dual focus on the individual and the collective is important, supported by the instrumental framework with individual and collective actor rights. From the victim's perspective, there may exist not just a burning need to know the truth of their case, but also to have it proven and publicly recognised; in this way the victim can escape his own sense of responsibility and public denial.⁵⁰⁴

By public truth acknowledgment, both of the legal truth applicable to the individual case and of the collectively acceptable version of truth, the victims have been heard and had their suffering recognised. There is a political as well as a moral need to truth acknowledgment of both legal and social truth. The actors, as well as the fundamental aims, gain from the possibility of investigating and acknowledging both aspects in assimilated justice. Truth acknowledgment of truthful inclusive truth must be one of the main objectives of a restorative truth-discovery process, especially in the case of truth commissions not responding to the rule of law and legal judgement. Obviously, the forensic truth that is instrumental to the prosecutorial process is also acknowledged with legal authority, making the legitimised truth that is relevant to the particular case indisputable. Still, the truth acknowledged in a prosecutorial process is only the truth of one particular case in relation to the legal norms violated.⁵⁰⁵ In order to deny further denial, the acknowledgment of guilt, participation, and suffering constitutes a real step towards democracy and reconciliation. “[T]he revelation of the truth is a useful means to remove the stigma from the victims who are burdened by a sense of responsibility for their own victimization...Society is often inclined to treat victims with a shunning or shame because it is thought that they must have done something wrong to bring about

⁵⁰³ Except to the extent that such responsibility sheds light on the individual whose criminal accountability is the focal point for the case.

⁵⁰⁴ SA TRC Final Report, Desmond Tutu, Vol.1, p.8: “I recall so vividly how at one of our hearings a mother cried out plaintively, ‘Please can’t you bring back even just a bone of my child so that I can bury him’. This is something we have been able to do for some families.”

⁵⁰⁵ With regard to the *mens rea* and *actus reus* of the offender, in relation to the crime committed.

their victimization. Public disclosure of the facts will make it clear that the victim was not responsible or guilty of causing his/her own harm.”⁵⁰⁶ Depending on the circumstances, actual knowledge of the truth may be the essential need of victims of past regimes where crimes have been so effectively hidden and denied that no individual memory has complete knowledge of them. In most cases, however, the comment by Hayner quoted earlier is true: individual knowledge exists, but needs to be confirmed through public acknowledgment, conferring on the knowledge acknowledgement and transforming the individual truth into collective truth.⁵⁰⁷ Truth acknowledgment has appeared so important that Argentinian victims have refused reparations until the *Nunca Más* truth commission establishes the full truth and Eastern Europeans demanded the opening of files from the Nazi era as late as in the 1990s.⁵⁰⁸

Assimilated justice must, like other justice processes, prevent general amnesty following the truth acknowledgment. With the cooperation of the legal truth investigations and the prosecutorial process, the granting of amnesty is made more complicated. Yet a legitimate amnesty would not be able to considerably worsen the situation, since the spread of truth denial and collective responsibility have been hindered by the two truths processed and acknowledged. Furthermore, assimilated justice has other fundamental aims to fulfil. The established legal truth will primarily serve the next fundamental aim under discussion, just-desert punishment.

4.3 JUST-DESERT PUNISHMENT

This section of chapter four discusses the fundamental aim of just-desert punishment. The infliction of punishment is an exercise of state power and the use of punishment is generally justified in terms of state sovereign power to maintain order and protect its citizens.⁵⁰⁹ After an introduction of the fundamental aim of just-desert punishment, the section briefly discusses utilitarian justifications for punishment. The principles behind retributive just desert are then considered, along with their inherent individual offender focus. The section ends by viewing the fundamental aim in assimilated justice.

Theories of punishment try to justify the sanction of the state against the individual by reference either to the individual or to the greater good of all. The former refers to just-desert

⁵²⁹ Netherlands Institute of Human rights, 1992.

⁵⁰⁷ Hayner, 1994, p.607; and see Cohen, 2001; Nagel, T. in Zalaquett, 1989; Wechsler, 1990.

⁵⁰⁸ See Id. and e.g. <http://www.law.harvard.edu/programs/HRP/Publications/truth1.html#anchor1276618>;
<http://www.truthcommission.org/>; <http://www.worldpeacefoundation.org/truthcommissions.html>;
<http://www.usip.org/library/truth.html>; Ball & Chapman, 2001, at
http://muse.jhu.edu/journals/human_rights_quarterly/v023/23.1chapman.html.

⁵⁰⁹ Ashworth, 1998, 2003.

punishment principles, *i.e.* punishment is justified as the correct response to a wrong that an individual has committed; the latter refers to utilitarian principles, *i.e.* punishment is justified as a preventative instrument. The idea that punishment is justified as an instrument inflicted in order to prevent future harms refers to utilitarian theories with a more collective focus than the individual offender focused just-desert principles. Utilitarianism is not considered a valid justification for punishment in assimilated justice; however utilitarian theory is introduced for its important collective values. These will be further developed in the section on the fundamental aim of deterrence.

Punishment is generally perceived as justified if it achieves security, satisfaction and prevention more than it does harm, while being fairly, appropriately and efficiently distributed. This is also the characterization of punishment applied in this study. However, this perception actually incorporates an accumulation of retributive and utilitarian theories.⁵¹⁰ As Hart pointed out,⁵¹¹ and Jareborg also argued,⁵¹² justifications of the criminalisation itself; of the conviction; of the sentence; and of the execution of sentence are required in criminal law theory. Perhaps one theory of justification is not enough however, by combining utilitarian motives with retributive just-desert grounding principles, justification is incorporated at more than one level.⁵¹³ Briefly, the political, ethical and moral justifications and values of the individual offender and the community, with domestic and international support, have led to the criminalization of gross violations of fundamental human rights that are not further queried here.⁵¹⁴ Similar justifications have led to the development of the principle of universal jurisdiction, with regard to the same crimes, to ensure legitimate conviction and sentence. Finally, the normative statutes of international institutions and stable democratic domestic legal systems support legitimate execution of just-desert punishment.⁵¹⁵

⁵¹⁰ The distinction between retributive and utilitarian may only be of internal relevance to criminal justice (*i.e.* the question of how to position the justification for inflicting punishment), while externally the results may remain the same, especially if the different theories' axioms are integrated. Where however punishment would be shaped for utilitarian purposes of prevention, this would not be acceptable.

⁵¹¹ Hart, 1968.

⁵¹² Jareborg, 1988, 1995; ch.5.

⁵¹³ See ch.1. This study is not concerned with criminal law theory *per se* or ideologies of criminalisation (*i.e.* questions of what makes crimes wrongful). The reasons behind the development of the international core crimes are only discussed with reference to jurisdiction and international criminal justice, and not the criminal law theories that support them. See ch.6. for international criminal justice development. Utilitarian motives surrounding prevention incorporate many values that affect the individual and the community and just-desert principles, as we will see, intends fair and just protection principles of the individual. These values affect the justification of punishment, whichever level referred to, according to Jareborg or Hart, Id.

⁵¹⁴ *I.e.* the international core crimes. While questions relating to what makes the crime wrongful are not further discussed, see Jareborg, 2000, differentiating between crime ideologies as: primitive (state-offender focus), collective (legal norm-offender focus) and radical (victim-offender focus); see Duff, 2002, criticising. With regard to the most heinous of crimes, the ideologies behind the international core crimes may perhaps be argued to represent a more radical, yet collective ideology.

⁵¹⁵ Id., and see ch.3 for a brief outline of the jurisdictional set-up of the ICTs and the ICC. More on jurisdiction in ch.5.

All of which is supported by the sovereign state's delegated power.⁵¹⁶ In line with the overall objective of inclusive justice, representing the actors, the view of this study is that it is the state and its victims,⁵¹⁷ who focus on the offender, through the criminal norm.⁵¹⁸ The criminal norm represents a communication of political, ethical and moral values from the community, suggesting that certain conduct is wrongful⁵¹⁹ and, again concerning international core crimes, that such violations affect and harm entire communities and even the international community. There is thus believed to be a combined focus behind the fundamental aim of just-desert punishment, incorporating the role of the state as the protector, together with the voice of the community, which in turn incorporates the voice of the victim.

The view supported throughout this research is that the fundamental aim of punishment is actually just-desert punishment, interpreted as the punitive response to crime inflicted upon the individual offender. While just-desert punishment refers to and incorporates retribution, denunciation, rehabilitation and deterrence, it is the principle of just desert that primarily justifies punishment or the right to inflict punishment, while the effects may be all of the above and the aim may be prevention. To exact payment and to be justly condemnatory, punishment must necessarily be based on a true account of the relevant behaviour. Punishment is then specifically offender-centred.

4.3.1 UTILITARIANISM: COLLECTIVE FOCUS

Many theories of punishment and state power challenge the infliction of harm on an individual by the state and seem to register the accountability of the offender for his action through some species of punitive sanction.

In its pure forms, a utilitarian (consequentialist) theory of punishment would recommend inflicting punishment upon the individual in the public interest. Since Beccaria in the 16th century, the utilitarian view has been that “the object of punishment is to prevent the criminal from injuring

⁵¹⁶ Supra, Ashworth, 1994.

⁵¹⁷ *I.e.* the actors at large, including the victims. See later section, where the social contract is symbolically used to identify the state's authority, sanctioned by the population.

⁵¹⁸ The fact that the state may be represented by the ICC or another international institution; and the community is represented by the larger international community, or the communities of the member states to a particular treaty; does not *per se* change the focus. This is so at least with regard to the international core crimes, and the principles of universal jurisdiction and individual criminal accountability. The crime has been declared a crime, reflecting an international view that such an offence is wrongful, and of international concern. States may then properly exercise the power of punishment. The offender is viewed as a member of the international community. See generally ch.5; Cassese, 1998.

⁵¹⁹ See ahead, last section of this chapter, where the relationship between state, criminal justice and legal order is discussed.

anew his fellow citizens and to deter others from committing similar injuries.”⁵²⁰ This view was supported by Bentham and later on by Hart.⁵²¹ This approach is focused on the interests of the community rather than those of the offender and it is thus representative of a collective focus. According to utilitarianism “What distinguishes a criminal from a civil sanction and all that distinguishes it...is the judgement of community condemnation which accompanies...its imposition... If this is what a ‘criminal’ penalty is, then we can say readily enough what a ‘crime’ is...It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community...Indeed the condemnation plus the added [unpleasant physical] consequences may well be considered...as constituting the punishment.”⁵²² Hart’s moral community denunciation could of course serve social justice through its punitive and deterrent effects. Denunciation is a utilitarian aim, which is not much different from the general idea of deterring the public through condemnation.⁵²³ “The law declares certain kinds of conduct to be wrong, and to be avoided for that reason. Convictions formally censure offenders for their wrongdoings. Punishment also communicates that censure to them. But when we ask why that censure should be communicated through hard treatment punishments, the answer is that such hard treatment adds to the law’s initial moral appeal a prudential, deterrent incentive for obedience.”⁵²⁴ Bentham’s utilitarian theory likewise justifies punishment as serving the larger social good of deterrence.⁵²⁵

According to utilitarian theories, if the notion were supported that punishment produces some independent good that no alternative can produce, the infliction of punishment would be justified for that reason alone. Therefore, if the imposed punishment is believed to produce deterrence or another good, it could be justly imposed regardless of its proportionality to the crime and the guilt. Criminal law may aspire to safeguard the interests of the community, but it must also safeguard against abuse of power, whether by state or individuals inflicting punishment.⁵²⁶ This collective focus appears harsh, unfair, and inhumane with regard to the individual. The social movement of the 1960s, discussed in relation to the aim of reparation, also believed so, and a return

⁵²⁰ Beccaria, 1764; Durkheim, 1893; Foucault, 1978.

⁵²¹ Bentham, 1789; Hart, H.L.A., 1968.

⁵²² Hart, 1958.

⁵²³ Shaming is a form of denunciation that is applied in restorative justice and it can also be noticed in criminal justice, Cohen, R. 2001. In criminal justice shaming is not directly applied, but can be the effect of a public trial. In restorative justice it is a technique used for reintegration, Braithwaite, 1989. See later chapter, Punishment and Deterrence in Restorative Justice; Durkheim, 1893.

⁵²⁴ Duff, 2001, p.83.

⁵²⁵ Bentham, 1962, may be the best-known utilitarian following Hobbes’ ‘greatest happiness of the greatest number’; Hobbes, 1968.

⁵²⁶ Jareborg, 1995.

to retributive theories took place.⁵²⁷ While utilitarian goals were still appreciated as beneficial effects of punishment, they were considered as too precarious a basis for the justification of punishment.⁵²⁸

4.3.2 RETRIBUTIVE JUST-DESERT: INDIVIDUAL FOCUS

With the growth of criminology and other disciplinary studies in the last fifty years,⁵²⁹ which take into account first and foremost the offender, the crime, and its effects, the just-desert theory, first developed in the 18th century under the label of retribution (non-consequential), has been revived.⁵³⁰

Kant, a retributionist, did not deny the good consequences of punishment in accordance with utilitarian goals, but was concerned with the moral right (“just desert”) to inflict punishment.⁵³¹ According to Kant, the state, through its role as representative of the community, holds both a right and a duty to punish.⁵³² Hegel followed this line of retributionism by viewing punishment as a negation of the offender’s right and as justified only when it had taken into account the rights of the offender.⁵³³ Retributionists may agree on the importance of both deterrence and state and community denunciation; however, the primary justification must be the aptness of the punitive response to the individual offender. A retributive theory of punishment does thus not justify the sanction of the state against the individual by reference to the greater good of all, at least not without firstly taking into account the just desert of the offender. However, with regard to the power of the state to inflict punishment, in line with legal philosophy, the state assumes the role of the community, by reference to the greater good of all.⁵³⁴ In order not to exclude the important value of deterrence, it is viewed as a separate fundamental aim in assimilated justice and is discussed in the next section.

⁵²⁷ See later section, and ch.3; Duff’s penal communication, 1996 is further discussed in later chapters.

⁵²⁸ Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders, Apr.2000, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>, offenders and victims: accountability and fairness in the justice process. The utilitarian aim of deterrence is further dealt with in the next part of this chapter.

⁵²⁹ See ch.3 offender rights that developed out of such theories.

⁵³⁰ See OED, “retribution”, “retributionist”, *n.* can also be referred to as “retributivist” *n.* “retributive”, *a.* “retributivism”, *n.* Retribution involves punishment of different forms, and should not be seen as a biblical outcry for revenge in the form of ‘an eye for an eye’.

⁵³¹ Kant, 1978, 1998.

⁵³² Reiss, 1991, p.154.

⁵³³ Hegel, 1991, p.126; see ch.3 and the development of offender rights.

⁵³⁴ See ahead, later section, Hobbes, 1968; and see Hart, 1968; Duff, R.A. Alternatives to Punishment – or Alternative Punishments, in Cragg, 1992.

In terms of the main retributionist rationale, punishment is morally justified as a rational choice - even by the offender whose rights are affected, were he to return to Rawl's original philosophical position - according to which society chooses fair standards to govern societal order.⁵³⁵ In other words, if the offender were in the position of the victim or a member of the general community, the choice of a reasonable man would be coercive sanction, that is, punishment. The offender would thus agree to undergo punishment as a guarantee that he would in turn be recognised and have retribution similarly granted on his behalf if he were similarly inflicted with harm.

There is an important distinction here between a Hartian utilitarianism in which the justification is based on a possible anticipated change in a public good, and Rawls' fairness, which, although not self-acclaimed as retributionist, appears more sympathetic to retribution, where the justification is based on the committed crime and the offender's (assumed already made) choice.

The focus on the offender is re-emphasised through the just desert approach, and in accordance with this, the necessity has arisen to protect the individual from undue state intervention.⁵³⁶ Hence just-desert punishment theory focuses on the actual offender, and the justly imposed punishment of the state.⁵³⁷ The international core crimes of genocide, crimes against humanity and war crimes violate fundamental human rights, and upset or threaten national public order as well as international peace. Because of this, national states and the international community are authorised to impose punishment, through international law's growing duty to prosecute and punish.⁵³⁸ Criminal law legitimises the fundamental aim of just-desert punishment, based on a moral framework of individual guilt and the development in international law of making the individual directly accountable seems to ensue from this principle. In international law, individual criminal accountability developed because "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁵³⁹

With the ascendancy of retributive theory, the utilitarian approach has declined in popularity and what has taken over is the idea of just-desert punishment, in which only the guilty deserves punishment justified and measured by the wrongful act. This supports the belief of the present

⁵³⁵ Hart, 1968; Kant 1949; Rawls, 1971. See last section of this chapter, with reference to the social contract.

⁵³⁶ See behind, ch.3 for a role of each actor.

⁵³⁷ Or the international community or a treaty-established international institution, e.g. the ICC.

⁵³⁸ See generally ch.5; Cassese, 1998.

⁵³⁹ Nürnberg International Military Tribunal, 1946; ch.5.

study, that is, criminal responsibility presupposes individual culpability.⁵⁴⁰ It is important that the circumstances surrounding each offender can be accounted for, especially as international law prohibits collective punishment.⁵⁴¹ Accordingly, the fundamental aim of just-desert punishment focuses on the individual offender.

The individual offender-focus that criminal justice can supply through the aim of just-desert punishment is vital. However, with regard to the international core crimes, there may not always be a clear distinction between offenders and victims. As already noted, Rosenberg refers to the situation where there is a distinction between offenders and victims, as “a regime of criminals”, while a collectively infected community would be a “criminal regime”.⁵⁴² In the latter case, a collective focus may be necessary. However, this does not clash with just-desert principles, as each offender must be judged accordingly. It only highlights the importance of collectively focused processes and it supports the assimilation of restorative justice with criminal justice.

4.3.3 JUST-DESERT PUNISHMENT IN ASSIMILATED JUSTICE

In deciding upon punishment generally, two world-views exist and often collide. For the sake of contrast, these may be presented in simplified form.⁵⁴³ Restorative justice supporters consider that criminals are shaped by their circumstances, that society is as much to blame for their misdeeds as themselves, and that they should not necessarily be harmed or stigmatised by punishment.⁵⁴⁴ On the other hand, criminal justice systems and their lawyers believe that, since criminals have had the benefit of free choice, they should be held responsible for their choices and should primarily be punished rather than treated.⁵⁴⁵ The divergence between these disciplines even goes as far as terminology and language. Representative of restorative justice is a more social language, which focuses on the outcome, the result and the underlying social forces, rather than the individual status of, for example, the offender. The different paradigms also represent, at least to

⁵⁴⁰ See behind, ch.3 for a discussion on collective responsibility v. collective guilt. Common circumstances of the international core crimes are a multitude of secondary offenders, perhaps belonging to a collectively infected criminal regime, in Rosenberg, 1995, p.400.

⁵⁴¹ The advancement of individual criminal accountability renounces collective accountability and collective punishment, e.g. 1949 fourth Geneva Convention, arts.33, 34 “No protected person may be punished for an offence he or she has not personally committed”; art.6 Add.Prot.II of 1977 laying down the principle of individual responsibility, and its corollary – there can be no collective penal responsibility for acts committed by other members of a group.

⁵⁴² *Supra*, 1995, p.400.

⁵⁴³ With reference to restorative and criminal justice only.

⁵⁴⁴ See generally, for social science and restorative justice Braithwaite; Zehr; Umbreit; Van Ness; Wright; ch.6.

⁵⁴⁵ See generally the previous part of this section, Kant; Duff; Jareborg.

some extent, the collective versus the individual.⁵⁴⁶ Informal justice mechanisms, of restorative justice, such as mediation and reconciliation programs and other types of community supported conflict resolution are suggested because of their potential benefit to the general community.⁵⁴⁷ However, in states that have suffered international core crimes and where a cohesive and fair community is lacking, such community resolutions cannot easily distribute and represent the society in a balanced and equal manner. Informal reconciliation programs cannot either be said to fulfil the duty to prosecute and punish offenders of such crime, but can instead create further injustice. Informal justice mechanisms are instead potentially achievable in relation to the fundamental aim of reconciliation.⁵⁴⁸

Restorative social justice may refer to the offenders as part of the collective, enabling utilitarian goals of deterrence for the greater good of all. However, while utilitarian punishment theories may share common societal goals with restorative justice, such as deterrence, rehabilitation and generally forward-looking objectives of a collective nature, the fundamental aim of just-desert punishment is part of the rule of law and criminal justice. Assimilated justice, with regard to this fundamental aim, is thus concerned with combining just-desert punishment with social goals of utilitarianism, which, in turn, can benefit from the assimilation of criminal with restorative justice.⁵⁴⁹ Criminal justice refers to the offenders individually, according to their individual guilt and just desert, but can impact on community interests. For example, just desert can express and communicate justice to the victims. Still, punishment will remain difficult to justify, especially in states where violence and injustice have existed for so long that they have become the norm. Assimilating utilitarian goals with just desert principles, similar to Hart,⁵⁵⁰ would facilitate the application of the fundamental aim of just-desert punishment with the other fundamental aims, without however losing the legitimating individual offender focused aim of just-desert punishment.⁵⁵¹ At the same time, the fundamental aim of just-desert punishment would only be one of five fundamental aims, all of which lend support and overlap. According to just desert theory,

⁵⁴⁶ Again, the thesis is not concerned with changing existing law. The assimilation of restorative justice mechanisms with international criminal justice does not intend changing the different paradigms, which represent different aspects of justice, inherent to each system, see ahead, later section. The developing thesis intends protecting the actors involved in international core crimes, by supplying international justice that can guarantee actor recognition during circumstances of restricted justice. See ch.1 and ahead, this chapter.

⁵⁴⁷ Wright, 1996; Wright & Galaway, 1989. Further discussed in ch.6.

⁵⁴⁸ And such mechanisms will be discussed in relation to this aim, in a later chapter.

⁵⁴⁹ Where restorative justice aims and focus can assist utilitarian goals of e.g. general deterrence, through truth discovery of a broader social truth. However, restorative justice must not be confused with utilitarian theory.

⁵⁵⁰ *Supra*, 1968.

⁵⁵¹ Further reference to assimilating utilitarian and retributive theories, and to some extent perhaps restorative justice aims with punishment, is discussed in a later chapter, viewing just-desert punishment in process, where the community, and the collective, has a communicative role, see Duff, 2001.

and needs and rights of the actors, just-desert punishment is also a right⁵⁵² and a duty,⁵⁵³ adding to the prerequisite recognition of actor needs and rights in assimilated justice.

By incorporating the aim of just-desert punishment with the dual focus of the aim of truth, the community is notified that the justice process is not purely a state-offender relationship, but depends also on the moral and social support of the community. Ideally, the state represents the community and its values of fairness and equality,⁵⁵⁴ making punishment a community, rather than state value. Furthermore, collective notions of truth are taken into account. Such assimilation will further assist collective notions of the other fundamental aims, as becomes obvious in the next sections of this chapter. Of course, essential to punishment are the moral principles that shape the reasonable response to crime by the state, and govern rules of individual responsibility. Criminal justice without morality would be as dangerous as no criminal justice. It is important to value the moral justification for the infliction of punishment and its extent, by balancing retribution with its possible utility. It is maintained that retributivist theory inserts a humane side to punishment by requiring appropriateness and efficiency – “just desert” – whereby the punishment must be fair and reasonable in relation to the crime, violated rules and injury done. By prioritising the principle of just-desert punishment, then, as long as they work within the boundaries set by this principle, utilitarian goals can be accommodated. Criminal justice must recognise societal reality, and deterrence *per se* does not clash with other primary aims of the just-desert punishment theory. If respect for the society in general is valued by utilitarianism, humanitarian ethics must include recognition of the violation of individual integrity. However, assimilated justice prioritises criminal justice with regard to punishment and both utilitarian justifications for punishment, and restorative justice values are secondary to the criminal justice aim of just desert, which depends on the proven guilt of the person subjected to punishment, according to normative rules applicable to the international core crimes.

While the offender focus is inherent in the fundamental aim of just-desert punishment, the victim’s and community’s role in the fundamental aim may be acknowledged through the states imposition of punishment and through indirect effects of deterrence, welcoming a utilitarian addition to just desert without sacrificing moral justification for practical benefits.⁵⁵⁵ While it can be

⁵⁵² While just desert is measured and justified with a focus on the offender, and the offender’s right, it is also a right and a duty of the state to punish the offender. Punishment can also be viewed as a vindication of a victim’s need and right to see justice done to the offender, and it can correspond to the right to justice, and restitution by the offender, according to Princip.25 Bassiouni principles, 2000.

⁵⁵³ According to international criminal law applicable to assimilated justice concerned with the international core crimes, see ahead, ch.5 and behind ch.3. Princip.4, Bassiouni principles, 2000.

⁵⁵⁴ See ahead, later section, Hobbes, 1968; Rawls, 1971; Minow, 1998; Duff, 2001.

⁵⁵⁵ The moral justifications refer to the just desert of the offender, *and* the moral support by the community. Through all may come deterrence, protection of victims and community and symbolic reparation to the victim.

said in simplistic terms that just desert justifies punishment by fulfilling the offender's duty to repay society for the harm caused, it may also be argued that the offender's obligation lies to some extent in the right of the victim to have justice done, through sanctions imposed by the state.⁵⁵⁶ The offender owes the victim, which further justifies the punishment. The pronouncement by public and legal authority that a crime has been committed and harm has been done means that the victim is confirmed a victim of crime and it enforces the sense of acknowledgment of the victim's feelings. When resentment is enough to take revenge, the justice system, which is obliged to inflict punishment, has failed. It is important that the association sometimes made between retribution and revenge is not seen as a victim's right. Just desert is separable from vengeance and revenge. The latter refers to subjective, personal acts without any element of proportionality or consideration of right and wrong and the former refers to offender suffering as compensation for the harm done. Retribution is a reaction to crime that attempts to restore the balance of justice – a just-desert philosophy in which the punishment should fit the crime and the culpability of the offender. Just-desert theory is able to restore the imbalance without creating a new imbalance. Retribution is also argued by some as an opportunity for the offender to expiate the wrong by his moral guilt.⁵⁵⁷ The focus is not on the damage caused but on the possibility for the offender to expunge his guilt. However, this is only meaningful and significant if the offender shows honest remorse. Retribution can also be recognised as public condemnation of the crime, thereby educating the offender as to what behaviour is unacceptable.

To hold the offender accountable, the state (or the international community) must supply a legitimate justice system that is able to impose just desert upon the offender, compelling him to repay in some form as a response to his wrongful action.⁵⁵⁸ Durkheim supported the view that appropriate punishment leaves the public satisfied and without need to take revenge, while accepting the punishment imposed as being just.⁵⁵⁹ In other words, Durkheim tried to reconcile opposing theories in a similar way to the approach taken here, by attaching certain utilitarian goods to just desert principles of punishment.⁵⁶⁰ The international core crimes qualify as international crimes rather than civil wrongs with treaty obligations prescribing punishment, and a punitive result is reasonable under these circumstances, according to the combination of just desert *and* public

⁵⁵⁶ Hegel seems to support this view, see Walker, 1991.

⁵⁵⁷ Du Toit, 1981, Glick, 1995.

⁵⁵⁸ Massaro, 1991; Kahan, 1996.

⁵⁵⁹ Durkheim, 1893. However, the relationship would, through the focus of the state (and community) remain on the individual offender.

⁵⁶⁰ Neither Duff, 1986, nor Von Hirsch, 1985 seem to have excluded possible benefits coming out of punishment. Neither Kant for that matter, but Kant *justified* the punishment on the fact that a wrong had been committed.

good *à la* Durkheim.⁵⁶¹ Defended in this thesis are also such Kantian arguments as that which claims that, while deterrence is a good, it can never alone justify punishment. The offender must firstly and foremost deserve the sanction, which in turn may deter. Only then, once punishment has been inflicted upon him for “just desert”, can deterrence be morally embraced.

The general and overall perception of punishment as justified if it achieves security, satisfaction, and prevention more than it does harm, while being fairly, appropriately and efficiently distributed, is maintained. This notion of punishment is upheld because of its potential to assimilate retributive and utilitarian theories. This assimilation allows more influence for social justice, bringing the community and the collective into focus. This assimilation is further supported by the fundamental aim of truth being able to reach its full potential. Individual offender-focused legal truth becomes functional because just desert depends on it. The potential for assimilating the theories in practice does not, however, exclude the theoretical just-desert justification for punishment. Punishment as a whole thus comprises retribution in response to someone who has committed a crime with a goal to impose punishment that represents the annulment of the weight of the crime as viewed by the community, proportionally balanced against the penalty (just desert). In addition to this, punishment may have deterrence, pacification and reparation as other consequential goals.⁵⁶²

4.4 DETERRENCE

This section introduces and discusses the fundamental aim of deterrence. The next part proceeds to consider the theory behind the aim and its general and more specific focuses. The theory of utilitarianism is again discussed, this time in relation to deterrence, followed by a discussion of deterred deterrence, that is, limitations to the fundamental aim of deterrence. The section ends with the position of the fundamental aim of deterrence in assimilated justice.

With the assistance of investigated legal truth, and the fundamental aim of just-desert punishment, the criminal justice process also incorporates the fundamental aim of deterrence, particularly specific, individual deterrence. Punishment is meant to have a deterring effect, but this

⁵⁶¹ Public utility does not play a confident role in justice systems and in primitive ‘systems’ where one punishes for the sake of punishing, it is an emotional reaction formed into custom.

⁵⁶² The proportionality must be fair, which includes (beyond symbolising the obliteration of the crime) a demonstration of this to the offender, possibly seeking remorse and rehabilitation. In dealing with the offender, one response may be confinement, another may be service to the community at large, and a third may be making reparations. However beneficial improvement of the offender or deterrence of the community should not be a core justification for punishment. Offender rehabilitation cannot be guaranteed, and it is not certain in all cases that deterrence works, or that a change in attitude is honest. It does not mean however that rehabilitation and specific deterrence may not be achieved, or that they should not be criminal justice goals. See next sections.

should not, following just-desert principles, affect the extent or type of punishment. While utilitarians believe that deterrence is a good justification for punishment, retributivists and the principles surrounding the fundamental aim of just-desert punishment disagree, for the reason that we cannot assume every offender to be a rational and responsible person who would be deterred. Nor would it be correct to justify the punishment of the offender to deter the general public, as that would infringe the individual rights of the offender's "just desert" and lead to unjust or disproportionate punishment.⁵⁶³ Nonetheless, legal truth, coming out of a prosecutorial process, is instrumentally focused on the individual to inflict correct punishment, according to the truth established, and just desert. This immediate and inherent individual focus of the process further supports such a focus on the fundamental aim of deterrence, where specific deterrence may be a positive consequence of inflicted punishment.

With the assistance of discovered and expressed inclusive truth, the restorative justice process may also incorporate the fundamental aim of deterrence, more specifically general, collective deterrence, for example through shaming or denouncing parts of the truth.

Deterrence is justifiable and legitimate as a fundamental aim in its own right. At the same time the fundamental aim works together with the fundamental aims of truth, and just-desert punishment. The just-desert principle of not using deterrence as a justification for punishment further supports the inclusion of the fundamental aim of deterrence in relation to a restorative justice process, where deterrence is also legitimate *per se*. Where restorative justice does not aim for punishment and does not assign specific punishment, it may still aim for deterrence and hence add further legitimacy to the aim of deterrence, as distinct from the aim of just-desert punishment.

4.4.1 SPECIFIC AND GENERAL DETERRENCE: INDIVIDUAL AND COLLECTIVE FOCUS

The most important advantage of the fundamental aim of deterrence is its ability to be shaped according to the most critical need of deterrence. Deterrence aspires to the prevention of harmful actions through different means of justice. Two forms of deterrence are recognised, a specific (individual) form and a general (collective) form.⁵⁶⁴ If, for example, the removal of the offender from the local community ends the threat to further violence and criminal behaviour,

⁵⁶³ Kant's theory where individuals should not be treated as means towards other ends is a retributivist argument, supporting the view that the punishment cannot be justified on the basis of deterrence.

⁵⁶⁴ According to Andenæs, 1966, p.949, a distinction is made between the effects of punishment on the man being punished, individual or special deterrence; and the effects of punishment upon the members of society in general, general deterrence. The characteristics of special deterrence are e.g. termed "prevention", "reformation", and "incapacitation". General deterrence can be described as the restraining influences emanating from the criminal law and the legal machinery.

general deterrence may not be necessary and specific deterrence can focus on the individual offender. If there exists a general threat of criminal violations, general collective deterrence may be appropriate, especially in circumstances of the international core crimes and in states in transition that present cases of collective responsibility and suffering.

Specific deterrence is aimed at the offender as a direct consequence of the punishment. With specific deterrence, it is believed that rational actors will change their behaviour with the threat of punishment and the shaming consequences that punishment or a real threat of punishment have.⁵⁶⁵ Criminal justice and its prosecutorial process aim to achieve specific deterrence.⁵⁶⁶ By finding the offender guilty in a public trial and so morally disapproving his actions, it is hoped that the offender will be deterred from similar actions. However, even though general collective deterrence may not be a direct aim of criminal justice, it may be a consequence of the prosecutorial process.⁵⁶⁷ While the offender guilty of committing international core crimes may, hypothetically, benefit from punishment through a better understanding of his actions, the general community may also react in this same way.

The threat of punishment can thus also aspire to general deterrence, with the expression and denunciation of wrongful conduct discouraging individuals in general from shameful conduct.⁵⁶⁸ This threat, which is used by the authorities to deter certain activities, must be carried out in a timely fashion, in order to be taken seriously. A threat that is never carried out will not remain a threat for long, as the warning will quickly be forgotten when the risk disappears.⁵⁶⁹ Rapid administration of punishment may thus have a deterrent value. General deterrence is not aimed at the offender *per se* but rather at other potential offenders, collectively, by showing the community that the individual who has broken the law has not gained any benefit from the crime. Such general deterrence may be a fundamental aim separate from the prosecutorial process. If the threat of punishment is not used to bring about deterrence, other denunciatory and perhaps educative social mechanisms must be put in place. Restorative justice may well aim at general deterrence of the community at large, by transforming the truth into deterrence by denunciation. Expressive truth may likewise have the effect of general deterrence, without it being specifically aimed for.

⁵⁶⁵ This is the main discussion in law and economics. See further Becker, 1968.

⁵⁶⁶ Focused on the individual offender, specific rehabilitation programs may be supplied to aid the deterrence process.

⁵⁶⁷ The deterrence justification serves to discourage the public in general from engaging in criminal activity, and if the cost of criminal behaviour exceeds the benefits of the criminal conduct, reasonable people will choose to avoid criminal actions; Feeley, 1979; Becker, 1968.

⁵⁶⁸ See previous chapter on theories of punishment where utilitarians justify punishment in terms of the good of general deterrence.

⁵⁶⁹ We generally react in a similar manner to unfulfilled promises, and lose faith in the promise or even the person, or system making the promise. See next part, Brown, 1996, discussing Beccaria and utilitarian theory.

If one of the fundamental aims of the justice process is deterrence, in order to fulfil this aim the criminal law, or in the case of restorative justice, the truth acknowledgment and report,⁵⁷⁰ must be declaratory, clearly communicating to each and everyone what misconduct is condemned and then condemning such conduct because the individual offender's misconduct deserves it. The prosecutorial process can, with the help of the established individual truth and just-desert punishment, evaluate the need for specific deterrence. As will be considered below, the need for deterrence and more specifically individual deterrence can however be difficult to assess and to ensure. A propos offenders of international core crimes, it is believed that the international community, and individual states have communicated that violations of fundamental human rights are not tolerated, supported by the principles of universal jurisdiction and individual criminal accountability.⁵⁷¹ Such normative development does however not appear to be enough of a deterrent.⁵⁷² In support of the fundamental aim of deterrence, and to emphasise the importance of general deterrence in circumstances of international core crimes, the Bassiouni principles ensure the right to guarantees of non-repetition.⁵⁷³ The duty to accomplish guarantees of non-repetition can involve, besides elements of the fundamental aims of truth⁵⁷⁴ and just-desert,⁵⁷⁵ promoting civilian control and involvement; limiting military justice and instead strengthening the independence of the judiciary;⁵⁷⁶ providing human rights training to all sectors of society; and creating mechanisms for conflict resolution and preventive intervention.⁵⁷⁷ The important mental element of ending suffering is greatly influenced by a feeling of security. "It shall not happen again". Fulfilling the aim of deterrence can therefore deter victims from taking the law into their own hands.

4.4.2 UTILITARIANISM

Following the classical school of Beccaria (and later Bentham), people have a free will and a rational nature.⁵⁷⁸ Relying on this belief, any individual should weigh the pleasure to be gained from law-abiding behaviour against the pain (punishment) that follows an illegal action and should

⁵⁷⁰ And perhaps also the recommendations made to the government.

⁵⁷¹ *I.e.* such crimes and offenders are of concern to the global community. See ahead, international criminal justice.

⁵⁷² While it is difficult to measure the success of deterring measures, constant violations of international human rights and humanitarian law continue to exist. Yet, the establishment of the ICTs and the ICC make it increasingly difficult for states to avoid their obligations to impose individual accountability for international crimes.

⁵⁷³ See previous chapter, Bassiouni principles, 2000, specifically Princip.25(i).

⁵⁷⁴ *Id.* Princip.25, *e.g.* verification of the facts, full and public disclosure of the truth, investigations, public truth acknowledgement, with an inclusion of an accurate account of the violations that occurred.

⁵⁷⁵ *Id.* Princip.25, *e.g.* sanctions against persons responsible for the violations.

⁵⁷⁶ *E.g.* the UN SC established the ICTs as measures for the restoration of peace and security under Chapter VII of the United Nations Charter.

⁵⁷⁷ *Id.* Princip.25(i).

⁵⁷⁸ Beccaria, 1764; Bentham, 1789; strongly supported by Durkheim, 1893.

then decide not to perform the illegal act. Brown summarises Beccaria's principles on which deterrence is based: "Assuming that people are rational, hedonistic, and that they exercise free will, it followed for him that crime control is a function of the certainty, celerity, and severity of punishment."⁵⁷⁹ Thus, the threat of punishment must be a clear probability. If the risk of punishment is small - such as where crime is not reported, police authorities do not react, laws are inconsistent, trials are inefficient and sentences are not always carried out - there appears to be no risk, no penalty and consequently nothing to lose.

It is difficult to determine which out of such crime-inhibiting factors as social disapproval, punishment, threat of punishment, and moral guilt actually deter, and to what extent they may deter. In line with utilitarian theory, rational types of crime should react more positively to deterrence measures than irrational, spontaneous and violent crimes would, given of course that the offender fits the crime, *i.e.* a less irrational offender commits a less irrational crime. "Empirical studies show that the willingness of persons to obey various laws is indigenous to their beliefs about whether other views the law as worthy of obedience: If compliance is perceived to be widespread, persons generally desire to obey; but if they believe that disobedience is rampant, their commitment to following the law diminishes. Even a strong propensity to obey the law, in other words, can be demeaned by a person's 'desire not to be suckered.' When the law effectively expresses condemnation of wrongdoers, however, it reassures citizens that society does indeed stand behind the values that the law embodies."⁵⁸⁰ Kahan's study indicates that deterring mechanisms are process-sensitive, not only to the individual's will and ability to be deterred, but also to local particularities of the collective. In the case of "criminal regimes" that Rosenberg refers to,⁵⁸¹ discussed with regard to collective responsibility, entire communities have chosen to redefine the law in terms of acceptance of certain crimes, often ethnic in character. What must then be required of the fundamental aim of general deterrence is a real threat. Amnesties must be excluded and prosecution and punishment included, which suggests prioritising the prosecutorial process, even with regard to general deterrence, especially with the occurrence of the international core crimes.

If a person refrains from committing an illegal act because he fears the threat of punishment, that person has been deterred. But how do we count the number of dogs that do not bark in the night?⁵⁸² Hart's moral community denunciation, in support of a utilitarian justification for

⁵⁷⁹ Brown, 1996, p.170.

⁵⁸⁰ Kahan, 1996, p.604.

⁵⁸¹ See ch.3, Rosenberg, 1995, p.400.

⁵⁸² *I.e.* how do we measure the amount of individuals who refrain from committing such crimes?

punishment, is not easy to measure in terms of real deterrence.⁵⁸³ Much more than just the threat of punishment or a specific sanction may affect criminal behaviour. With utilitarianism, the main consequences sought from punishment were deterrence and reform.⁵⁸⁴ However, when it became apparent that these ends often failed with the majority of offenders, the aim of deterrence lost some of its importance.⁵⁸⁵ However, the level and severity of sanctions may still be influenced by considerations towards deterrence, as well as rehabilitation of the offender. Severe punishment would be justified, by utilitarian standards, in terms of the possible deterrence and rehabilitation consequences for the incapacitated offender (specific deterrence) and as a message to the community at large (general deterrence).⁵⁸⁶ Specific deterrence would, in utilitarian terms, try to shape the punishment in accordance with possible individual deterrence, but this conflicts with just-desert principles, as not every offender needs deterring and some will not be affected by it. Furthermore, if punishment were to be conceived in terms of deterrence, it may end up not being proportionate to the crime. Severe punishment may be inflicted *pour encourager les autres*. Such general deterrence may be consequential to the prosecutorial process, but, according to the fundamental aim of just-desert punishment, this is only legitimate if the punishment is proportionate to the crime, as long as it is not used to justify the punishment.⁵⁸⁷

4.4.3 DETERRENCE DETERRED

Limitations to the fundamental aim of deterrence are apparent. Punishment cannot be inflicted by reason of deterring every man, as not every man is a rational man. Nor may it be morally tolerable to inflict inhumane deterrents such as corporal punishment.⁵⁸⁸ The effectiveness of inflicted punishment through specific deterrence has not been empirically confirmed through the

⁵⁸³ *Supra*, previous section. According to utilitarianism “What distinguishes a criminal from a civil sanction and all that distinguishes it...is the judgement of community condemnation which accompanies...its imposition... If this is what a ‘criminal’ penalty is, then we can say readily enough what a ‘crime’ is...It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community...Indeed the condemnation plus the added [unpleasant physical] consequences may well be considered...as constituting the punishment.” Hart, 1958.

⁵⁸⁴ The difficulty of proving that the ‘corrected’ offender was deterred, reformed, rehabilitated made the utilitarian justification of punishment doubtful and the goods turned into wrongs.

⁵⁸⁵ The aim of rehabilitation, as part of the reform objective, also declined in popularity. See earlier section. For this reason, of not being able to rely on rehabilitation, especially not of offenders of international crimes, rehabilitation is further discussed under the heading of reconciliation. See more in a later chapter on the social justice movement and hence restorative justice, which grew out of negative rehabilitation and reform reports.

⁵⁸⁶ The severer punishment focus would determine the length of sentence on forecasted deterrence and rehabilitation, rather than on just-desert and individual accountability. See earlier section.

⁵⁸⁷ The idea that life imprisonment would be too harsh a punishment for crimes against humanity and genocide appears odd and if other goods such as credibility of the justice process and general deterrence are the outcomes, so much better.

⁵⁸⁸ Not to mention the inexistence of confirmation that such deterring mechanisms actually deter. See more, Walker, 1991.

institutional mechanism of prisons.⁵⁸⁹ Whether third party actors are deterred because a few high-ranking official offenders are punished is also uncertain.⁵⁹⁰ The efficiency of deterrence cannot be calculated on a general scale, but is particular to each individual, to his background, education, social standard, rationality and mentality. This is also true for general deterrence of the collective when the collective belongs to a criminal society.

Besides the retributive reasons applicable to just-desert principles, the uncertainty concerning the success of deterrence mechanisms augurs support for the separation of the fundamental aims of deterrence and punishment. The least precarious of reasons for punishment may be its benefit in terms of the public's trust and belief in the state for supplying just punishment. When a wrong is done to us, we experience anger and would in many cases want to punish those who wronged us unless the justice system intervenes on our behalf. What must be recognised is that most people who suffer harm will not instantly forgive, but will opt for punishment. Unless the state can supply a reasonable response to the victims of crime, further harm may be inflicted as personal vengeance, and the state may lose the public's confidence. Besides the actual enforcement of punishment, the state is under an obligation to guarantee non-repetition, not only because this is morally compelling in itself, but also because effective deterrence and reconciliation will not otherwise be achievable.⁵⁹¹

These limiting factors highlight the importance of assimilated justice and the valuable role it can play. The potential dual focus of deterrence should be an aim that is taken into account by the justice process. If both an individual as well as collective accountability process can be provided, the legitimacy of each aim and actor-involvement is promoted by the in-depth individual and collective focus. If the fundamental aim's specific and individual focus is not fulfilled, the aim's general and collective focus can still be supported by mechanisms that can relate to the community in question, its characteristics and needs.

4.4.4 DETERRENCE IN ASSIMILATED JUSTICE

Scepticism about the effectiveness of deterrence exists, but international criminal justice might be an area where it has some force, through the normative and institutional development of

⁵⁸⁹ Rather, what correction of offenders is done is unsure and what successful treatment exists is often applied more successfully outside of the institutional walls. At least with regard to domestic crime and institutional support that exists in democratic states, see Walker, 1991; Gray, 2003, at <http://www.carlisle.army.mil/ssj/pubs/2003/maindetr/maindetr.htm>

⁵⁹⁰ Varying degrees of deterring effects are still very much based on assumptions about people and behaviour and are very difficult to prove, especially with regard to the international core crimes.

⁵⁹¹ See generally Bassiouni principles, 2000, and behind, ch.3. See also Wippman, 1999, p.473, 488.

the last decade. In combination with actor rights and state duties relating to deterring measures, deterrence would not just work out in the spirit of criminal punishment. Deterrence, when viewed as a separate fundamental aim from punishment, supports and complements criminal justice and the assimilation with restorative justice. Deterrence is also a need and a right of the actors,⁵⁹² with a corresponding duty.⁵⁹³ Furthermore, it enables an individual as well as a collective focus in assimilated justice, in addition to established individual and collective truth.

Deterring offenders of the international core crimes must involve more than reassuring the victim and community that the offender will not commit more crimes. This is so because entire communities and states have been involved and affected, perhaps to the extent that deterrence must focus on the community at large. If collective responsibility, *i.e.* a criminal regime,⁵⁹⁴ exists, the collective notion of the fundamental aim of truth will hopefully have investigated this, perhaps with the help of the legal truth pertaining to the fundamental aim of just-desert punishment. This must then be part of the general collective deterrence focus.

In a process of assimilated justice, it is possible to use the fundamental aim of truth in a wider social conception in order to aid general deterrence. These two fundamental aims can subsequently focus on collective public goods arising from the truth and from punishment. The individual focus of legal truth and the fundamental aim of just-desert punishment will also support the fundamental aim of deterrence, particularly specific and individual deterrence. In this way, individual as well as collective focus is possible, involving the offender, and the community.⁵⁹⁵

There is an insistence that the most serious crimes of concern to international justice must not go unpunished, especially those committed by people in power and thus potentially immune from the law. Most participants in the development of international justice - states, NGOs, the Secretary-General of the UN - have expressed their belief and hope that truly evil leaders might be deterred by the threat of punishment.⁵⁹⁶ Bearing in mind *Pinochet's* unhappy experience,⁵⁹⁷ many past or present dictators must be cancelling plans to travel. It may be that those who have planned future atrocities are cancelling plans to commit genocide or crimes against humanity. I believe that

⁵⁹² The right to protection and preventative measures has been laid down in human rights instruments, see ch.3 and *e.g.* Princip.25, Bassiouni principles, 2000.

⁵⁹³ *Id.* Princip.3.

⁵⁹⁴ See Rosenberg, 1995, p.400.

⁵⁹⁵ A relationship where the collective community and the individual offender are in focus. The victim may indeed benefit from the fulfilment of the fundamental aim of deterrence, especially in its general form, where the victims are part of the community at large. However, there is no specific victim focus involved.

⁵⁹⁶ See *e.g.* Preamble of the ICC Statute, and Prep.Comm. PCNICC/1999/L.4; PCNICC/2002/3, GAOR, A/51/22, A/CONF.283/2/add.1.

⁵⁹⁷ *R. v. Bow Str. Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte*, 1999.

there is a case for general deterrence here - in levels of the mind beyond those concerned with travel plans!

Through the fundamental aims so far discussed in a system of assimilated justice, the individual offender has been in focus in all three of the fundamental aims, but more so in just-desert punishment and deterrence; the community has likewise been in focus, through its role in truth and in deterrence; and finally the victim, who has only really been in focus through his involvement in the aim of truth, is given a larger role to play in the fundamental aim of reparation, discussed next.

4.5 REPARATION

Due to the varied aspects of reparation, and its victim focus, the fundamental aim of reparation deserves further analysis, by developing the elements discussed in the previous chapter.

The section on the fundamental aim of reparation begins by looking at the dual focus of the aim and its narrow and broad definitions. The definitions, needs and rights established in chapter three are referred to, with reference to their dual focus. Individual and collective reparation is then considered, separately, in relation to the material and symbolic nature of reparations. The section ends by considering the aim of reparation in assimilated justice.

The fundamental aim of reparation is broad in definition and focus, and involves individual and collective victims, and the community. Reparation is a means to restore, compensate and rehabilitate, and, as the following quote indicates, reparation is not just another word for compensation, but actually involves several modes of making amends. “Let me begin by noting that reparation is not just about money, it is not even mostly about money; in fact, money is not even one percent of what reparation is about. Reparation is mostly about making repairs; self-made repairs, on ourselves – mental repairs, psychological repairs, cultural repairs, organisational repairs, social repairs, institutional repairs, technological repairs, economic repairs, political repairs, educational repairs, repairs of every type...”⁵⁹⁸

One of the more important and perhaps surprising things emphasised by the above quotation is that reparation is not directly conditional on the offender, as it focuses on repairing the harm done to the victim. Means of reparation today are not limited to those deriving from the offender,⁵⁹⁹ which is a welcomed and realistic development, especially with regard to the international core

⁵⁹⁸ Chinweizu, 1993.

⁵⁹⁹ Ch.3, Princip.3, 17-18, Bassiouni principles, 2000.

crimes.⁶⁰⁰ While the responsibility for the aim of reparation to be respected and carried out remains with the state, the offender also has a certain amount of influences, especially moral, on the victim's reparation. However, besides material reparations, many of the repairs can be self-made, with the symbolically reparative support of the state and community.

4.5.1 NARROW AND BROAD REPARATION: INDIVIDUAL AND COLLECTIVE FOCUS

Reparation is both narrowly defined, representing individual victim reparation; and broadly defined, representing collective victims and even community reparation. These definitions are apparent in United Nations principles and guidelines on the subject of victims of violations of international human rights and humanitarian law, and include restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.⁶⁰¹ Conceptually, reparation has intrinsically a double connotation; as a duty, someone, offender or state, has to make reparation; as a right, the victim shall be repaired. The right to reparation can be individual and collective and reparation can be made through individual and collective symbolic and material forms. In proportion to human rights development, reparation shall primarily be viewed as an individual right. The necessary collective dimension does not cancel the individual rights, but accumulates them, where the focus is on the state and its responsibility to make such reparations. In the individual perspective, although it is not imperative to relate reparation to the person who makes the reparation, the focus is on the individual offender. This has already been identified in chapter three, visible in the ICC Statute and in the Victim Declaration, and it can be of great assistance, in relation to healing aspects to have the offender make reparations.

Worth repeating, any reference to a victim necessarily also includes collective victims, as the victim definitions earlier discussed have identified. The individual focus of the fundamental aim is therefore also focused on the collective victims.⁶⁰² The guidelines and principles support a direct

⁶⁰⁰ Known as mass atrocities that leave a great number of victims and victims at large. No single offender could ever fulfil his obligation to make reparation to such a number and the identification of the victims who suffered directly from the offender's crimes may likewise prove unrealistic, with diseased and unidentifiable corpses or relatives.

⁶⁰¹ Reparation as a legal remedy has primarily been supported by international human rights instruments such as the UDHR 1948, the ICCPR 1966. Fundamental rights securing reparations have been outlined since the 1985 Victims Declaration in e.g. the 1997 Guidelines by van Boven, Joinet, Guissé, and recently by Bassiouni, in the Bassiouni principles, 2000, e.g. Princip.19-23. Rights surrounding the specific elements of reparation involve the right to be informed of rights; assistance during proceedings; the right to prompt, fair and adequate reparations, Princip.12, 15. See further, ch.3.

⁶⁰² Princip.8, Bassiouni principles, 2000: "A person is "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A "victim" may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations,

victim focus and have been influenced and strengthened by different victim rights movements. Lobby groups in favour of a victim focus range from social support to positive rights theories and have found plenty of support in the restorative justice discipline.⁶⁰³ The victim movement found followers both in the late 1960's civil rights movement and liberal politics, and in the 1980's conservative rights-focused governments.⁶⁰⁴ The United States' civil rights movement, in the 1960s, was much inspired by humanitarian ideals and women's rights. By involving victims of crime in the criminal justice system, the US demonstrated a move towards positive rights. Rights to be informed and to participate and influence sentences developed out of a great volume of serious crime and victim dissatisfaction with the court system.⁶⁰⁵ Europe developed affirmative victim-support out of community-based voluntary organisations, which started more out of sympathy than a lobby movement.⁶⁰⁶ In the last decades, a new wave of thinking has passed through criminal justice systems, pushing to the surface the identity of the victim. Zehr argues that this development is evidence of a new paradigm.⁶⁰⁷ From this perspective, the belief that the means of accountability had lost touch with its end - to hold the wrongdoer accountable to his victim - finds further support.⁶⁰⁸ The means did not effectively fit objectives, which aimed to restore the victims' loss and pain. Consequently, what has developed are victim-offender programs, where the actors meet face to face to see how far, if at all, they can be reconciled. This can be transferred to the application of victim and offender mediation programs within criminal justice and, to some extent, public hearings and testimonies in restorative justice truth commissions. In domestic justice systems, this is applied in addition to just-desert punishment rather than as replacement for it, an idea supported by

has suffered physical, mental, or economic harm." Princip.13. "In addition to individual access to justice, adequate provisions should also be made to allow groups of victims to present collective claims for reparation and to receive reparation collectively." Taking the victim definitions into consideration, combined with a realistic notion of the community, the definition is based upon the Bassiouni Princip.8, in combination with the 1997 Guissé report. When individual physical or mental harm has been suffered, the individual will fall under the definition of victim, whether the victim appears individually, or collectively. Harm also affects groups, collectives, and even entire societies, where violations are massive. A broad community definition is necessary, and defined as a collective that, as a result of acts or omissions that constitutes a violation of international human rights or humanitarian law norms, have collectively suffered harm, including emotional suffering, economic loss or impairment of fundamental legal rights.

⁶⁰³ Price, M. *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, www.vorp.com/articles/justice.html; see later chapter where theories of restorative justice are discussed.

⁶⁰⁴ Fattah, 1992. This development is visible in the instrumental framework, where human rights instruments were to a large extent created in the 1960s and 1980s, and then given affirmative action since the 1985 Victim Declaration.

⁶⁰⁵ For US practice, see United States Department of Justice, 1998; for an overview of popular US practices, see www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf

⁶⁰⁶ Peters, 2000.

⁶⁰⁷ Wright, 1991; Zehr, 1990 and see previous chapter 3 for evidence of this. The ICC is a landmark symbol of this.

⁶⁰⁸ It supports assimilated justice, as described here. See further, Zehr, 1990, 1995, who believes that the shift in paradigm relates to the experience of crime; justice as paradigm; community justice; covenant justice; and victim-offender reconciliation programs. Prosecutorial process threatens to undermine alternative processes such as mediation, and requires a basis in alternative, restorative values, in order to cooperate with, or even assimilate such values, i.e. assimilated justice. See Appendix 2.

restorative justice and TCs.⁶⁰⁹ A punitive part is often lacking in national methods of reconciliation, in which the offender's identity is perhaps protected from the public or amnesty is issued. Even in cases where public shaming of the offender in TC hearings involves some measure of punishment, deterrence and mediation; just-desert principles are not adhered to. *Vis-à-vis* the fundamental aim of reparation,⁶¹⁰ and the corresponding state duty to assist and supply victims with the means of attaining reparation have found support in such theories and movements.

Restitution seeks to restore the victims to their previous situation and fits both the narrow definition of reparation, focused on reinstating the legal rights and social status of the individual victim, as well as the broad definition of restoring the community, the victims at large, by restoration of residence, employment and housing.⁶¹¹

Compensation should be provided for any economically assessable damage. It must be properly estimated according to the victim's needs and losses, and this emphasises both state and offender responsibility, as the offender may have the means to at least partly compensate.⁶¹² Costs relating to assistance required because of the harm suffered and loss of income can be financially assessed, with regard to the victim. However, such material reparation must remain narrowly defined and is difficult to envisage with regard to community assistance.

Rehabilitation, as a means of reparation focused on the victim and not the offender, includes "medical and psychological care as well as legal and social services".⁶¹³ Rehabilitation constitutes a network of services provided to the victims as part of the healing process, which should result in services for the victims and the community at large. State mechanisms are essential, but do not exclude pro-active efforts by the offender. The usage of mediation schemes, which concentrate on reparative acts between the offender and the victim, has an individual rehabilitation focus.⁶¹⁴

Satisfaction and guarantees of non-repetition involve aspects of all the fundamental aims, with both an individual and a collective focus on the victim's and the community's right to truth, justice and deterrence.⁶¹⁵

⁶⁰⁹ Especially common law jurisdictions, see further Umbreit 1994, 1995, 1997; Van Ness, 1997.

⁶¹⁰ And indeed other victim rights, e.g. right to truth, and access to justice.

⁶¹¹ Princip.19, Bassiouni principles, 2000.

⁶¹² Compensation for torture must include "the means for as full rehabilitation as possible", art.14, Torture Conv; Princip.20 Bassiouni principles.

⁶¹³ Princip.21, Bassiouni principles, 2000. Offender rehabilitation is referred to in terms of a deterrence mechanism, as well as reconciliation.

⁶¹⁴ Rwanda's genocide law provides for reduced punishment for offenders who confess and express remorse before the prosecutor. After this, offenders can be sent to a mandatory 3-month solidarity camp, an offender-focused rehabilitation centre where reconciliation and the importance of asking forgiveness from the victims are discussed. Mediation schemes further focus on rehabilitation and reconciliation, and are discussed with regard to reconciliation, and restorative justice.

⁶¹⁵ Princip.22-23, Bassiouni principles, 2000.

The term reparation is generic rather than specific; it is able to incorporate all of the above and at the same time broaden the perspective to include the victims, by recognising that their needs and rights are wide-ranging. "Reparation requires the court to consider what the offence meant to the victim, and secondly, to consider what the victim regards as being necessary in order to put the damage right."⁶¹⁶ Victim related research, conducted in different countries concerning victim preferences, indicates a growing knowledge of the right to reparation.⁶¹⁷ It is shown that victims who suffer a great amount of material loss or verbal and/or physical abuse appear to prioritise the prosecutorial process punishment, before seeking reparation.⁶¹⁸ Victims who suffer a lesser amount of material harm and who may thus not carry the same amount of resentment and fear or at least not to the same extent as a victim who suffered greater harm, appear primarily to seek reparation.⁶¹⁹

Similarly to the fundamental aim of deterrence, the aim of reparation has the potential for both an individual and a collective focus on the victim and the community, by inviting material as well as symbolic acts of reparation.

4.5.2. INDIVIDUAL REPARATION

Reparation in the narrow sense concentrates on repairing the victim. Both the individual and the collective focuses of the previously discussed fundamental aim of truth assists and complements the fundamental aim of reparation, in finding the most suitable means of reparation.

Bringing the victim back into the court process and allowing victim narratives to describe the crime will assist the legal truth and give the court a better insight into the crime, the offender's actions and the harm suffered.⁶²⁰ At the same time, the prosecutorial process can focus on the individual victim and order individual reparations based on this.

Although the primary duty of the criminal justice system is to deal with the offender, this is not separate from the victim's right to reparation, but is rather entwined with it.⁶²¹ The legal truth and the fundamental aim of just-desert punishment must not undermine the fundamental aim of reparation. It is probably particularly important for victims of international core crimes to be

⁶¹⁶ Davis, 1988, p.132.

⁶¹⁷ Wright, 1989; Wright & Galaway, 1989; Galaway & Hudson, 1996.

⁶¹⁸ Id., Galaway 1989, 1996. Reparation may, depending on the domestic justice system, be sought separately, through the civil law, and victims of severe crime may then prioritise prosecution of the offender.

⁶¹⁹ Hamber, at <http://www.incore.ulst.ac.uk/home/publication/conference/thepast/repair.pdf>; Theissen, at <http://www.berghof-handbook.net/theissen/final.pdf>, 10; Brooks, 1999; Kritz, 1995.

⁶²⁰ The fundamental aim of reparation should be safeguarded by the prosecutorial process and how the right to reparation is dealt with by the ICC is looked at in ch.5.

⁶²¹ Particularly with regard to international criminal justice and the ICC. See previous chapter and ahead.

recognised and to feel involved, as part of a healing process.⁶²² Where the legal truth is limited to the truth relevant to the offender's crimes, the broader collective truth could further assist the court with handling victim reparation. As criminal justice does not focus on a broadly defined truth, the victims may have to rely on their legal counsel to present such facts to the court.⁶²³

The collective focus of the fundamental aim of truth may further assist the victims at large, by identifying community needs. This is of vital concern to assimilated justice, as it is problematic for any justice process to hear and repair each individual.⁶²⁴ Symptomatic of this problem, the Inter-American Court of Human Rights laid down one measure limiting the rights of the victims. Only those who suffer direct harm can be individually repaired, because “[t]o compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured.”⁶²⁵ Although the court concentrated on offender-made reparation, the reasons given are realistic in connection with the state duty to make reparation as well. For reparation to be effective, it is important to recognise means of a reparative nature other than compensation, as many offenders and many states in which gross violations of human rights occur are not capable of providing any great financial reparation.⁶²⁶ In the end, material reparation to the victim may have to be further limited, because of the amount of direct victims or because of the absence of funding, or both.

Symbolic reparations are often viewed as less concrete than material reparation, e.g. compensation. Compensation serves important survival functions, albeit short-term. In reality, money will often only help temporarily, and compensation cannot compensate for the loss of life or the amount the lost person could financially have contributed, if alive and well.⁶²⁷ An example of symbolic reparation is a victim impact statement.⁶²⁸ A victim impact statement is a document that is intended to provide information to the court or any other institution of justice, about the physical, financial, emotional and psychological effects suffered by the victim, as a result of a crime. Victim impact statements follow discussions with the actual victims, (who often take the role of witnesses)

⁶²² There may e.g. not exist any domestic services, and the victims can have been suffering under an oppressive regime for a very long time, without having had any rights or recognition.

⁶²³ See previous chapter on the right to participation and reparation in the ICC Statute, arts.68, 75.

⁶²⁴ Human Rights Watch, 1994; Pasqualucci, 1994; Lutz, E.L. *After the Elections: Compensating Victims of Human Rights Abuses*, in Kritz, 1995, p.557.

⁶²⁵ *Aloboetoe case*, #48, 1993. The victim definition used here and by the Bassiouni principles and the ICC do not appear to contradict this judgement. The community definition, of victims at large who suffered indirect harm also appears to concur with the above judgement.

⁶²⁶ Compensation orders are made to victims who have suffered personal injury, loss or damage. Financial means are also required with regard to restitution and rehabilitation, however to a less extent.

⁶²⁷ In essence, compensation is yet another means of symbolic reparation; Kritz, 1995; <http://www.incore.ulst.ac.uk/home/publication/conference/thepast/repair.pdf>

⁶²⁸ These can derive out of expressive truth and at the same time be an aim of instrumental truth. A victim statement in any process may be healing. Legal truth of a prosecutorial process may need victim statements, instrumental to the other fundamental aims, and especially the ‘newly arrived’ fundamental aim of reparation.

and may have, at a symbolic level, the effect of healing. The victims feel acknowledged, their needs and views have been heard and they have been treated with equal opportunity, in relation to the offender. This type of recognition can improve the victim's satisfaction with the justice system, and both increase their willingness to cooperate and decrease their wish for revenge. The statements can also positively affect the justice system by enhancing the qualities of efficacy and credibility in the justice administered, preventing arbitrary sentences and, at the same time, advancing other fundamental aims. The system is reminded that there are real people involved in the case brought by the prosecutor. Of course, the additional burden on the institutions of justice must be recognised, as well as the added suffering on behalf of the victim, who may have to face the offender and cross-examination and who may have unrealistic expectations.⁶²⁹

This is where it appears that truth commissions are often justifiable. TCs are known to invite and hear victims to enhance the truth-discovery process.⁶³⁰ They can reach a large amount of victims who would otherwise never have access to justice and can provide the victims the therapeutic and liberating experience of having a forum in which to be heard, for the truth to be discovered, to provide recognition that what happened was wrong, to receive an apology, and other forms of healing reparation. "Only the knowledge of truth will restore the dignity of the victims in the public mind, allow their relatives and mourners to honor them fittingly, and in some measure make it possible to make amends for the damage done."⁶³¹ This process should not be seen as working against criminal justice, but rather together with it.

4.5.3. COLLECTIVE REPARATION

Broadly defined reparation has a collective victim and community focus and often takes the form of symbolic reparation, as it lacks direct victim-focus. Viewed broadly then, reparation overlaps with the other fundamental aims, and especially the more collective notions of truth, and deterrence, focusing on the greater good of all.

"To repair" and "to make amends" are usually understood as involving financial or other material forms of reparation to compensate the victim, but they can also be understood in the form of symbolic reparation. Examples may be an apology made by an offender to the community and, symbolic reparation by the state, such as the building of memorial sites. The element of satisfaction and guarantees of non-repetition involve a great amount of symbolic means of reparation that can

⁶²⁹ Victim impact statements are used by many countries such as the USA, Canada, New Zealand and Australia to enhance the prosecutorial process; www.intractableconflict.org/m/narratives.jsp

⁶³⁰ See later chapter on restorative justice.

⁶³¹ Barryman, 1993.

reach the victims and the community. For the collective, funds for community rehabilitation programs furthermore support healing of all the actors and thus the fundamental aim of reconciliation. Compensation programs impose a great cost and hopefully also a deterrent on the state, and there is no duty without hardship. Any means of reparation serve to acknowledge the wrongdoing and restore the victim's dignity, as long as it is publicly acknowledged.⁶³² The right to reparation is thus not restricted to victims, but can be extended to communities and peoples. In cases where whole communities have been victimized, there should be emphasis on symbolic and communal forms of reparation.⁶³³ Material collective reparation can assist minority groups to carry out cultural activities, in order to rehabilitate and revitalize the community as a whole. However, in order to truly rehabilitate the community, reparations must address structural violence as well as physical and psychological violence. The collective truth will thus be of importance. Symbolic reparation can derive from broadly defined collective reparation, which, in turn, may be the outcome of truth investigations, especially in a truth discovery process where a broader collectively acceptable truth highlights the victims' and the community's suffering.

One of the oldest forms of symbolic reparation is to commemorate the victims. Commemoration sites (such as museums) and other such devices (anti-apartheid T-shirts issued and supported by a state-operated project, for example) appear popular with states in transition. These symbolic means of reparation seem to be more collectively educative than reparatory. Obviously they still promote the acknowledgment of truth concerning the past and carry with them warnings and hopes for a better future, but these means can neglect the important victim focus.⁶³⁴ Expressive truth may be transformed into symbolic reparation as a consequence of the truth expressed, but individual reparation cannot be derived from a general picture of truth without some specific focus on the victim and without affirmative state or offender action.

Broadly defined reparation may play a role when it comes to deciding upon the actual punishment. While imprisonment is viewed as appropriate for more serious offences, one view is that "for other, less serious, offenders, a spell in custody is not the most effective punishment. Imprisonment restricts offenders' liberty, but it also reduces their responsibility; they are not required to face up to what they have done and to the effect on their victim or to make any recompense to the victim or the public...[C]ompensation to individuals and reparation to the public

⁶³² <http://www.incore.ulst.ac.uk/home/publication/conference/thepast/repair.pdf>; Kritz, 1995.

⁶³³ Theissen, <http://www.berghof-handbook.net/theissen/final.pdf>, 10

⁶³⁴ E.g. the Apartheid museum in Johannesburg, SA is, according to media, mainly visited by foreign tourists and has primarily been discussed in SA press for its outstanding and challenging design. Its importance to the victims and the community must however not be ignored. Another example is churches turned into mass graves turned into memorial sites in Rwanda.

should be an important element of punishing offenders in the community.”⁶³⁵ A reparation order is ordered by the court and thus enforced upon the offender. However, with regard to offenders of international core crimes, and the fundamental aim of just-desert punishment, the above quote and reparation orders more generally, appear unrealistic and inappropriate. While a display of remorse may not be essential to criminal justice, it may mean much to the victims, symbolically. The incorporation of means to assist, hear and repair victims who appear before the ICC may symbolically relieve victims. Nothing will undo the deed and the harm done, but an apology or acknowledgment may give the victim the feeling that “...the appropriate moral standards are shared by the offender”.⁶³⁶ However, if such symbolic means of reparation, for instance an apology, are achieved through compulsion or are imposed on the offender, the victims and the community may struggle to understand the motives of the offender’s participation and an apology may not lessen the mental suffering or have the desired therapeutic effect. If the offender were to volunteer such reparation on a strategic basis, hoping for mitigation, it would not longer be based on the victim’s right to reparation.

4.5.4. REPARATION IN ASSIMILATED JUSTICE

In theory, the discussed fundamental aims of truth, just-desert punishment and deterrence can be viewed as means to mend injustices done to victims. Truth can repair individually through legal truth mechanisms and collectively through a broad social perception of the truth. Just-desert punishment can individually and collectively repair through the satisfaction of seeing justice done. Deterrence can repair collectively by creating confidence and security. Finally, reconciliation (to be considered next) has the ability to repair individually through the healing that is necessitated by individual reconciliation and to repair collectively through public acknowledgment and reinstatement of civic rights.

The possibility of both individual and collective focuses promotes a legitimate justice process which satisfies all of the fundamental aims through a dual focus. Furthermore, it encourages an assimilation of restorative justice mechanisms with criminal justice. This would assist the fundamental aim of reparation to reach its potential dual focus through the assistance of the

⁶³⁵ #1.1, 1.4. Green Paper Cm 424, 1988, Home Office, UK. Reparation orders are often used in domestic legal systems in order to aid the victim’s healing process; however, the role of the offender is emphasised, and reparation orders can only really claim to be a mode of symbolic reparation. Reparation orders may also have punitive, deterring as well as reconciling effects, involving rehabilitation of both offender and victim. This could also take the shape of a court ordering a letter of explanation and apology. This has a punitive effect in which the offender suffers by facing the victim at the same time as making some practical reparation.

⁶³⁶ Davis, 1992.

fundamental aim of truth and its potential individual and collective social truths. These truths can help ascertain the necessary victim and community needs of both a material and symbolic nature. The fundamental aim of just-desert punishment can, by holding the offender accountable, assist the material needs of the victim, if the offender is capable to make restitution. Through the fundamental aim of deterrence's individual form can individual mediation programs be assisted, and through its collective form, deterrence may promote a collective cure to insecurities. However, the fundamental aim of reparation is essential as a pro-active and affirmative means of victim rights to reparation and to some extent also community rights.⁶³⁷ The different elements of reparation, such as compensation, restoration and rehabilitation appear essential to the legitimation of the accountability process, through their involvement of the victim. However, by not losing sight of the individual victim and in order to achieve equilibrium between the actors and the fundamental aims, the aim of reparation and the right to reparation must remain primarily focused on the victims. The fundamental aims of truth, just-desert punishment, deterrence and reconciliation can overlap as means to mend injustices done to the community, particularly when impunity threatens victim reparation.

International, regional, and national laws and regulations support affirmative victim rights. In the same way, they support assimilated justice, by not excluding, but rather including, criminal and restorative values.⁶³⁸ Many human rights instruments create international organs and procedures with which to monitor compliance by states with prescribed norms.⁶³⁹ However, although state

⁶³⁷ Thus a relationship with the victim in focus. The community is partially in focus.

⁶³⁸ See previous chapter.

⁶³⁹ However, as earlier stated, it is not further discussed here. In a growing number of cases, prosecution is requested, and in some instances also the issue of redress for victims, relying on domestic legal systems. E.g. the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and other bodies that accept individual communications make recommendations concerning state compensation and reparation. There are regional settings such as the European Court of Human Rights and the Inter-American Court of Human Rights, where individuals may bring cases and remedies play a large role, but the focus is only on state responsibility and no criminal jurisdiction exists. The UN Human Rights Committee requires compensation to be paid to certain victims. The important authority for this is the *Velásquez-Rodríguez* case that emphasised the fact that reparation "consists of full restitution, meaning the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm." Inter-Am.Ct.HR, 1988. The Honduran government was held responsible for paying the victims compensation for harm done by the prior regime. The findings by the Inter-American Commission on Human Rights concerning illegal amnesty laws in Argentina and Uruguay are also of importance. The governments were recommended to pay the petitioners moral compensation for violating the right to judicial protection and a fair trial through amnesty laws. Moral reparation largely stems from the Inter-American Court's South American judgements' interpretation of "fair compensation", Inter-Am.CHR. art.61(1). Rather than punitive, which puts some focus on the violator, fair compensation focuses on the victims, and to a lesser extent society. European Convention for the Protection of Human Rights and Fundamental Freedoms and the ECtHR, at <http://www.echr.coe.int/art.34> of the convention, Rule 47 of the court: after finding that a state in an individual case has violated human rights the decision on the consequences is left to the state and the complainant. Before 1998, individual petitions were not possible under the ECHR, but this was reversed 31 Oct.1998. The ECtHR may assess the compensation to be paid, which is followed up by the Council of Europe, see *Van Mechelen et al. v. The Netherlands*, ECtHR, 1997; The Committee of Ministers form a framework of law through its recommendations, e.g. Recom.No.R(97)13 concerning intimidation of witnesses and the rights of the defence.

violations of international law produce a duty to make reparation, reparation is the only direct sanction attendant upon state responsibility (despite punishment being inferable from a duty to make reparation in the broad sense).⁶⁴⁰ Traditionally, criminal justice systems are offender-orientated. Human rights instruments have however influenced the institutional objectives with regard to international criminal justice. International law has developed means of reparation based on the victim's right with regard to the international core crimes and a state duty to redress the harm done, whether or not the violations were committed by the state.⁶⁴¹ Thus, the fundamental aim of reparation also epitomises a need, a right⁶⁴² and a duty.⁶⁴³

Victim programs often intend, as an "outreach" facility, to provide the close service and support the victim is thought to need in order to deal with psychological suffering. In the domestic systems of developed countries, it is primarily the police and social services that provide the initial aid to the victim; however, neither the international community nor states in transition have such an infrastructure of support. Certain types of "outreach" programmes are provided at the local level by international, regional, and local humanitarian aid organisations on behalf of the international community. With regard to the international core crimes, the victim has to rely on diplomatic relations to be able to use possible human rights mechanisms holding the state responsible, or to go through domestic courts or the international prosecutor's office of the ICC.⁶⁴⁴ Moreover, victims of the international core crimes often lack effective mechanisms in their own legal systems, so a formal aim at reparation within international justice might be the only realistic means of achieving any form of individual reparation.⁶⁴⁵

While the separation between punishment and compensation has paralleled the distinction between criminal and civil law in domestic systems, it is not so for the international legal system or

⁶⁴⁰ Conversely, however, while individual criminal accountability involves individual criminal accountability, no direct offender-based duty to make reparation has been formally incorporated into international law. It would remain an unfulfilled duty. International law establishes a state duty to make reparation to the extent possible; this duty has developed from case law to treaty law, in which violating states are often obliged to make reparations to the injured parties. *Id.*, and see *e.g. the Factory at Chorzow* case, 1928; UDHR, art.8; ICCPR, art.2; ECHR, art.50; African Charter HR, art.21(2); ACHR, art.63(2); Dupuy, 2003, 2004; Resolutions may ask states for actual compensation and reparation orders, 1964 UN Yrbook 145, ILM, 1981, p.963, where the Security Council asked the country in question to offer the violated state compensation for its victims.

⁶⁴¹ See Bassiouni principles, 2000; ICC Statute, 1998; and ch.3 concerning the duty to make reparations, find the truth, facilitate access to justice etc.

⁶⁴² *Id.*, Princip.21-25, Bassiouni principles, 2000; ch.3.

⁶⁴³ *Id. e.g.* Princip.3.

⁶⁴⁴ Human rights bodies assigning reparation only focus on state responsibility, see earlier footnotes. State compensation has been recognised by Germany, Albania, Bulgaria, Czechoslovakia and Russia, see Kritz, 1995. This is a venture open to few victims of international crimes but established TCs or regional Human Rights Courts can help by putting pressure on the local government.

⁶⁴⁵ States unwilling to try offenders of international core crimes are generally also unwilling or incapable of supplying the victims with a civil trial remedy route. It remains to be seen whether truth commissions mandated to make recommendations regarding reparations actually have their recommendations carried out by such governments. See ahead, later chapter.

for states in transition with faulty or no justice system. Individual responsibility for the international core crimes requires the criminal forum of accountability in the international legal system. Civil restorative justice mechanism should thus be assimilated with the criminal objectives and made a function of the accountability process and the justice system.⁶⁴⁶ This could enable more victim and community participation in the justice process, linked to, rather than separated from the accountability of the offender. An assimilation of restorative and criminal justice could ensure a dual focus on the actors, much enriched by being applied together with the individual focus of the fundamental aims through criminal justice mechanisms. The additional collective focus, repairing the community through broad, often symbolic, reparations, require knowledge, time, and funding, and is dependent on local restorative mechanisms. Where reparation and funding are limited and restricted to the absolutely necessary fulfilment of the fundamental aim of reconciliation can further legitimise the accountability process and the involvement of the actors.

4.6 RECONCILIATION

Reconciliation is complicated, not only in terms of terminology, but also in terms of process. It is the final fundamental aim to be discussed. The section views the fundamental aim from its individual and collective focus. The values of forgiveness and rehabilitation are considered and, subsequently, the section considers the fundamental aim of reconciliation from a process perspective. Collective reconciliation is also discussed, the section ending with an overview of the aim of reconciliation in assimilated justice.

Reconciliation can simply translate into the will to forgive and move on, on both individual and collective levels. It is an attitude that reflects hope in terms of “Let us focus on our future, a future different to the past!” This attitude reflects the natural process of the aim of reconciliation, as well as its character as an end in itself. After such injustices as the international core crimes, against the individual and the community, reconciliatory attitudes do not just materialise out of thin air, but appear to rather reflect and comprise the entire journey of developing such attitudes, individually and collectively.

⁶⁴⁶ If procedural rules were created for victims and communities of international crimes to take the case through a guaranteed civil process, in a similar fashion to how some domestic legal systems are set up, rather than combining the processes in one legitimate assimilated justice process, it is argued, to a larger extent in later chapters, that the important civil aspects, having to deal with a great amount of victims, must represent and understand the local context. An internationally set up civil law network could not guarantee this and if it remained reliant on domestic states, where the prosecutorial process cannot be guaranteed, the procedure would represent existing human rights mechanisms, linked to state responsibility, and not individual criminal accountability.

In civil law, the term “reconciliation” refers to an agreement to resume a relationship after some kind of separation; in public international law it refers to a non-judicial agreement, adjudication or settlement between the actors reaching a solution to a dispute by surrendering all claims. In African cultures, reconciliation was, and still is, common practice in settling family or local conflicts, through restorative justice mechanisms. The fact that pre-colonial (and independent) Africa focused on the community rather than on the offender (for example *Ubuntu* practice in South Africa – the common good of the community) could mean that reconciliation may be a value that is better rooted and purposeful in certain cultures than in others.

4.6.1 THE PROCESS OF RECONCILIATION: INDIVIDUAL AND COLLECTIVE FOCUS

The fundamental aim of reconciliation entails the individual and collective process of coming to terms with the past for a common future, incorporating the different points of reference that do not oppose each other but rather represent varied levels of the same aim.⁶⁴⁷ In order not to put the fundamental aim of reconciliation at risk of failure, the aim cannot only relate to the practice of certain cultures, inherently focusing on the community before the individual actor. If reconciliation begins within the individual, the reconciliatory process cannot circumvent the individual for the better good of all, without first recognising the actors, individually. With the help of the other fundamental aims, the individual process of reconciliation has already been given means of assistance. Through the fundamental aim of truth, there is awareness of the past, criminal justice has been seen to be done through the fundamental aim of just-desert punishment (and perhaps, to a lesser extent, through deterring means, which may also have had an overflow effect of creating deterrence in the community) and the fundamental aim of reparation has assisted the victims and perhaps also the community.

Reconciliation is a process, which is an end in itself. It is not a mechanism aiming to achieve something else, but a slow process that works through different stages, through such means as truth discovery, forgiveness and rehabilitation.⁶⁴⁸

To advance from *basic* coexistence to *peaceful* coexistence involves a move from reluctance to willingness to progress together. Yet advancement involves more than coexistence. It involves understanding and sharing of one’s past, a collective restoration and willingness, based on trust, to

⁶⁴⁷ Referring to the meaning of reconciliation within civil law, international law and African cultures.

⁶⁴⁸ See North’s process, ahead.

establish a *relationship*.⁶⁴⁹ This may work on a purely individual level, or it can advance to collective (regional and national) level, as an end of successfully realised means.

While individual reconciliation is directly offender - and victim-centred, collective reconciliation must take into account all the actors.

4.6.2. RECONCILIATION THROUGH FORGIVENESS AND REHABILITATION

At the individual level, reconciliation involves confronting the differences between offender and victim through the simple means of telling and knowing the truth, through understanding the views and feelings of the other party. This may be supported by mediation and rehabilitation services⁶⁵⁰ and through the purely internal progression of self-acknowledgment, healing, and forgiveness. At the collective, community level, reconciliation is an aim with different levels of function, incorporating truth acknowledgment, rehabilitation and forgiveness through education, and media and public policies. Collective reconciliation is a lasting or long-standing setting aside of disputes and cannot simply be decreed, just as individual offender-victim conciliation cannot be dictated. Simply dictating or decreeing reconciliation, whether individual or collective, will not be based on sincere sentiments, and can therefore not form a sound basis for a reconciled and stable future.

Reconciliation is interlinked with rehabilitation and forgiveness, focusing on the victim and offender.⁶⁵¹ Dependant on each other, the property of the end of rehabilitation is offender-focused, while forgiveness is victim-focused. These ends are means of the reconciliation process. Also, with the assistance of the other fundamental aims, assimilated justice can assist offender rehabilitation through the individual focus of truth, just-desert punishment and deterrence.⁶⁵² The element of forgiveness is yet another means to reconciliation and it may be further assisted by the other aims. For example, truth acknowledgment, offender confession and the expression of remorse and apology may assist the victim's ability to forgive. Forgiveness and rehabilitation are not necessarily conditional, although they are often considered to be so. As an example, forgiveness through the

⁶⁴⁹ Italics are used to highlight what are generally different steps. The society in question must, after gross violations of human rights, end hostilities before any justice process and any fundamental aim can be fulfilled.

⁶⁵⁰ E.g. through symbolic means of reparation, as services provided to achieve the right to rehabilitation, see ch.3.

⁶⁵¹ Rehabilitation has been omitted as a separate aim, for reasons stated in the introductory chapter. Rehabilitation has been chosen to be included within the aim of reconciliation, although it figures of course in the fundamental aims of just-desert punishment and deterrence as mainly offender-focused; and victim-focused in the aim of reparation as well. See previous aims and ch.3.

⁶⁵² The victim may require repairing rehabilitation, through the individual focus of the aim of reparation. The victim may be further assisted to rehabilitate mentally through knowing the truth, and seeing the offender being brought to justice and held accountable.

means of release from prison by the criminal justice system is often conditional on rehabilitation. Forgiveness may also be conditional upon confession, remorse and apology. Forgiveness is a process the victim may go through over considerable time, perhaps aided by actions from the offender, or perhaps just affected by the victim's psychological healing process.⁶⁵³ Whether conditional or not, forgiveness is not offender-focused. The victim does not forgive to aid the offender, but to let go of the pain and move on, in preparation for overall community reconciliation.

Forgiveness must not, however, be mistaken for amnesia or for forgetting the past, the harm and the injustice done.⁶⁵⁴ The international core crimes do not allow statutes of limitation, so the crimes may thus be prosecuted no matter how long a time has passed since the commission of the crime.⁶⁵⁵ This rule, and the continued prosecutions of WWII atrocities, for example, indicates a moral responsibility not to forget such crimes. It also indicates recognition of the victims' suffering and that forgiveness, individual and collective, cannot be rushed. However, when prosecuting an offender, of considerable age for international crimes committed fifty years earlier, the offender before us may no longer, in significant respects, be the same guilty man he was fifty years ago. In this situation, as in a situation where the offender has undergone treatment or can show a change of attitude and responsibility,⁶⁵⁶ forgiveness may be an easier issue to deal with. Forgiveness refers to a psychological process, specifically of the victim letting go of resentment and, to some extent, community willingness to reaccept offenders.⁶⁵⁷ Although forgiveness cannot be forced or imposed, psychotherapy applies techniques to restore esteem and self-respect, reduce fear and self-blame, to release resentment and teach understanding. It is understood that crime victims hold a good deal of anger that must be released before forgiveness can be reached and future revenge avoided.⁶⁵⁸

Individual reconciliation is connected to rehabilitation, where rehabilitation is a means towards reconciliation; and forgiveness, on behalf of the victim and the community, for example by accepting the offender back into the community, can also be seen as a means to reconciliation.⁶⁵⁹ The internal order between reconciliation, rehabilitation, and forgiveness is similar to the internal difference between inflicted punishment, as justified by just desert and deterrence. From an external

⁶⁵³ Gehm, in Messmer & Otto, 1992.

⁶⁵⁴ Zehr, 1990; Minow, 1998. Haber argues for forgetting, not the harm done, but a "conscious decision by the victim not to remember the justifiable claim for recompense" in Scobie & Scobie, 1998, p.375.

⁶⁵⁵ Criminal justice demonstrates that for those responsible of such grave crimes, there will be no escape, territorially or temporally, with punitive and deterring effect sought. See the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968; ch.3; Princip.6, Bassiouni principles, 2000.

⁶⁵⁶ *I.e.* rehabilitation.

⁶⁵⁷ Forgiveness can be defined as the end of feeling resentment. According to Webster's dictionary, it is defined as 'a process of ceasing to feel resentment against someone'. Religion seeks to teach such a process to restore relationships, reconciliation and peace. Forgiveness is here not used in the criminal justice sense of forgiveness being given through a served prison sentence.

⁶⁵⁸ Van Ness, 1986.

⁶⁵⁹ At the same time, reconciliation can be viewed as a consequence of rehabilitation and forgiveness.

viewpoint, the end result appears the same. Just as punishment inflicted for just condemnation also seeks to achieve deterrence to prevent further harm and insecurity, the aim of reconciling offender with victim, and with the community at large, also seeks to achieve rehabilitation of the offender, of the victims, and forgiveness on behalf of the victim and community. Of course, this does not mean that the aim of just-desert punishment automatically achieves the aim of deterrence, or that the aim of reconciliation achieves rehabilitation and forgiveness, or indeed that rehabilitation and forgiveness achieve reconciliation.⁶⁶⁰

4.6.3. NORTH'S INDIVIDUAL RECONCILIATION PROCESS

Restorative justice and, to some extent, criminal justice have accepted at least part of the reconciliation doctrine through mediation and healing programs for victims and rehabilitation programs for offenders.⁶⁶¹ North has proposed a nine-stage-process, which an offender must go through to earn forgiveness. However, while it may well indicate a process internal to the offender, it does not deal with the community's reaction to the crime committed and the fact that forgiveness and rehabilitation and hence reconciliation, are more than merely an individual process.⁶⁶²

According to North, the offender must firstly recognise the action as a crime; second, publicly acknowledge the recognition of the act as criminal; based on the acknowledgment, regret and remorse should be experienced; third, the offender "resolves to reform, undergoes a process of reframing in regard to himself"; at the fourth stage, the offender may recognize some means of self-improvement, and begins the internal process of self-forgiveness.⁶⁶³ North believes that the offender, at this stage, needs external, societal, and perhaps victim forgiveness, and this is usually present in either a mediation process or a similar victim-offender reconciliation program where the offender expresses remorse and the victims express their suffering.⁶⁶⁴ Stage six may entail asking the victim for forgiveness, although it cannot be dictated that an offender has the right to this, and it

⁶⁶⁰ See behind, fundamental aim of just-desert punishment and fundamental aim of deterrence. There is academic disagreement as to whether reconciliation necessarily follows forgiveness, *e.g.* North, in Enright & North, 1998, believes it does. Scobie & Scobie, 1998 and Enright & Wisconsin Human Development Study Group, in Enright & North, 1998, believe it is not necessarily so.

⁶⁶¹ Wright & Galaway, 1989; Galaway & Hudson, 1990.

⁶⁶² North, in Enright & North, 1998, p.30.

⁶⁶³ North's model indicates a possibility for offenders to reach rehabilitation and forgiveness without shaming, through self-forgiveness, although at this stage shaming will probably be present, through the prosecutorial process, and/or public truth acknowledgement.

⁶⁶⁴ Zehr, 1990, 1995, 1997, believes a mediation process represented by the offender and the victim is an important factor for reconciliation. Stage four and five are interrelated and could possible exchange order, as it may be as important to receive community and/or victim forgiveness to reach self-forgiveness. Zehr's valuable studies on retributive versus restorative justice are further discussed in a later chapter, but see the retributive v. restorative lens in Appendix 2 and Zehr's restorative model, based on the needs of victims and offenders, past ways of responding to crime, recent experiments and biblical principles.

may take one or two further stages, seven and eight, in order for such forgiveness to be forthcoming. The ninth and final stage involves the realisation of “some measure of interpersonal harmony”, that is, reconciliation.⁶⁶⁵

The importance of forgiveness is more victim-focused than offender- or community-focused, although, as part of the aim of reconciliation, all three actors are involved and affected. It is not only the process towards reaching forgiveness that relies more heavily on the victim, but also the outcome. If and when the victim is able to forgive, his feelings and outlook will thereafter undergo a more considerable change.⁶⁶⁶

Despite the fact that forgiveness is an important feature of reconciliation and that reconciliation is more likely to be achievable if forgiveness is first achieved, reconciliation must not depend on such an individual and subjective psychological development. It is essential to create the possibility for communication that relies on the involvement of victim and offender.⁶⁶⁷ It is through communication that the victim can move towards forgiveness, providing a chance to promote understanding and allowing the victim to receive and the offender to experience and express remorse, confession, and apology.⁶⁶⁸ Through communication the offender is made aware of the victim’s suffering, and this can help the offender’s process of rehabilitation, assisted by forgiveness. If forgiveness is reached from the help of the offender’s contribution, it may further assist the offender positively to want to change and feel part of the reconciliation efforts. The community will profit from communication in a similar way, more willingly reaccepting the offender after victim forgiveness, and helping the victim’s healing process through the knowledge and understanding that arise out of communications. With regard to established and acknowledged legal and social truth, further communication will reduce any remaining differences in accounts. A broad collectively acceptable version of the truth will, through assimilated justice, therefore be of importance.

4.6.4. COLLECTIVE RECONCILIATION

The correlation between individual and collective reconciliation is further complicated by the fact that collective community reconciliation depends on it. In fact, the collective dimension of reconciliation must, while perhaps demanding more, at least be an aggregation of individual cases of reconciliation.

⁶⁶⁵ North, in Enright & North, 1998, p.33.

⁶⁶⁶ Estrada-Hollenbeck, in Galaway & Hudson, 1996, p.310.

⁶⁶⁷ See again, North’s proposed process above, of offender-invited forgiveness.

⁶⁶⁸ Haley, in Wright & Galaway, 1989.

According to Professor Assefa, reconciliation consists of the core elements of: (a) an honest acknowledgment of the harm each party has inflicted on the other; (b) sincere regrets and remorse for the injury done; (c) readiness to apologize for one's role in inflicting the injury; (d) readiness of the conflicting parties to "let go" of the anger and bitterness caused by the conflict and the injury; (e) commitment by the offender to not repeat the injury; (f) sincere effort to redress past grievances that caused the conflict and compensate the damage caused to the extent possible; and (g) entrance into a new mutually enriching relationship.⁶⁶⁹ The last two steps of reconciliation in Assefa's list represent collective efforts, which clearly rely on the preceding individual steps towards reconciliation.

Habermas has firmly criticised the treatment of the holocaust as an aberration with which the German society should become reconciled.⁶⁷⁰ Habermas argues that justice and reconciliation could not be viewed as collectively achievable if events of the past are merely treated as aberrations. Rather they must be recognised as something intrinsically possible within cultures, with each case taken seriously, in these terms. At the individual level, the fundamental aim of reconciliation appears to necessitate, or at least to benefit greatly from involving the other fundamental aims in assimilated justice, especially in terms of the more individual focus. Victim-offender reconciliation would appear to require the individual truths related to the specific victim-offender case, and a prosecutorial process that is able to deal with the actual offender and individual criminal accountability. The victim, but perhaps also the offender to some extent, may find the internal process facilitated by imposed just-desert punishment, as well as specific deterrence. Individual reparations by the state and the offender, whether material or symbolic, could further advance this individual process.

In a similar fashion, at the collective level, the fundamental aim of reconciliation gains from the potential collective focus of the other fundamental aims. For society to be able to move ahead and build on the past a collective perception of inclusive truth may be necessary; this would be free from conflicting ethnic versions, for example. After a truth-discovery process involving victims, offenders, and the general community, truth acknowledgment, together with education and other public affairs support measures, would promote the collective truth. Collective deterrence and reparation will further assist the community in moving away from constant reminders of the past.

Reconciliation is a complicated *modus operandi* that may be achieved through healing mechanisms such as rehabilitation programs. Social welfare programs working at rehabilitating and

⁶⁶⁹ Assefa, 1999, p.42.

⁶⁷⁰ Habermas, 2001, arguing that further development of the EU requires both a mobilizing political project, positively differentiating the Old World from the New, and a formal Constitution, submitted to a popular referendum.

healing local and regional communities are important implementations, supported by means of general deterrence and collective, often symbolic, reparations. With regard to the international core crimes, criminal regimes and transitional states, reconciliation involves reforming or rehabilitating more than victims and offenders. It must aim at collective education and rehabilitation, in which the community as a whole must accept the cultures of both the offenders and the victims. Rehabilitation, forgiveness, and reconciliation focus on reintegration by restorative intervention of both offender and victim in the community. However, just as not all individuals are rational persons able to be deterred by the threat of punishment, not all individuals can be rehabilitated. On the other hand, the aim of reconciliation includes analysis of the individual and his environment to find the causes of the conflict as well as the causes of the actual suffering, in order to work towards a collective future.

Thus, reconciliation works towards individual and collective changes, which are both of immediate concern to international core crimes. States that abuse human rights often try to present the victims as criminals. Victims of the international core crimes are often forced to take sides, to choose between fighting the offenders and simply remaining inactive. Because of this, there is a tendency to blame the victim, by those who remain ideologically opposed to the interests the victim is deemed to represent or those who see the victim as mere “collateral damage”. A victim may go through a personal process of blame and doubt. While physical and psychological rehabilitation is necessary for the survivors, rehabilitating the reputation of the victim may be just as necessary. To create and reinforce understanding of the victim, the intervention must reach immediate and remote family, as well as the general community. Trauma programs are often carried out by human rights NGOs, aimed at the victims. Rehabilitation programs also help differentiate between the victims’ different needs. Children and women may be more vulnerable than other victims and, while their individual needs must be dealt with, most work must be carried out at the community level, as vulnerable individuals are in need of support groups. The discovery, articulation, and dissemination of the truth will help, but should be followed by specific reconciliation programs, or the aim of reconciliation will not be reached.

The fundamental aim of reconciliation is thus reliant on the other fundamental aims and would greatly benefit from assimilated justice, with its ability to present both an individual and a collective focus.

4.6.5. RECONCILIATION IN ASSIMILATED JUSTICE

It makes sense to consider reconciliation as the last stage of an assimilated justice process, in which the other aims have first been processed; in which the offender may therefore have confessed and faced his just-desert punishment; and in which the victims' right to reparation has been acknowledged. At that stage, victims may more readily consider forgiveness and the community will have been served with a better understanding of the past through the social truth, through rehabilitation and healing truth discovery and through general deterrence measures, as well as symbolic collective reparation.

In other words, the reconciliation process has already begun, with the different fundamental aims also serving as stages of reconciliation that involve all the actors.⁶⁷¹

Alternatively, reconciliation may be invoked as an aim at the outset of the justice process, as the aim chosen to indicate a preferred restorative rather than a criminal process. This choice is based on the considerations and circumstances linked to the stage of transition and on whose prerogative it is to decide.⁶⁷² However, the will to forgive and not to punish, which lies at the heart of restorative justice, is fundamentally a choice that only the victims can make. If this is not recognised, reconciliation will not be achieved in the long term. "Father, I am ready to forgive, but I need to know whom to forgive and for what."⁶⁷³ Reconciliation should be a fundamental aim in any process of justice, and must be a fundamental aim of international justice. Truth commissions of the past have opted for the exclusion of the prosecutorial process,⁶⁷⁴ and have hence risked leaving out all together the individual focus, which has been stressed above as the starting point for any reconciliation, whether focused on victim-offender reconciliation or overall collective societal reconciliation. At the same time, international and domestic criminal justice may put the collective focus at risk, as the prosecutorial process struggles with the collective notions of the aims, but instead focuses on the individual offender and perhaps to some extent the victim.

Reconciliation, viewed in the two separate yet interlinked dimensions of the individual and the collective, becomes an apparent complementary fundamental aim in the assimilation of the individual and collective dimensions represented by criminal and restorative justice. Criminal justice is inherently focused on the individual and therefore recognises the value of each individual case. Restorative justice, on the other hand, may aid the collective process. In assimilated justice, each dimension must be recognised.

⁶⁷¹ Whereas the individual focus of the aim would only highlight the individual actors (victim and offender), they must however all be dealt with, with regard to the collective focus.

⁶⁷² A restorative justice TC may, for example, be set up to discover the truth with reconciliation as the objective, similar to the SA TRC or many other TCs, see ch.2 and appendix 5, list of TC development in the 1990s; later chapter.

⁶⁷³ Borain, 1994, p.121.

⁶⁷⁴ See appendix 5, list of TC development in the 1990s; later chapter.

The aim of reconciliation is not contradictory to criminal justice, but it cannot claim anything but secondary significance because, internally, criminal justice focuses on legal truth, just-desert punishment, and deterrence. At the same time, individually focused fundamental aims tend to be subordinated to collective processes and goals within restorative justice. A restorative justice process can, in theory, through all its stages, supply the aim of reconciliation with important tools, including a collective public commitment, inclusive truth discovery and acknowledgment of truths through symbolic and material reparation. Informal community supported justice mechanisms, suggested by restorative justice as an alternative to punishment,⁶⁷⁵ correspond to the social justice prerequisite to assimilated justice, albeit not as an alternative to the fundamental aim of just-desert punishment.

Justice conceptualised in assimilated justice represents the dual dimension of the rule of law (criminal justice) and particular social justice relevant to the local particularities (restorative justice).⁶⁷⁶ The rights-based approach is part of the foundation of assimilated justice, taking into account the needs and rights of the actors, where equality and recognition of rights cannot be presupposed.⁶⁷⁷ Community based reconciliatory justice is part of the fundamental aim of reconciliation and the collective community focus of assimilated justice. It is an essential tool to understand and identify the needs of the local community.⁶⁷⁸ However, because the local conception of justice and community resolutions may not represent a fair and equal society or indeed complete justice,⁶⁷⁹ social or restorative justice is not reliable enough for the actors to attain justice. Nevertheless, the fundamental aim of reconciliation can incorporate important needs of the actors. Even aims with an important collective focus require more than a restorative justice process.⁶⁸⁰ Collective reconciliation seems to entail affirmative state action on public policies for the public good, which are a means of reconciliation. Furthermore, the fundamental aim of reconciliation seems to begin with an internal individual process, thus inviting criminal justice to pay attention to the potential individual focus of the fundamental aims.

The fundamental aims work together in legitimising a justice process involving victims, offender and community through an assimilation of restorative with criminal justice. This is so, although the fundamental aim of reconciliation arose in opposition to punishment and is still often

⁶⁷⁵ Wright, 1996; Wright & Galaway, 1989. Further discussed in ch.7.

⁶⁷⁶ See ahead, next section.

⁶⁷⁷ In communities where injustice and inequality have become the norm.

⁶⁷⁸ Especially important in states that have suffered international core crimes, and lack a cohesive fair community.

⁶⁷⁹ Again, international justice with regard to the international core crimes is argued to necessarily involve truth, prosecution and punishment, and reparation, although assimilated justice fundamental aims may be able to supply a more complete conception of justice.

⁶⁸⁰ And even though the fundamental aim of reconciliation stems from and appears better suited within restorative justice processes, it is but one fundamental aim, which, on its own, will not provide a legitimate justice process.

invoked without a link to criminal justice, trial and punishment.⁶⁸¹ It is nevertheless argued here that this aim works in conjunction with the other aims by complementing punishment and deterrence as a necessary prospective aim, which focuses on the individual and, more importantly for stable peace and order, based on collective reconciliation. In relation to criminal justice, which finds strong moral and normative support where international core crimes are concerned,⁶⁸² reconciliation is likely to be more justifiable and efficient working together with criminal punishment than secluded from it.⁶⁸³ While victim and community rights exist, in theory, deferring a judicial process definitely makes it more difficult to claim these rights.⁶⁸⁴ Realistically, new regimes still breathe the air of their predecessors and fear the difficulties that criminal trials can provoke. This is often the case where amnesty remains an option or certain offenders involved in the past atrocities still hold some power. Under these circumstances, temporary settlement may be the unintended outcome of peace negotiations, rather than precisely and fundamentally aimed for. When these are the circumstances, permanent reconciliation would appear to be an unachievable or at least a more difficult goal.

On the contrary, when reconciliation is incorporated in the justice process as a fundamental aim and where rehabilitation and forgiveness are conceded their importance, there exists a firmer base for such values to stand on, both in terms of the individual actor and the collective community. A justice process can furthermore provide the victims with the choices legally available to them, to dispose of as they wish.⁶⁸⁵

4.7 THE FUNDAMENTAL LEGITIMISING AIMS IN EQUILIBRIUM

The last section of this chapter considers the fundamental aims in equilibrium and argues that assimilated justice is necessary. Without deliberating over the respective justice systems,⁶⁸⁶ a brief look at the inherent dimensional focus of criminal and restorative justice respectively assists a theoretical understanding of the proposed assimilation. The dimensional origins of each justice

⁶⁸¹ It could be argued that reconciliation is most effective through encouraging the offender to repent. Duff, 1986, seems to justify punishment by penitence. Indeed many abolitionists oppose criminal law punishment and deny deterrence and instead put most of their faith upon repentance, remorse, reconciliation and rehabilitation; see generally Duryea, 1994; Bazemore & Pranis, 1997.

⁶⁸² See ch.6 and behind ch.2.

⁶⁸³ See e.g. South African voices of disappointment with the TRC's absent link with the criminal justice system, ch.2, and later chapter.

⁶⁸⁴ And, restorative justice processes cannot guarantee the fulfilment of the recommendations made by the TC, or that the state acts on its duties, and only in a few cases have reparations been made, and individual and collective rights have to a large extent been ignored. See later chapter.

⁶⁸⁵ Whether to forgive or not is not really a choice a victim is faced with, but a possibility after truth and healing mechanisms are established. The choice to seek any form of reparations is a right that should be available to all victims.

⁶⁸⁶ This is done in later chapters.

system are considered with reference to legal philosophy,⁶⁸⁷ where restorative justice is linked to fair, moral and social values of the community and to peace; and criminal justice is linked to the rule of law of the state, and to order. Through a hypothetical exposition, a broad conceptualisation of justice is reached through renegotiation of the social contract,⁶⁸⁸ assisted by the prerequisite involvement of needs, rights and duties, outlined in chapter three. The concept of justice in assimilated justice is concerned with the rights of the actors and the duties of the state and the justice system, as part of both the rule of law dimension and as part of the local restorative justice dimension. Both dimensions are believed to be necessary in societies that have suffered international crimes, and where the state cannot therefore automatically represent the actors and the community in a fair and equal manner.⁶⁸⁹ The section ends with assimilated justice as a combination of all of the above, in a state criminal order with restorative community peace, able to accept assimilated justice.⁶⁹⁰

Each of the fundamental aims - truth, just-desert punishment, deterrence, reparation and reconciliation – is a legitimate aim that recognises the actors to varying extents. It is argued that, for a process of justice to be legitimate, it must include all the actors and that therefore it cannot aim solely to achieve just-desert punishment and deterrence, as it would then lack sufficient recognition of the victim. Likewise, a legitimate process of justice cannot aim only for reparation and reconciliation to the exclusion of just-desert punishment and deterrence, as this would show a lack of recognition of the offender. In theory, truth is the fundamental aim with the most comprehensive actor inclusion, requiring the narratives of all the actors to be pronounced as the truth. However, truth is process sensitive and does not guarantee the inclusion of all actors.⁶⁹¹ Furthermore, truth is essential to the other aims, through its individual and collective focus.⁶⁹² Thus, complexity is reinforced by the need to secure equilibrium between the aims where truth, combined with other aims that focus on specific actors, necessitates and guarantees the recognition of all actors.⁶⁹³

⁶⁸⁷ However it must be emphasised that the limited reference to legal philosophy is only used to the extent where it can demonstratively clarify and sustain the arguments put forward.

⁶⁸⁸ Rousseau, p.86, 1994. See Rawl's original philosophical position, according to which society chooses fair standards to govern societal order, 1971; Hobbes, 1968.

⁶⁸⁹ Or where indeed the community may not justly and fairly represent the actors and can therefore not reposition itself in place of the state.

⁶⁹⁰ See ch.1 clarifying the ideology of the thesis.

⁶⁹¹ While a justice process may aim for truth, if the process does not include e.g. victim involvement, the truth discovered and so pronounced will lack the victims' narratives. Truth does not necessarily guarantee the involvement of its potential dual focus, see later chapter, truth in criminal justice process; truth in restorative justice.

⁶⁹² Again, the aim of truth is to some extent the initiating aim of the justice process, where just-desert punishment must involve and be based on the truth. Likewise, to be effective, means of deterrence and reparation must be evaluated according to the truth, and in order to reconcile, truth is necessary.

⁶⁹³ These relationships pose difficulties for the justice process in safeguarding each aim, and each actor. A more empirical perspective on the fundamental aims' process application is taken in ch.5-6.

Furthermore, due to their multi-functional possibilities, the aims overlap to some extent in the various processes, and this is beneficial in circumstances of impunity threats or legitimately restricted justice. Where a balanced application of the fundamental aims is threatened or impossible to achieve,⁶⁹⁴ the overlapping potential can assist the legitimate justice process. For example, expressive truth may be punitive, deterring, repairing, and reconciling in itself. Just-desert punishment may deter, which, in turn, can to some extent repair and reconcile. Reparation can be a form of punishment,⁶⁹⁵ as well as a means to deterrence and reconciliation. Reconciliation also has deterrent and reparatory effects, on the individual and the collective levels. Taking into account the previously discussed impunity that can threaten any justice process, a flexible model of assimilated justice is required and further assimilated in later chapters. If an amnesty or immunity is recognised as legitimate and does thus not qualify as a real impunity threat, the legitimacy of the justice process is not necessarily under threat. It is believed that an amnesty, applicable to the international core crimes, could only possibly be recognised if it were individually granted by a justice process that had at least supplied semi-judicial mechanisms with an aim to identify truth and fulfil the other fundamental aims.⁶⁹⁶ Where the fundamental aims can be applied in a flexible model that is process sensitive, and therefore able to recognise the impunity threats that exist within the local circumstances, one particular aim may have to be accentuated over some of the others, with the result of equilibrium between the actors. Owing to the potential dual focus of the fundamental aims and their potential overlapping, the legitimacy of the justice process should be able to withstand at least some impunity threats.

4.7.1 ASSIMILATED JUSTICE – A NECESSITY

The thesis is concerned with achieving justice for the actors in states where no legal, just or fair system exists and where the state cannot automatically assume representation of the actors; nor can the community assign justice in a fair and equal manner. The recognition and involvement of the actors add legitimacy to the proposed assimilated justice process. The legitimacy stems to some

⁶⁹⁴ E.g. where an individually granted amnesty is recognised by the prosecutorial process, the aim of just-desert punishment may not be fulfilled, with regard to the offender in question. Or where it is impossible to finance material reparation to all the victims, symbolic means of reparation, applied through the fulfilment of the other aims must be recognised.

⁶⁹⁵ If the offender is ordered to make reparation it has a punitive effect. Otherwise, the state's responsibility for the crimes, (whether the state is directly or indirectly responsible), is confronted by the state duty to provide the actors with the truth, access to justice and reparation. See ch.3.

⁶⁹⁶ See ch.2. Illegitimate impunity threats, i.e. most amnesties and other *ad hoc* impunity protections from just-desert punishment and/or fulfilment of other fundamental aims, such as not discovering the truth or financially supporting reparation, must be fought by holding the accountability process elsewhere.

extent from the mere recognition of the actor and his rights, along with the correlating state duties; but also from the application of fundamental aims, whose values work towards actor recognition and a justice system that is able to represent both the rule of law and local community restoration.

Where equality and fair representation is lacking in the domestic state, or where the international criminal justice system is put in place of the domestic legal system, actor needs must be treated as a necessary prerequisite to assimilated justice, a base on which to renegotiate the concept of justice, in order to achieve the assimilated justice goals. This is so because the actors may not support the domestic justice system after violent conflict involving international core crimes. Alternatively, the domestic state may not be capable or willing to initiate a justice process.⁶⁹⁷ The international criminal justice system may at the same time not be able to positively affect the domestic situation and may leave local actors unrepresented, or it may have to ignore important issues of collective notions.⁶⁹⁸

Equilibrium between the fundamental aims and hence the actors,⁶⁹⁹ is believed to be attainable through an assimilation of the collective focus of restorative justice with the individual focus of criminal justice, as neither justice system provides a satisfactory answer with regard to the actors and the fundamental aims, that are provided as an alternative justice paradigm. In order for the justice process to be legitimately applied by such assimilated justice, all the fundamental aims must be applied. Reciprocally, an application of the fundamental aims necessitates legitimation through assimilated justice, without which the dual focus cannot be accomplished. The result of this application would be a dual focus, which satisfies each aim's potential for individual as well as collective focus, involving offender(s), victim(s) and community.⁷⁰⁰ Assimilated justice would thus conceptually demonstrate a dual dimension of justice; that which is legal, universal and individual in focus; and that which is fair, local and collective. International criminal justice is viewed as representative of the state criminal order, that which is universal general law.⁷⁰¹ The rule of law

⁶⁹⁷ See ch.2 and later chapters.

⁶⁹⁸ E.g. acknowledgement of a criminal regime. Although this does not mean that the international criminal justice system fails, *per se*, as its focus remains with providing the individual offender and the victims with a fair trial, and reparation. It means however, with regard to the assembling of assimilated justice that neither the domestic, nor the international justice system represents a stable democratic legal system, which would be aware of the actors and their needs, having assigned rights and obligations. The basis of ch.3 rights are therefore part of the underlying assimilation.

⁶⁹⁹ As the fundamental aims represent the needs and rights of the actors, as well as the justice system, with duties assigned to the state and/or the international justice system.

⁷⁰⁰ The rights-based approach (distributive justice) of the individual and collective rights of the actors is included in assimilated justice through the application of the fundamental aims; Aristotle, 1986; Rawls, 1971; ch.3.

⁷⁰¹ Representing the rule of law, see ch.1. The position I take is a broad conception of the rule of law, including moral notions of equality and human rights, recognising the substantive and moral content of international human rights and humanitarian law. See e.g. Aquinas, St.T, in Porter (Ed.) *Classics in Political Philosophy*, Prentice-Hall, 1989; Dworkin, 1977.

with regard to the protection of fundamental human rights recognises actor rights.⁷⁰² Restorative justice is representative of restorative community peace, that which is local, particular and fair. Here too actor rights are recognised.⁷⁰³

4.7.1.A. STATE – CRIMINAL - ORDER V. RESTORATIVE - COMMUNITY – PEACE

Today, most states, if not all, are accustomed to some form of legal system and criminal jurisdiction, as both an obligation and a right held by the state to deem the offender accountable for the harm done.⁷⁰⁴ Punishment and deterrence were held to be primary aims of the theory behind the social contract,⁷⁰⁵ whereby individual rights were, through consent, transferred to the sovereign, in order to protect the individuals from harm and to uphold order via the rule of law. Aristotle conceptualised the rule of law as complete legal justice, with an additional partial justice, where the former representing what is legal and just and the latter represents what is rectificatory and fair.⁷⁰⁶ A criminal order, supplied by a stable democratic state, with international law applicable to the international core crimes, is representative of the rule of law.⁷⁰⁷ With regard to the international core crimes, the development of universal jurisdiction, individual criminal accountability and the recognition of certain individuals as subjects of international law,⁷⁰⁸ the right to truth, criminal justice and reparation can be referred to as transferred rights by individuals to the sovereign.⁷⁰⁹ International criminal justice is thus representative of norms that are universally applicable.⁷¹⁰ To reinstate order and make right the wrong, the state supplies the necessary authoritative sanctions to prevent crime and restore order and it undertakes the necessary reparations to recompense the victim. Assimilated justice is concerned with assigning justice to the individuals involved and affected by international core crimes. These actors not only justify assimilated justice, but also the rule of law dimension of assimilated justice, for the sake of protecting universal general law.⁷¹¹ The

⁷⁰² See ch.3 for a more individual than collective perspective, representing general legal justice of universal application. The actor needs and rights have found support in the fundamental aims, which have furthermore indicated the corresponding state duties, earlier in this chapter.

⁷⁰³ Id. Thus from a more community-interest perspective of a collective nature particular to the local context.

⁷⁰⁴ Supra, earlier discussion on theories supporting the state infliction of just-desert punishment.

⁷⁰⁵ Hobbes, 1968, p. 354 and see next part.

⁷⁰⁶ Partial justice, according to Aristotle's philosophy, included rectificatory and distributive justice, Aristotle, 1986, pp.116-117.

⁷⁰⁷ Ch.1 and supra. The international criminal justice system is an extension of the domestic sovereign's power to assign criminal justice and it is therefore likewise representative of the rule of law; ch.2, Cassese, 2003; Bassiouni, 1998, 2001.

⁷⁰⁸ See ch.2 and later chapter.

⁷⁰⁹ The sovereign being the jurisdictional power, the state, or the international community, e.g. Hobbes, Hart, Id. E.g. recognised victim rights in ch.3, and see Rome Statute of the ICC, 1998.

⁷¹⁰ At least in theory, see ch.2, and ch.5 international criminal law applied.

⁷¹¹ I.e. international criminal justice.

state supplies criminal justice aims to maintain and restore order between individuals,⁷¹² imposing norms of universal and general character that must be enforced to set limits to community conduct. Criminal justice imposes order through law and law-enforcement, focusing on the offender and representing a top-down approach, in which the state assumes the role of the community at large.⁷¹³ The offender is assumed to repair the harm done to the victim and the community through serving a sentence of punishment. Although there may be some direct victim involvement before the ICC, the victim's role has been marginalised through the state's imposition of the aggregate good. Focus on social and moral norms, involving the local community, and its means to fair restoration and peace are thus not directly part of legal justice.⁷¹⁴ Within the criminal justice paradigm, the performative contradiction of the top-bottom approach of the prosecutorial process actually hinders deterrence as a primary aim. The aims of reparation and reconciliation are subordinated to an even greater extent, by a system and a process, which, inherently must focus primarily on the individual offender. Therefore, it is more difficult to achieve the aims of reparation and reconciliation, without re-involving the actors, as these fundamental aims necessitate, at least to some extent, the knowledge and the inclusion of local particularities.

The right of the state to declare a crime punishable and to initiate criminal proceedings has not, however, always been firmly established. Before the centralisation of governments, harm was viewed above all as harm done to the actual victim and, accordingly, victims brought 'prosecutions' and reparations were used to repair the harm.⁷¹⁵ Restorative justice views the notion of crime as a conflict between individuals that primarily causes harm to the victims and the community.⁷¹⁶ As we have seen, restorative justice supporters suggest informal community supported justice mechanisms, because of their potential benefit to the general community.⁷¹⁷ The aim to reconcile the actors and maintain peace through active participation is thus not a new notion, but stems from the medieval

⁷¹² The prosecutorial process focuses on the individual offender, and to some extent the victim, see previous parts of this chapter. The community can be partly recognised, where collective victims and the fundamental aim of truth can incorporate such collective notions in the prosecutorial process. Further studies of the fundamental aims in prosecutorial process are done in ch.5.

⁷¹³ A previous displacement of the victim in criminal justice can be explained by legal definitions of crime focusing on definitional origins from within public law where a crime is a wrong affecting the public, the state, which assigns prosecution and punishment in the name of the state, Hart, 1968; Foucault, 1978. Thus, a harmed individual does not prosecute or have the offender prosecuted in the name of the victim. Legal reforms, such as introducing crime victim's rights, play a role in legitimising the process and legitimising its social reasons, Foucault, 1978. The actor relationship is here a top-bottom approach with a vertical state focus on its subjects, where the State represents the community at large.

⁷¹⁴ *Supra*, Aristotle. It belongs to partial justice, represented by restorative justice social and collective interests in this thesis.

⁷¹⁵ Zehr, 1990; Van Ness, 1993.

⁷¹⁶ Although restorative justice may not be representative of the "rule of the man", in opposition to the "rule of law," it may be fair to link restorative justice to Aristotle's partial, rectificatory justice, *supra*.

⁷¹⁷ Wright, 1996; Wright & Galaway, 1989. Further discussed in ch.6.

period. In addition to the rule of law, universalism - legal justice (with reference to Aristotle); partial rectificatory justice, particularism - restorative justice, represents the second dimension of assimilated justice. With affirmative international recognition of community based conflict resolution, for example through restorative justice TCs, it is possible to incorporate community based peace restoration in the social contract of assimilated justice.⁷¹⁸ Restorative justice aims to maintain and restore peace by way of mainly community-interest-involvement in conflict resolutions, creating respect for peaceful cooperation. Restorative justice aims at peace and reconciliation through involving the actors in a bottom-up approach, comprising horizontal interaction between the community (representing offender and victim) and the state.⁷¹⁹ Restorative justice is thus representative of restorative community peace, that which is particular to the local circumstances. However, without legitimate state authority, the state cannot be considered a stable political community that is able to enforce law and order. Without this, there are no means to sustain peace, or to recognise and execute individual rights. Similarly, community resolutions cannot easily represent a fair and equal society in states that have suffered international core crimes and lack a cohesive just and fair community. Within the paradigm of restorative justice, the situation of the criminal justice paradigm is reversed, with restorative justice purporting to offer a more collective than individual focus.⁷²⁰ The aims of just-desert punishment, deterrence and individual reparation are difficult to achieve in this type of approach, in which there is no recognition of legal rights and duties, nor of direct state imposition of penalties.

The notions of “peace” and “order” can be considered respectively to represent the “community” and the “state” and, similarly, the forward-looking “restorative” and the backward-looking “criminal” justice systems. Both approaches appear necessary for a justice process to be able to sustain order and peace, by fairly taking into account the offender, the victim, and the community affected by international core crimes. As Derrida argues, criminal justice represents legal justice, but complete justice is so much more than the law applied; “...justice is not the law. Justice is what gives us the impulse, the drive, or the movement to improve the law, that is, to deconstruct the law. Without a call for justice we would not have any interest in deconstructing the law...Justice is not reducible to the law, to a given system of legal structures. That means that justice is always unequal to itself. It is not coincidental with itself...I tried to show that justice again implied non-gathering, dissociation, heterogeneity, non-identity with itself, endless inadequation,

⁷¹⁸ Ch.3, e.g. Joinet, 1997 impunity report; SA TRC received international support; El Salvador’s TC was internationally set up. See ch.6 for an analysis of restorative justice processes and Appendix 5, list of TCs.

⁷¹⁹ The relationship here indicates a horizontal focus on the victims at large, and the offenders, who assume the role of the collective community and a bottom-up approach.

⁷²⁰ See ahead, ch.7.

infinite transcendence. That is why the call for justice is never fully answered. That is why no one can say: 'I am just.' If someone tells you 'I am just', you can be sure that he or she is wrong, because being just is not a matter of theoretical determination. I cannot know I am just. I can know that I am right. I can see that I act in agreement with norms, with the law. I stop at the red light... To speak of justice is not a matter of knowledge, of theoretical judgment. That's why it's not a matter of calculation. You can calculate what is right. You can judge; you can say that, according to the code, such and such a misdeed deserves 10 years of imprisonment. That may be a matter of calculation. But the fact that it is rightly calculated does not mean it is just. A judge, if he wants to be just, cannot content himself with applying the law. He has to reinvent the law each time. If he wants to be responsible, to make a decision, he has not simply to apply the law, as a coded programme, to a given case, but to reinvent in a singular situation a new, just relationship; that means that justice cannot be reduced to a calculation of sanctions, punishments or rewards. That may be right or in agreement with the law, but that is not justice. Justice, if it has to do with the other, with the infinite distance of the other, is always unequal to the other, is always incalculable. You cannot calculate justice. Levinas says somewhere that the definition of justice... is that justice is the relation to the other."⁷²¹ Political, legal, and social interests are combined through negotiations that, to some extent, depend on peace and order.⁷²² With regard to universally accepted human rights,⁷²³ respected and outlined in international and national jurisdictions, as a result of joint political, legal, and social interests, such rights demand and deserve safeguarding through both peace and order.

4.7.1.B. THE SOCIAL CONTRACT

From a purely philosophical exposition, Hobbes' *Leviathan* justifies the assimilation of criminal and restorative justice and the joining of the actors in assimilated justice.⁷²⁴ For this alternative justice paradigm, applicable to situations where, after long periods of conflict and

⁷²¹ Derrida, J. in Caputo, 1997, p.16.

⁷²² Without order there can be no stable judiciary, no criminal responsibility or sanction imposed by the state; and without peace there is little chance of sustained legal justice, restoration or reconciliation, by and within the community; and these factors have serious repercussion for the outcome of the justice process and, in cases of assimilated justice, the fundamental aims cannot be applied in their full potential, as e.g. the collective notion of truth, deterrence and reconciliation require participation by the local community.

⁷²³ That has been violated by the international core crimes.

⁷²⁴ Hobbes, 1688. Hobbes asserted the *raison d'être* for sovereignty. Survival and peace of a "multitude" of men could only be established by a covenant of every man with every other man, where their powers and strength were conferred upon one man or one assembly of men, so reducing the men into one will, the "Leviathan", called sovereign. Hobbes argued that where no Leviathan had been created, states were cursed to a state of nature, warring against each other, due to a lack of superior law or legal order that would be binding upon them.

international core crimes, the justice system cannot, or will not be relied upon by the domestic state, the notion of justice is of vital importance.⁷²⁵ An umbrella conceptualisation of justice, represented by assimilated justice, could recognise comprehensive justice through the recognition of the fundamental aims and the actors, in equilibrium.

Based on the actor needs and rights, of relevance to international justice, renegotiation of the social contract could include assimilated justice, comprising recognition of the basic needs and rights of the actors;⁷²⁶ the rule of law and international criminal justice dimension of universalism;⁷²⁷ and the social and moral particularities of the local collective dimension of particularism.⁷²⁸ In fact, the social contract, which asks legitimacy, basically has to re-ask the question, as a continuous renewal of the contract, to the local community, in order to resolve truth and support. The individual, through giving up certain rights for the collective order, lends moral support and justification for the state to exercise jurisdiction. It is not only the fundamental aim of just-desert punishment that requires justification through sustained community support. Collective, social notions of effective security, through the aims of deterrence, reparation and reconciliation uphold the social dimension and moral legitimacy, which the failed or new state or the international community requires. Thus, besides the universal dimension of the rule of law, the dimension of local particularities, with restorative justice can supply additional legitimacy, especially necessary in circumstances where the state has been a culprit and created a vacuum. If assimilated justice is reflexive in its commitment, and objective in its achievement of assimilated justice, it represents a continuous renewal of social trust and legitimacy. Theoretically then, the *Leviathan* can symbolically justify the right and the duty of the state⁷²⁹ to establish truth, to ascertain the offender's accountability, to inflict just-desert punishment, to deter, to make reparations, and to reconcile society.⁷³⁰

Hobbes's justification for the right and the duty to implement a system that is able to supply these mechanisms is enforced through the social contract in which every person, for his or her own comfort and safety, gives up certain rights in favour of societal order. "The right, which the

⁷²⁵ The basic actor rights give rise to duties of the state and the justice system, ch.3 and earlier parts of this chapter. The duty to recognise and satisfy the rights remains with the state. Rawls' distributive justice of rights to some extent presupposes liberty and equality, which can be difficult in terms of states in transition from severe civil conflict and this will affect the justice application, whether domestic or international, Rawls 1971, p.60; Aristotle, 1986; Sadurski, 1985.

⁷²⁶ I.e. distributive justice, following liberty and equality, in Rawls, 1971, see ch.3. For criticism of this and other distributive theories, see e.g. Dworkin, 1981; Rawls, 1996.

⁷²⁷ The reference to international criminal justice refers to the rule of law dimension of the thesis, representing norms of international human rights and humanitarian law, see ch.1.

⁷²⁸ I.e. restorative justice, based on Aristotle's rectificatory justice, supra, 1986, p.117.

⁷²⁹ And, with regard to international criminal law, the international community.

⁷³⁰ See also e.g. Locke, 1988; Mill, 1989. Neither the *Leviathan*, nor Hobbes' theory are further discussed here, but only used metaphorically to describe the convergence of assimilated justice.

commonwealth [the sovereign] hath to put a man to death for crimes...remains from the first right of nature, which every man hath to preserve himself...the foundation of that right of punishing, which is exercised in every commonwealth. For the subjects did not give the sovereign that right; but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him only..."⁷³¹ The *Leviathan* is based on the principle of sovereignty and hence jurisdiction; and where this trust is broken, represented by states in transition, the trust conditions must be re-negotiated. The fact that some rights and duties have gradually been transferred from the sovereign state to the jurisdiction of the international community does not mean that the state has lost its place at the centre of justice.⁷³² It means that the states forming the international community have agreed to transfer certain rights and duties of the state to the jurisdiction of the international community, in order to maintain peace and order and protect their communities from the global harm posed by the international core crimes. "Could action taken by the international community to extend democracy beyond the frontiers of the sovereign State to cover those actors and forces that are, at present, beyond the bounds of democratic accountability? ...States should be the best guarantor of human rights...when States prove unworthy of this task, when they violate the fundamental principles laid down in the Charter of the United Nations, and when – far from being protectors of individuals – they become tormentors ...the international community must take over from the States that fail to fulfil their obligations. This is a legal and institutional construction that has nothing shocking about it and does not ...harm our contemporary notion of sovereignty."⁷³³

Justice conceptualised in assimilated justice thus includes a rights-based approach, both within both the universal rule of law dimension and within the local particular restorative justice dimension. Through the application of the fundamental aims, the actors are recognised and involved. As assimilated justice is concerned with providing justice to the subjects of certain international crimes, the subjects justify legitimate justice, based on criminal justice (*i.e.* the rule of law) protecting universal general law, in combination with social and moral values of the community (local particularities). Justice is an individual as well as a collective right; and it is an individual as well as a collective duty.⁷³⁴ The rights and interests of the offender have been

⁷³¹ Hobbes, 1968, p.354.

⁷³² The UN, as the voice of the international community, is perhaps the principal *Leviathan*, with regard to some areas of interest. Of course the main subject and actor is the sovereign state, whose duty to prosecute, provide truth, justice and reparation to the victims and the community remains a state duty.

⁷³³ Statement made by Boutros-Ghali, B. at the opening of the UN World Conference on Human Rights, 14 Jun.1993, in 1993, p.14.

⁷³⁴ The individual and collective actors have a right to justice, and it is a duty on behalf of the individual state and the collective international community to provide it.

implemented in many criminal justice systems today.⁷³⁵ Victims are high on the agenda, with growing acceptance of legal rights that must be recognised by all justice systems.⁷³⁶ The relationship between offender and victim, offender and community, and victim and community is of growing concern for the aim of reconciliation.⁷³⁷ Theoretically, as long as the social contract is justly and fairly assembled, individual as well as collective rights and duties should be safeguarded, along with recognised truth, (legal) justice, reparation and reconciliation.⁷³⁸

The goal to achieve equality between the actors through legitimate assimilated justice could also represent a social contract which assimilates the criminal and restorative approaches. The social contract philosophy brings the state and all its actors together, and hence it represents offender, victim, and community, under the social contract umbrella, upheld by the state. Assimilated justice integrates the rule of law (universal and general legal justice)⁷³⁹ with social and moral values of the community (local particularities).⁷⁴⁰ In this way, the notion of assimilated justice can be both backward-looking, as represented by criminal justice and forward-looking, as represented by restorative justice.

4.7.1.C. A STATE CRIMINAL ORDER WITH RESTORATIVE COMMUNITY PEACE

Reliance upon the state and its justice system to represent the community and deliver justice and equality must be possible, at least to some extent. Perhaps such representative reliance can be presupposed, just as, in a similar way Hobbes appears to presuppose each individual's natural right and sovereign power, through the social contract.⁷⁴¹

⁷³⁵ See, for a list of offender rights and instruments, the Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, 1992; 10th UN Congress on Offender Rights, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; ch.3.

⁷³⁶ E.g. 1982 Report of the US President's Task Force on Victims of Crime; 1985 Victim Declaration; Bassiouni principles, 2000; <http://www.victimology.nl>; Shapiro, 1997; Office for Victims of Crime, U.S. Dep't of Justice, 1998; ICC Statute, 1998.

⁷³⁷ Especially regarding responsibility in relation to victim rights, e.g. offender compensation to the victim and/or state compensation to the victim. These relationships have been brought to life much thanks to the work of TCs and the ICC, where reconciliation inherently also refers to peace and order; See ch.3 collective rights (*i.e.* victims at large community); Sebba, 1982, 1998.

⁷³⁸ Legal justice represents the rule of law prosecution, deterrence, and the right to reparation. Truth, collective reparation and reconciliation represent, in brief, partial, local and socially collective justice.

⁷³⁹ *Supra*. Aristotle's and Rawls' distributive justice is recognised with regard to the individual focus on the rights and needs of the actors included in criminal justice.

⁷⁴⁰ It is argued that the social and moral aspects assimilated justice is concerned with, besides criminal justice, can be further assimilated with the rule of law, representing another dimension of it, similar to Aristotle's partial justice, referring to rectificatory, or restorative justice. The collective focus on the actors in restorative justice represents another level of distributive justice.

⁷⁴¹ *Supra*, 1968.

Rousseau wrote: “If we seek to define precisely the greatest good of all, the necessary goal of every system of legislation, we shall find that the main objectives are limited to two only: liberty and equality; liberty, because any form of particular subordination means that the body of the state loses some degree of strength; and equality because liberty cannot subsist without it.”⁷⁴² Equality necessarily limits liberty, similar to how the rule of law limits moral and social particularities of the local community.⁷⁴³ In Aristotle’s *Nicomachean Ethics*, the judge is declared to restore equality by the sentence he imposes.⁷⁴⁴ Habermas, in a similar but more procedural manner, refers to ethics and legitimate communication in relation to the institutionalisation of the public use of reason in the legal-political domain.⁷⁴⁵ Ideal communication, according to Habermas, depends on fair, democratic and communicative ethics, which must involve pragmatic reasoning about how best to achieve the ends; ethical reasoning concerned with goods, values, and identities; and moral reasoning about what is just, fair and equally in the interest of all.⁷⁴⁶ This supports the philosophical renegotiation of justice, where the rule of law dimension of assimilated justice protects equality and the communicative (restorative) dimension protects local particularities.⁷⁴⁷

Thus, in a state that is not yet ready to supply its subjects with a stable democracy, peace and the rule of law, communication between the subjects must assist in solving the pragmatic, ethical and moral interests of all. The recognition and involvement of all the actors is thus further accentuated. A fair and hence legitimate justice process requires responsibility to be identified, which in turn is required for the restoration of equality, and the assurance of a peaceful future. Assimilated justice is thus founded on backward- and forward-looking truth, just-desert punishment, deterrence, reparation and reconciliation.

At the foundation of criminal law theory lies not only punishment of the offender but also the concept of deterring disorder and social harm.⁷⁴⁸ The community’s need for security and the victim and offender’s needs for a resolution should be addressed within a single process.⁷⁴⁹ The justice system otherwise runs the risk of losing sight of one or more of the actors, in the classic separation of civil and criminal.⁷⁵⁰ Civil or restorative justice sanctions do not appear to protect

⁷⁴² Rousseau, p.86, 1994.

⁷⁴³ While some actor rights, and certain aspects and focus of the fundamental aims may attempt representation of the local particularities, equilibrium between the aims and the actors avoids imbalance. For a philosophical discussion on the balance of liberty and equality, see e.g. Rawls, 1971; Dworkin, 1987.

⁷⁴⁴ Aristotle, 1959.

⁷⁴⁵ McCarthy, 1994; Habermas 1984, 1998.

⁷⁴⁶ McCarthy, 1994, p.48.

⁷⁴⁷ Especially with regard to lack of fairness and equality in oppressive societies with a culture of unequal distribution.

⁷⁴⁸ I.e. state criminal order.

⁷⁴⁹ I.e. restorative community peace.

⁷⁵⁰ Or as within the international system or a state in transition lacking a dependable civil/criminal justice system, the separation may be one of restorative/criminal justice.

society from the criminal, nor do they carry the deterrent weight of criminal sanctions. The duty of the state to reinstate order would be replaced by a duty of the state to seek reparation for the victim. On the other hand, the duties that international core crimes give rise to secure criminal justice and the two criminal law propositions that an offence has occurred against the individual and that the offence is harmful and dangerous to others. Deterring mechanisms must take into account the needs of the victim and the interests of the community in order to be effective in the restoration and maintenance of peace and order. Nonetheless, criminal law will not be able to solve or deter all social problems. For justice to be legitimate, the community has to support the system and the underlying duty of the state must be to ensure a fair and just process.⁷⁵¹

The social contract is constantly renegotiated in the international sphere and in states in transition, which lack a stable domestic political and legal system on which to rely. A transitional state authority cannot be taken for granted and it lacks settled legitimate aims. Transitional justice thus lacks a presupposition of the social contract and must move towards peace and order. Unless an assimilation of aims can take place in the renegotiation, political, legal, and social forces may differ to the extent that one finds a forced peace or unfair justice. Peace without order will be short-lived and there cannot be order without peace, mutual community respect and imposed norms.⁷⁵² Assimilated justice may thus be of more urgent importance for states that, having suffered international core crimes, lack a stable democratic legal order that is able to represent and involve all the actors.⁷⁵³ If the state and international community were to take into consideration all the fundamental aims of assimilated justice, including both criminal and restorative approaches to peace and order, the justice process may involve and represent offender, victim and community.

If the state and hence the justice system, could combine criminal with restorative justice, the system would be able to aim further for collective truth, reparation and reconciliation, together with the criminal justice aims of individual truth, just-desert punishment and deterrence. In this way, the state would assume a role as representative of the community.

4.8. CONCLUSION

⁷⁵¹ Hence creating a state criminal order with restorative community peace.

⁷⁵² *Supra*. The international core crimes violate fundamental human rights, harm victims and communities and upset and threaten national public order as well as international peace. Because of this, national states and the international community are authorised to impose punishment, through international law supporting a growing duty to prosecute and punish; Cassese, 1998.

⁷⁵³ Transitional justice may be due to the international core crimes, which, on the other hand, may be caused by years of absent democracy. For more on this subject, and a valuable discussion on different meanings of justice, see Mani, 2002.

This chapter has attempted to establish a foundation for the value-based approach of the dissertation, which is at the heart of each fundamental aim. This has been attempted by introducing each fundamental aim and its supporting theories. The chapter has also identified the actors focused upon by each aim, in theory, as well as the existence of a potential dual focus on the individual and the collective, a goal which appears achievable through the assimilating of restorative and criminal justice approaches.

In theory, the fundamental aim of truth focuses as much on the individuals as on the collective community. In the remembrance and truth acknowledgment of the different aspects of truth, both individual as well as collective notions of truth are of importance if truth is to be considered instrumental to other fundamental aims, besides being appreciated for its expressive value. Unless the fundamental aim of truth is incorporated into the assimilated justice process, it may be treated as either purely expressive or purely instrumental truth, thus losing its potential dual focus. The process-sensitivity of the aim must be taken into consideration at the initiation of the justice process, a process that should be able to solicit and investigate individual *as well as* collective truths. The legitimising effect of the aim of truth depends on this, as the focus of the justice process determines which actors will be involved, for what reason and in what manner.

It also appears that the fundamental aim of truth, if applied to its full potential, will be able to lay the foundations for the prospective reach of the other fundamental aims. The actual truth-finding process is of great importance to the entire justice process, as well as to the legal relevance of an amnesty. If truth is assumed to be instrumental and if the process is to go through the different stages of truth and evidence investigation and corroboration, similar to a prosecutorial process, truth and responsibility will thus have been established. If an amnesty is subsequently to be granted, the legal relevance of the amnesty will be similar in effect to a pardon and will be less likely to prove an impunity threat.

The fundamental aim of just-desert punishment is justified, in theory, on just-desert principles, but is suitably combined in a justice process with other fundamental aims and values, such as deterrence and rehabilitation. The notion of just-desert punishment is justified if it achieves security, satisfactions and prevention more than it does harm, while fairness, appropriateness, and efficient distribution are maintained. This notion of punishment is upheld because of its potential for assimilating retributive and utilitarian theories. Such utilitarian values as deterrence and rehabilitation work well within the fundamental aim of just-desert punishment, while avoiding the danger of justifying imposed punishment on the basis of something other than the offender's just desert. Punishment is inherently focused on the individual offender and must be, according to legal norms establishing individual criminal responsibility. Depending on how the aim is applied, a

collective focus on local circumstances related to collective notions of criminal behaviour can be taken into account, however the aim of just-desert punishment remains individual in focus.

Assimilated justice may allow a social justice influence, bringing in the community and a collective focus. This assimilation is further supported by the fundamental aim of truth being able to reach its full potential. Legal, individual offender-focused truth becomes functional because just desert depends on it. The individual focus may further promote the involvement of the victim and it may also aid the aims of reparation and reconciliation. The fundamental aim of deterrence depends, furthermore, on an individual offender focus. At the same time, expressive truth, with its collective social functions, can be put to good effect through general community involvement in the study of general utilitarian goods. Such expressive truth, together with aspects of general goods arising from just-desert punishment, such as general deterrence, requires such a focus. The recognition of general goods arising from the aim of punishment may also promote symbolic collective reparation and lay the foundation for reconciliation.

It is vital to include deterrence as a fundamental aim separate from just-desert punishment. Deterrence accommodates the aims of utilitarian as well as restorative justice without interfering with the principle of just desert. In this way, deterrence may be used further to complement criminal justice. The aim of deterrence, in relation to the nature of international core crimes, requires both a specific as well as (and indeed more importantly) a general focus. This is due to the great number of individuals involved in and affected by these crimes and hence in need of deterrence. It is also due to the lack of evidence of the effectiveness of specific deterrence, especially in terms of these psychologically compelling crimes. Deterrence allows a focus both on the individual offender, as well as on general community needs and impulses.

Assimilated justice needs, and also supports, the dual focus of deterring the international core crimes that must involve more than just reassuring the victim and community that the offender will not commit more crimes. This is so because entire communities and states have been involved and affected, perhaps to the extent that deterrence must focus on collective responsibility, that is, “a criminal regime”.⁷⁵⁴ Adding to established individual and collective truth, specific deterrence is closely linked to just-desert punishment, while general deterrence aids utilitarian goals of punishment. The individual focus may promote the involvement of the individual direct victim, and aid the aims of reparation, internal healing and reconciliation. The collective recognition may also promote symbolic collective reparation and lay the foundation for reconciliation.

⁷⁵⁴ Rosenberg refers to the situation where there is a distinction between offenders and victims, as a regime of criminals, while the collectively infected community would be a criminal regime, Rosenberg, 1995, p.400.

Reparation is broad in interpretation and includes victim rights of both an individual as well as collective character. However, considering the importance of not losing sight of the individual crime victim, and considering the possibility of viewing the fundamental aims of truth, just-desert punishment, deterrence and reconciliation as means to mend injustices done to the community, the focus of the fundamental aim of reparation must primarily remain on the victim. This is also due to impunity threats in the form of financially limited victim reparation.⁷⁵⁵ Today, international, regional, and national laws and regulations support affirmative victim rights and likewise, they support assimilated justice, by not excluding but rather by including criminal and restorative values of the collective. The collective-focused side of reparation, often in the shape of symbolic reparation, also has the effect of working as a means to, and as part of, the process of collective reconciliation. Collective reparations are more general in focus than individual reparations, and are hence more likely to interlink with the collective focus of the other fundamental aims. Individual reparations, on the other hand, rely on truth in its entirety (legal individual truth not always assisting the victims) and perhaps also just-desert punishment and specific deterrence as a mode of victim satisfaction. Individual reparation may also provide an essential starting point for the individual reconciliation process.

Through assimilated justice, individual offender- and state-supported material and symbolic reparations can be combined with state-supported collective reparation.

Reconciliation is a fundamental aim that inherently focuses on all the actors. As regards offenders, their victims and communities affected by the international core crimes, society is faced with more than just a few cases that require individual reconciliation, although it has been emphasised that individual and victim-offender reconciliation launches the process. Collective reconciliation therefore appears achievable through the aggregation of individual cases of reconciliation. In order to accomplish this, it is essential to assimilate the capacities of collective restorative justice processes with criminal justice. The focus must remain on collective reconciliation between all the actors through general forgiveness and understanding, while individual offender-victim mediation towards forgiveness and rehabilitation must not be forgotten.⁷⁵⁶ While the collective dimension of reconciliation begins with individual reconciliation, this is not to say that other factors are not required as well, but that it must remain a minimum requirement.

⁷⁵⁵ Impunity threats can of course limit all kinds of reparation, however symbolic and collective reparation can be accomplished through less destitution.

⁷⁵⁶ Individual reconciliation must not be thought of only in the way of mediation programs. Such programs are only one type of mechanism, and perhaps, through the fulfilment of the other fundamental aims, and recognition and involvement of the victim, other mechanisms are not needed. Reconciliation can, as North's offender-focused process identified, be, to a large extent, internal. Supportive mechanisms should be available however, to assist healing and rehabilitation.

Assimilated justice does not require the justice process to indicate a preferred restorative or criminal process, but it will be able to ask all the questions of all the actors that are necessary to the fundamental aims. It is important that justice processes should be able to accommodate the lengthy process that the aim of reconciliation has been shown to demand, as justice is far from secured until an honest move towards reconciliation has been taken. Therefore, the aim of reconciliation is better considered last in assimilated justice. Where the other aims are firstly fulfilled, the individuals are served with truth, just desert, deterrence and victim reparation. Hence the individual victim (and also the offender) has already had a chance to begin his internal reconciliation process and may be ready to consider forgiveness. The collective focus of the other aims will have served the community with a better understanding of the past through social truth, rehabilitation and healing truth discovery, general deterrence measures, as well as symbolic collective reparation. The individual reconciliation process may hence become collective through the demands of the other aims, necessitating a process of justice able to supply these aims.

The aim of finding equilibrium between the fundamental aims in a process of justice which, even in cases of legitimately restricted justice or under threats of impunity, will be able to recognise and involve the actors, must recognise different factors. Most importantly, the fundamental aims are very much dependant on the process in which they are applied in order to achieve their possible individual and/or collective focus. This is similar to the way in which truth can be treated as expressive and/or instrumental legal truth, depending on the focus of the justice process. To reach their full potential, assimilation of restorative and criminal justice processes would enable the supply of both an individual as well as a collective focus.

Optimal balance - equilibrium - appears possible through incorporation of all the fundamental aims in a justice process in which different modes of application are possible, taking into account local particularities, mostly of a restorative justice nature, whilst respecting universal principles, generally represented by criminal justice norms. Reasons supporting assimilated justice have been identified through looking at the inherently different paradigms of criminal and restorative justice. Whereas criminal justice is represented by a state controlled legal order to a greater extent than restorative justice, restorative justice may fundamentally, in theory, support community-based decision making in order to gain and maintain peaceful relationships. Assimilation has been proposed, not only with regard to the fundamental aims and the actors, but also of the two justice systems. The thesis does not attempt to change stable democratic legal systems of domestic states⁷⁵⁷ or actual prosecutorial and restorative justice processes *per se*. The

⁷⁵⁷ See further ch.1.

thesis involves developing assimilated justice that can focus on the actors through the application of the fundamental aims, and withstand impunity that threatens actor involvement in international justice of international core crimes.

A flexible franchise model of assimilated justice may be possible: one concerned with international justice, but relevant to both international and domestic justice systems. An optimal balance between the aims appears to exist in their assimilated application, where the aim of truth inherently focuses on all the actors, just-desert punishment focuses mainly on the offender, deterrence mainly on the offender and general community, reparation mainly on the victim and reconciliation firstly on the individual actors and secondly, on the community. As soon as one of the aims is not applied, more weight appears to be put on either victim or offender and, realistically, taking criminal justice as well as restorative justice practices into account, the fundamental aim of reparation appears to be the most precarious of the aims applied, which reflects the urgent need to include the victim in the justice process.⁷⁵⁸

This theoretical analysis of the fundamental aims and their potential actor inclusion serves as the basis for their legitimising effects on the actors in assimilated justice. The actual application of the fundamental aims and the real participation of the actors are next explored. In order to assimilate the fundamental aims according to their potential overlap, it is of importance to ascertain what aims and actors are actually fulfilled by the prosecutorial process and by the truth discovery process.

CHAPTER 5: THE FUNDAMENTAL AIMS IN THE PROSECUTORIAL PROCESS

5.1. INTRODUCTION

The overall aim of the thesis is to develop the assimilate justice paradigm, built on the specific fundamental aims of both criminal and restorative justice, in order to enable a broader actor involvement, especially in circumstances of transitional justice, where restrictions to the justice system often exist. It is believed that theoretical support for the fundamental aims and theoretical as well as normative support for the inclusion of the actors have been supplied in previous chapters. Together with the abstract, yet fundamental reasons for why assimilated justice would add legitimacy to any justice process, which deal with the international core crimes, assimilated justice also creates an opportunity for the actors to claim a part of the justice process. In the following two

⁷⁵⁸ See ahead, ch.5-6.

chapters, a closer look at the application of the fundamental aims in the international prosecutorial process and the restorative process is taken, expanding the discussion of chapter four. The objective of these two chapters is to indicate what fundamental aims are most effectively fulfilled in the prosecutorial process and in the truth discovery process. It is also important to establish what the real actor recognition and participation is in the processes, of which restricted justice will be dealt with in chapter seven and chapter eight.

In order to assimilate the fundamental aims, an understanding of how each justice system processes the aims is required. In order to understand the prosecutorial process of international criminal justice, an understanding of the system's underlying jurisdictional principles is required. International law development in the sphere of criminal justice includes the recognition of certain international core crimes, acknowledged individual criminal accountability, universal jurisdiction and a permanent international criminal court; all of which are relevant to the application of the fundamental aims in the prosecutorial process.⁷⁵⁹ The ability of the international criminal justice system to try high-ranking offenders, *e.g.* state and military officials in an international context, free from local partiality and with resources to investigate, in many countries at the same time, was greatly assisted by the International Military Tribunal of Nürnberg.⁷⁶⁰ Today, the ability to investigate, indict and try individual criminal accountability of the international core crimes is held by the International Criminal Court, which prosecutorial process is therefore in focus. The prosecutorial process must be understood in relation to its inherent restrictions, as well as in relation to practical problems, as it is believed that the international criminal court will play an important prosecutorial role in the future, possibly also involved in assimilated justice.

Perhaps the major development in the sphere of international law has been the making of individuals as subjects of international law that can be held criminally accountable, whereby the individual focus of the prosecutorial process is examined in relation to the application of the fundamental aims.⁷⁶¹ This development has affected many aspects of international law, involving

⁷⁵⁹ The study does not answer questions on crime conceptions and the general nature of the international core crimes was introduced in ch.1. As the intrinsic ingredients of each crime are not of direct relevance to the present study, the application of universal jurisdiction is discussed in relation to jurisdictional aspects of the crimes. The purpose is to note the implications that these regulations have on both the national and international justice systems. Not only does this justify and describe the relevance and importance of the criminal justice system and the importance of the ICC rules and procedures, but it also explains the difficulties surrounding international law.

⁷⁶⁰ IMT of Nürnberg, 1945, see King, 2000; Reference to the historic development of international criminal justice is restricted and this chapter and research is limited to study the application of existing international institutions of criminal jurisdiction as the focus remains on building legitimate assimilated justice able to aid present day situations, see ch.3; Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties to the Preliminary Peace Conference, 1920; the Treaty of Versailles, 1919. A convention was adopted in 1938 for the creation of an international court, due to the assassination of King Alexander of Yugoslavia and a French Foreign Minister in 1934; Bassiouni, 1993.

⁷⁶¹ See *e.g.* Editorial Harvard Law School, pp.1943, 2001; Dupuy, 2003, 2004.

human rights law, for its role in the protection of the dignity of the individual, and international humanitarian law, for its protection in armed conflicts, in which many of the international core crimes often arise.⁷⁶² Understanding this principle will assist the progressive development of assimilated justice; and it will also clarify the inherent individual focus of the prosecutorial process, used in assimilated justice as one side of the equilibrium.

Chapter five explores the application of the fundamental aims through the international justice system's prosecutorial process. The institutional reference to criminal justice considers the prosecutorial process of the international criminal court (ICC), with some reference made to the international criminal tribunals (ICTs). Criminal jurisdiction applies to the international core crimes' stipulation of prosecution and punishment, and the international prosecutorial process is considered, rather than a domestic prosecutorial process, because the international core crimes are mostly committed in situations of transitional justice, in countries where no fair and sturdy judicial system exists, or where there is often not enough support for a prosecutorial process, and where hence the international criminal justice system may have to play a role.⁷⁶³ "People all over the world want to know that humanity can strike back – that wherever and whenever genocide, war crimes or other such violations are committed, there is a court before which the criminal can be held to account; a court that puts an end to a global culture of impunity; a court where acting under

⁷⁶² "The impetuous development and propagation in the international community of human rights doctrines...has brought about significant changes in international law, notably in the approach to problems besetting the world community...A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well." *Tadic*, ICTY Decision 2 Oct.1995, #97. Since the IMT and the incorporation of crimes against humanity in already existing customs and the laws of war that belonged to humanitarian law, a bridge was made between human rights and humanitarian law. Human rights law is designed to operate primarily in peacetime conditions, in the framework between the state and its citizens. Humanitarian law is concerned with conditions of armed conflict and relationships between a state and the citizens of its adversary. However, today human rights law and the powers of international tribunals are important also in armed conflicts. See Wright, 1975; and generally Steiner & Alston, 2000; Bassiouni, 1998, 2000.

⁷⁶³ See behind and more specifically ch.7. Comparative criminal law studies generally highlight great differences within different legal traditions, although the prosecutorial process is generally quite rigid. Yet, e.g. within civil law traditions, truth investigations are dealt with in different manners to common law traditions and it will not be of much assistance to look at domestic examples of prosecutorial processes. However, the development of extradition, mutual assistance and a general internationalisation of criminal procedure, e.g. in the ICTs and domestic courts applying international criminal law, can be interpreted to mean that modern criminal justice must be able to operate above jurisdictional customs of, for example civil and common law traditions, at least with regard to the international core crimes, and follow similar procedures. The identification of globalised crime necessitates freedom from jurisdiction control, see ICC statute, part 9, international cooperation; see also, on the influence of rights paradigms over emerging international criminal procedure, Amann, 2000; ICC art.21, highlighting the usage of precedents (common law origin) while at the same time guaranteeing that those are consistent with international law and codified law (civil law origin); Elliott, 2000; Grande, 2000. If for no other reason, international crimes cannot in any real sense be compared to domestic, or lesser, crimes, and may require extraordinary and flexible mechanisms and institutions apt to deal with extraordinary atrocities. Any real comparison to domestic criminal justice is for these reasons not conducted or believed to be of great relevance, except in asking domestic justice systems to apply international criminal law, according to the standards set by the international institutions. Or else, applicable accountability and victimology may be externalised from the domestic actors, and the collective transition.

orders is no defence; a court where all individuals in a government hierarchy or military chain of command, without exception, from rulers to private soldiers, must answer for their actions.”⁷⁶⁴

Chapter five begins by considering jurisdictional principles applicable to the ICC and the principle of universal jurisdiction, concerning the right and sometimes duty to prosecute and provide justice for the international core crimes. The jurisdictional aspects call for the involvement of criminal jurisdiction and secure the inclusion of the fundamental criminal justice aims of just-desert punishment and deterrence in assimilated justice. Principles of universalism, that is, universal values that should be universally applied, also apply to assimilated justice. Combined with the criminal justice aims and the individual focus of the prosecutorial process, universalism represents one side of the assimilated justice equilibrium. Restorative justice aims and focus represent the other side of this equilibrium, dealt with in chapter six.

Chapter five also considers, in separate sections, each of the fundamental aims, and their application in the prosecutorial process, beginning with the fundamental aim of truth, to then move on the aim of just-desert punishment, deterrence, reparation, and reconciliation. At the same time, the chapter explores which actor(s) each aim focuses on, when applied in the prosecutorial process: offender, victim and community. The last part of the chapter draws attention to the benefits of criminal justice and the prosecutorial process, in terms of the assimilated justice objective to fulfil the fundamental aims and involve the actors.

5.2. JURISDICTIONAL ASPECTS OF THE ICC AND THE INTERNATIONAL CORE CRIMES

Criminal jurisdiction is important in relation to the international core crimes stipulating prosecution and punishment; and it is also important in relation to the fundamental aims of legal truth, just-desert punishment and deterrence. This section begins by introducing jurisdictional principles, in order to understand the jurisdictional aspects that call for the involvement of domestic and international criminal jurisdiction. This section does not intend a discussion on jurisdiction, on the contrary, jurisdictional principles applicable to domestic prosecutorial processes and to the international prosecutorial process of the ICC are only presented in order to understand how international institutions, as well as domestic states, are able to legitimately prosecute and punish.⁷⁶⁵ Such insight will also assist an assessment of successful fulfilment of the fundamental aims, and of

⁷⁶⁴ What Kofi Annan expects out of international criminal justice institutions concentrates on classic criminal justice and its offender focus, UN Secretary-General Kofi Annan, ICC Conference, Rome, 15 Jun.1998.

⁷⁶⁵ The chapter is not concerned with domestic practices or national jurisdiction rules, without denying the value of such a survey. However such a survey is best pursued with regard to a specific legal system. Most states and legal systems understand the principle of territorial jurisdiction as a general principle of law. See *e.g.* Hirst, 2003, on the general principle of jurisdiction in common law; and Swedish Criminal Code, Ch.2,§1.

legitimately restricted prosecutorial processes. All such knowledge will better assimilated justice, which advances such restrictions in its flexible character, further discussed in chapters seven and eight.

Jurisdiction has historically been, and still is primarily linked to states and their territory.⁷⁶⁶ In general, exercise of state power equals jurisdiction in relation to the imposition of criminal sanctions.⁷⁶⁷ Jurisdictional questions arise before the prosecutorial process really begins,⁷⁶⁸ to the extent where the prosecutor and the investigating body must make a preliminary judgement on whether a crime has been committed, and whether the courts have jurisdiction. The world legal order is based upon sovereign states, where jurisdiction is primarily related to the territory of the sovereign state, confirming the view held that any justice process must be sensitive to the local particularities, and also domestically integrated.⁷⁶⁹ Jurisdiction is thus primarily territorial. Extraterritorial jurisdiction (jurisdiction outside territorial state jurisdiction) is always subject to the rights of other sovereignties, and “in regard to criminal law in general, it is easy to observe that in municipal law, with the exception of that of a very small number of States, jurisdiction over foreigners for offences committed abroad has always been very limited: It has either (1) been confined to certain categories of offences; or (2) been limited, when the scope of the exception has been wider, by special conditions under which jurisdiction must be exercised and which very much limit its effects.”⁷⁷⁰ The effort to internationalise criminal jurisdiction is essentially based on the

⁷⁶⁶ The most important principle in the *corpus juris gentium* is the sovereign rights of states. See statement made by Boutros-Ghali, ch.3, referring to those situations where states have failed their duty to protect their subjects and international peace, thus giving the international community the right to act.

⁷⁶⁷ The one who can legally impose criminal sanctions and thus prosecute has jurisdiction to do so, parallel to state power. For a brief discussion on the justification of this sovereign power, see ch.1, 2, and in particular ch.4, just-desert punishment and theories of e.g. Hobbes; Bentham. Further justifications for the exercise of criminal jurisdiction will not be given here.

⁷⁶⁸ See ahead, section 5.3 where the prosecutorial process is discussed in relation to the fundamental aims and where the primary concern relates to the question of criminal accountability, just-desert.

⁷⁶⁹ From the Westphalian territorial jurisdiction are other approaches growing, where international criminal law is concerned, e.g. international, or universal jurisdiction; the European Community discussed *Corpus Juris Criminalis*, Delmas-Marty, 1997; and ahead, the Rome Statute of the ICC, 17 Jul.1998, arts.5-13. See generally on territorial jurisdiction, Oppenheim, pp.458, 1992; Brownlie, 2003.

⁷⁷⁰ *SS Lotus case, i.e. France v. Turkey* No.9, PCIJ Series A, No.10, 1927, p.19. The court decided that while jurisdiction is territorial and a State cannot exercise jurisdiction outside its territory without permission, “[i]t does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.” The *Lotus case* discusses the objective principle of territoriality, where acts originate outside of the territory, but are completed within the territory of the state in question. The subjective principle of territoriality allows the state where the act originates from jurisdiction. The *SS Lotus* has in recent years been referred to as liberal with regard to the application of the territorial and passive personality principles, in the contest of a crime committed against a national of the state in question, in another state’s territory. In the *Nuclear Weapons case*, a stricter line was argued, *Legality of the Threat or Use of Nuclear Weapons*,

recognition that some crimes are of international concern, *i.e.*, confined to certain categories of offences, which requires an international system of criminal justice.⁷⁷¹ In relation to the universal values that the international core crimes seek to protect, the territoriality principle extends a duty to states to exercise jurisdiction, in order to protect nationals of other states who are within its territory. For example, the Torture Convention prescribes that a state shall exercise criminal jurisdiction when torture has been committed within its territory.⁷⁷²

Briefly, territorial jurisdiction is extended (to extraterritorial jurisdiction) by *e.g.* the nationality principle; where the nationality of the accused allows the state of nationality to seek jurisdiction in cases where the territorial state fails to act.⁷⁷³ The protective principle can similarly extend territorial jurisdiction, for example in the case of cyber crime or terrorism, where protected interests of a state are threatened.⁷⁷⁴ In relation to international criminal law, a state can enforce its law to aliens for crimes that are committed abroad but that affect the security or interests of the state, or its nationals. Specific rules exist, in order for states to know when and how they can exercise jurisdiction, when the territorial state does not exercise jurisdiction, however such rules are not relevant to the development of assimilated justice. Nevertheless, the criminal justice side of the equilibrium represented by assimilated justice must, of course, be processed with a correct claim to jurisdiction. It is therefore underlined how the international prosecutorial processes, of the ICTs and of the ICC, have such legitimate claims.

5.2.1. JURISDICTION OF THE ICC

International law has developed, based on principles of territorial jurisdiction, where the rules and values thus depend on domestic state action. The necessary reliance of international law enforcement upon domestic legal systems is often denied, where non-action and impunity threats demand a permanent forum that can exercise criminal jurisdiction.⁷⁷⁵ Nearly a century ago, during a

1996; *USA v. Neil*, 2002; Restatement (Third) Foreign Relations Law of the United States, 1987, Am.L.Institute; Cameron, 1994; Arnell, 2000; Reydams, 2000; Vagts, 2003.

⁷⁷¹ However, only “the most serious crimes of international concern” are protected by the ICC with reference to those states that have acceded to its Statute. See ICC Statute, 1998, art.1, *i.e.* the international core crimes.

⁷⁷² See more, Brownlie, 2003, pp.501; UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, arts.4-5.

⁷⁷³ The principle of nationality suggests that when a state’s nationals (victims or offenders) are involved in a crime with the *locus* committed in foreign territory, but with consequences on the state of nationality of the individual involved, the nationality principle allows the state of nationality to apply extraterritorial jurisdiction. The active personality principle means that the offender is a national of the state in question or is domiciled in the state in question. The passive personality principle suggests that the victim is a national of the state in question, or is domiciled in the state in question, without relevance to location of crime or nationality of offender. See more in Brownlie, 2003, pp.301.

⁷⁷⁴ See on this topic *e.g.* Sheehan, 1999; Bassiouni, 2001; Brownlie, 2003, pp.302.

⁷⁷⁵ See behind, ch.2.

peace conference in 1919, was the establishment of an international criminal court recommended,⁷⁷⁶ and the Treaty of Versailles took a similar stand;⁷⁷⁷ yet the IMT and the Tokyo tribunal were *ad hoc*, followed by another two *ad hoc* ICTs, for former Yugoslavia and Rwanda.⁷⁷⁸

The principle of territorial jurisdiction applies to the judicial body of the ICC, as it applied to the IMT, where the jurisdiction applied by these institutions has been established by states, through bi- or multi-lateral agreements, where the states agree to extend their right to territorial jurisdiction to the international institution. The ICTs were similarly established with territorial jurisdiction, however by the UN, an international organisation created with such competences through its member states.⁷⁷⁹ “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”⁷⁸⁰ The quote indicates that article 2(7), of the UN Charter, protects the principle of sovereignty and the domestic right to territorial jurisdiction, and thus restricts international intervention.⁷⁸¹ The SC and UN peacekeeping operations thus only function as the extended arm of the international community, made up of domestic states. This extended jurisdiction is applied where international order may be disrupted,⁷⁸² e.g. during conflicts that may become cross-border, humanitarian

⁷⁷⁶ Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties to the Preliminary Peace Conference, 1920.

⁷⁷⁷ Treaty of Versailles, 1919; and see 5 RIDP, 1928, for other attempts before WWII. A convention was adopted in 1938 for the creation of an international court, due to the assassination of King Alexander of Yugoslavia and a French Foreign Minister in 1934.

⁷⁷⁸ After WWII and the war crimes’ trials, since 1947 the UN and the ILC discussed the creation of an international court, definition of aggression, and a draft code; Bassiouni, 1993. ILC report UNDocA/Res/64/10 recommends the adoption of the draft code, and UNDocA/Res/47/10 recommends the establishment of an ICC; see behind, ch.3.

⁷⁷⁹ Bassiouni, 2001, 2002. The SC is only authorised to pass binding resolutions if the measures are found necessary for peace and security, according to earlier discussed principle of national sovereignty and art.2(7) of the UN Charter. The fundamental idea behind the creation of the UN, after WWII, was to maintain international peace and security and analogous to this aim are the principles of individual criminal accountability and universal jurisdiction, limiting state jurisdiction when necessary to protect international peace and security. The ICTs are subsidiary SC organs under art.29 of the UN Charter, though established as enforcement measures under ch.VII, art.39. “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” art.39, UN Charter.

⁷⁸⁰ Recognised in the UN Charter, 1945, art.2(7).

⁷⁸¹ Despite article 2(7) of the UN Charter, domestic states, through the international community, have decided that international institutions, applying international law, can prosecute offenders for violations of both international and national laws of armed conflict, as the Yugoslavian and Rwandan conflicts posed threats to international peace and security. The ICTY has competence to prosecute criminals for violations of both international and internal laws of armed conflict, and the ICTR is the first international institution able to apply international law, in the prosecution of persons who committed crimes in an internal armed conflict.

⁷⁸² UN Charter, art.24 “(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. (2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The Specific

emergencies, and where violations of fundamental principles of the international order are committed.⁷⁸³ The SC found, both with regard to former Yugoslavia, in 1993, and Rwanda, in 1994, that international prosecutions were necessary to bring the situations to an end, as they were held to constitute threats to international peace and security.⁷⁸⁴ The scale of the atrocities made the crimes international in character and of concern. *E.g.* nearly one million were killed within three months in Rwanda, with consequences of thousands fleeing the country to neighbouring countries and to other continents.⁷⁸⁵ The ICTs have primacy of jurisdiction, in direct succession from the UN Charter, after having found subject-matter jurisdiction.⁷⁸⁶ This means that if a person has been tried by the ICTs, national courts are precluded from trying the same person again for the same acts, but if a person has been tried by a national court first, it does not mean that the ICT is precluded from prosecuting.⁷⁸⁷ This primacy of jurisdiction is however temporal and territorial, linked to the restoration and maintenance of international peace and security in the respective territories, with *ad*

powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. (3) The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration." Art. 25 "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." The UN Secretary-General emphasised, in the setting up of the ICTY that the tribunal would not be subject to the authority or control of the SC in the performance of its judicial functions. UNDoc.S/25704, 1993, p.8; *Tadic* case, ICTY IT-94-I-T, where the Appeal Chamber, 2 Oct.1995 repeating Kofi Annan, and that the intention of the SC was to create an independent subsidiary body with primacy over national jurisdiction, #56.

⁷⁸³ *UN Secretary-General Says Outlook in Somalia Remains Uncertain Despite Tremendous Progress*, 1993. Thus, the threat does not appear to have to be only of international character. See *e.g.* UN intervention in Somalia, due to famine and clan fighting, SCRes.794, 3 Dec.1992.

⁷⁸⁴ "Determining that this situation continues to constitute a threat to international peace and security, Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, Convinced that in the particular circumstance of the former Yugoslavia the establishment as an *ad hoc* measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace, Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed." SCRes.827, UNDoc.S/INF/49, 1993. See *Tadic* case, ICTY, deciding on the legality of the ICTY, and the SC's right to set up the tribunal. This study does not allow further insight into the history and conflicts of former Yugoslavia, but see generally Cassese, 1995; Jones, 2000; Human Rights Watch, 1993. The conflict in former Yugoslavia crossed over international borders and was both international and national in nature, while the Rwandan conflict's consequences became international once armed forces and refugees crossed into neighbouring states, and also because the ethnic hostilities in Rwanda posed a great threat to such hostilities elsewhere, particularly in Burundi and the DRC. See Greenwood, 1996; *The Lockerbie* case, ICJ Repts.1992; *Tadic*, 1995, Appeal Chamber. The UN Secretary-General named a Commission of Experts to investigate grave humanitarian violations including acts of genocide 1 Aug.1994, SCRes.935, 1994; AI Report, 1994. Less than two years later, a similar decision was taken regarding Rwanda.

⁷⁸⁵ On the topic of Rwanda, see generally, Prunier, 1995; Sarkin 1999, 2000, 2001; Schabas, 2000.

⁷⁸⁶ Subject matter jurisdiction, *i.e.* the conflicts were held to be international, although not exclusively so, *cf.* With regard to former Yugoslavia, SCRes.764, 13 Jul.1992 recognised individual criminal accountability and reminded all parties to the conflict to comply with international obligations, SCRes. 780, 6 Oct.1992 set up a commission of experts, who recommended the setting up of an *ad hoc* ICT, UNDoc.S/25274, 10 Feb.1993, p.20. SCRes.808, 1993 decided to set up the ICTY, and SCRes.827, 1993 established the ICTY; Arnell, 2000; *Tadic*, 1995, ICTY, Appeal Chamber; ICTY Statute, arts.8, 13, 16, provisions that guarantee the tribunal's independence and impartiality as a judicial body. With regard to Rwanda, SCRes.955, 8 Nov.1994 set up the ICTR.

⁷⁸⁷ ICTY Statute arts.9-10, and rule 13 of the Rules of Procedure and Evidence, 3 May 1995.

hoc mandates.⁷⁸⁸ A clear and authoritative message from the international community is heard through the ICTs. With primacy of jurisdiction and concurrent jurisdiction, member states should cooperate with requests from the ICTR, a lacking competence with serious repercussions in the hybrid courts of both Timor-Leste and Sierra Leone.⁷⁸⁹ the ICTR has been able to claim the arrest, detention, and prosecution of some of the more serious of the genocide offenders who fled the country, something Rwandan courts would unlikely have been able to do.⁷⁹⁰

The International Criminal Court was set up in Rome in 1998, through a treaty honouring the principle of complementarity,⁷⁹¹ whereby member states of the Treaty of Rome are under a duty to cooperate with the ICC, but domestic courts may, and should exercise territorial, personal or universal jurisdiction, to demonstrate that its judiciaries can and will exercise justice.⁷⁹² Unlike the ICTs, the ICC does not have primacy of jurisdiction, but exists on the principle of complementarity, stressing the need for states to prosecute and respect principles of universalism. Thus, the primary duty to investigate and prosecute remains a state responsibility, and a case cannot reach the ICC if it

⁷⁸⁸ The ICTR is limited to prosecuting those responsible for genocide and other serious violations international humanitarian law committed in Rwanda between January 1, and December 31, 1994; the ICTY has the mandate to prosecute persons responsible for serious violations of international law since 1 January 1991.

⁷⁸⁹ See art.8, ICTR Statute, 1994; and see ahead, ch.7.

⁷⁹⁰ This is not the place to discuss the success of the ICTs, however, although with problematic starts and costly running, international human rights and humanitarian law would not be what it is today if it were not for the ICT judgements. Also, the discussion on international crimes is now known to everyone following daily media and press, and not only part of academic interest, and most people are also aware of international jurisdiction and the threat the international community can put on impunity practices and human rights violators. Even more importantly, the violators themselves may be so aware. It is doubtful if the same thing would come out of purely domestic trials lacking the legal authority and public as well as political attention that is automatically raised through the UN. Of course reliance on states to criminalize, to prosecute, to punish the offenders and to generally cooperate remains, but the reliance has foremost been a reliance on state cooperation with evidence, arrests and the surrender of suspects to the international forum. The ICTs have three organs: the Chambers (two trial chambers and one appeal chamber), the Prosecutors (acting independently as a separate organ of the ICTs), and the Registry, ICTY statute, arts.11-17, and see the Rules of Procedure and Evidence, 2 May 1995. The ICTR statute has similar provisions, and the Rules of Procedure and Evidence of the ICTY was adopted *in toto*, however, see witness and victim protection, later chapter. Arts.2-5, ICTY Statute provide the *ratione materiae* jurisdiction of the tribunal: grave breaches of the Geneva Convs; violations of the laws or customs of war; genocide; crimes against humanity. See behind, international core crimes, ch.1, for definitions. Arts.2-4, ICTR Statute do the same: genocide; crimes against humanity; serious violations of Common Article 3 of the Geneva Conventions and Add.Prot.II. See ICTY Indictment and Proceedings, at <http://www.un.org/icty/cases/indictindex-e.htm>; General Information on the achievements of the ICTR, at <http://www.ictor.org/default.htm>.

⁷⁹¹ See ICC Statute, 1998, ICC Preamble; "...Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations; Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State, Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, Resolved to guarantee lasting respect for the enforcement of international justice." ICC arts.1, 12-14, 17; ICC Ratification and National Implementing Legislation, 2000; Arnell, 2000; Bolton & Roth, 2000.

⁷⁹² ICC, 1998, see Annex, and arts.25-27. See *Id.*, on the topic of the ICC and jurisdiction; van Der Vyver, 2000; Marler, 1999.

is being, or has been, genuinely investigated and prosecuted by a state with jurisdiction. Thus, with regard to assimilated justice, domestic states should establish jurisdiction and fulfil its responsibility to provide a legitimate prosecutorial process, rather than relying on the ICC.

Still, for different reasons, domestic states may not exercise jurisdiction, in which case the ICC can often be relied upon. Article 17 mentions reasons such as genuine inability or unwillingness on behalf of the state, which may give rise to admissibility before the ICC.⁷⁹³ Even when a case has been brought to the attention of the ICC, and it has been found admissible, the prosecutor must, once sufficient grounds for investigations have been established, notify the state(s) concerned, according to article 18. The state may then begin its own investigations, to which the prosecutor of the ICC shall defer. Exceptions allowing the prosecutor to investigate involve Pre-Trial Chamber decisions on the subject, and the prosecutor's right to review the state's genuine progress. In line with the complementarity of the ICC, the court must rely on state cooperation,⁷⁹⁴ where failure to cooperate with the ICC is reported to the Assembly of State Parties, or to the UN Security Council.⁷⁹⁵

In line with the ICC representing its member states, it is not surprising that the Statute should produce such varied justifications for punishment, such as deterrence, restoration of the victims and rehabilitation of the actors generally. The ICC Statute hints at the notion of criminal prosecution as something that puts right that which is wrong as a result of the evil act. It hints also at the idea that everyone has an interest in seeing this done, as a solution protecting a universal right from a universal threat, and that it is a state duty to apply criminal jurisdiction to offenders of the

⁷⁹³ ICC art.17 reads: "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State is unwilling or unable genuinely* to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has *already been tried* for conduct which is the subject of complaint, and a trial by the court is not permitted under article 20, paragraph 3; (d) The case is *not of sufficient gravity* to justify action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exists, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for *the purpose of shielding the person concerned from criminal responsibility* for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an *unjustified delay* in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are *not being conducted independently or impartially*, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

⁷⁹⁴ Part 9, ICC Statute, *e.g.* art.93(1)(a)-(k) evidence, arrest.

⁷⁹⁵ UN SC is only notified if the investigations began under art.13(b), see ahead. Otherwise art.112 empowers the Assembly of State Parties to take control of the situation.

international core crimes.⁷⁹⁶ The ICC does accordingly not only complement national jurisdiction, which is necessary in situations of illegitimately restricted justice,⁷⁹⁷ but it also act as a representative of already established jurisdiction, by transferring the growing communitarian duty to do justice, based upon the principle of universalism, in relation to the most serious crimes.

5.2.2. UNIVERSAL JURISDICTION

Where principles of sovereign state rights can conflict with the protection of individual rights, the principle of universal jurisdiction, applicable to certain fundamental human rights norms, is necessary, in order to avoid impunity threats.⁷⁹⁸ The general definition of universal jurisdiction is that states can exercise criminal jurisdiction over non-nationals for crimes committed in a third state.⁷⁹⁹ The justification for this exercise of extra-territorial jurisdiction is based upon principles of universalism (or universality), representing a communitarian view that crimes of universal jurisdiction are so heinous that they should not go unpunished.⁸⁰⁰ The maxim *aut dedere aut*

⁷⁹⁶ ICC Preamble, ICC Statute, 1998; "Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes..." The ICC was e.g. required to establish principles relating to reparations, including compensation and rehabilitation following the ICC Preparatory Committee for the Establishment of an International Criminal Court (1996-1998) and ICC Prep. Commission meetings between 1999 and 2000, at <http://www.un.org/law/icc/prepcomm/prepfra.htm>. E.g. arts.15(3) victim representation in relation to initiating investigations, 19(3) victims' roles before the court with regard to case admissibility, 43(6) Victims and Witness Unit, 54(1) Rights of actors during investigations, 68 Victim and witness participation in court. A reparations order may be made against a convicted person. See e.g. art.75, ICC, reparations to victims; 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Slade and Clark, 1999; Bassiouni Principles, 2000, and ahead.

⁷⁹⁷ Illegitimate restrictions to justice are, e.g. blanket amnesties, see ch.2. Ch.7 further discusses restricted justice.

⁷⁹⁸ States may e.g. claim territorial jurisdiction in order to hinder another state from exercising jurisdiction and thereby hindering prosecution; see ch.2; see Cassese & Delmas-Marty, 2002 for a collection of articles on the topic.

⁷⁹⁹ For a historic development of international law and the principles of individual criminal accountability and universal jurisdiction, see behind, 3.3.1; and see generally on this topic International Law Association (Committee on International Human Rights Law and Practice), 2000; Princeton Project on Universal Jurisdiction, 2001, at http://www.princeton.edu/~lapa/unive_jur.pdf; Bassiouni, 2001; Africa Legal Aid (AFLA), 2001, at <http://www.afla.unimaas.nl/en/act/univjurisd/preliminaryprinciples.htm>; Amnesty International, 2001; Avocats sans frontières, 2001, at www.asf.be; Roth, 2001. See the joint Press Report of Human Rights Watch, the International Federation of Human Rights Leagues and the International Commission of Jurists, 2000, at <http://www.hrw.org/press/2000/11/world-court.htm> or <http://www.icj.org/press/press01/english/belgium11.htm>. See also the efforts of the ICRC in promoting the adoption of international instruments on international humanitarian law and its support of national implementation efforts, at http://www.icrc.org/eng/advisory_service_ihl; <http://www.icrc.org/eng/ihl>; Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968, p.68.

⁸⁰⁰ Recent State practice indicates the move towards a customary international law norm of *aut dedere, aut punire*, obliging states either to try or to extradite in case of crimes against humanity, Schabas, 1996, p.555. Customary law, binding on all states, arises out of a general and consistent state practice from a sense of legal obligation, Third

judicare is meant to preserve national public order and *civitas maxima*, world peace and public order, through universal jurisdiction, thus in order to prevent impunity.⁸⁰¹ This is the foundation on which the principle of universal jurisdiction rests, as the last jurisdictional resort, focusing on the *nature* of the crime.⁸⁰²

There are many views as to the meaning of universal jurisdiction and its status under international law, as universal jurisdiction is established by customary international law and treaty law.⁸⁰³ The distinction between theory and practice, in relation to universal jurisdiction, is important to realise, where criminal justice recognises the principle, but states do not always implement or apply it.⁸⁰⁴ Whereas the possible universal state duty to prosecute and punish the offenders of the international core crimes is discussed, it is only done so with the objective to ascertain the importance of universalism and criminal jurisdiction, in assimilated justice. This part does thus not provide an in-depth analysis of each international core crime's jurisdictional application, but it rather indicates the support for universal jurisdiction. Universal jurisdiction is not widely exercised, where upon assimilated justice must take into consideration restrictions to the application of

Restatement of the Foreign Relations Law of the US, para.102(2), 1987; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., June 30 1980).

⁸⁰¹ Grotiou's *Aut dedere aut punire* is generally rephrased as *aut dedere aut judicare*. See e.g. art.146, Geneva Conv. relative to the Protection of Civilian Persons in Time of War; Art.50 Geneva Conv. for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Art.129 Geneva Conv. relative to the Treatment of Prisoners of War; Art.85(1) Add.Prot.I to the four Geneva Conventions of 12 Aug. 1949, relating to the Protection of Victims of International Armed Conflicts, 8 June 1977; ICRC National Enforcement of International Humanitarian Law: Universal Jurisdiction Over War Crimes, <http://www.icrc.org/>; Bassiouni, 1996, Bassiouni & Wise, 1995.

⁸⁰² Violations of universal values should thus be universally protected. Universal jurisdiction can be idealistically supported by saying that it protects *actio popularis*, universally shared values, likewise it can be supported by more pragmatic reasons of accountability, see Bassiouni, 2001, p.96. There is no common application of universal jurisdiction, and states incorporate the principle in domestic legislation in different ways. See e.g. Spain's *Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena*, 5 Nov.1998, <http://www.derechos.org/nizkor/chile/juicio/audi.html>. Israel chose to prosecute and try the case of *Israel v. Eichmann* based on the nationality principle, see *Israel's Attorney-General of the Government of Israel v. Eichmann*, 36 ILR 1961. Because domestic legislation often requires the crime to be outlined in domestic law before it can be tried before domestic courts, many states only incorporate the treaty crimes that the state is a signatory of into domestic legislation or not at all due to political or practical difficulties. Because of such obstructions to justice, states are obliged to hand over indicted offenders to the ICTs, as are state actors to the ICC, should the court request such action. Between 1815 and 2001, there are, according to Bassiouni, 281 conventions with 28 categories of international crimes. The first four categories are held to be: 1) aggression, 2) genocide, 3) crimes against humanity, 4) war crimes, see Bassiouni, 1997. Belgium is one of a few countries that has held trials in connection to the Rwandan genocide and made genocide and crimes against humanity prosecutable under domestic law, indicating a certain turn regarding state behaviour, maybe due to the extremely inhumane genocide that occurred, whereby states have accepted their duty to prosecute based on universal jurisdiction. See e.g. Belgium handing down four of the first convictions against Catholic officials in the 2001 trials, finding two Rwandan nuns guilty of homicide, *Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capitale*, 2001, at <http://www.globalpolicy.org/intljustice/tribunals/2001/0608rwd3.htm>; Reydam, 2000; Amnesty International, 2001; International Law Association 2000; Redress, 1999, at <http://www.redress.org/inpract.html>.

⁸⁰³ Some support an independent theory of universal jurisdiction concerning the international core crimes, claiming that those crimes have acquired the character of *jus cogens*, see e.g. Bassiouni & Wise, 1995; Bassiouni, 1999, pp.217; 2001; Charney, 2001; Cassese, 2001; Butler, 2000; for a discussion on the pros and cons of such a development.

⁸⁰⁴ See ahead, last section to this chapter, where the reality of criminal justice is discussed, and see ch.7.

universalism, in order to provide a legitimate alternative.⁸⁰⁵ Restricted justice is however not included in this chapter, but in chapter seven.

It has for a long time been said that genuine universal jurisdiction only applied to the crime of piracy, in customary international law, but perhaps the “torturer has become, like the pirate or the slave trader before him, *hostis humani generis*, an enemy of all mankind”,⁸⁰⁶ and perhaps one can add the perpetrator of genocide, crimes against humanity and war crimes. In 1945, The IMT Charter laid down rules to prosecute offenders of violations of the laws of war and other atrocities, labelled crimes against humanity, with the objective to prosecute and punish major war criminals, no matter their capacity or locality of the crime.⁸⁰⁷ The historic developments of universal jurisdiction, individual criminal accountability and early suggestions to establish an international criminal court have already been outlined, in chapter three. Since the IMT Charter, the genocide convention and the four Geneva Conventions further developed international human rights and humanitarian law.⁸⁰⁸ Certain crimes have thus been subjects of international treaties, in contribution to the universal jurisdiction development, such as the 1984 Torture Convention.⁸⁰⁹ The *Furundžija* case, of 1998,

⁸⁰⁵ Excluded from this thesis is a more in-depth study of the substantial law development of each crime, *i.e. mens rea* and *actus reus* of the international core crimes references are not included or discussed. This focus is not dependent on the crimes’ substantive law and shortcomings. It is hoped that a later study, continuing and furthering the assimilated justice theory, will include substantive law issues of each international core crime, adding an additional angle to why assimilated justice is necessary and how it can further assist restricted criminal justice. For more on this interesting topic, see Aptel, 1997, p.675, 2002; Schabas, 2000; Cassese, 2003; Dinstein, 2001; Flynn, 2000; Rumney, 1999; Dawson, 2000.

⁸⁰⁶ Irving R. Kaufman, United States District Judge in *Filartiga v. Pena-Irala* (2nd Cir. 1980) 630 F.2d 876 (2d Cir. 1980), 30 June 1980, at 880; Restatement Third of the Foreign Relations Law of the US, 1987, #404, “Even though the United States could not assert jurisdiction under either the territorial or the nationality principle, it would have some arguments for concurrent jurisdiction. First, the United States could argue that the bombing was an act of terrorism of a type so universally condemned that any nation-state may prohibit it and may prosecute its perpetrators if they can be brought into its custody. This “universal” basis of jurisdiction is generally recognized for such acts as piracy, slave trade, genocide, attacks on civil aircraft and war crimes, but it has not been quite as widely accepted for acts of terrorism”. Art.5 of the Torture Conv. obliges state parties to establish jurisdiction on the basis of territory, active and passive nationality, and where an offender is present in their territory (jurisdiction must be established when the state chooses to prosecute rather than extradite), art.7 of the Torture Conv. lays down the duty to prosecute individual offenders.

⁸⁰⁷ Charter of the International Military Tribunal of 1945 also aimed at prosecuting offenders who had committed crimes in other countries; IMT Judgement and Sentences, 1947. The IMT tried 13 cases at Nürnberg, and this normative development was included in the UK General Assembly’s Control Council; in the IMT Charter for the Far East Tokyo tribunal; in US military tribunals; in allied tribunals in Germany; as well as in other domestic courts. See Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity, Berlin, 20 Dec.1945; Charter of the Military Tribunal for the Far East, Tokyo, 19 Jan.1946; Rückerl, 1979; France started other such proceedings, *Barbie* case, 1985, *Cour de Cassation* held that the prohibition of statutes of limitations, with regard to crimes against humanity in this case, could apply retroactively. This development constituted the Nuremberg principles, part of customary international law.

⁸⁰⁸ For a good overview of the Geneva Diplomatic Conference see Best, 1994. Human rights law was given the role of regulating peacetime human right violations. The Geneva Conventions, Add.Protocol I, II and the Torture Conv. impose on state parties a duty to prosecute or extradite.

⁸⁰⁹ The Convention against Torture is widely ascribed to, building on the 1975 UN Declaration on Protection from Torture requires all States to ensure that all acts of torture are offences under its criminal law and that criminal proceedings against alleged offenders are instituted, arts.7, 10, UNDoc.A/10034, 1975. Domestic and international case

confirmed previous decisions and held that “the existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.”⁸¹⁰

The international core crime of genocide prescribes a duty, on the contracting parties to the genocide convention, to prosecute or extradite, as outlined in its convention, primarily linking jurisdiction to the principle of territoriality.⁸¹¹ However, genocide has also been recognised as asserting universal jurisdiction under customary law, where there is state practice to support a universal duty to punish or extradite offenders of genocide.⁸¹² “The principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”⁸¹³ The Genocide Convention and the four Geneva Conventions have been adopted by many states, and it is reasonable to conclude that the conventions are part of customary international law.⁸¹⁴ Many also consider war crimes and crimes against humanity to be subject to universal jurisdiction.⁸¹⁵ It is generally agreed that there is a legal, as well as a moral imperative to prosecute the international core crimes, based on international

law has supported the application of universal jurisdiction, e.g. *Aksoy v. Turkey*, ECtHR 1996; *Akayesu* 2 Sept.1998, ICTR; *Pinochet*, 1999.

⁸¹⁰ The *Furundžija* case, 10 Dec.1998, #146. In reference to torture, ICTY held one consequence of the *jus cogens* character (applicable to torture) to be that every state is entitled to investigate and prosecute, #156.

⁸¹¹ Genocide Conv. arts.5-6 require state actors to punish all persons participating in the crime, while customary law may only require states to punish those who commit genocide on its territory, the Restatement, Third, of the Foreign Relations Law of the US, 1987, §404, 702; ICJ Reports 1951, #23, stating that prosecution of the persons committed acts of genocide constitutes customary international law; Randall, 1988, p.836; Cassese, 2001. An anti-genocide declaration was signed 30 Jan.2004 at an international summit in Sweden, discussing preventive measures to the recurrence of genocide, mass murder and ethnic cleansing. All 50 states represented signed the declaration, hailed to be the most powerful in condemning ethnic cleansing and mass killings since the Genocide Conv. of 1948. Reference to the ICC was left out in the declaration following objections by the US and Israel. See more, www.jsmp.minihub.org

⁸¹² Study of the Question of the Prevention and punishment of the Crime of Genocide, 1978, E/CN.4/Sub.2/416, p.799; and ICJ Reports, 1970; see generally Bassiouni, 1992, Cassese, 2001; *Israel v. Eichmann*, 36 I.L.R. 1968; The ICJ held that “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*” and “that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention”, in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996 (II), p.616, #31; *Belgium v. Spain*, 1970, ICJ confirmed *erga omnes* obligations of Genocide; *Pinochet*, 1999; De Nike, 2000; Flynn, 2000; Mitchell, 2000.

⁸¹³ *Reservations* case, ICJ 1951. In *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia*, ICJ 11 Jul.1996, 105 ILR, 1999, #31, the ICJ states that the rights and obligations of the Convention are rights and obligations *erga omnes*. The obligation to prevent and punish genocide is thus not territorially limited by the convention, however this does not assert a strict obligation to establish universal jurisdiction for the crime of genocide.

⁸¹⁴ The four Geneva Conventions impose on Contracting Parties the legal responsibility to search for, arrest, prosecute or extradite individuals who commit grave breaches of the Geneva Convs. See generally Meron, 1984; Hannum, 1992; Steiner & Alston, 1996, 2000.

⁸¹⁵ E.g. Bassiouni, 1999, 1996; Meron, 1995, 1989; Tadic case, ICTY, 1995; Furundžija case, ICTY, 1998; Dugard, in *Bouterse* case, <http://www.icj.org/objectives/opinion.htm>; Randall, 1988.

law,⁸¹⁶ victim rights,⁸¹⁷ and a general fight against impunity.⁸¹⁸ Ferencz comments that the Nürnberg precedent confirmed that international law required international crimes to be punished.⁸¹⁹ Crimes against humanity have been understood to give rise to a duty to prosecute and punish, although it is difficult to ascertain such a duty under customary law.⁸²⁰ The four Geneva Conventions, of 1949, and their Protocols, demand parties to respect the conventions, in common article 1. The important legal basis for universal jurisdiction for war crimes is the articles on *aut dedere aut judicare*, granting jurisdiction over war criminals based their presence in the state that asserts jurisdiction.⁸²¹ Article 49 of the first Geneva Convention clearly states that grave breaches of war crimes incur a treaty duty to prosecute or extradite. Older legal doctrine, before 1949, had already recognised such crimes and duties.⁸²² “The crimes defined by Article 6, section (b) of the Charter were already recognized as War Crimes under international law. They were covered by...the Hague Convention of 1907, and...the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.”⁸²³ Article 4 of the ICTR Statute appears to extend the scope of the duty to customary international law, incorporating Additional Protocol II, of 1977, and common article 3,

⁸¹⁶ See ahead, fundamental aim of just-desert punishment and the principle of individual criminal accountability. See also behind, ch.4.

⁸¹⁷ In addition to criminal law treaties and customary law practice, ch.3 recognized treaty obligations and international principles highlighting a state responsibility to bring offenders to justice. Bassiouni principles, 2000.

⁸¹⁸ See illegitimate restrictions to justice, behind ch.2 and see ahead, ch.7. Moral grounds also include the protection of universal principles, and see ch.4, grounds for just-desert punishment.

⁸¹⁹ Art.6© referred to crimes against humanity, Ferencz, 1980, p.22. By its very nature the crimes seemed to recognise the need for an international court representing all of humankind, p.23. Principle 1 of the UN Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, 1973, at web.amnesty.org/library/Index/ENGAMR220042002?open&of=ENG-CHL provides that crimes against humanity shall be investigated and prosecuted; the *Barbie* case, 1988 confirms customary law of non-applicability of statutory limitations with regard to crimes against humanity, as does the Conv. on Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 1968, and the European Conv. on the same topic, 1974.

⁸²⁰ One can conclude that a customary international law obligation exists to prosecute acts of genocide in their national courts, Cassese, 2001, p.264. Recent state practice indicates the move towards a customary international law norm of *aut dedere, aut punire*, obliging states either to try or to extradite in case of crimes against humanity, Schabas, 1996, p.555.

⁸²¹ The Geneva Convs. and Add.Prot. contain an obligation to repress grave breaches, submitting the parties to universal jurisdiction. See e.g. art.146 Geneva Conv. relative to the Protection of Civilian Persons in Time of War; art.50 Geneva Conv. for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art.129 Geneva Conv. relative to the Treatment of Prisoners of War, art.85(1)of Add.Prot.I to the Geneva Convs. of 12 Aug. 1949, relating to the Protection of Victims of International Armed Conflicts, 1977.

⁸²² 1899 and 1907 Hague Conventions Respecting the Laws and Custom of War on Land; Geneva Conventions on the Wounded and Sick in Armies in the Field and on the Treatment of Prisoners of War, 1929; IMT Charter Art.6(b). The principle of individual criminal accountability for war crimes was recognised by treaty law before the IMT, in the Treaty of Versailles, 1919, and in 1947 the ILC began drafting a code of offences against peace and security of mankind, UNDoc.A/1316, 1950.

⁸²³ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, 1947, p.253; and see e.g. the principle of universal jurisdiction, SCRes 808, 1993 establishing the ICTY.

war crimes of internal armed conflict.⁸²⁴ Additional Protocol II provides rules relating to prosecution and generally reflects customary international law and general principles.⁸²⁵ No matter the difficulty to ascertain universal jurisdiction for the international core crimes, under customary international law, there is enough support for such a duty to grow deeper roots, protecting important values that need universal application.

The international core crimes, within the jurisdiction of the ICC, shall not be subject to any statute of limitations, in line with the protection of universal values.⁸²⁶ Discussed in detail in chapter two, the recent ICJ case between the DRC and Belgium may have invalidated the general view that no immunity could be invoked for the international core crimes.⁸²⁷ It appears that still serving state officials may enjoy full personal immunity, putting the universal interests that the international core

⁸²⁴ Add.Prot.II is ratified by few states and not considered part of customary international law, but ICTR art.4 suggests that Add.Prot.II of 1977 forms part of customary international law. Furthermore, Common art.3 has certain qualification criteria to apply, and does thus not apply to all internal armed conflicts, or where no agreement between the parties have been reached, Common art.3: "...the Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention." See behind, the development of the principle of individual criminal accountability, and the Nürnberg principles being part of customary international law.

⁸²⁵ E.g. it is based on the ICCPR, art.15; arts.86, 89-108 of third Geneva Conv; arts.64-78 fourth Geneva Conv. Rwanda had ratified Add.Prot.II but not signed a special agreement. Art.6. Add.Prot.II: "(1)This Article applies to the prosecution and punishment of criminal offences related to armed conflict. (2)No sentences shall be passed and no penalty shall be executed on persons found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular: (a)the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b)no person shall be convicted of an offence except on the basis of individual responsibility; (c)no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d)anyone charged with an offence is presumed innocent until proved guilty according to law; (e)anyone charged with an offence shall have the right to be tried in his presence; (f)no one shall be compelled to testify against himself or to confess guilt. (3)A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised. (4)The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. (5)At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." Following ICTY case law, common article 3 may not be part of the grave breaches regime, however, *dicta* in the *Tadic* case supports the idea that atrocities committed in internal armed conflicts may constitute grave breaches, see *Prosecutor v. Tadic*, 1995. For *dicta* that atrocities committed in internal armed conflicts can constitute grave breaches see *Prosecutor v. Tadic* ICTY, 1995, separate Opinion of Judge Abi-Saab; *Prosecutor v. Delalic et al.* ICTY, 1998. What is clear is that crimes of Common art.3 and Add. Protocol II art.4 of the Geneva Conventions are part of international treaty law of the ICTY, art.3. See *Tadic II*, opinion, ICTY Judgement Oct.1995; *Tadic Interlocutory Appeal* ICTY, 1995; ICTR, art.4, *Akayesu* ICTR 1998, the ICC, art.8, and see SC recognising individual criminal accountability in the civil conflicts of East Timor, SC Res.1272, Oct.25, 1999; and Sierra Leone, SC Res.1315, Aug.14, 2000.

⁸²⁶ Art.29, ICC; Non-applicability of statute of limitations, see Ratner & Abrams, 1997, p.143 "[c]rimes against humanity today are subject to universal jurisdiction."; Restatement (Third) of the Foreign Relations Law of the United States, 1987, #404; The Convention on Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity, of 1968 similarly stipulates that no statutory limitations shall apply to the crime of genocide; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 1974, at <http://conventions.coe.int/Treaty/EN/Treaties/Html/082.htm>

⁸²⁷ Belgium's arrest warrant for a foreign minister of Congo was disputed. The main issue related to the state official's immunity, 42 ILM, May 2003; *Democratic Republic of Congo v. Belgium*, ICJ 14 Feb.2002, at www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_20020212.pdf

crimes protect, at risk. Still, immunity can be abrogated in treaties. The ICJ, in the same case, raised the opinion that while domestic law can confer universal jurisdiction, international arrest warrants, for individuals outside of the requesting state's territory, would amount to extraterritorial enforcement of universal jurisdiction, contrary to international law.⁸²⁸ Belgium's amended Law Concerning Grave Breaches of International Humanitarian Law,⁸²⁹ of 2003; today reflects those of most Western countries, indicating limited enforcement of universal jurisdiction, requiring a clear personal or territorial connection to the country in question.⁸³⁰ Thus, while universal jurisdiction exists, in principle, its application requires caution. Although it is not the purpose of this thesis to establish to what extent a universal duty to prosecute offenders of the international core crimes exists, both legal and moral foundation exists to support criminal jurisdiction in the protection of universalism. This is so, even though universal jurisdiction is often not practised. The gravity and extent of the international core crimes violate humanity, as a collective international community, qualifying a positive rule that, at least, allows states to prosecute or extradite, under customary international law. The core crimes are violations against the individual man and also against the collective of men, enforcing the double dimension, of importance both locally and universally.⁸³¹ The state or institution that applies criminal jurisdiction in relation to an international core crime can thus be said to do so on behalf of the international community, speaking a universal language of correctly imposing just-desert punishment.⁸³² Each member of the international community can be

⁸²⁸ Id. §§53, www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm

⁸²⁹ The 1993 Law concerning Grave Breaches of International Humanitarian Law, amended in 1999 and 2003 was abolished for the new law, 5 Aug.2003, setting out punishment for serious violations of international humanitarian law. See further Smis & van der Borgh, 2003, at http://www.lachambre.be/documents_parlementaires.html; Andries, Van den Wyngaert, David, & Verhaegen, 2003. For academic and civil society's opinion on universal jurisdiction allowing the exercise of such jurisdiction *in absentia*, see e.g. The Princeton Principles on Universal Jurisdiction, 23 July 2001, with a foreword by Mary Robinson, UNHCHR, at <http://www.princeton.edu/~lapa/univjur.pdf>; Intern.Ass. Committee on I.H.R.L. & Practice, 2000; Bassiouni, 2001; Africa Legal Aid, 2001, at <http://www.afla.unimaas.nl/en/act/univjurisd/preliminaryprinciples.htm>; Amnesty International, 2001.

⁸³⁰ Questions relating to domicile and/or nationality may be assessed once legal proceedings have been initiated. The personal link works with regard to both offender and/or victim, e.g. active personality principle (the offender is Belgian, or is domiciled in Belgium), and passive personality principle (the victim is Belgian, or is domiciled in Belgium). A special clause states that the Belgian judiciary remains competent to rule on those pending legal cases in connection with which at least 1 Belgian was the plaintiff, or 1 suspect was incarcerated in Belgium, at the time the initial case was brought. This means that cases associated with Rwanda, Guatemala and Chad remain intact. The legislation is meant to be transparent, leaving no leeway for assessing the political nature of the action, while still being able to initiating legal proceedings against offenders of the international core crimes, in the fight against impunity. See arts.7 and 144, Belgian Council of Ministers: Amendment of 1993 Law concerning Grave Breaches of International Humanitarian Law and art. 144 of the Judicial Code, May, 2003, at <http://diploble.fgov.be/en/press/homedetails.asp>

⁸³¹ The offender has thus wronged humanity and is held criminally accountable to humanity, whether or not he or his local community considers the act a crime.

⁸³² The offender is "called to answer by and to the community whose law he as allegedly broken, for a 'public' *wrong in which the community is properly interested*...Such a procedure makes clear that the *wrong allegedly committed is the concern of the whole political community*, and makes it clear to both victim and defendants that they are seen and treated as members of that community-that the community shares in the wrong suffered by the victim, and that the defendant is both bound by the community's values and protected by the various rules of the criminal process." Duff, 2001, p.72. Italics added. Generally, if customary international law does impose a duty to prosecute or extradite, states

seen as representative of universal values and commitment, shared by humanity, without having to further identify common denominators, as fundamental human rights are the concern of all.⁸³³ Principles of universalism were further established and agreed upon with the acceptance of the individual criminal accountability notion, discussed with regard to the fundamental aim of truth.

In sum, the prosecutorial process relies on criminal jurisdiction, which primarily belongs to domestic states' territorial jurisdiction. The ICC relies on such state jurisdiction, where the member states are the primary actors, who have agreed to transfer some of their rights to a supranational institution, in order to protect certain universal values.⁸³⁴ The ICC should hence function as the last instance, when other jurisdictional forums are exhausted, according to the principle of complementarity.⁸³⁵ When a case does reach the ICC, state actors to the ICC treaty must cooperate with the ICC in its investigations, prosecution and punishment.⁸³⁶ Based upon an international treaty, carrying voluntary ratification, the court can only exercise jurisdiction if the state in whose territory the crime was committed has accepted the court's jurisdiction, or if the state of which the accused is a national has accepted the court's jurisdiction.⁸³⁷ It is unfortunate that the ICC treaty could not incorporate the terminology of *e.g.* the Torture Convention, where the state finding the accused has jurisdiction over the crime, no matter where the crime was committed or the nationality of the accused.⁸³⁸ The ICC cannot exercise jurisdiction over crimes that occurred before its entry into force, and it cannot take cases that occurred before the ratification by the state in whose territory the crimes were committed, and the ICC Statute is thus not retroactive. The protection of the universal principles therefore relies on domestic prosecutorial processes that should prosecute and punish according to the rules laid down in the ICC Statute. In reference to the international core crimes, the development of universal jurisdiction is a fundamental goal of international criminal law, in order to establish a universal duty to prosecute the offenders of such crimes.⁸³⁹ International law, outlined in treaties and customary law, either authorises or obliges states to prosecute individuals who commit international core crimes.⁸⁴⁰ Universal jurisdiction is confirmed in treaty

on whose territory the crimes have been committed would be able to exercise jurisdiction in a less complicated manner than a state not at all implicated. Of course other jurisdictional claims, such as the nationality principle, can assist states in prosecuting.

⁸³³ *Id.*, with reference to the earlier quote of Duff's communitarian support for criminal jurisdiction. The actual actors, choosing to prosecute, would be the office of the prosecutor, representative of the state, or the people. Membership in the community of humanity is not voluntary, and not accepting the authority is thus not a valid excuse.

⁸³⁴ Evidence of the ICC referring to the principle of territorial jurisdiction as the general rule upon which to prosecute, can be found in art.18, ICC, where the court refers to states not parties which would normally exercise jurisdiction.

⁸³⁵ El Zeidy, 2002; Llewelyn, 2001; van Der Vyver, 2000; Danilenko, 2000.

⁸³⁶ ICC statute parts 9 and 10.

⁸³⁷ ICC art.12.

⁸³⁸ Art.5, 1984 UN Convention on Torture; Alexander, 2000.

⁸³⁹ See generally, Arnell, 2000; Reydam, 2000; van Der Vyver, 2000; Amann, 2000; Mitchell, 2000.

⁸⁴⁰ Bassiouni & Wise, 1995.

law, and further clarified and supported by the ICC Statute, which seeks to protect the universal values violated by the international core crimes; but customary international law does not clearly ascertain such a universal duty.⁸⁴¹ The ICTY held, in the *Furundzija* case, that peremptory norms, or *jus cogens*, entitle every state to investigate, prosecute and punish or extradite accused individuals who are present in a territory under its jurisdiction, thus not strictly obliging states to prosecute.⁸⁴² However, the development in the field of criminal jurisdiction and prosecutions of the international core crimes support the aim to bring such offenders to justice. With a general duty to prosecute and punish, criminal jurisdiction is elementary in the protection of universal human rights, violated by the international core crimes. With new models of hybrid courts, working parallel to truth commissions, and an operational ICC, universal principles that demand criminal jurisdiction are thus finding new grounds to ascertain prosecutions.⁸⁴³

5.3. APPLICATION OF THE FUNDAMENTAL AIMS IN THE PROSECUTORIAL PROCESS OF THE INTERNATIONAL CRIMINAL COURT

The overall goal of this thesis is to apply the fundamental aims and their potential individual and collective focus on the actors, in assimilated justice that recognises aims of criminal justice as well as aims of restorative justice. This section discusses the prosecutorial side of assimilated justice, in order to ascertain what aims the prosecutorial process can fulfil, and what its main actor focus is, during the stages of investigation, trial, judgement, and execution of sentence. The focus is on the prosecutorial process of the ICC, in order to look at the procedures that have been internationally agreed upon.

⁸⁴¹ It should be ascertainable that genocide and torture are crimes of universal jurisdiction, acc. to 1948 Genocide Conv. supra, and the 1996 ICJ case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, #616, ICJ Reports, 1996, pp.595, ILC has similarly confirmed such universal jurisdiction, see art.8, #8, Draft Code of Crimes against the Peace and Security of mankind, UNDoc.A/51/10, 1996; Torture Conv. and ICTY case *Furundzija*, supra #153 torture has evolved into a peremptory norm or *jus cogens*. Weaknesses in the substantial law, although not spelled out in this research, highlight further vulnerability, where domestic criminal law will remain applicable. E.g. the crime of genocide only includes specific groups, and the list is exhaustive. Crimes conducted in a similar fashion against non-included groups may lead to other types of crime and human rights violations, see behind, ch.1.

⁸⁴² Id., #156.

⁸⁴³ See Dugard, in Cassese, A (Ed.) 2002, p.693, discussing the ICC and amnesty. While the ICC firmly supports a state responsibility to prosecute and punish, the silence on the topic of amnesty in the ICC Statute may support a discretionary recognition of specific amnesties. Art.15 allows prosecution to decline a case *proprio motu*, art.53(2)(c) allows the prosecution to conclude that there prosecution is not in the interest of justice. Perhaps the chambers will use certain amnesties as a mitigating factor. Art.16 allows the Security Council to defer prosecution under Chapter VII of the UN Charter if it could constitute a threat to international peace to ignore the amnesty, which would appear unlikely. Art.17 could apply, whereby a case would be held inadmissible before the ICC, according to art.53, and the amnesty process has qualified as a judicial investigation and decision not to prosecute. Art.20 could defer a case based on *non bis in idem* principles, if the amnesty process would qualify as a trial; See behind, ch.2, and ch.7; Dugard, in Cassese, 2002, p.701.

The fundamental aim of just-desert punishment holds an underpinning position in the prosecutorial process, with reference to the fundamental questions that the prosecutorial process seeks to answer; relating to whether a certain act qualifies as a crime and, if the conditions of criminal accountability are fulfilled, what punishment should be imposed. The fundamental aim of truth is instrumentally viewed, in order to provide evidence of the crime and the offender's actions. The aim of truth is thus instrumental to all the fundamental aims that are fulfilled in the prosecutorial process. Deterrence is linked to the overall process and the execution of sentence, where the severity of sentence and the actuality of it being carried out may have deterring effects.⁸⁴⁴ The prosecutorial process can have healing effects, and it allows actor participation, and victim recognition, whereby the aims of reparation and reconciliation may be fulfilled, to some extent at least, by the process. Although the prosecutorial process may have reconciling effects, the process is generally focused on just-desert punishment and deterrence, and, in accordance with the principle of individual criminal accountability, it is inherently focused on the individual offender.

5.3.1. TRUTH IN THE PROSECUTORIAL PROCESS

Truth is a vital ingredient of justice. Without truth investigations, public trials and publicly acknowledged judgements, we may remain in denial. Recalling from chapter four, truth has the potential of absorbing all the actors, truth is individual and collective, and it is dual in motive, being both an end in itself (expressive truth) and a means to other ends (instrumental truth), depending on the focus of the justice process. In the prosecutorial process, the fundamental aim of truth appears instrumentally linked to the investigation, evidence and judgement of one particular case, and the guilt of one particular offender. This part, on the fundamental aim of truth, considers individual criminal accountability and its effect on the fundamental aim of truth. Second, it considers how the prosecutorial process authoritatively investigates and acknowledges truth.

5.3.1.A. INDIVIDUAL CRIMINAL ACCOUNTABILITY

The principle of individual criminal accountability forms the basis for the prosecutorial process and its individual focus. Although the idea of individual criminal accountability pre-existed the two World Wars,⁸⁴⁵ international law did not prescribe individual criminal accountability and

⁸⁴⁴ See behind, ch.4.

⁸⁴⁵ Pre-1899 customary international law saw the state as the sole carrier of responsibilities. The 1899 and 1907 Hague Conventions refer to the prosecution of the belligerent party, rather than the individual offender, and the individual was not held responsible in his personal capacity, but states had the right to prosecute war criminals (No II, and IV

did not oblige states to impose criminal jurisdiction on its own nationals, for crimes committed in the sovereign territory of the state, until the IMT.⁸⁴⁶ That those following the policies of dictators, militia and other heads of state could be held criminally accountable for individual misconduct was practically a foreign concept.⁸⁴⁷ The IMT Charter provided for individual criminal accountability for violations of the laws of war and other atrocities, labelled crimes against humanity, with the objective to prosecute and punish the major war criminals, no matter their capacity or locality of the crime.⁸⁴⁸ In 1945, the IMT tried 13 cases, at Nürnberg, and this normative development was included in the UK General Assembly's Control Council; in the IMT Charter for the Far East Tokyo tribunal; in US military tribunals; in allied tribunals in Germany; as well as in other domestic courts.⁸⁴⁹ The justification for individual criminal accountability was based on the nature of the crimes, not only violating principles of universalism, that is, values shared by the major legal systems; but violating all of humanity.⁸⁵⁰ "International law imposes duties and liabilities upon

respectively). In 1915, in the Armenian genocide, individual criminal accountability was referred to in terms of crimes against humanity, see Cassese, 1997. First attempt to authorise the prosecution of individual war criminals failed, after WWI, with the Treaty of Versailles, 28 Jun. 1919, because the Dutch government declined to surrender the German Emperor to the Allied and Associated Powers, in History of the UN War Crimes Commission, 1948. Yet, theoretically, individuals could have been prosecuted for some time.

⁸⁴⁶ There was no principle of individual criminal accountability under customary international law or general principles of law, Id. The Nuremberg Charter annexed to the London Agreement listed crimes for which there shall be individual responsibility, crimes against peace, crimes against humanity, and war crimes, art.6. Charter of the IMT, London, 8 Aug.1945; Nuremberg Principles, Geneva, 29 Jul.1950; Gross, 1955; Green, 1980; Sandoz, 1986; Orentlicher, 1991.

⁸⁴⁷ Higgins, 1994, pp.49. International law did address violations of individual rights by states, in the areas of state responsibility for injury to aliens, mostly dealing with property, and certain limitations on the conduct of war. Two exceptions to the rule that only states could be held accountable were; the abolishing of slavery, which was not based on any legal conception of wrongdoings against a state and its subjects, but due to general abhorrence of the practice, and piracy as a right of self-defence, obviously not involving persons under the control of any government; Cassese, 2001. The law was silent on the subject of individual accountability – consequences for individuals who had violated the law and consequences for those violated.

⁸⁴⁸ The IMT also aimed at prosecuting offenders who had committed crimes in other countries. IMT Charter, art.6 extended individual criminal accountability to all individuals involved in the crimes, and see art.8, including conspiracy and complicity, seen as incriminating. The IMT held senior government officials, army generals and other influential private individuals accountable, trying to put a stop to act-of-state immunity. Charter of the IMT, 1945; IMT Judgement and Sentences, 1947.

⁸⁴⁹ Charter of the International Military Tribunal, 1945; Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity, Berlin, 20 Dec.1945; Charter of the Military Tribunal for the Far East, Tokyo, 19 Jan.1946; Between 1955 and 1969 Germany tried over 1000 cases, less than 100 of those convicted received life sentences, Herz, 1995; Rückerl, 1979; France started other such proceedings, *Barbie* case, 1985, where *la Cour de Cassation* held that the prohibition of statutes of limitations, with regard to crimes against humanity in this case, could apply retroactively. This development constituted the Nuremberg principles as part of customary international law.

⁸⁵⁰ The Western concept of human rights is rooted in the Enlightenment doctrine of natural rights, whereby man possesses rights by virtue of his humanity, articulated by John Locke, *Essays on the Law of Nature*, (von Leydon, W. (Ed.) 1954). According to Kelsen, international law regulates human conduct and thus lays down rules regulating individuals, and it only rarely considers an individual a direct subject of international law, 1934, p.474, 1966, p.96. Kelsen put international law at the top of the hierarchy of laws, and believed procedural capacity to be the criterion to determine subjects of international law, and emphasised the importance of actual enjoyment of international rights by individuals before an international court. Lauterpacht believed individuals to be subjects of international law, and not merely subjects of duties under international law, when an individual can appear, as a subject of responsibilities, before an international court, 1944, p.58; Meron, 1986; Orentlicher, 1991.

individuals as well as upon States...Individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁸⁵¹

With the help of the development since the Treaty of Versailles and article 6 of the Nuremberg Charter, the Genocide Convention contemplated an international criminal court and laid down the principle of individual criminal accountability for the crime of genocide.⁸⁵² The ICRC continued the development of individual criminal accountability, in the four 1949 Geneva Conventions.⁸⁵³ With the atrocities committed in former Yugoslavia and in Rwanda, involving individuals connected to the government as well as civilians, the principle of individual criminal accountability was yet again given further means, in the form of two *ad hoc* ICTs, in the mid-1990s.⁸⁵⁴ The law applied by the *ad hoc* tribunals imposes a states responsibility to prosecute the offenders of the international core crimes, or hand over the suspect to the jurisdiction of the courts.⁸⁵⁵ The qualification of individual criminal accountability essentially means that offenders of the crimes incurring individual criminal accountability law are criminally liable, and together with universal jurisdiction so liable before a domestic, regional or international court.⁸⁵⁶ The offender

⁸⁵¹ Trial of the Major War Criminals, 1947, p.223; Orentlicher, 1991, p.2553. Thus, after having established that the violations were crimes against humanity, crimes against peace and war crimes, it was found natural to try the violators, who were inherently linked to international war, at an international tribunal.

⁸⁵² The Treaty of Versailles, art.227, 28 Jun.1919, imposing individual criminal accountability in the German Kaiser, in History of the UN War Crimes Commission, 1948; the Convention on the Prevention and Suppression of the Crime of Genocide, 1948, art.4 impose individual criminal accountability for crimes listed in arts.2, 3. For a historic development of international law, and the principles of individual criminal accountability and universal jurisdiction, see behind, 3.3.1.

⁸⁵³ The four Geneva Conventions impose on Contracting Parties the legal responsibility to search for, arrest, prosecute or extradite individuals who commit grave breaches of the Geneva Convs; Draft Code of Crimes against the Peace and Security of Mankind, Geneva, 5 July 1996, YILC, Vol.II(2), 1996. International human rights law grants right to individuals, although obligations are only imposed on states. See generally Meron, 1984; Hannum, 1992; Steiner & Alston, 2000, pp.180; Dupuy, P-M. *International Criminal Responsibility of the Individual and International Responsibility of the State*, pp.1085, in Cassese, (Ed.) 2002.

⁸⁵⁴ Statute of the International Tribunal for the Former Yugoslavia, ILM 1993, p.1192; Statute of the International Tribunal for Rwanda, ILM 1994, p.1598. The ICTs have jurisdiction over natural persons, art.6 ICTY. The ICTs' statutes include individual accountability on the part of both the military elite and civilians.

⁸⁵⁵ The international courts were set up in the belief that those responsible for gross violations of international human rights and humanitarian law must be brought to justice and, while domestic courts remain the primary resort, the international alternative was set up for the occasions where domestic courts cannot or will not fulfil the obligations for various reasons, *i.e.* the ICTs were created with primacy of jurisdiction, and concurrent jurisdiction, see behind; ICTY art.29, Rules 39, 40; Bassiouni & Manakis, 1996; Cassese, 1995. The ICTs lack any means of its own to bring accused before the tribunals, and require states to cooperate in the investigation and prosecution of accused.

⁸⁵⁶ Those who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime will be held individually criminally accountable, no matter status or superior order, art.7. The Rules of Procedure and Evidence of the ICTs enable the tribunals to relieve a person of individual criminal accountability, due to *e.g.* mental incapacity. Jones, 2000; Schabas, W. A. "ICTR, Genocide, Length of detention pending indictment and formal appearance before tribunal. Delay in informing defendant of charges and suspension of proceedings as remedy for abuse of procedure by prosecutor. Review of prior decisions, Appeals Chamber", in 94 AJIL 2000.

was defined in chapter three, according to the principle of individual criminal accountability and article 25 of the ICC Statute, thus renouncing collective accountability and collective punishment.⁸⁵⁷

The principle that international law imposes duties and liabilities upon individuals as well as on states, developed at Nürnberg and detailed in the ICTs, is intended to ensure that everyone who contributes to the commission of a crime will be held criminally accountable.⁸⁵⁸ The systematic nature of the international core crimes, in particular genocide and crimes against humanity,⁸⁵⁹ often link the commission of the crime to the state apparatus, yet there has been no recognition of a collective nature and with the exclusion of immunity, the individual's acts and intentions are being separated from those of the state.⁸⁶⁰ The concept of collective criminal accountability, in relation to criminal organisations, was raised at Nürnberg, confirming the fact that the IMT could only try natural persons and could not impose a sentence on a collective group, but it could declare an organisation to be criminal.⁸⁶¹ Although trials that can ascertain the criminality of an organisation would offer solutions to the restricting problem of prosecuting thousands of collaborators, in *e.g.* the Rwandan genocide, or in the Nazi regime, criminal guilt is personal, as ascertained by the IMT,

⁸⁵⁷ Statute of the International Criminal Court, Rome, 1998, art. 25 and see behind, ch.3; ICTs, *e.g.* art.7 ICTY. The fourth Geneva Conv. also reasserts the prohibition of collective punishment, arts.33-34. "No protected person may be punished for an offence he or she has not personally committed"; art.6 Add.Prot.II of 1977 laying down the principle of individual responsibility, and its corollary – there can be no collective penal responsibility for acts committed by other members of a group. Collective punishment is also prohibited by art.50 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land.

⁸⁵⁸ Morris & Scharf, 1995, p.93.

⁸⁵⁹ ICTY, *Karadžić* case, 1996; ICTR, *Akayesu* case, 1998.

⁸⁶⁰ An individual can thus be held individually responsible for his acts of *e.g.* crimes against humanity, as long as the offender had knowledge of the systematic or widespread acts or he can be held responsible for individual crimes, if the acts were not part of the systematic attack. See ICTY, *Tadić* case, 1997, ##659.

⁸⁶¹ United Nations War Crimes Commission, 1948, p.291. Arts.9-11 of the IMT Charter discussed criminal organisations. A group or organisation could be declared criminal by the IMT, but membership alone was not enough to come within the scope of the definition of group or organisation, p.161. Any person convicted by the IMT could be charged before a national, military or occupation court, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the IMT for participation in the criminal activities of such group or organisation. See Trial of the Major War Criminals before the IMT, Judgment, 1947, p.171, 256. Justice Jackson argued that the reference to collective criminality in the Charter was not a new legal concept, as different domestic legislations allowed for the prosecution of members of collective organisations, found to be criminal. See VIII Trial of German Major War Criminals, Proceedings of the IMT, 1947, pp.41. Justice Jackson laid down essentials for collective criminality: the group must be some aggregation of persons in identifiable relationship with a collective; membership should be voluntary; the aims of the organisation must be criminal, acc.to art.6 of the IMT Charter; the criminal aims or methods of the organisation must have been of such character that its membership may be charged with knowledge of them; some individual must have been a member of the organisation and convicted of some act on the basis of which the organisation was declared to be criminal. *E.g.* the German Penal Code of 1871 criminalised participation in certain organisations and 1924 Germany had declared the Nazi Party to be such a criminal organisation. The notion is included in art.1(2) of the Apartheid Convention, 1973, "The States Parties to the present Convention declare criminal those organisations, institutions and individuals committing the crime of apartheid." Kelsen condemned the theory of organisational criminality as being primitive, and instead supporting the London Charter's establishment of the principle of individual responsibility for crimes against peace, see Kelsen, 1947, pp.165.

the ICTR, and the ICC.⁸⁶² As membership in a criminal organisation cannot in itself lead to a guilty verdict, and the prosecutorial process would still have to focus on the individual's actions, where membership would only be one factor of evidence.⁸⁶³ This does not exclude the advantages that such declaratory judgements could bring to the prosecutorial process, and to the overall justice process, where truth acknowledgement in the prosecutorial process would include a collective notion, indicating state and collective group involvement. State involvement and sponsorship is common in the carrying out of the international core crimes, and these crimes are often referred to as state sponsored crimes.⁸⁶⁴ Because of this involvement and hence responsibility, it would not be correct to exclude state responsibilities *per se*.⁸⁶⁵ Instead, the state responsibility discussed in this thesis refers to the responsibility to prosecute offenders of the international core crimes, do justice

⁸⁶² Instead, joint trials exist with e.g. cabinet ministers and military commanders tried together. See Bizimungu, Mugenzi, et al, members of the former Interim Government in Rwanda, tried jointly on charges including conspiracy to commit genocide, ICTR-99-50-1. In the negotiations of the ICC, France proposed to include legal persons under the ICC jurisdiction, see *Draft Statute for the ICC*, art.23, UNDoc.A/CONF.183/2/Add.1, 1998. This could not be agreed upon and the ICC only has jurisdiction over natural persons, art.25 ICC Statute.

⁸⁶³ Id. Following the discussion by Justice Jackson, in the IMT trial, the court would try the top figures in the indicted organisations, making a declaration of criminality against the organisation, whereby domestic courts would be empowered to prosecute individuals for the crime of membership in such an organisation. In fact, in a case before the ICTY, fear that the court may assume guilt based on an ascertained criminal organisation was raised in *Prosecutor v. Kordic & Cerkez*, 2001, #215, "the Prosecution's case is predicated on the assumption that, if this Trial Chamber finds that the Bosnian Croat institutions operated as 'criminal' associations in Central Bosnia, and further finds that the accused (particularly Dario Kordic) was a prominent member of one or more of those organisations, the Prosecution may then be relieved from having to prove that Dario Kordic possessed the requisite discriminatory intent when committing the alleged acts of persecution." In Rwanda, the *gacaca* process does not appear to have such safeguards, as it combines aims of the prosecutorial process and restorative justice. Dugard has stated that "[p]rosecution emphasises the right to justice, and society's demand for retribution. The truth commission seeks to satisfy the right to know and understand the past, and aims at reconciliation rather than retribution". Dugard, 1999, pp.1001. Had the criminal organisation concept been incorporated from the start, offenders in Categories 1 and 2 could have been dealt with by the ICTR and domestic courts, leaving the *gacaca* to deal with the less serious offences. The establishment of the African Union indicates a strong human rights commitment, with a plan to establish an African court on human rights. Principle 4 of the African Union reads "The right of the union to intervene in a member state pursuant to a decision of the assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity". Since the Rwandan genocide, and the South African TRC, the pan-African parliament and the African Union conclude that African nations are making progress towards taking collective responsibility for the continent.

⁸⁶⁴ State involvement may be central to war crimes (particularly grave breaches of the Geneva Conventions) and crimes against humanity, and often, due to the nature of the crime, also genocide, see ICC Statute, Appendix 1; *The Pinochet Precedent, How Victims can pursue Human Rights Criminals Abroad*, Human Rights Watch, at <http://www.hrw.org/campaigns/chile98/precedent.htm>. State responsibility is traditionally determined by the test put forward by the ICJ in *Nicaragua v. United States*, ICJ, 1980; challenged by the ICTY Appeals Chamber in *Tadic*, which has developed a separate test, *Prosecutor v. Tadic*, ICTY, 1999; "If a State...possesses such rules of Municipal Law as it is prohibited from having by the Law of Nations, it violates an international legal duty.", Oppenheim, in Lauterpacht, 1955, p.45; Vienna Conv. on the Law of Treaties, art.27, 1969.

⁸⁶⁵ State responsibility is the larger *corpus* of international law in terms of general state obligations. This corpus is mainly found in public international law, see Brownlie, I. *Principles of Public International Law*, Clarendon Press, 1990. This research is, however, not concerned with general state responsibility, as it is limited to an accountability process applicable to the international core crimes, which in turn only give rise to *individual criminal* accountability. When an individual is not acting in a private capacity, but instead in official state capacity, dual aggravated state responsibility may become relevant, however state responsibility is dealt with under non-criminal principles of international law. Aggravated state responsibility, as Cassese refers to it, appears parallel to individual criminal responsibility with regard to the crimes of humanity, genocide, war crimes, torture and terrorism, Cassese, 1999, at <http://www.ejil.org/journal/Vol10/No1/100023.pdf>; Cassese, 2003, p.191; ICTY, *Krstic* case, 2001; Clark, 1986; Weiler, 1989; Bassiouni principles.

and make reparations.⁸⁶⁶ Excluding collective notions of guilt, other, promising principles, of both criminal and restorative nature, have arisen, supporting affirmative obligations to prosecute and to establish the truth and offer reparations.⁸⁶⁷

As article 1 of the ICTY ascertains, the court “has the power to prosecute persons responsible for serious violations of international humanitarian law”; it is thus the nature of the crime, rather than the offender’s position, that matters.⁸⁶⁸ While this concept is broadly accepted, inherent restrictions to the justice system may limit individual criminal accountability, where it may be practically impossible to try the amount of offenders; or other legitimate restrictions exist, where the state cannot fulfil its responsibilities, without imposing certain external restrictions to the process, *e.g.* in the shape of individual amnesties.⁸⁶⁹ Still, from the beginning of the prosecutorial process, the focus remains on the individual.

5.3.1.B. TRUTH INVESTIGATION

The prosecutorial process is obviously associated with the fundamental aim of truth, without which there would be no evidence to determine just-desert punishment. However, the prosecutorial process mechanism of truth investigation does not aim to establish a broad notion of the truth. Rather, beginning the investigations, only facts relevant to the specific case are investigated and further researched.

⁸⁶⁶ These state responsibilities do however not involve criminal accountability on behalf of the state. The state responsibility refers to a moral and sometimes legal duty (depending on the topic) to *e.g.* prosecute. See Bassiouni Princip. adopted 19 Apr.2005, UNHCHR Res.2005/35, *e.g.* Principles 4-5 “In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations. 5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.” See more on such state responsibilities in ch.3.

⁸⁶⁷ Based on *e.g.* Joinet, 1997; Bassiouni principles, 2000. See behind, ch.3 for details, where human rights treaties identify instruments that states must supply in achieving the obliged results, *e.g.* investigate and criminalize. The Human Rights Committee comments assert that the ICCPR arts.2 and 7 ask states to ensure effective protection through investigation, prosecution and reparation, UNDoc.E/CN.4/Sub.2/Add.1/963, 1982. The 1988 *Velásquez Rodríguez* case similarly asserted such responsibilities; Cassese, 2001.

⁸⁶⁸ Art.1, ICTY Statute, 1993. On the following of superior orders and the no defence position, see Gaeta, 1998, pp.172.

⁸⁶⁹ See behind, ch.2 and ahead, ch.7.

International law does not recognise a positive right of individuals to seek execution of individual criminal accountability. Rather it remains a state responsibility to bring offenders of these crimes to trial, before a domestic or international criminal court.⁸⁷⁰ However, with the advancement of international law, analogous, but limited rights to state responsibility exist. Individuals and, more importantly, victims have been equipped with the right to instigate proceedings before the ICC, through the office of the Prosecutor. Victims can request the court to start investigation, or the court can start on its own initiative.⁸⁷¹ Of course, as long as domestic jurisdiction allows it, it is hoped that victims and witnesses are always able to bring information to the domestic courts (or the office of the prosecutor) in order to initiate investigations. This right, which is similar to the state responsibility to investigate, prosecute or extradite, is significant, as individuals do not have to rely on states to fulfil their responsibilities, but can make sure that valuable information will reach the right forum.⁸⁷² In addition to this, the more individuals that exercise their right to help initiate investigations, the less possible will it be for states to avoid fulfilling their responsibilities to initiate investigations. Thus, preliminary investigations will begin, once a case has been referred to the attention of the court or the Prosecutor, either by a state party;⁸⁷³ by the Security Council,⁸⁷⁴ or by another source, e.g. a victim or the prosecutor.⁸⁷⁵ If the

⁸⁷⁰ Part 9, ICC.

⁸⁷¹ *Proprio motu*, ICC arts. 13, 15, 18-19; Rules of procedure and evidence, e.g. Rules 44-50. See Appendix 3.

⁸⁷² This is an important aspect, especially in the fight against impunity and illegitimately restricted justice. See behind, ch.2 and ahead, ch.7.

⁸⁷³ Arts.13(a) "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15." Art.14 "Referral of a situation by a State Party. 1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation."

⁸⁷⁴ Art.13(b).

⁸⁷⁵ Arts.13© and 15(1) "The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. 2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. 3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence. 4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case. 5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. 6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor

Security Council or a state refers a situation to the Prosecutor, the victims still have a role at the early stages of the proceedings, and a right to be informed of any relevant decisions.⁸⁷⁶ Articles 15 and 53 deal with the initiation of investigations, where the Prosecutor shall analyse the information, and may seek additional information from states, the UN, or other reliable sources, and may receive testimony, at the seat of the ICC.⁸⁷⁷ The analysis, against legally relevant material begins as soon as the information reaches the court, and the Prosecutor is guided by article 53(1) on the decision whether to initiate investigation. Even initial information may thus be subject to testimonies and victim representations, and a pre-trial chamber will find whether there is reasonable basis to investigate,⁸⁷⁸ hence from the beginning authoritatively questioning the truthfulness of the information. The investigation should, amongst other things, serve the interests of justice, based on the gravity of the crime and the interests of victims.⁸⁷⁹ Important provisions of the ICC Statute permit victims to challenge propositions on jurisdiction and admissibility of a case.⁸⁸⁰ The rules allow victim intervention, either directly or indirectly through a lawyer, throughout the trial stages,⁸⁸¹ and the judges have to decide when it is justifiable to involve the victims, and thus prolong the trial and numerous articles support victim participation, but there are no criteria to limit and safeguard participation. Issues of admissibility, in article 17, have already been discussed, in relation to ICC jurisdiction.⁸⁸²

from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.”

⁸⁷⁶ Art. 13(b), arts.14-16, ICC Statute; The right to satisfaction includes the following: “(a) Cessation of continuing violations; (b) verification of the facts and full and public disclosure of the truth; (c) An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons closely connected with the victim; (d) Apology, including public acknowledgment of the facts and acceptance of responsibility; (e) Judicial or administrative sanctions against persons responsible for the violations; (f) Commemorations and paying tribute to the victims; [and] (g) Inclusion in human rights training and in history or school textbooks of an accurate account of the violations committed in the field of human rights and *international humanitarian law*.” The right to full and public disclosure of the truth includes “the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim’s fate”.

⁸⁷⁷ Art.15(2), and Rules 48, 104 of the ICC Rules of Procedure and Evidence. Whereas the initiation of investigations is complex compared to the ICTs, they were set up to investigate already specified situations, while the prosecutor of the ICC has independence that is mainly regulated by the Security Council. Art.16 allows the SC to defer investigations and prosecutions, as does Chapter VII of the UN Charter. See art.18(1), ICTY, art.17(1), ICTR, simply stating that the Prosecutor shall assess information received.

⁸⁷⁸ Art.15(3), 15(4).

⁸⁷⁹ Art.53(1)©, and art.17(1)(d).

⁸⁸⁰ *Proprio motu*, arts. 15, 18-19. With time it is important that the OTP develops means to receive and recognise victim information, as this type of information may differ to a great extent from other sources. Art.53 ICC does not mention victim notification. It is advisable that victims be notified of the reasons of the OTP to take on a case or not, whoever made the referral to the OTP. Also, the victims would further gain from knowing that they can still provide the court with information. Cassese, 2001, p.269.

⁸⁸¹ Art.19(3), ICC Statute.

⁸⁸² See behind, current chapter and see ch.7.

If a decision not to initiate investigation is taken, the Prosecutor shall inform those who provided the information,⁸⁸³ and a Pre-Trial Chamber can review this decision, in order not to risk unduly decisions.⁸⁸⁴ Otherwise, all state parties will be notified, once it has been decided that investigations shall begin,⁸⁸⁵ and if the state concerned chooses to begin its own investigations, the ICC will defer to the domestic operations, with the possibility of review.⁸⁸⁶ The urgent and widespread notification, provided for in article 18, appears exaggerated, as those states who would normally exercise jurisdiction, but have chosen not to, may attempt to prevent investigations. In case of deferral, the court can still exercise control over the national investigation, according to the same article 18, in order to protect the truth investigation. The ICC can investigate in any territory of a state party, even without the cooperation of that state,⁸⁸⁷ with the result that when the state is, for example, unable to investigate, the truth relevant to the applicable case does not run the risk of being overlooked or uncared for.⁸⁸⁸ Still, according to the principle of complementarity and the incomplete international criminal justice system, the ICC relies heavily on state cooperation and judicial assistance, with regard to the arrest, collection of evidence and many other types of assistance.⁸⁸⁹ The fulfilment of the aims of the prosecutorial process and criminal justice thus

⁸⁸³ Art.15(6), Rule 49 of the Rules of Procedure and Evidence.

⁸⁸⁴ Art.53(3).

⁸⁸⁵ Which can involve a Pre-Trial Chamber authorisation if a *proprio motu* referral initiated the investigation, art.15.

⁸⁸⁶ Art.18(1) "When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Actors and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States. 2. Within one month of receipt of that notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation. 3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation. 4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82, paragraph 2. The appeal may be heard on an expedited basis. 5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Actors shall respond to such requests without undue delay. 6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available. 7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances." If, however, investigations are started, based on art.13(b), no other action is required, see art.53(3)(b).

⁸⁸⁷ See art.57 and Part 9 of the ICC Statute.

⁸⁸⁸ Arts.17-18.

⁸⁸⁹ Part 9, ICC, art.93 lists forms of assistance.

remain, to a large extent, in the hands of member states.⁸⁹⁰ The limitation to the reach of the ICC is found in the ICC preamble “nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State,” and in article 72, which protects information of national security.

Inherent to the prosecutorial process, investigations are done with a micro-approach to case-based investigations, and the OTP will have to assess what information must necessarily reach the victims, balanced against confidential evidence and other sensitive issues.⁸⁹¹ Article 54, and Rules 111 and 112 list the OTP duties during an investigation.⁸⁹² In order for information to be admissible in court, strict rules of evidence, and the collection of such evidence, is required.⁸⁹³ Truth, in the prosecutorial process, likens the established judgement, and, during investigation facts and evidence, and in order to find and establish objective truth, all facts and evidence (incriminating and exonerating) relevant to the case, shall thus be investigated. The relevance of thorough truth investigations, where evidence of individual criminal accountability must be established, is linked to the general notion of “presumption of innocence”.⁸⁹⁴

⁸⁹⁰ However under the supervision of the ICC, which can provide assistance to the states, art.93(10).

⁸⁹¹ *Id.*, arts.3-4, 15, 54(1)(b). The OTP can seek information at the place of origin, where most victims will remain. In accordance with art.16 and a SC decision to delay investigation or prosecution, if victims could present their truths in some way, maybe written, to the OTP or Pre-Trial Chamber, such decisions may be avoided, or at least taken on satisfactory grounds, while at the same time leaving the victims with the possibility to participate. Also, arts.82, 110 are of concern to the victims and notification will be important. It will be of importance to find a method of notifying victims speedily, especially of decisions not to investigate, as rejection and mistrust of the criminal proceedings may otherwise occur.

⁸⁹² Art.54 “1. The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally; (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and (c) Fully respect the rights of persons arising under this Statute. 2. The Prosecutor may conduct investigations on the territory of a State: (a) In accordance with the provisions of Part 9; or (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d). 3. The Prosecutor may: (a) Collect and examine evidence; (b) Request the presence of and question persons being investigated, victims and witnesses; (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate; (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person; (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.”

⁸⁹³ ICC art.54, Rules 111-112; Wierda, Hayner & van Zyl, 2002, at www.ictj.org. The ICTY has allowed written statements, ICTY Rule 92 *bis*, Rules of Procedure and Evidence, see e.g. www.un.org/icty/rappannu-e/2003/AR03e.htm; www.un.org/documents/ga/docs/56/a56853.pdf

⁸⁹⁴ In civil law the presumption of innocence may be limited to the right of the accused to contest the charges, and it is thus expected that the accused will testify and not remain silent. In common law, the right of the accused to remain silent can be questioned, which is contrary to the ICC, art. 67(1)(h)); the Criminal Justice and Public Order Act 1994 s.34, 36-37; *R v Martinez-Tobon*, 1994. The ICTY Statute clearly states that the accused shall be innocent until proven guilty. The accused may remain silent and does not have to confess guilt or testify, in accordance with the ICCPR. ICTY art.21(3) and Rules of Evidence and Procedure Rule 42(A)(iii). See also ICC art.67(1)(g); ICTY art.21(3)(g).

Truth in criminal justice is thus confined to the facts relevant to establish guilt, just desert.⁸⁹⁵ Each person heard before the court must give an undertaking as to the truthfulness of the narrative given,⁸⁹⁶ and evidence given must be corroborated, unless facts of common knowledge are discussed.⁸⁹⁷ The notion of truth is process-sensitive, and the prosecutorial process requires legal professionals to assess the facts normatively, that is, against the requirements of the crime committed.⁸⁹⁸ The legitimacy of the facts is ascertained through the investigations, by professional evaluation, also bound to protect such evidence.⁸⁹⁹ When the investigation is finished, based upon the legal and factual basis established, the OTP shall decide whether to prosecute.⁹⁰⁰ If the facts found fulfil the requirements laid out in article 53, a Pre-Trial Chamber will issue an indictment,⁹⁰¹ which will provide detailed charges, after the pre-trial phase has established its proof.⁹⁰²

5.3.1.C. AUTHORITATIVE TRUTH ACKNOWLEDGMENT THROUGH PUBLIC TRIAL AND PUBLISHED JUDGEMENT

The important aspect of fulfilling the fundamental aim of truth is continued through all of the procedural trial aspects of each case, and does not necessitate a detailed investigation of the entire ICC Statute and its rules on procedure and evidence. Beginning with the investigation of facts and the establishment of evidence, such proof is tested throughout the trial stages,⁹⁰³ with the final establishment of truth, applicable to the specific case, in the final judgement.

Until the final stage of truth establishment, which is linked to ascertaining just-desert punishment and discussed with regard to the fundamental aim of just-desert punishment, the

Art.14(3)(g) sets out the right “not to be compelled to testify against himself or confess guilt”; Rule 90(E) (as amended). The ICC mirrors the procedural realities of civil and common law practices, emphasizing that it is the prosecutor who must prove, beyond reasonable doubt, the guilt of the accused, art.66. Similar to common law, the ICC does not ask of the accused to have to prove or contest the charges, art.67.

⁸⁹⁵ See Minow, 1998. In relation to the establishment of guilt, due process rights of persons during an ICC investigation are vital, and they are laid down in arts.55, 61, 67-68.

⁸⁹⁶ Art.69 and the Rules of Procedure and Evidence.

⁸⁹⁷ Unless testimony is given according to the rules of the court, for example intentionally giving false testimony, presenting false evidence, interfering with witnesses, evidence or court officials, it can be found an offence against the administration of justice, art.70 and the Rules of Procedure and Evidence; Findlay, 2001; Schabas, 2001.

⁸⁹⁸ The facts are thus from the beginning selected and evaluated against forensic evidence and legal rationale, according to the principles of *actus reus* and *mens rea* of the individual offender and the specific individual events related to the case and the crime(s).

⁸⁹⁹ And persons, see arts.54, 57, 68.

⁹⁰⁰ Art.53, the OTP shall decide against prosecution when, e.g. it is not in the interest of justice; the case is inadmissible, art.17; or there are no reasonable grounds to establish guilt.

⁹⁰¹ Art.58.

⁹⁰² Art.61, and ch.5 of the ICC Rules of Procedure and Evidence. Zappalà, 1999, pp.39, 1999; Triffterer, 1999.

⁹⁰³ In accordance with important general provisions, basically in accordance with just-desert principles and the protection of the individuals laid down in ICC arts.22-34.

Prosecutor, the Defence, Witnesses and the Trial Chamber are the main trial actors.⁹⁰⁴ The pre-trial collected evidence can, upon Trial Chamber request, be added to, with further documents and testimony.⁹⁰⁵ This is necessary, in order for the Court to have all the evidence it finds necessary to determine the truth,⁹⁰⁶ and having made the judges important actors in the actual trial may assist careful examination, presentation and efficiency, in accordance with a speedy trial. More importantly, for the objective of fulfilling the aim of truth, can the judges, who act in a neutral position, assist such fulfilment, through, for example, the protection of confidential information,⁹⁰⁷ and protection of the parties.⁹⁰⁸

Evidence, according to article 69, focuses on witness testimonies,⁹⁰⁹ where personal testimony under oath is preferred. Victim and witness testimonies are valuable, both to the victim and to the establishment of truth, although not without its problems, as experienced in the ICTs.⁹¹⁰ Article 69 must therefore be applied together with article 68, providing witness protection, further discussed under the victim-focused aim of reparation.

Important to the establishment of truth is the legitimacy of the process, and of the final decision. Truth established in the prosecutorial process can claim to have been so established with legal authority, represented by professionalism,⁹¹¹ public trial and public acknowledgement of the decision.⁹¹² Part nine of the ICC Statute involves the cooperation of states, which adds legitimacy and credibility, besides adding necessary assistance to the court, which cannot carry out its mandate without it. This value, of authoritative truth acknowledgment, is fulfilled through the instrumental truth made public, and the prosecutorial process is, to a large extent, public.⁹¹³ There are exceptions to the rule of public hearings, in the interest of protecting victims, witnesses and the accused,

⁹⁰⁴ That is, once arts.59-60 have been fulfilled, *i.e.* arrest, transfer of the accused and surrender to the court, where determination of the charges are decided, art.61.

⁹⁰⁵ Art.64(6).

⁹⁰⁶ Art.69, concerning with the ICTs, whose rules have also allowed the judges to play active roles in the gathering and establishment of evidence. See ICT Rules 90 and 98, Rules of Procedure and Evidence, ICTY and ICTR.

⁹⁰⁷ Art.64(6)C.

⁹⁰⁸ Both the accused and the victims and witnesses are provided protection, according to arts.67-68.

⁹⁰⁹ See Rules of Procedure and Evidence, ch.4, Rules 66, 74-75.

⁹¹⁰ ICTR, *Akayesu* case, 1998, not only relating to language problems, but to the reliability and credibility of a suffering individual, who can add important personal facts.

⁹¹¹ Further authority is linked to the professionalism of the court. An independent judiciary is a general value, which represents a fair trial. ICC art.35-36; the ICTY requires a complex process of selecting judges, in order to guarantee the independence and wide representation of the UN member states, requiring "adequate representation of the principal legal systems of the world", arts.12-13. However, with the ICTs, through the UN, the ICC and state actors, political state interests appear too close to the principle of independence to declare a definite separation between political interests and the preservation of justice.

⁹¹² Art.64(7), 74.

⁹¹³ Art.64(7).

whereby certain parts of the hearings could be conducted in camera.⁹¹⁴ Still, the sentencing shall be pronounced in public.⁹¹⁵ The legal authority is based upon the support of the treaty and its normative value, which represent principles of universalism. Such authority can invite less challenges and doubts concerning the truthfulness of the acknowledged truth, which may be made less difficult when we take into account the fact that instrumental truth, of a prosecutorial process, is only applicable and relevant to one particular case. Few individuals are involved in the process,⁹¹⁶ and the truth established is therefore narrow in definition. Still, truth is an important value that must be trustworthy, in order to be respected, and the legal authority can attach further importance to the truth. Although legal truth may be narrow in definition, it can be very wide in application, that is, legal truth applicable to one case of committed genocide may only affect one offender,⁹¹⁷ but it will affect a magnitude of victims. Delivered judgments must be accompanied by written reasons, which add to the authority of indisputable facts.⁹¹⁸ Recognising that new relevant facts may appear, and that errors of law, or of fact, may occur, makes review and appeal of judgements possible.⁹¹⁹ Authoritative prosecution, trial and judgement, which furthermore allow for appeal, may symbolise a non-tolerance attitude to the international community as well as to the local community, with the message that the legal system can, and will hold future abusers accountable.⁹²⁰

Legal attributes in establishing the truth are vital also in other respects. A rational legal process can aid a rational living memory, and avoid or lessen moralistic attributions of responsibility becoming the collective memory.⁹²¹ Guilt may be less problematic if legally

⁹¹⁴ Art.68. Protection and Reparation rights of the victims are further discussed under the aim of reparation, see ahead, this chapter.

⁹¹⁵ Art.76.

⁹¹⁶ The testimonies will be corroborated against forensic truth.

⁹¹⁷ Although there is potential to affect other offenders as well, see ahead, the aim of deterrence.

⁹¹⁸ ICTY art.23; ICC art.83(4).

⁹¹⁹ ICTY arts.25-26; ICC part 8, arts.81-84; "84(1). The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that: (a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46. (2). The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate: (a) Reconvene the original Trial Chamber; (b) Constitute a new Trial Chamber; or (c) Retain jurisdiction over the matter, with a view to, after hearing the actors in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised." ICC art.85 deals with compensation to an arrested or convicted person.

⁹²⁰ This may work as a deterrent as well.

⁹²¹ Between 1983 and 1988, Argentina's Nunca Más Human Rights Commission issued reports on thousands of disappearances, which were used by the authorities, in order to prosecute members of the military junta that had ruled the country. Alfonsín was elected president in 1983, and directly appointed a National Commission on Disappeared

qualified, and a legal process should therefore always be involved in establishing the truth. Justice Jackson, of the IMT, wrote that an essential start of a case would be to “write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.”⁹²² The authority that can derive from an *international* prosecutorial process, representing a professional, stable process of law enforcement of universal values, is beneficial, especially for transitional justices, where legitimate authority may not exist, with regard to the domestic criminal justice system.⁹²³

Legal truth and prosecutorial processes do not mean to determine the complete truth. Legal truth can be added on to, used as a means to fulfil other aims, and a broader picture of the truth.⁹²⁴ The objective of the prosecutorial process is to investigate and prosecute against its specific mandate, and although its authority and professional investigation and evaluation could further assist broader pictures of the truth, it may put its authoritative legal rationality at risk. This is so because the prosecutorial process would need to involve timely investigations and hearings of experts and witnesses, not necessarily relevant to the individual criminal case. Legal attributes of the truth focus on the individual offender, and on extracts of specific situations. Geo-political, historical, and other attributes may be taken into account, but not as part of the fact-finding process.⁹²⁵ “[The] Tribunal can tell an important part of the story, but it is equally important that the people come to their own consensus about their recent history and acknowledge the abuses suffered

Persons, selected 10 prominent citizens, known for defending human rights, as members. Alfonsín also revoked the amnesty that had been declared before the armed forces left office, and asked for the prosecution of the nine leaders of the military junta, the National Commission on Disappeared Persons CONADEP, 1983. Thousands of victims brought criminal complaints in the mid-1980s, and 9 high-ranking military officials were tried as a result, although the *Leyes de Punto Final*, the full stop amnesty laws protecting military personnel, compromised the initiatives. The military has not provided any documents and the TC report did not document cases of individuals who were detained and released, www.TruthCommissions.org Five officials were ultimately found guilty, and the trials, covered by media, contributed to public knowledge and acknowledgement of the fact that crimes had been committed. In 1987 two exculpatory laws further halted prosecutions, limiting the cases brought by the TC to the courts, leading Congress to pass the 1990 reparations law.

⁹²² 39 Am.J.Int'l.L. 1945, quoted in Orentlicher, 1991, p.2546, note 32.

⁹²³ Kelsen referred to international law as a primitive legal system allowing resort to self-help and a system of reprisals, Cassese, 1997. However the referral may be different today at least with regard to the situations where ICTs have been set up, and depending on the success of the ICC. See generally, on the influence of international criminal law practice on domestic practice, and vice versa Nijboer & Reijntjes (Eds.), 1999; McDonald & Swaak Goldman (Eds.), 2000.

⁹²⁴ In fact, truth in prosecutorial process is instrumental and not viewed as an expressive end.

⁹²⁵ Broad contextual historic explanations may be included in the final decision, and heard, by expert witnesses, during the trial, in order to add clarity to the specific facts. See e.g. Guardiola-Rivera, 2003, pp.792-808. Such analysis of the causes is thus not part of the prosecutorial process investigation. What can be found in a general chapter is a background analysis to the grave instances, but, as with the SA TRC process of individual amnesties, collective responsibility does not bring criminal accountability. Legal attributes do not take account of unreasonable or unrealistic attributes, and can avoid notions of collective guilt, which often exist in countries where, for example, blanket amnesty has been granted. The SA TRC identified both the individual and institutional actors, and while individuals would be heard and maybe granted amnesty, what was mentioned concerning collective responsibility and apartheid would later only be incorporated in the social justice chapter, recommending institutional reform. See ahead, ch.6.

by all victims ... Through the [Truth] commission, Bosnians could figure out how former neighbors and friends were driven to inflict such evil upon one another.”⁹²⁶ Involving mechanisms of macro-truth discovery and truth telling that are not entirely focused on the individual offender are therefore invited, in assimilated justice, in order to create a broader picture, and add inclusive participatory elements of the truth. Excluding the prosecutorial process investigation for individual truth, linked to the guilt of the offender, would on the other hand be detrimental.⁹²⁷ Legal truth should thus not be seen as an obstacle to truth discovery processes, but rather as an important part of any justice process. In assimilated justice, legal truth constitutes one side of the equilibrium of the fundamental aim of truth, through its individual focus. References may be made, in the investigation and hearings that can, for example, aid in the reformation of official institutions and political reconciliation. With the authoritative acknowledgment it will be difficult for the state, its community and the individual actors to ignore that which has been established.⁹²⁸

The specific individual offender focus of the prosecutorial process has meant that criminal justice has had to define and assign the offender with specific rights.⁹²⁹ The offender is protected by principles of admissibility and *ne bis in idem*.⁹³⁰ General principles such as *nullum crimes sine lege* (no crime without law) and *nullo poena sine lege* (no punishment without law) are part of the ICC Statute, and generally protect and safeguard many offender rights.⁹³¹ Articles 55 and 67 lay down

⁹²⁶ ICTY Justice Richard Goldstone, 1998, p. 6.

⁹²⁷ In many of the situations where international core crimes are committed, the entire nation has in some way been involved and individual guilt must be established with legal attributes to avoid collective responsibility. A blanket amnesty could in these circumstances worsen the situation considerably, by enhancing the feeling of collective guilt, while legal rationality could hinder further guilt.

⁹²⁸ In general, the use of amnesty threatens the memory, encourages further impunity, and invites the victims to take justice in their own hands. If truth is fulfilled in the prosecutorial process, and an amnesty is subsequently granted, the legal relevance of the amnesty will be much similar to a pardon, and pose a lesser threat of impunity, as legal, individual truth has been declared, relevant to the accused and to the crime.

⁹²⁹ See behind, ch.3 for offender definition.

⁹³⁰ See ICC arts.17-20. The person shall not be prosecuted if, e.g: Art.17.1(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3. 17.2(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

⁹³¹ ICC arts.22-24, 26, 30-31, see Annex. Art. 22.1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute. Art. 23 A person convicted by the Court may be punished only in accordance with this Statute. Art. 24.1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply. Relevant to the establishment of truth is the role that the actors can play, and the right to participation is further discussed in the section of the fundamental aim of reparation, ahead. As already discussed in an earlier chapter, criminal justice has resulted in principles almost entirely centred on the offender, where the state has taken the role of the victim and the community.

the rights of the accused during investigation and trial, where the accused is, for example, allowed adequate time to prepare a defence, with legal assistance; to remain silent; to cross-examine and call witnesses.⁹³² The prosecutor of the ICC shall, to carry out investigations and establish the truth, cover all facts and evidence relevant to establish individual criminal accountability according to the Statute and especially article 25. Although in focus, a passive role is to some extent assumed for the offender, heavily reliant on the defence to present the interests and narratives of the offender. A fair outcome requires fair proceedings, and in the establishment of truth, the actors must be able to contribute. In collecting and examining evidence, the rights and interests of victims and witnesses must be respected and, in comparison to the ICTs, attention to the victim is given, throughout the process.⁹³³ In relation to the international core crimes, access to justice, and a fair trial demand expertise and support, not only for the prosecutor, the defence and the bench, but also for the actors.⁹³⁴ However, the availability of representation has proven tricky in the operation of the ICTs, where defence counsels have had to come from completely different cultures, and speaking different languages. The right to representation thus appears to depend on the availability of service, discussed under the next heading.⁹³⁵ The pre-trial chamber of the ICC is supposed to protect the accused during the investigation stage, and “take such measures as may be necessary to ensure the efficacy and integrity of the proceedings and, in particular, to protect the rights of the defence”.⁹³⁶

In conclusion to this section, legal, rational truth focuses on narrow definitions of truth, relevant and applicable to the individual offender, or accused, which, in terms of criminal law, relates to the criminal intent and action of the offender. Actual legal guilt necessitates both *actus reus* (an active role) as well as *mens rea* (mental intent).⁹³⁷ The truth investigation of the prosecutorial process hence focuses on the truth relevant to establish the fundamental aim of just-desert punishment, which, in turn, inherently focuses on the offender. The ICTs and the ICC express and confirm the principle of individual criminal accountability, and at the same time, allow

⁹³² Arts.55, 67.

⁹³³ E.g. arts.15, 19, 54(1), 56-7, 68. Ch.4 of the Rules of Procedure and Evidence. See ahead, fundamental aim of reparation. It is in the prosecutor’s power to request the presence of persons under investigation, relevant victims and witnesses. He or she may also seek cooperation of any states or IGOs to facilitate the investigations, and the prosecutor is under the obligation to secure the evidence. The pre-trial chamber is of further assistance, and may offer further protection for victims and witnesses for the preservation of evidence.

⁹³⁴ See generally Cotterrell, 1992, and ahead.

⁹³⁵ This has led to many costly and timely difficulties and even requests for new legal teams. See e.g. the case *Prosecutor v. Tadic*, at <http://www.un.org/icty/tadic/trials2/decisions-e/100895pm.htm>

⁹³⁶ ICC art.56(1)b), arts.57–69. Included is the disclosure of evidence to the accused, prior to trial, and the limitation of this right remains with the prosecutor, in the interest of protecting investigation and security interests, but this can also mean that the accused will not be able to use the investigations, but must rely on his testimony.

⁹³⁷ Osiel, 1997; ICC Art. 25-27, individual criminal accountability.

for vicarious liability, complicity, and the statutes deny the excuse of superior orders or office.⁹³⁸ The fundamental aim of truth, applied in a prosecutorial process, may therefore avoid collective responsibility, which can easily contaminate a region, oppressed by a violent history.⁹³⁹ The practical reasons for avoiding collective, general responsibility should not be ignored, and avoiding incriminating a state is imperative to international law.⁹⁴⁰ The notion of collective responsibility is peculiar to legal logic, and must not be confused with guilt, which is truly individual, referring to a committed act or active role. Rational legal truth, besides establishing the truth related to one criminal incident with authority, may eliminate collective guilt, aid a correct living memory of the past, and may also be able to disclose public responsibility, and draw attention to necessary reform. The final version of the truth, acknowledged through the public trial and the judgement, must represent normative legitimacy, where it is important to recognise the inherent limitations of the aim in the prosecutorial process, and thus not expect a broad account of the past to be created. As part of a prosecutorial process, the truth investigation and acknowledgement justify the aim of just-desert punishment and, perhaps to some extent, the aim of deterrence. To a lesser extent, instrumental truth may also indicate individual and collective needs of reparation and reconciliation. The issue of authority is of great importance, and where the fundamental aim of truth is instrumental to the other fundamental aims of criminal justice, the legitimacy of the authority can perhaps only be determined once the aim of just-desert punishment has been fulfilled, that is, once the guilt of the accused has been determined.

5.3.2. JUST-DESERT PUNISHMENT IN THE PROSECUTORIAL PROCESS

This part looks at the fulfilment of the fundamental aim of just-desert punishment in the prosecutorial process, where the fundamental aim of truth is instrumental to the qualification of just desert. Just desert principles are based on the truth investigated and established, through the prosecutorial process stages of investigation, trial, and judgement, as just-desert punishment must necessarily be based on a true account of the relevant behaviour, in order to exert payment, and to be justly condemnatory.⁹⁴¹ Just-desert punishment is based on the determination of guilt, and sentencing penalties, whereby this part begins with the prosecutorial process determining guilt, and proceeds to look at the determination of the sentence.

⁹³⁸ Nuremberg Charter, art.8; ICTY art.7(4); ICTR art.6(4), ICC art.25, all state that, depending on the circumstances of each case, the facts behind the superior order may be considered as a mitigating factor in terms of punishment only.

⁹³⁹ Establishing individual criminal accountability (guilt) can avoid collective responsibility (general collective feeling of guilt and selfblame) of *e.g.* all Serbs of crimes committed in former Yugoslavia or Hutus in Rwanda.

⁹⁴⁰ See behind, ch.3; ICC art. 25; ICTY art. 7; jurisdiction only over “natural persons”.

⁹⁴¹ See behind, ch.4.

Punishment is the unpleasant response to crime, inflicted upon the offender as his just desert and as a symbolic denouncement of the crime. Established in chapter four, the fundamental aim of just-desert punishment refers to, and incorporates retribution, denunciation, rehabilitation and deterrence, but it is the principle of just desert that justifies punishment. The individual offender focus is inherent in the fundamental aim of just-desert punishment, whereas the role of the victim has been acknowledged in the prosecutorial process of the ICC, through indirect participation in the different stages of the prosecutorial process.

5.3.2.A. A VERDICT OF GUILTY

International criminal law recognises that a person who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of the incriminating acts prescribed shall be held criminally accountable for the crime of genocide, crimes against humanity and war crimes.⁹⁴² That the principle of individual criminal accountability is linked to the aim of just-desert punishment is obvious, as is the inherent focus on the individual offender, whose presence is required during the ICC trial.⁹⁴³ Based on this principle of accountability, or guilt, and the mechanisms of the prosecutorial process, values of fairness, quality and equality must be respected, whereby the fundamental aim of just-desert punishment is being fulfilled, based on the individual notion of the fundamental aim of truth.⁹⁴⁴

Just-desert punishment is based on the determination of guilt. Articles 64(8) and 65 indicate how important it is for the prosecutorial process to investigate and establish such guilt, and not only rely on an admission of guilt.⁹⁴⁵ If the guilty admission does not satisfy the requirements of article

⁹⁴² See art.25.

⁹⁴³ Art.63(1), and see art.61(2), where the defendant can waive his right during the confirmation hearing only.

⁹⁴⁴ See generally arts.22-33, 67.

⁹⁴⁵ Art.65 “1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether: (a) The accused understands the nature and consequences of the admission of guilt; (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and (c) The admission of guilt is supported by the facts of the case that are contained in: (i) The charges brought by the Prosecutor and admitted by the accused; (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused. 2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime. 3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber. 4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may: (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit

65, where there is, for example, contradictory evidence, the trial will proceed, in order to establish innocence or guilt. The defence counsel, as outlined in article 67(1)(b), is necessary, in order to assist this determination of innocence or guilt, in order to balance the interests presented by the prosecutor.⁹⁴⁶ As the determination of guilt must be made public,⁹⁴⁷ as a decision resolving perhaps the most fundamental issue to the prosecutorial process, and to the fundamental aim of just-desert punishment, it must be determined with legal authority. Otherwise, dismissal of the judgement may take place, and the prosecutorial process exhausts its valuable declaratory value. “A criminal trial calls a citizen to answer a charge of wrong-doing. He is called to answer by and to the community whose law he has allegedly broken, for a ‘public’ wrong in which the community is properly interested. If the charge is proved against him, he is censured for it by a formal conviction. Such a procedure makes clear that the wrong allegedly committed is the concern of the whole political community, and makes it clear to both victims and defendants that they are seen and treated as members of that community – that the community shares in the wrong suffered by the victim, and that the defendant is both bound by the community’s values and protected by the various rules of the criminal process.”⁹⁴⁸ Duff captures the spirit of an ideal prosecution. Consequentialist values support the trial and the infliction of punishment,⁹⁴⁹ justified on the offender’s just desert, assisted by the symbolic and declaratory power of the prosecutorial process *per se*, and the fulfilment of the aim of just-desert punishment. Based on just-desert punishment discussions in chapter four, the collective community has approved the wrongful conduct, defined as a crime, and the state, representative of the local community and of the international community, is authorised to inflict punishment.⁹⁵⁰ The collective support is referred to as societal communication, by Duff, where the offender is communicated to, with legal authority, based on his just-desert.⁹⁵¹ The legal authority is

the case to another Trial Chamber. 5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.” See Rule 139.

⁹⁴⁶ The right to defence and to appeal are principles essentially vested in the fundamental rights to equality before the law; to equal protection by the law; to have respect for and protection of his dignity; and every person has the right to freedom and the security of his person. See subsection 3, ch.2, Rule 27, Rules of Evidence and Procedure; Art.56; and see behind, ch.3.

⁹⁴⁷ Art.50 and Rule 40(1).

⁹⁴⁸ Duff, 2001, p.72.

⁹⁴⁹ Some of those values, besides being declaratory of guilt or innocence, based on legal authority, can assist the fulfilment of the aim of deterrence, and perhaps also assist reconciliation. See ahead.

⁹⁵⁰ Concerning the international core crimes they have been so declared, reflecting an international view that such offences are wrongful, and of international concern. States and the international community (through national states directly, or indirectly, via the UN) may then properly exercise criminal jurisdiction and the infliction of punishment. The principles of universal jurisdiction and individual criminal accountability mean that the offender is viewed as a member of the community of humanity, against which he has committed a wrong. See earlier, this chapter, and see ch.7. Whether the prosecutorial process is domestic or international does not matter in this regard, as representative of universalism.

⁹⁵¹ Duff, 2001, p.80 “...communication requires someone to or with whom we try to communicate. It aims to engage that person as an active participant in the process who will receive and respond to the communication, and it appeals to

based on correctly exercising jurisdiction, respecting international law and the normative elements of the crime, and treating the actors justly.⁹⁵² A verdict of guilty is thus a communication of censure, a public denouncement, strengthened by legal authority.

During trial, the court speaks on behalf of the community, which necessarily involves the victims. However this must not exclude direct victim involvement, but should be seen as additional moral justification for the prosecutorial process, bringing an important recognition of the actors into the prosecutorial process. The prosecutorial process of the ICC affirms a growing recognition of the victim,⁹⁵³ where the victim mostly participates as a witness, but the international prosecutor and invited *amicus curae* can also represent the victims.⁹⁵⁴ The importance of these provisions is discussed under the heading of reparation, but with regard to authoritative and representative communication, the victims cannot be interpreted to speak on behalf of the collective community in a fair and impartial manner.⁹⁵⁵ With regard to community-representation and communication, the moral behind international law, applicable to the international core crimes, is to criminalize violations of universal rights,⁹⁵⁶ and the international community carries a representative and communicating role of such universal values, heard through the international criminal court.⁹⁵⁷

The right to appeal, by the offender or the prosecutor, based on error of procedure, fact, law or any “other ground that affects the fairness or reliability of the proceedings or decision”, ensures fairness and consistency.⁹⁵⁸ Fairness and quality are issues that the prosecutorial process and the fundamental aim of just-desert punishment must safeguard. An unfair prosecutorial process will not achieve justice, but will only violate fundamental human rights. It is with respect for the rights of

the other’s reason and understanding – the response it seeks is one that is mediated by the other’s rational grasp of its content. Communication thus addresses the other as a rational agent...”

⁹⁵² Without legal authority, the prosecutorial process cannot claim legitimacy, as the entire process, and the infliction of punishment, and thus particularly the fundamental aim of just-desert punishment, can otherwise not be said to represent the community. The quality of the prosecutorial process is essential, and legal documentation, with reliable evidence, in accordance with principles of due process and fair trial are important, in order to set standards which will not discredit the law. Orentlicher, 1991.

⁹⁵³ As discussed in ch.3.

⁹⁵⁴ Rule 103 “1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate. 2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1. 3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.”

⁹⁵⁵ This is furthermore a reason why the prosecutorial process should be in the hands of a legitimate state and not the victim, who may well be affected by self-interest.

⁹⁵⁶ While even the most fundamental of human rights may not be owned by all; the right to life, and other basic human rights violated by genocide, crimes against humanity and war crimes *should be* owned and respected by all, and these rights need universal jurisdiction for their protection. See generally Shelton, 1999; Ratner, 2001; Steiner and Alston, 2000.

⁹⁵⁷ As do domestic courts when they prosecute individuals accused of the international core crimes. On the communicative response by the offender, see ahead, rehabilitation and reconciliation.

⁹⁵⁸ Art.81(1)(b)(iv), part 8 of the ICC Statute, deals with the right to appeal, based on an error of procedure, fact or law. Pursuant to art.25, Rules 107-117, ICTY, the appeals chamber hears appeals alleging errors on a question of law.

the actors and general principles of fairness and equality, especially those of the offender, which restricted justice can be found illegitimate.⁹⁵⁹

For the prosecutorial process to be able to fulfil the fundamental aims in general, and more specifically, the fundamental aim of just-desert punishment, the time factor must be respected. While the time factor can be in the criminal justice system's favour (at least where the prosecutorial process represents a stable legal system) compared to restorative justice mechanism that are often without fixed institutional mechanisms and routines,⁹⁶⁰ the time factor is still an issue. Already discussed in chapter four, in relation to the aim of truth, it is difficult to rely on evidence, factual as well as honest personal memory, after some time, especially in cases where the truth has been suppressed for years.⁹⁶¹ All efforts should be made to begin investigations and a swift trial, without jeopardizing fairness and quality of procedure.⁹⁶² Following criminological arguments, enforcement of the sentence, that is, conviction and penalties must occur with celerity, or else the punishment may not indicate the obvious link to the crime.⁹⁶³

Just-desert punishment may also be justifiable in respect of the victim's suffering, and in respect of established norms that prescribe punishment, as such factors have a role in decisions based upon the interests of justice, and on the interests of the victims.⁹⁶⁴ Still, just-desert punishment, when institutionally applied, refers to the appropriate punitive sanction that follows a crime, guided by general principles demanding equality between similar crimes, and equality between the individual guilt and the harm done. Proportionality and appropriateness bring difficulty to the sentencing stage, where numerous factors must be taken into account by the court, such as the nature and the gravity of the crime and the personal circumstances of the offender, perhaps combined with the general interest of the community.⁹⁶⁵

⁹⁵⁹ This can be the case, with regard to states, often in transition, with undemocratic or unstable legal practice. For example, military involvement and impunity threats linked to the prosecutorial process, places the international community under a duty to safeguard the fundamental aim of just-desert punishment. See behind, ch.2, and ahead, ch.7.

⁹⁶⁰ This should not be interpreted as criticism of the restorative justice system, as it is an inherent value of the truth discovery process' flexibility, in response to different local particularities, see ch.6-7.

⁹⁶¹ It is neither fair to prolong the suffering.

⁹⁶² See e.g. art.59, asking for a prompt arrest; art.67, promptly informing the accused; and art.103(1) asks for prompt enforcement mechanisms of the sentence; Rule 49, the prosecutor must take prompt action regarding investigation decisions; rule 121, prompt confirmation of charges.

⁹⁶³ Jewkes, & Letherby, 2002.

⁹⁶⁴ Art.53(1)C. Neier, A. p.99, in Boraïne, 1994. The focus lays on the offender and the state (representing the community in the prosecutorial process) as representative of the punishment that is imposed on the offender; and acceptance of the sentence on behalf of the offender. This practice, both the imposition of punishment and the serving of the sentence by the offender may aid the victim and the community.

⁹⁶⁵ Art.78 "1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person. 2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime. 3. When a person has been convicted of more than one crime, the Court shall pronounce

5.3.2.B. SENTENCING PENALTIES

The sentence shall be considered by the Trial Chamber,⁹⁶⁶ taking into account the evidence presented, any submissions made, during the trial, as well as the gravity of the crime and general interests that are found relevant to the sentence.⁹⁶⁷ The Trial Chamber can request further evidence, at this stage, in order to certify that it has all relevant information at hand, before pronouncing the sentence, in public, in the presence of the offender.⁹⁶⁸

Confinement is important in cases of international core crimes, where the victims and the general community fears the offender, and wants him imprisoned. Surviving victims may ask for execution, or a very long prison sentence; while the court, taking the offender's personal circumstances into consideration, as well as mitigating and aggravating factors, applies the principle of individualised sentencing.⁹⁶⁹ Yet, it is important that the sentence reflects proportionality and fairness, with regard to the victims, the offender, and general principles, in order for the just-desert punishment to represent truth, and vice versa, for the truth established to represent just-desert punishment.

The ICC Statute, similar to the ICTs, excludes the death penalty,⁹⁷⁰ and includes, in part seven of the Statute,⁹⁷¹ the maximum penalty of life imprisonment and, in addition to imprisonment, fines and forfeiture of assets can be added. Since the death penalty and torturous alternatives, like whipping, are widely considered unconstitutional and therefore abandoned,⁹⁷² life imprisonment is the most severe penalty that is prescribed by international criminal justice and most, but not all, domestic criminal justice systems. Yet, because it is not universally excluded, a persistent group of

a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b)."

⁹⁶⁶ Obviously in the event of a conviction.

⁹⁶⁷ Art. 78, supra.

⁹⁶⁸ Art. 76.

⁹⁶⁹ Prescribed forms of punishment, and length of sentences, applicable to the international core crimes, have so far been prescribed by the two ICTs, with some discretion left to the judges concerning length of sentence rather than form of punishment. The result of the ICTs has been that the judges impose lengthy periods of imprisonment, on multiple counts, where the periods do not run concurrently, but one after the other, ICTY art.25, ICTR art.24, and common Rule 101. The discretionary power of the judges has existed a long time in international law. *E.g.* the 1945 IMT Charter asked the court for death or such other punishment as shall be determined by it to be just, art.27; the 1948 genocide convention, art.5 requests effective penalties; See Schabas, *International Sentencing: From Leipzig (1923) to Arusha*, 1996, in Bassiouni, *International Criminal Law*, Vol.III, 1997, pp.171.

⁹⁷⁰ Neither ICT permits the death penalty. The maximum penalty that can be imposed is life imprisonment, ICTY art.24.

⁹⁷¹ Arts.77-80.

⁹⁷² The preparatory work of the ICC involved many debates on the exclusion of the death penalty and the application of life imprisonment, see Report of the Prep.Comm. on the Establishment of an ICC, UNDoc.A/AC.249/WP.35; UNDoc.A/CONF.183/C.1/WGP/L.14.

different states opposed this decision, whereby article 80 was included: “Nothing in this Part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.” Similar to the ICTs, the ICC refers to the general principles of national laws of legal systems of the world, including the laws of the states that would normally exercise jurisdiction.⁹⁷³ However, the ICC Statute does not authorize judges to consider or to defer to the local sentencing practices of the jurisdiction where the crime occurred, whereby article 21 is not likely to matter much,⁹⁷⁴ and the ICTs have not been able to pay much attention to the laws of former Yugoslavia or Rwanda.⁹⁷⁵ This provision of the ICTR had the potential to make the ICT more sensitive to the local, social context, and thus perhaps more meaningful to the local population, but in many instances are the practices of the local courts not according to international law.⁹⁷⁶ Other differences, raised in the Working Group on penalties, concerned the length of sentences, where certain states opposed long sentence for neglecting rehabilitation, and others insisted on life imprisonment, thus reflecting the diversity in penalties and sentiments about punishment.⁹⁷⁷ Such discussion will not be repeated; instead the correct sentence should follow the final conclusions, laid down in the ICC Statute, which can look for guidance to the ICTs.

Imprisonment can be imposed for a maximum period of 30 years, and life imprisonment can be imposed when “justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”⁹⁷⁸ The ICTY has imposed long sentences of imprisonment, but not life imprisonment,⁹⁷⁹ while the ICTR has imposed life imprisonment with regard to genocide on different occasions.⁹⁸⁰ A difference in the law, between the ICC and the ICTs is that review is mandatory with the ICC, according to article 110, if, amongst other things, there is an honest willingness of the offender to cooperate in the proceedings, to assist the court, and to provide information that will locate assets to orders of fine, forfeiture or reparation.

⁹⁷³ Art.21.

⁹⁷⁴ Arts.76-78.

⁹⁷⁵ Sentences are to be established taking into account the “general practice” of the criminal courts in Rwanda, ICTR art.23.

⁹⁷⁶ Rather, the ICTs respond to concerns regarding the prohibition of retroactive sentences, according to Schabas, 1997 pp.468-69; ICTR Statute, art.23(1); See *Prosecutor v. Serushago*, Parts II.B, C, ICTR 1999, at www.ictr.org/ENGLISH/SENTENCE/os1.htm; *Prosecutor v. Kambanda*, ICTR, 1998, #26-37, at www.un.org/ict/english/judgements/kambanda.htm; Morris & Scharf, 1995.

⁹⁷⁷ See UNDoc.A/CONF.183/C.1/WGP/L.3/Rev.1, pp.1.

⁹⁷⁸ Art.77(1). The ICTs only refer to imprisonment, but the ICTY, e.g. has imposed sentences of 46 years, although not a life sentence, in the *Prosecutor v. Jelisić*, 2001, #100.

⁹⁷⁹ Id.

⁹⁸⁰ Mitigating factors have led to sentences of 15 years, see *Prosecutor v Akayesu*, (life imprisonment) 1998; *Prosecutor v Serushago*, (guilty plea as mitigating factor) 2000.

Punishment affirms suffering on behalf of the offender, perhaps through imprisonment, but not necessarily. If the purpose of punishment were generally idealised as deterring, preventive, reformative, and retributive, justified on just desert principles, under circumstances of international core crimes, just desert would explain a severe penalty. Loosing, or giving up one's personal freedom to imprisonment is a hardship. Imprisonment punishes the offender for the crime committed, and at the same time aims at deterring the individual offender, and potential offenders, while protecting the community from the offender, and perhaps attempting to rehabilitate the offender.⁹⁸¹ For imprisonment to work towards rehabilitation, resources are needed, in order to motivate, heal and educate. Imposed punishment may compensate or satisfy the general community and the victims, by publicly acknowledging that the offender is being punished. However, the offender may not be a reasonable man, he or she may not be likely to be deterred, nor may there be a great possibility of rehabilitating the offender. In the words of a sceptic of the prosecutorial process, "individuals who commit atrocities on the scale of genocide are unlikely to behave as 'rational actors', deterred by the risk of punishment. Even if they were, it is not irrational to ignore the improbable prospect of punishment given the track record of international law thus far."⁹⁸² In fact, the ICTs have concurred the meaning applied in this thesis of just-desert punishment, where retribution and deterrence, and other utilitarian goods are involved in the purpose behind sentencing.⁹⁸³ There are other means of punishment than imprisonment.⁹⁸⁴ With the disappearance of the death penalty, the international prosecutorial process is really only faced with the choice of imprisonment or imprisonment and fine.⁹⁸⁵

Imprisonment can be combined with fines in the ICC Statute.⁹⁸⁶ In determining the suitability of a fine, and the amount, the court must ascertain whether imprisonment is sufficient; what the financial capacity of the offender is, including any orders for forfeiture,⁹⁸⁷ and any orders

⁹⁸¹ See ch.4 for a more details discussion of combining the retributive "just desert" theory with utilitarian aims of e.g. deterrence and rehabilitation. The mere knowledge of the fact that one can be deprived of one's freedom ought to be enough for individual as well as general deterrence.

⁹⁸² Minow, 1998, p.50; see also Minow, 2000.

⁹⁸³ See *Prosecutor v Tadic*, ICTY, 1997, #61; *Prosecutor v Rutaganda*, ICTR, 1999, #456.

⁹⁸⁴ Restorative justice supporters would perhaps opt for public confession with public denouncement, community service and fines, depending on the severity of the crime, and the threat of future harm. Nevertheless, removing the offender from freedom may well be in relation to the severe harm caused by the international core crimes, which, for the survivors, may be a lifetime of suffering.

⁹⁸⁵ Domestically, fines have grown in application, as an alternative to short-term imprisonment, or accompanied by imprisonment as an alternative, but fines are hardly ever ordered in the case of serious crimes where the general community and the victims want and need protection. Prisons are an extremely expensive form of punishment, and, because of overcrowding and growing criminal prison cultures in the western world, rehabilitation is a difficult purposes to maintain, as the unlikelihood of rehabilitation and remorse cannot be ignored. Under certain circumstances is the offender ordered to compensate for damage and loss suffered by his victims.

⁹⁸⁶ Art.77(2) and Rule 146.

⁹⁸⁷ In accordance with art.77(2)(b).

for reparation.⁹⁸⁸ Furthermore, whether and to what degree the crime was motivated by personal financial gain can be a determining factor and, in assessing the amount,⁹⁸⁹ the damage and injuries caused and any gains derived from the crime, by the offender, are assessed. In addition, forfeitures can be a penalty, in addition to imprisonment.⁹⁹⁰ Article 109 obliges states to give effect to fines or forfeitures ordered by the court, in accordance with the procedure of the domestic law.⁹⁹¹ “(2) If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the court to be forfeited, without prejudice to the rights of bona fide third actors. (3) Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgment of the Court shall be transferred to the Court.”⁹⁹²

Lastly, mitigating and aggravating factors can affect the penalty, and such factors may be important to publicly recognise in the sentence, with respect to the rule of law. Such factors may be the gravity of the crime, as well as the offender’s personal circumstances.⁹⁹³ Aggravating factors may, for example, be the level of responsibility held in the military, as held in a few cases before

⁹⁸⁸ In accordance with art.75.

⁹⁸⁹ Rule 146. The total amount shall not exceed 75 per cent of the value of the offender’s assets. 146(3) The court shall allow the offender a reasonable period in which to pay the fine, in installements, lumpsum or other decided measures. “5. If the convicted person does not pay the fine imposed in accordance with the conditions set above, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109. Where, in cases of continued wilful non-payment, the Presidency, on its own motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it may as a last resort extend the term of imprisonment for a period not to exceed a quarter of such term or five years, whichever is less. In the determination of such period of extension, the Presidency shall take into account the amount of the fine, imposed and paid. Any such extension shall not apply in the case of life imprisonment. The extension may not lead to a total period of imprisonment in excess of 30 years. 6. In order to determine whether to order an extension and the period involved, the Presidency shall sit in camera for the purpose of obtaining the views of the sentenced person and the Prosecutor. The sentenced person shall have the right to be assisted by counsel. 7. In imposing a fine, the Court shall warn the convicted person that failure to pay the fine in accordance with the conditions set out above may result in an extension of the period of imprisonment as described in this rule.” Fines are not provided as a penalty in the ICTs.

⁹⁹⁰ Art.77(2)(b) “A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.” See Rule 147. Frozen and seized assets must be secured and the cooperation of states for this protection must be sought, in accordance with Part 9 of the Statute; arts. 57(3)(e), 93(1)(k): “1. States Actors shall, in accordance with the provisions of this Part [Part 9] and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third actors”. Rule 218(1) details the content of such an order.

⁹⁹¹ The Trust Fund, holding fines and assets, will be discussed under the heading of reparation, as the aim of the trust fund is to repair the victims. See Rules 217, 146(5), on necessity for the Presidency of the Court to request such obligatory cooperation, by the state on whose territory the assets are located.

⁹⁹² Art.109, duties of states to enforce fines and forfeitures. Article 24 of the ICTY Statute clarifies that a defendant may receive sentences of imprisonment and may also be ordered to return property and proceeds acquired by the criminal conduct. Other factors can also be considered in imposing sentence, e.g. whether the offender has made restitution, and Rule 105.

⁹⁹³ Art.78(1). ICTY art.24; ICTR art.23, common Rule 101.

the ICTY.⁹⁹⁴ Indicated remorse can be a mitigating factor, as can a lack of personal participation in killings.⁹⁹⁵

Although it is recognised that a sentence without enforcement may be the same as truth without acknowledgement, the enforcement of the ICC sentences is discussed in the next part, in relation to the fundamental aim of deterrence.

Concluding this section, the individual offender focus is important and essential to the prosecutorial process, according to the principle of individual criminal accountability, which is, to a large extent, fulfilled in the prosecutorial process, once investigation and judgement on the truth has been fulfilled, and just-desert punishment has been enforced. Still, other values recognised, in support of the just-desert punishment and the prosecutorial process, have to be fulfilled. As stated in the ICC preamble, states must meet the responsibility to prosecute and punish to put an end to impunity. Just-desert punishment is thus viewed as an integral part of the criminal justice process, but not as the only part. With regard to the importance of just desert principles, not only in the fulfilment of the fundamental aim of punishment, but also in terms of moral legitimacy and legal authority, it is strange that the ICC Statute provides only a few brief, yet concise provisions on available penalties and the manner of sentencing. The just desert of the offender is thus, basically, in the hands of the judges, who have been allowed a very participatory role in the establishment of evidence, obviously in order to ascertain the correct sentence.⁹⁹⁶ The next part identifies certain aspects that can assist the judges in their correct determination of just desert.

5.3.3. DETERRENCE IN THE PROSECUTORIAL PROCESS

Briefly referred to in the previous part, the fundamental aim of deterrence is not ignored, or forgotten in the offender-focused punitive prosecutorial process, but the ICC actually confirms the possible combination of retributive and utilitarian objectives, in applying just-desert punishment. The general objective of the prosecutorial process of the ICC is referred to in its Preamble; “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” The Trial Chamber of the ICTR, in the case of Rutaganda, confirmed that “[I]t is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their

⁹⁹⁴ See, supra, the *Akayesu* case, #36; the *Serushago* case, supra, #28. Aggravating factors are such factors that add to the cruelty of the crime, e.g. lack of regret, or sympathy, see ICTR *Rutaganda*, #473.

⁹⁹⁵ See e.g. on remorse, *Serushago*, supra #39; lack of personal killing, in *Prosecutor v Ruggio*, #63; Rule 145 lists a few examples.

⁹⁹⁶ See Lattanzi & Schabas, 2000.

crimes punished, and over and above that, on the other hand, at deterrence, namely to dissuade for good, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.”⁹⁹⁷ The aim of deterrence thus appears to exist, focusing on general deterrence, as the above quotes indicate; ‘contribute to the prevention of such crimes’, and ‘to dissuade for good, others who may be tempted...’.

Based on discussion in chapter four, and the difficulty to ascertain any deterring effect, and the reason for it, this part begins by discussing the existence of the aim in the international prosecutorial process. Secondly, the possible fulfilment of the aim is looked at, based on the writings of Beccaria, who held that punishment should not necessarily be harsh, but it must be inevitable.⁹⁹⁸ Accordingly, it remains to be seen how the ICC fulfils enforcement of its sentence, with the aim to deter.

5.3.3.A. DETERRING COMMUNICATION

Following the sentencing stage of the previous part, where life imprisonment; imprisonment; or imprisonment with a fine can be the penalties, based on the gravity of the crime and the personal circumstances of the offender, in which aggravating and mitigating factors are taken into account, there is no mention of factors relating to prevention.⁹⁹⁹ Yet, numerous judgements, of the ICTs, refer to the importance of deterrence, and its role in determining the sentence. “It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence.”¹⁰⁰⁰ Without any specific mechanisms of deterrence available to the court, it is thus the

⁹⁹⁷ *Supra*, *Prosecutor v Rutaganda*, ICTR, #456. See *supra*, *Prosecutor v Tadic*, ICTY, 1997, #61, where incapacitation of the dangerous and rehabilitation were added to the aims of punishment and deterrence. The ICTs seek to achieve deterrence, through effective prosecution and punishment, where others may be deterred from committing the same crimes, and perhaps to convince those already engaged in such behavior that they should stop. Schabas, 1997, pp.461, p.498 citing ICTY Preamble. *Prosecutor v. Rutaganda*, 1999, #475; *Prosecutor v. Musema*, 2000, #986, at <http://www.icty.org> The ICTY has held deterrence to be the most important factor in the assessment of appropriate sentences. *Prosecutor v. Delalic*, #1234, 1998, at <http://www.un.org/icty/>; *Prosecutor v. Kupreskic*, #838, 2000, at <http://www.un.org/icty/>

⁹⁹⁸ See ch.4, and below.

⁹⁹⁹ Arts.77-78, Rule 145. Neither is there any mention of such factors in the Statutes or Rules of Procedure and Evidence of the ICTs.

¹⁰⁰⁰ ICTY *Prosecutor v Furundžija*, 1998, #290; and see ICTY *Prosecutor v Delalić et al*, 1998.

declaratory power of the actual prosecutorial process, sustained by legal authority that may have a deterring effect.

In relation to just desert principles, and public opinion, the penalty imposed must reflect international standards, and there is guidance for the ICC Trial Chambers to be found in judgements of the ICTs, as well as in international conventions.¹⁰⁰¹ Detailed guidance was given by Judge Jorda, of the ICTY, in the case of the *Prosecutor v. Erdemović*.¹⁰⁰² “the penalty imposed as well as the enforcement of such penalty must always confirm to the minimum principles of humanity and dignity which constitute the inspiration for the international standards governing the protection of the rights of convicted persons, which have *inter alia* been enshrined in article 10 of the ICCPR,¹⁰⁰³ ...The significance of these principles resides in the fact that a person who has been convicted of a criminal act is not automatically stripped of all his rights. The Basic Principles for the Treatment of Prisoners state that “except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the UDHR” (paragraph 5). Last, the Trial Chamber considers that the penalty imposed on persons declared guilty of serious violations of humanitarian law must not be aggravated by the conditions of its enforcement.”¹⁰⁰⁴

Of course prevention is directly fulfilled through incapacitation,¹⁰⁰⁵ and perhaps such specific deterrence can be assisted by indicting, and thus shaming the accused, whether or not the accused is later incapacitated. Generally, specific deterrence is referred to in relation to just desert, as a direct communication to the offender.¹⁰⁰⁶ On the assumption that the Trial Chamber has taken the aim of deterrence into account in the penalty chosen, the public communication of the penalty is declaratory of universal censure, of the criminal act; to the offender and to the general community.¹⁰⁰⁷ The acknowledgement is communicated on behalf of the international community, as indirect victims, representative of the violated humanity; and it is communicated on behalf of the

¹⁰⁰¹ See behind, ch.3 and in particular, the ICCPR, art.10 (an aim of punishment must be reform and social rehabilitation); Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res.2076, LXII.

¹⁰⁰² 29 Nov.1996, IT-96-22-T, #74.

¹⁰⁰³ Judge Jorda went on to list: “art.5(2) of the ACHR and, as regards penalties more specifically, art.5 of the UDHR and art.3 of the ECHR. The Trial Chamber would also refer to the following instruments: Standard Minimum Rules for the Treatment of Prisoners; Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; European Prison Rules and Rules governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal.” Id., #74.

¹⁰⁰⁴ Id.

¹⁰⁰⁵ Imprisonment is often referred to as a necessary prevention, “to protect society from the hostile, predatory conduct of the guilty accused.” ICTY *Prosecutor v Delalić et al*, 1998, #1232.

¹⁰⁰⁶ Id., #1234, “the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again.”

¹⁰⁰⁷ See generally Duff, 2001, pp.61.

victims, and the victimised local community.¹⁰⁰⁸ The victims and the local collective have a general interest in the fulfilment of the fundamental aim of deterrence, as a means of protection against the offender and against potential offenders, necessary in order to advance and reconcile. Such interests may be safeguarded by creating respect for the rule of law and the credible prosecutorial process. Such respect may be given roots through the objective of deterrence, which is often formulated in general terms. For example, the ICTR “must be directed...at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities...”¹⁰⁰⁹ General deterrence may furthermore be more effective when the prosecutions or at least execution of sentences are conducted in the domestic territory, where the communicative threat of punishment has a real audience.¹⁰¹⁰ This audience may not be directly deterred, however this does not hinder the moral aspects of education and respect for the rule of law, which cannot, however, be recognised as having any immediate effect.¹⁰¹¹ Deterring communication may, supposedly, become effective once a state ratifies the ICC Statute, as a declaration that the state recognises international law and the universal values that the prosecutorial process protects. It is therefore important that the process and the law are collectively perceived of as legitimate similar to how just desert principles rely on such acceptance.¹⁰¹² Because the ICC is complementary to domestic legal systems, the deterring communication primarily relies on its reception in member states, although the declaratory power of the international prosecutorial process may be heard universally.

5.3.3.B. SECURE AND TIMELY ENFORCEMENT OF SENTENCE

Perhaps it is not the severity of the penalty that carries the deterring effect, but maybe it is the timely enforcement of the sentence, following Brown, who cites Beccaria. “The certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity.”¹⁰¹³ A complicated and inextricable

¹⁰⁰⁸ The ICC Statute Preamble recognises the victims and their suffering as one of the reasons for the international prosecutorial process. The Statute has furthermore recognised the victims to the extent where it is obvious that restorative justice values, discussed in ch.3, have influenced the ICC. The recognition of the victims, and the communication on behalf of them, is further discussed under the heading of reparation, this chapter.

¹⁰⁰⁹ ICTR *Prosecutor v. Kambanda*, 1998, #28, at www.ictj.org/ENGLISH/cases/Kambanda/judgement/kambanda.html

¹⁰¹⁰ Goldstone, 1997, pp.227. Yet, Judge Jorda, of the ICTY, recognized that local, general deterrence may take a long time, and that the establishment of the ICT has not prevented further atrocities in the region. See UNSCOR, 55th Sess, at 3, UN Doc.S/PV.4161, 2000.

¹⁰¹¹ See *e.g.* *Supra*, ICTY *Prosecutor v. Kupreskic*, #838; *Prosecutor v. Erdemović*, #58, referring to the promotion of the rule of law. Any educational aspects should be recognised for their possibly long-term effects, however the social aspects, which require public recognition of the process as legitimate, will not instantly change the local moral stance.

¹⁰¹² *E.g.* Justice is done, rather than revenge being taken. See Posner, recognising the deterring effect of the criminal justice system, in *Retribution and Related Concepts of Punishment*, 1980, pp.71.

¹⁰¹³ Brown, 1996, p.171.

relation between intensity of punishment and deterrence leaves no room for simplistic and popular assumptions that an increase in intensity of punishment necessarily leads to a reduction of crime. Severe punishment may be justified, by utilitarian standards, in terms of the deterring and rehabilitating possibilities of greater incapacitation, both for the offender and for the general community.¹⁰¹⁴ Such justifications are dangerous, and not applicable to just desert principles.¹⁰¹⁵ Thus restraint, although serving its purpose to protect the general community and the victims, may not necessarily fulfil general deterrence (and prevent criminal activity). Citing Packer, “if people are to be deterred from engaging in criminal conduct by the punishment of those who have done so in the past, it is important that the imposition of punishment be as nearly certain as possible.”¹⁰¹⁶ Secure and timely enforcement may thus be necessary in order to fulfil both specific and general deterrence, as respect for the rule of law and the prosecutorial process is required from the individual offender, as well as from the collective community.

In accordance with the ICTs, the ICC sentence of imprisonment shall be enforced by, and served in a state designated by the court, from a list of states that have expressed their willingness to receive offenders.¹⁰¹⁷ Some scepticism relating to domestic enforcement, according to international standards, may be granted, but the necessary reliance on domestic states for secure and timely enforcement is a reminder that the ICC and international law does not have a complete system of criminal justice to rely on.¹⁰¹⁸ Although with some caution, it would appear that the states that ratify the ICC Statute and express willingness to enforce the penalty, according to the provisions of the Statute and the Rules of Procedure and Evidence, express a will and ability to do so.

Part ten of the ICC Statute includes elaborate rules on international enforcement of its sentences, based on the state consensus given in the cooperation to fight the most serious crimes of concern to the international community as a whole.¹⁰¹⁹ In terms of prompt and secure enforcement, article 103 asks the designated state to promptly inform the court of its acceptance, and of any circumstances that can affect the penalty.¹⁰²⁰ With regard to secure enforcement, according to the rules, the designated state has no right to alter the sentence.¹⁰²¹ The Registrar of the ICC shall

¹⁰¹⁴ The rehabilitation focus could determine the length of sentence based on forecasted rehabilitation, rather than on individual accountability, sometimes with undetermined length.

¹⁰¹⁵ See behind, ch.4.

¹⁰¹⁶ 1968, p.64.

¹⁰¹⁷ E.g. ICTY arts.27, 28, Rules 123-25; ICC art.103, ch.12 of the Rules of Procedure and Evidence, particularly Rules 200-201.

¹⁰¹⁸ Whether this would even be desirable demands an interesting, yet impossible study to engage in at this time.

¹⁰¹⁹ ICC Statute, Preamble.

¹⁰²⁰ Art.103(1)© and (2)(a). Art.104 allows the ICC to change state of designation.

¹⁰²¹ Art.105(1).

ensure the proper and prompt enforcement.¹⁰²² In deciding upon the designated state, the court may look at the application of international treaty standards with regard to treatment of prisoners; even the views of the offender can influence the court; as can the offender's nationality.¹⁰²³ However, a restricting factor, for the above mentioned factors to be able to influence future designation, is the equitable distribution criterion, which includes geographical distribution and a need to afford each state, on the list, the opportunity to receive offenders.¹⁰²⁴ This, again, reminds the specific actors and the international community that the primary actors in the doing of international justice are the domestic states. Perhaps utilitarian values of just-desert punishment are best provided by domestic states, however it is uncertain whether, and to what extent, the ICC will be able to review the enforcement and its consistency with international treaty standards.¹⁰²⁵ As the conditions of the imprisonment shall be governed by the law of enforcement, and consistent with international standards, the ICC may have to rely upon confidential communication from the offender, which will be a timely exercise.¹⁰²⁶

Evidence of aiming at fulfilling specific deterrence is seen in the reference to rehabilitation, in ICT cases, referring to reintegration, especially of younger members of the community,¹⁰²⁷ although it was not seen as an important consideration in the previously cited *Erdemović* case.¹⁰²⁸ International crimes are often state sponsored crimes, of political and ethnic ideologies. In order to serve justice, by punishment and deterrence, such practices may need more than enforcement of sentence, in order to be deterred. The offenders may be indoctrinated militant defenders of some obsession, as referred to in the *Erdemović* case.¹⁰²⁹ "Empirical studies show that the willingness of persons to obey various laws is indigenous to their beliefs about whether other views the law as worthy of obedience: If compliance is perceived to be widespread, persons generally desire to obey; but if they believe that disobedience is rampant, their commitment to following the law diminishes. Even a strong propensity to obey the law, in other words, can be demeaned by a person's 'desire not to be suckered.' When the law effectively expresses condemnation of wrongdoers, however, it

¹⁰²² Rule 206.

¹⁰²³ Art.103; Rules 201-204, Rules of Procedure and Evidence.

¹⁰²⁴ Art.103(3)(a), Rule 201(c) "The number of sentenced persons already received by that State and other States of enforcement; (d) Any other relevant factors."

¹⁰²⁵ Art.106.

¹⁰²⁶ It will require visits to the state in question, and the determination of the truthfulness of the communications. Art.106, Rule 211.

¹⁰²⁷ See, e.g. ICTY *Prosecutor v Delalić et al*, 1998, #1233.

¹⁰²⁸ *Supra*, ICTY, 1996, #66: "Without denying any rehabilitative and amendatory function of the punishment, especially given the age of the accused, his physical or mental condition, the extent of his involvement in the concerted plan (or systematic pattern) which led to the perpetration of a crime against humanity, the Trial Chamber considers at this point in the determination of the sentence that the concern for the above mentioned function of the punishment must be subordinate to that of an attempt to stigmatise the most serious violations of international humanitarian law, and in particular an attempt to preclude their recurrence."

¹⁰²⁹ *Id.*

reassures citizens that society does indeed stand behind the values that the law embodies.”¹⁰³⁰ The quote indicates that deterring mechanisms are process-sensitive, not only to the individual’s will and ability to be deterred, but also to the local context. The efficiency of deterrence cannot be calculated on a general scale, but is particular to each individual; to his background, education, social standard, rationality and mentality, and should not be viewed in black or white.¹⁰³¹ Besides the actual execution of the punishment, the offender must be held accountable to his or her victim, not only because this is morally compelling in itself, but also because effective deterrence and reconciliation will not otherwise be reached. It is therefore important that the censuring communication represents the views of the victims, but also, and more importantly, that the sentencing is communicated directly to the offender, and done so in the name of the victims. According to Duff, the penalty should be communicated, rather than imposed.¹⁰³² The offender is then given a chance “to understand and accept that he committed a wrong for which the community now properly censures him.”¹⁰³³ The ICC demands that the sentence is pronounced in public, and, where possible, in the presence of the accused.¹⁰³⁴ In order to further deterrence and thus the meaning of the sentence, the decision is in writing, containing a reasoned statement on the findings on evidence and conclusions, and it is publicly communicated.¹⁰³⁵

For general deterrence to be fulfilled and effective in a community affected by international core crimes, a broad account of the past may be necessary, in order to spread knowledge of the past. Truth commissions are sometimes mandated to discover the broad truth, incorporating the actions of all sides, and to encourage remorse and apology, in combination with public denouncement.¹⁰³⁶ General deterrence is community-centred, and if fulfilled, deterrence may assist the aims of reparation and reconciliation. The prosecutorial process is believed to focus on achieving general deterrence, through its declaratory sentence. Specific deterrence, aimed at the offender, may be fulfilled as an automatic consequence of the punishment, based on the belief that rational actors will change their behaviour with the threat of punishment.¹⁰³⁷

¹⁰³⁰ Kahan, 1996, p.604.

¹⁰³¹ This is also true for general deterrence of the collective when the collective belongs to a criminal society. In cases where entire communities have chosen to redefine the law into acceptance of certain crimes, often ethnic in character, a “real” threat of punishment may be required for the fundamental aim of general deterrence.

¹⁰³² Duff, 2001, p.58.

¹⁰³³ Id., p.80.

¹⁰³⁴ Art. 76(4).

¹⁰³⁵ Art. 74(5).

¹⁰³⁶ See ahead, ch.6, and 7.

¹⁰³⁷ See behind, ch.4, deterrence. The deterrence justification serves to discourage the public in general from engaging in criminal activity, and if the cost of criminal behaviour exceeds the benefits of the criminal conduct, reasonable people will choose to avoid criminal actions. By finding the offender guilty in a public trial and so morally disapproving the actions, it is hoped that the offender will be deterred from future actions. General deterrence may follow as a consequence of the condemnation.

Concluding the exploration of fulfilling the aim of deterrence in the prosecutorial process, a lack of mechanisms focused on deterrence leaves the prosecutorial process with the means of professional and normative assessment of the penalty; rules and international standards for a secure and timely enforcement; and its declaratory power, in order to achieve deterrence. The ambiguousness of determining factors, both in relation to just desert and to deterrence, may appear as a restriction to the fulfilment of the aims of just-desert punishment and deterrence. However, as the aims are both important substances of the sentence (where deterrence is thus part of the just-desert punishment, which, in turn, is based on the truth, including the gravity of the crime and personal circumstances of the offender) a detailed and strict provision on how to establish the just sentence could risk exclusion of important factors. Again, the focus of the entire process is on the individual case.¹⁰³⁸

It is recognised that much more than just the threat of punishment or a specific sanction can affect criminal behaviour, but although rehabilitation and other utilitarian goods could shape the sentence to focus on deterring the individual offender, not every offender will be deterred. Furthermore, if the punishment were to be conceived with the objective of deterrence, the penalty may not be proportionate to the crime. Severe punishment may be inflicted, and an important aim may be to deter, but, according to just desert principles, such a sentence is only legitimate if it is proportionate to the crime. The declaratory power of the prosecutorial process and a guarantee that the threat of punishment will be enforced can also fulfil general deterrence, where the expressive denunciation of the wrongful conduct discourages the general community.¹⁰³⁹ This threat, which may be used by the state authorities and the criminal justice system, with the aim to deter certain activities, must be carried out in order to be taken seriously, as it may be the rapid administration of punishment, and not the severity of it, that has the deterring value.¹⁰⁴⁰ “Respect for law generally is likely to suffer if it is widely known that certain kinds of conduct, although nominally criminal, can be practiced with relative impunity.”¹⁰⁴¹ Criminal justice is a fundamental process in crime prevention, but in order for it to work towards the fundamental aim of deterrence, it must be enforced, and this responsibility rests with the member states of the ICC.

To halt a culture of impunity and gain new respect for the rule of law it is essential for the new regime to apply the rule of law and enforce just penalties for the crimes committed, as a

¹⁰³⁸ And no two cases are identical.

¹⁰³⁹ See ch.4 on theories of punishment where utilitarians justify punishment in terms of the good of general deterrence.

¹⁰⁴⁰ In the case of transitional justice judicial mechanisms, for example, enforcement of sentences and mechanisms of deterrence and rehabilitation do often not exist, or do not operate with enough certainty. Therefore, the probability of arrest, prosecution, and punishment is low.

¹⁰⁴¹ Packer, 1968, p.287.

deterrent for future violations.¹⁰⁴² If amnesty, the greatest threat to the independence of the law, is instead granted, respect for the rule of law is again threatened, as is the transition towards democracy, and the maintenance of democracy.¹⁰⁴³

5.3.4. REPARATION IN THE PROSECUTORIAL PROCESS

This part considers the fulfilment of fundamental aim of reparation in the prosecutorial process, in its individual and collective victim focus. All the stages of the prosecutorial process; investigation, trial, judgement, and enforcement of sentence, are important in the realisation of the aim of reparation. This is not so strange when considering the stages as representative mechanisms of the fundamental aims of truth, just-desert punishment, and deterrence. The fulfilment of the aim of truth begins with the detailed investigation and completed in the final judgement, during which time the victim will be involved, perhaps mainly as a witness, as shall be identified in this part. The involvement and recognition of the victim and his suffering, in the establishment of truth, may give the victim a chance to tell his narrative, understand the offender's actions, begin his individual healing and reconciling process and restore the dignity of the victim, for example through the authoritative sentence. The fulfilment of the aim of just-desert punishment begins when the investigation is over, and the aim of truth can be fulfilled, with a completed trial. Just-desert punishment is laid down in the judgement, where the victim's suffering can be taken into account, in relation to the gravity of the crime, the opinion of the victim(s) may have been told, and the penal communication is spoken on behalf of the victims, and the collective community. The fulfilment of the aim of deterrence takes place through the declaratory power of the process and through the enforcement of the sentence, which may give satisfaction to the victims, as well as a sense of security and respect for the rule of law. At this stage the victim may experience a certain amount of symbolic reparation and healing, including a beginning of the road to reconciliation.¹⁰⁴⁴

The prosecutorial process can thus be seen as supplying a certain amount of symbolic reparation, through the fulfilment of truth, just-desert punishment and deterrence (to its best ability) as indirect means towards healing. Even so, the ICC has introduced the victim as an actor in the

¹⁰⁴² Without saying that punishment is justified based on past crimes, it is made essential to change the criminal culture, Orentlicher, 1991.

¹⁰⁴³ While not saying that a democratic state always chooses prosecution, respect for the rule of law and less influence of military regimes are possibly easier to maintain in a democratic state with human rights values.

¹⁰⁴⁴ "The Court's proceedings – the investigation, public acknowledgement of atrocities and punishment of those responsible can themselves constitute a critical form of redress for victims and the societies of which they form part, if they are able to participate in the process and are kept sufficiently informed of it." Commentary of Human Rights Watch to the ICC Prep.Comms, Jul.1999, p.23.

prosecutorial process, which may be a reparative means in itself, which is why the discussion on the fundamental aim of reparation begins by looking at this development. In order to understand the reach of the inclusion of the victim and the aim of reparation in the prosecutorial process, the meaningful inclusion of the victim as a participant, with a right to protection is next discussed. Subsequently, the fulfilment of direct means of reparation by the ICC is investigated. In summary of chapter three, reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees against non-repetition.¹⁰⁴⁵ The means of restitution, compensation and rehabilitation are included in the ICC Statute,¹⁰⁴⁶ whereby punishment and reparation have been given new roots, tied together. This development is of utmost importance for the victims – usually the most neglected actors. It also adds practical recognition of the theoretical principles, discussed in chapter three, in terms of victim rights to justice, to participation, and to reparation. These admissions are very much linked to the overall objective of assimilated justice, to fulfil the fundamental aims, including the aim of reparation; and to balance actor-involvement, including the victim.

5.3.4.A. THE INTRODUCTION OF THE VICTIM AS AN ACTOR

Bringing the victim into the prosecutorial process, as an actor, assists the fulfilment of all the fundamental aims, and also brings further quality, legal authority and moral legitimacy to the prosecutorial process. For example, a victim's perspective is added to the truth investigation, which can be further detailed during trial, with the assistance of the Prosecutor, the Trial Chamber and *amicus curae*. The assessment of just-desert punishment may be able to reflect the harm suffered by the victims, and visibly enforced on behalf of the victims. Understanding and acceptance on behalf

¹⁰⁴⁵ See behind, ch.3-4; UN Handbook on Justice for Victims on the use and application of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNDoc.E/CN.15/CRP.4/Add.1, 1998; www.wfa.org; Bassiouni Principles, 2000, adopted 2005, whereby reference is done to such principles, e.g. 19-21, restitution, compensation, rehabilitation. See Appendix 3 for a list of ICC articles and rules relating to victim inclusion.

¹⁰⁴⁶ ICC art.75. Van Boven-Bassiouni Princip.22-23, satisfaction and guarantees against non-repetition are not included as means of reparation in the ICC Statute, see art.75 ICC. The means are largely included under the aim of deterrence, but are also a matter for domestic states to fulfil. E.g. amongst the means listed under princip.22-23, effective measures aimed at the cessation of continuing violations is foremost a domestic issue, outside of the prosecutorial process, as are public apology, including acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims; effective civilian control of military and security forces; civilian and military proceedings abide by international standards of due process, fairness and impartiality; providing human rights and international humanitarian law education; reviewing and reforming laws. On the other hand, as this part identifies, visible in the prosecutorial process are, e.g. as part of satisfaction and guarantees against non-repetition: verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed; an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim; judicial and administrative sanctions; inclusion of an accurate account of the violations; strengthening the independence of the judiciary; protecting persons. See behind, ch.3, for more details.

of the offender may be promoted through victim inclusion, through which rehabilitation and deterrence may be facilitated.

“The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”¹⁰⁴⁷ Although there is only limited reference to the victim in the ICT Statutes, such reference defined the victim in the international prosecutorial process and the Prosecutor’s representation of them.¹⁰⁴⁸ Still, the lack of victim inclusion of the ICTs is deplorable.¹⁰⁴⁹ The Security Council, in a pre-ICTY resolution, stated that “the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law”.¹⁰⁵⁰ Rather than actually implementing such measures in the ICT Statutes, the SC took the position that the ICTs should not provide reparation, but it was thought that the guilty verdict could assist the victim’s right to reparation in the domestic state,¹⁰⁵¹ which identifies some ignorance on behalf of the authors of the ICT Statutes. First, the Prosecutor may not always represent the victims; secondly, the victims are, in most cases, without other recourse; thirdly, domestic states that are unable to provide a prosecutorial process will, most

¹⁰⁴⁷ Art.20 ICTY Statute. Bassiouni Princip.2-3, 11, recognise the right to access to justice and princip.12 indicates the link between access to justice and a fair trial; princip.13 this right is also a collective right. Access to justice is a universal indicator of a fair trial, e.g. art.6, European Convention for the Protection of Fundamental Rights and Freedoms, recognise the connection between access to justice and fair trial; Findlay, 2002, p.237. In the ICTs, and the ICC, both civil and common law methods have been merged, and provisional application may depend on jurisdictional familiarity with such legal cultures, by the judges and prosecutors, see Bohlander & Findlay, 2002, on the topic of civil-common law differences and influences. Also Tochilovsky, 1998; Nsereko, 1994.

¹⁰⁴⁸ Clark, & Sann, 1996. The ICTY mentions the right to protection, arts.15, 20, 22; Rule 2, of the Rules of Procedure and Evidence, of the ICTs, defines the victim as a “person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.” The development of individual rights and duties under international law since WWII has unfortunately overlooked the procedural right to direct representation. The ECtHR and the Inter-AmCtHR allow for victim representation, but, agreeing with Schachter, individual victims cannot rely on states or state organs to properly present their case, Schachter, 1985. Regional human rights organs and international criminal courts, with their independent experts and prosecutors, may have an interest in the advancement of the general system, which could go parallel to the interests of the victim. It was therefore of importance for the victims in the *Velásquez-Rodríguez* case to be represented by lawyers of their choice, as advisors, see ILM 291, 1989, #63-64 and art.46(1)(a) Inter-Am.CHR. The court determined the amount of compensation to be paid, and the victims’ lawyer presented the view directly to the court that further reparations in the form of truth investigation, punishment of the offenders, rehabilitation measures and punitive damages were necessary. See further Shelton, 1989. Worth mentioning at the European level is the Convention on State Compensation, Council of Europe, 1983; Council Framework Decision Mar. 2001, on the standing of victims in criminal proceedings, 2001/220/JHA.

¹⁰⁴⁹ The victim and witness can be questioned any time by the Prosecutor, art.18, however without the right to demand counsel, no right of access to evidence, and no right to be kept informed of the proceedings. Instead, the victim and the witness remain reliant on Rule 34, which allows for a Victim and Witness Section.

¹⁰⁵⁰ 25 May 1993, SCRes.827.

¹⁰⁵¹ Rule 106 (amended 12 Apr.2001) “(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim. (B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation. (C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.”

certainly, be unable to provide reparation and; last, the Statutes ignored important international guidelines on victim rights.¹⁰⁵² Restitution of stolen property is only referred to in the sense of a penalty,¹⁰⁵³ and no other reparation has been addressed by either of the two ICTs.¹⁰⁵⁴ In 2000, Judge Jorda of the ICTY submitted an important report to the UN Secretary-General, on the role that ICTs could play in awarding compensation to victims.¹⁰⁵⁵ It was concluded that the ICTs were not the most suitable place to award compensation, as it would require major changes to the mandates and the procedures and an increase in the workload, which already had problems with long and slow trials.¹⁰⁵⁶ An important point raised was that too many victims would be excluded from the right to reparation, as only those who appear as witnesses and perhaps those who qualify as victims in the cases prosecuted and convicted by the ICTs would be included. In addition to these difficulties and objections, it would be difficult for the ICTs to secure the resources.¹⁰⁵⁷ Since the ICC Statute came into effect, direct implementation of the rules of procedure in the ICTs would, in theory, be possible. But, it has been maintained, by the SC and ICT judges that the novelty of the ICC and its rules of procedure require some testing and maturing, by which time the ICTs may have ceased their operations. President Jorda also requested the SC to consider a suitable mechanism for the payment of compensation, with the view that compensation for injuries resulting from international crimes is vital to reconciliation.¹⁰⁵⁸ This reflects the importance of bringing the ICT mandates up to

¹⁰⁵² See behind, ch.3. According to the adopted Bassiouni Principles, supra, fundamental rights are e.g. the right to be informed of one's rights Princip.24, the right to assistance during proceedings, Princip.12; the right to assistance as well as legal and social services Princip.11-12; and the right to fair and adequate reparations Princip.15.

¹⁰⁵³ Art.24(3) "the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners." Rule 105, ICTY Statute; Morris & Scharf, 1995.

¹⁰⁵⁴ No reparation scheme has been established. However, the ICTR Registry has mentioned the setting up of a trust fund to aid NGO operated assistance to victims, see Danieli, 1999, p.106.

¹⁰⁵⁵ Jun.2000, after President Jorda raised the issue, reflecting the view, shared by other ICT judges, that the victims of the international crimes have a right in law to compensation, the Chief Prosecutor of the ICTs suggested to the SC that the funds seized from the accused could be used to compensate the victims, which was, after consultation with the judges of the ICTs, referred to the UN Secretary-General in Oct.2000, S2000/1063. The focus was on financial compensation and participation, mainly because the initial proposal by the Prosecutor related to financial compensation.

¹⁰⁵⁶ Determining victim status, representation and additional evidence is needed, in order to assess financial and other losses of the victims. Victim testimonies would furthermore add to the workload, not only of the Chambers, but also of the Prosecutors Office, and of the Registrar, who hear and decide on the compensation, and who would need to make sure that the victims are informed of their rights.

¹⁰⁵⁷ The financing of the compensation could be done through direct offender compensation, however most offenders do not have the necessary finances. If frozen assets of the offender were used, "the order of forfeiture would need to be addressed to the individual States where the assets were located. In order to ensure the enforcement of such an order, the Tribunal would largely be dependent on domestic laws of these States, which are likely to differ from each other. Possible claims by third actors would have to be dealt with according to these laws and the appropriate procedures in this regard." p.15, S2000/1063. The amount available would then differ and be inequitable for different victims. Or, following the structure of the ICC Statute, a victim trust fund could be set up, distributing the frozen assets.

¹⁰⁵⁸ Id. On the one hand, there are advantages in a criminal court being able to award reparations, as no further actions would have to be taken by the victim. On the other hand, the approach has limitations concerning those victims that do appear before the court, whom are hence not a party to the proceedings, but yet a victim of the offender before the court. There is something to be said, perhaps, for the eventual creation of an ombudsman, a spokesperson for the victims, although the logistics of creating and operating such a body would be very challenging.

date, echoing the advancement of victim rights and the provisions incorporated into the ICC mandate.¹⁰⁵⁹

The ICC has advanced the position of victims, conferring on the victim the right to participate and to obtain reparation.¹⁰⁶⁰ The right to participation involves the right to access justice, and furthers the fulfilment of many of the fundamental aims. With the recognition of the right to reparation, the ICC identifies the victim as an actor in his own right, not conditional on the offender, or on participating in order to contribute to the truth, and thus just-desert punishment. In addition, reparation may not be limited to that which can be obtained from the offender.¹⁰⁶¹ Reparation concentrates on repairing the individual victim. While a general responsibility to safeguard the rights of the victims, including reparation, remains with domestic states,¹⁰⁶² the offender's role is important, as his contribution may include self-healing, while also positively affecting the victim, materially and symbolically. It is also important to recall the victim's role, and the local community's role, which can assist and extend many aspects of reparation, through symbolically supporting the victim. Furthermore, the fundamental aims potential of overlapping is too vital to ignore, and can reinforce reparation. Individual, legal truth investigation as well as truth establishment can identify the victim, his suffering and suitable means of reparation. "Reparation requires the court to consider what the offence meant to the victim, and secondly, to consider what the victim regards as being necessary in order to put the damage right."¹⁰⁶³ As a recap from chapter three, victims are natural persons who have suffered harm as a result of a crime within the jurisdiction of the ICC, and may include organizations or institutions.¹⁰⁶⁴ Bringing the victim back into the court process and regarding the victim as the best person to describe the harm, may create a better picture of the truth and give the court a better insight into the offender's character. In combination with the victim participating in the prosecutorial process, the process can focus on the individual victim and order individual reparations based on this.

5.3.4.B. PARTICIPATION

¹⁰⁵⁹ See Commentary of Human Rights Watch to the ICC Prep.Comms. Elements of Crimes and Rules of Evidence and Procedure, Jul.1999, pp.22; A/CONF.183/9, Draft Rules of Procedure and Evidence PCNICC/2000/INF/3/Add.1, PCNICC 99/DP.10, www.iccnw.org/documents/prepcom/papersonprepcommissues/ABADraftRulesofProcJune99.pdf now ICC-ASP/1/3, at http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf

¹⁰⁶⁰ See ICC Statute, art.75. See meetings of the ICC Prep.Comm. on the reparations to victims of crime, at www.cic.nyu.edu/pubs/ReparVictimsNew.html

¹⁰⁶¹ Arts.75, 79, 93.

¹⁰⁶² International law establishes a state duty to redress the harm done, to make reparation to the extent possible; this duty has developed from case law to treaty law, in which violating states are often obliged to make reparations to the injured parties. See ch.3 and e.g. *The Factory at Chorzow* case, 1928; *Velasquez Rodriguez* case, 1989; ICCPR, art.2; UDHR, art.8; ECHR, art.50; African Charter of HR, art.21(2); ACHR, art.63(2); Bassiouni Principles, 2000.

¹⁰⁶³ Davis, 1988, p.132.

¹⁰⁶⁴ Rule 85, ICC.

Victims of the crimes before the ICC will be able to participate, through legal representatives, in the proceedings, and will be able to apply for reparation as an award. The recognition of this right means that the victim has been recognised as an actor in the prosecutorial process. Although the prosecutorial process focuses on the individual, it can now focus on the victim, and not only on the offender. The recognition of a right to participate also means that the aim of truth can be assisted with victim narratives. The aims of just-desert punishment and deterrence, linked to the fulfilment of truth in the prosecutorial process, can furthermore involve victim recognition, e.g. harm suffered. Deterring and reconciling responses may furthermore be invited upon victim involvement. The prosecutorial process thus gains in its fulfilment of the fundamental aims, by involving the victim, which not only assists the success of criminal justice, but it also assists assimilated justice. In finding equilibrium between criminal and restorative justice processes, it is worthy to note that the victim and the aim of reparation, as well as other aims, can be assisted in their fulfilment, through the prosecutorial process.

In order to participate, unless the victim is heard as a witness,¹⁰⁶⁵ the victim can make representations to the Prosecutor and the Pre-Trial Chamber, as seen in reference to initiation of investigations, with a right to be informed of the conclusion of that investigation.¹⁰⁶⁶ A victim may also communicate with the court and submit information, “with respect to jurisdiction or admissibility.”¹⁰⁶⁷ “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹⁰⁶⁸ Rule 89 specifies the procedure, where the Registrar reviews the status and the application of the victim; the victim can re-apply, would he be dismissed. Once accepted, the individual victim has a positive right to choose his legal representation,¹⁰⁶⁹ whereas a collective of victims may be requested to choose a common

¹⁰⁶⁵ In which case the victim can apply to the court or to the Trial Chamber for protection and in camera hearings and other means of presenting evidence, as well as the assistance of the ICC set up Victims and Witnesses Unit, see arts.43(6), 54, 64(6), 68; Rule 85.

¹⁰⁶⁶ Art.15(3), (6); Rule 107.

¹⁰⁶⁷ Art.19(3).

¹⁰⁶⁸ Art.68(3). The outcome of the participation will have to be in accordance with the Trial Chamber, that “shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”, art.64(2). While it is a novelty within an international prosecutorial process, civil law countries include the victim as a *partie civile*, as a civil complainant who can claim damages directly through the criminal trial.

¹⁰⁶⁹ Rule 90(1), (5) the victim may receive financial and other assistance.

counsel.¹⁰⁷⁰ Actual participation in the trial includes the examination of the witnesses and of the offender, with a right of the victim or the representative to express the victim's views on many of the decisions made during the trial;¹⁰⁷¹ yet the victim has no access to evidence and cannot appeal the sentence. Rule 91(3)(b) expressly recognises the right of the victim to participate, not only as a witness, but as an actual victim, and where there are generally a great amount of victims of international core crimes, it is essential to agree upon strict criteria for admission to the proceedings.¹⁰⁷² Once a victim is admitted the right to participation, it should also be decided that he cannot appear as a witness in the same case, in order to safeguards the rights of the accused.

Identified in chapter three, the victim can, individually or collectively, request that the court makes an order for reparations, against the offender, or that reparations be made through the Victim Trust Fund.¹⁰⁷³ This provision is discussed under the sub-heading of reparation, once the right to protection has been looked at.

5.3.4.B.1. PROTECTION OF THOSE WHO PARTICIPATE

The right to “protection of the victims and witnesses and their participation in the proceedings”¹⁰⁷⁴ is not a right to reparation *per se*, however, since the victims have been allowed participation, and not only as witnesses, they are suitably identified in relation to the right to participation. It is a principal observation, as the often neglected victim requires protection, in order to sustain his right to participation and to reparation. It is also central to the assimilated justice objective of achieving a balanced involvement of the actors, as victim involvement without protection could be harmful, and thus further harm the victim and damage the equilibrium.

Recognised in the *ad hoc* tribunals, with regard to genocide, crimes against humanity and war crimes,¹⁰⁷⁵ the right to protection is essential, but also difficult, as the victims are often faced with a collective of offenders and thus perceive more than one person as a threat to their security. “The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of

¹⁰⁷⁰ Rule 89(4), and Rule 91(2) makes sure that in case of disagreement within the collective group, the interests of the individual victim must be represented.

¹⁰⁷¹ Art.65(4); Rules 91, 93, 119(3), 128, 136, 139.

¹⁰⁷² If this is not done before trial, a lengthy trial is feasible, as the identity of the victims will have to be determined.

¹⁰⁷³ Art.75.

¹⁰⁷⁴ Art.68, and see art.21, ICTY; art.22, ICTR, and common ICT Rules 69, 75, where a Victims and Witness Unit exist.

¹⁰⁷⁵ The international core crimes include rape and other sexual offences, see behind, ch.1.

anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media...How can one conceive of the accused being afforded an equitable trial, adequate time for preparation of his defence, and intelligent cross-examination of the Prosecution witnesses if he does not know from where and by whom he is accused?"¹⁰⁷⁶ To treat victims with compassion and respect for their dignity (as a fundamental victim's right) entails the avoidance of unnecessary repetition of the atrocious events that can easily occur through wearisome investigation, questioning and cross-examination.¹⁰⁷⁷ Generally, the identity of the witness,¹⁰⁷⁸ shall be disclosed, however, a child or a young witness are a special concern, as are victims of gender.¹⁰⁷⁹ Full protection thus depends on the rights of the accused, but can, according to the Trial Chamber in *Tadić*, under exceptional circumstances, trump those rights.¹⁰⁸⁰ The *Tadić* ruling on protective measures weighed the victims' rights against the rights of the accused, where the Prosecutor had requested the anonymity of four witnesses, necessary to protect against fear of retribution, death or physical harm.¹⁰⁸¹ The Trial Chamber granted the prosecutor's motion, concluding that a fair trial must not only protect the accused, but must also protect the victims and witnesses, where there is a real threat

¹⁰⁷⁶ ICTY, *Prosecutor v. Blaskic*, Requesting Protective Measures for Victims and Witnesses, Decision on the Application of the Prosecutor, 17 Oct.1996. Rule 69, ICTR: "(a) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (b) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence." Rule 75 "(a) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (b) A Chamber may hold in camera proceeding to determine whether to order: (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as: a) expunging names and identifying information from the Chamber's public records; b) non-disclosure to the public of any records identifying the victim; c) giving of testimony through image- or voice-altering devices or closed circuit television; and d) assignment of a pseudonym. (ii) closed sessions, in accordance with Rule 79; (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television. (c) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation." Art.22 "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

¹⁰⁷⁷ However, secret witness is illegal, art.14, ICCPR; art.6, ECHR; art.21, ICTY; art.20, ICTR; arts. 67-68, ICC.

¹⁰⁷⁸ With regard to protection, the status of victim or witness is the same, whereby reference will only be made to the witness in this part, as it is believed that the protective measures will mostly apply to victims who appear as witnesses before the court. Victims will probably mainly appear through their legal representatives, see behind.

¹⁰⁷⁹ Arts.54(1)(b), 68(1); Rules 16(1)(d), 17(2), 19, 86, 112, which allows the Prosecutor to record the questioning; *Tadic*, supra, Decision on Protection, 10 Aug.1995. The court can take protective measures with regard to other issues as well, art.68.

¹⁰⁸⁰ ICTY, *Tadic* case, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug.1995, at [Http://www.un.org/icty/tadic/trials2/decisions-e/100895pm.htm](http://www.un.org/icty/tadic/trials2/decisions-e/100895pm.htm); Report of Secretary-General on the setting up of the ICTY, SCRes.S/25704, #106, stating that the ICTY must fully respect internationally recognised standards, e.g. the ICCPR art.14; ECHR art.6.

¹⁰⁸¹ However Rule 69 ICTY provides that "the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence." This rule is subject to the Appeal Chamber's discretion. The defence argued that the ICTY Statute (arts.20-21) afforded the accused the right to examine the witnesses, where the identity had to be disclosed in advance of the trial. See Preliminary Hearing on Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Tadic*, 10 Aug.1995.

and the witness is important to the Prosecutor's case.¹⁰⁸² Closed hearings can thus be allowed, as an exception, however, perhaps as a rule in cases of sexual violence of children.¹⁰⁸³ Further assistance to the security of the witness allows the Prosecutor to not disclose a full testimony of a witness to the accused, if it can lead to grave endangerment of the security, but rather to disclose a summary of such evidence.¹⁰⁸⁴

The risk for unnecessary grievance does not only occur at the trial stage, but also, and maybe more so, during investigations and interviews of potential witnesses and victims, where there is often no support-net. Such security and social measures appear essential to provide not only at the actual court level, but also in the national environment, where the actual victims are.¹⁰⁸⁵ This is why anonymity may be the only means for protection. The ICTR has often ordered protection from the public, due to the severity of the local security situation, relying on the victims and the witnesses support unit to arrange protection, revealing the identity to the defence once protection can be guaranteed.¹⁰⁸⁶ To what extent the ICC will allow anonymity remains to be seen. The ICTs limit their victim and witness protection to the site of the tribunals. While a victim and witness protection program within the national environment may be ideal, it does not appear feasible under circumstances where hundreds of thousands of victims rely heavily on international protection and temporary residence and refugee status.¹⁰⁸⁷ The ICC has a Victim and Witness Unit, similar to the ICTs that, together with the Chambers and OTP, carry great responsibility.¹⁰⁸⁸ With regard to long-term protection, the VWU is mandated to work out a protection plan, including relocation and

¹⁰⁸² Art.22, ICTY, *Tadic*, 1995, #41. At the discretion of the Trial Chamber, the rights of the accused can be limited if, firstly, there is a real fear for the safety of the witness or his family. Secondly, the testimony of the particular witness must be important to the Prosecutor's case. The ICTs are heavily dependent on eyewitness testimonies and the willingness of individuals to appear before the Trial Chambers, where often paper and other evidence have been destroyed or never existed in the first place. Thirdly, the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy. Fourthly, the ineffectiveness or non-existence of a witness protection program...has considerable bearing on any decision to grant anonymity. Finally, any measure taken should be strictly necessary. The Trial Chamber of the ICTY relied on the leading opinion of *R. v. Taylor*, English CA, CLR, 1985, p.253, "Although a defendant had a fundamental right to see and know the identity of any prosecution witnesses, there could be circumstances...when this could be denied." These conditions have been re-applied in e.g. the ICTY *Blaškić* case, Decision, 5 Nov.1996. Generally, pseudonyms can be used, as long as the accused knows the true identity.

¹⁰⁸³ Art.68(2), as an exception to art.67(1), laying down the principle of public hearings.

¹⁰⁸⁴ Arts.68(5), 61.

¹⁰⁸⁵ "As far as possible, social workers and mental health care practitioners shall be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of aggression or sexual assault." Joinet, 1997, Princip.9. See behind, ch.3.

¹⁰⁸⁶ ICTR *Prosecutor v Bagosora*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 31 Aug.1997.

¹⁰⁸⁷ However, for the opposite view, see Amnesty International Report 1999; The right to guarantees of non-repetition, should be fulfilled domestically. See ch.3, and Bassiouni Princip.23.

¹⁰⁸⁸ Art.43(6), ICC, and see art.68, reasonably applied in accordance with art.14 (3) (e) of the ICCPR, "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", as rights of the accused. See ICC Rules 16-19, 87-88.

support services on the territory of the victim's state.¹⁰⁸⁹ Protection issues can be both difficult and sometimes urgent, demanding a skilled Victims and Witnesses Unit, able to advise the OTP, the defence and the court, on behalf of the victim.¹⁰⁹⁰

5.3.4.C. REPARATIONS

The introduction of reparation to criminal justice signifies a departure from general regard to victims and communities; and the arrival of respect for the individual victim. Reparation does not necessitate offender recognition, and has therefore mainly been viewed as a civil law remedy.¹⁰⁹¹ This has not hindered its acceptance in criminal justice, since its introduction into the prosecutorial process of the ICC, and earlier recognition in the now adopted "Basic Principles and Guidelines on the Right to a Remedy and Reparation".¹⁰⁹² The provisions given to the fulfilment of reparation, in the ICC, are an important symbol of respect for the victims, by the ICC and the rule of law, through the prosecutorial process, which must recognise the individual loss caused by the offender's criminal action.¹⁰⁹³ Failing to do so means that the offender has not been held accountable to his victims; the truth investigation has not included a victim-focus; with the result that just-desert punishment cannot have done so either, as the truth is instrumental to just desert. Detering values have furthermore probably not been included, or have not looked at factors involving the victims, such as the gravity of the harm. Failing the victim focus, which the aim of reparation requires, may also slow down reconciliation as the healing process of the victims may be halted or even take a wrong turn, where the victims may feel ignored. This may be so because once the victims have been recognised in the Statute; the repercussions of failing the victims may be more severe than if no mention of such rights had been included. It is therefore important to have allowed the victim to re-apply to the Registrar, for participation, in cases where the first application is denied.¹⁰⁹⁴ It is similarly valuable that the victim's legal representative has an increased right to participation, with regard to a request for reparation.¹⁰⁹⁵ And, again, it is valuable that reparation hearings can be considered individually or collectively, through class actions, where consideration and assessment

¹⁰⁸⁹ Rule 16(4). Rule 17(2)(a) "(i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection; (ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures"

¹⁰⁹⁰ ICC arts.43(6), 68(4); Rules 16-19.

¹⁰⁹¹ Ashworth, 1986

¹⁰⁹² Supra, *i.e.* Bassiouni Principles, 2000, adopted by UNHCHR Res.E-CN_4-RES-2005-35. See Annex.

¹⁰⁹³ Art.75; Rule 97.

¹⁰⁹⁴ Rule 89(2).

¹⁰⁹⁵ Rule 91(4); art.75.

of the scope and extent of damage, loss and injury of the victim or victims take place.¹⁰⁹⁶ The fundamental aims, and specifically the aim of reparation, as the foundation of assimilated justice, have thus been given further roots, in combination with the theoretical framework provided, in chapter three. The legitimacy of criminal justice is furthermore promoted, by joining prosecution and reparation, although it must be recognised that by doing so, the prosecutorial process demands added expertise and resources.

“Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.”¹⁰⁹⁷ The ICC has sole discretion in deciding upon the issue of reparations, based on an application either by the victim directly, or *ex proprio motu*; whether to grant reparation and whether to grant it on an individual or collective basis. The court shall take into account the scope and extent of any damage, loss and injury, according to Rule 97(1). It is hence in the interest of the victim to include as much information as possible in the application for reparation.¹⁰⁹⁸ If the court ever decides to act on its own initiative, the Registry shall notify the victims in question, as well as interested states; where the court speaks the voice of those who cannot, for different reasons, reach or communicate with the court.¹⁰⁹⁹ Regarding the possible amount of victims, it is unfortunate that article 75 does not recognise and refer to the domestic fulfilment of collective, symbolic reparation, perhaps in the form of satisfaction and guarantees against non-repetition.¹¹⁰⁰ This was probably excluded from the

¹⁰⁹⁶ Art.43(6), Rules 89-93. The common counsel will be chosen by the victims or by the ICC. Class action exists in civil law, and in common law. Supported by Jubilee2000 of South Africa, Southern African Catholic Bishops and the Apartheid Claims Task Force, cases have been filed since 2002 against banks, oil, arms and computer companies in American courts that allow for international court cases. A lawsuit against US company Fluor International was brought in April 2003 in New York where South African and American class action lawyers are suing the company for more than \$700 million in damages for discriminatory wages paid to black South African employees in the 1970s and 80s, see SA Sunday Tribune, 6 Apr. 2003, p.3. The SA class action lawsuit is based on apartheid as a crime against humanity. American federal law has ratified the Torture Victim Protection Act, which allows civil action for monetary damages for certain abuses, if the offender is within the jurisdiction of the federal courts. See Torture Victim Protection Act US Code vol.28, 1993; 1789 Alien Tort Claims Act (ATCA). In May 2003, US Attorney General Ashcroft filed an *amicus curiae* arguing for a radically different understanding of the 1789 Alien Tort Claims Act, which, over the last 20 years have permitted victims of serious human rights violations to civil law suits and civil damages against offenders found in the US. This interpretation, supported by the Justice Department of the Bush administration, would greatly limit the rights of victims only permitting suits for abuses committed in the US. The Justice Department now argues that the alien torts act should not be misused, and that the law of nations covered by the act does not include international human rights treaties so that abuses committed outside the US would not be applicable. See more on the topic at Human Right Watch online, and its Defence of the Alien Tort Claims Act, at <http://www.hrw.org/press/2003/05/doj050803.pdf>; <http://www.hrw.org/campaigns/atca/>

¹⁰⁹⁷ Bassiouni Princip.15, supra. Princip.11: “Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; and (c) Access to relevant information concerning violations and reparation mechanisms..”

¹⁰⁹⁸ Rule 94(1).

¹⁰⁹⁹ Rule 95(1).

¹¹⁰⁰ Supra, Bassiouni Princip.22-23.

Statute as it could implicate the state, yet in Part nine of the Statute, states could be asked to cooperate in fulfilling such symbolic reparation.¹¹⁰¹ However, the reference to collective reparation, in Rule 97,¹¹⁰² may refer to those situations where the offender does not have enough resources to fulfil the granted reparation, in which case the court can award collective reparation, *e.g.* in the form of health centres.

The award for restitution, compensation and rehabilitation shall be made directly against the offender and,¹¹⁰³ for the benefit of others and respect for the rule of law, the ICC may seek assistance from other organisations and states, in order to give publicity to the order made.¹¹⁰⁴ The ICC relies on state cooperation, in order to ensure implementation of the court's decisions, in general, and specifically in terms of victim and witness protection and reparation orders.¹¹⁰⁵ Unfortunately the ICC has not been empowered to order states to make reparations to victims; it is only against the convicted person that the ICC can order reparation to the victims.¹¹⁰⁶ State actors to the ICC are thus required to cooperate in collecting such awards,¹¹⁰⁷ but as the ICC was set up to deal with individual criminal accountability, state obligations are not incorporated as it would have threatened the sovereignty of states, which in turn would have led to less support. In line with this, reparations have been viewed mainly as a consequence of conviction, as reparation is meant to be paid by the offender. Of course this limits the resources available to individual reparation and also restricts the actual means to reparation. However, article 109, and Rule 218 state that if the requested state cannot give effect to an order of fines, forfeitures or a reparation order, the state shall recover to the same value.¹¹⁰⁸ In line with the argument that any justice process must be domestically integrated and applied, it is potentially more feasible for a domestic prosecutorial

¹¹⁰¹ See July-August 1999 Meeting of the Prep. Comm for the ICC, at www.cic.nyu.edu/pubs/ReparVictimsNew.html

¹¹⁰² "(1) Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both."

¹¹⁰³ Rule 98(1) and art.75(2).

¹¹⁰⁴ Rule 96(2). The knowledge of reparation made, especially in the case of the collective notion, it has symbolic values and can further respect for the rule of law.

¹¹⁰⁵ See Part 9, arts.93(1)(j) of the ICC Statute, and Section IV of the Rules of Procedure and Evidence. Art.87(7) states that failure to comply with an order to cooperate will be announced to the Assembly of States.

¹¹⁰⁶ This may greatly reduce the effectiveness of the reparations system. No one individual before the ICTs has had the wealth required to make reparations to the number of victims that have suffered due to the offender's criminal actions and most qualify for legal aid for their own defence. No state entities or corporations can be found guilty, bodies that usually have a greater amount of resources and are often involved in the criminal regime of state sponsored crimes.

¹¹⁰⁷ Art.109; Rule 218.

¹¹⁰⁸ Acc.to art.75(5) shall art.109 apply to reparation orders as if they were orders of fines or forfeitures, that the states have to enforce. Rule 218 (1) "In order to enable States to give effect to an order for forfeiture, the order shall specify: (a) The identity of the person against whom the order has been issued; (b) The proceeds, property and assets that have been ordered by the Court to be forfeited; and (c) That if the State Party is unable to give effect to the order for forfeiture in relation to the specified proceeds, property or assets, it shall take measures to recover the value of the same." Art.109(2).

process to apply a reparation order against an offender, where other parties can contribute to the reparation, though not obliging others to do so.

Article 79 of the ICC Statute provides that a Trust Fund (TF) shall be established for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims.¹¹⁰⁹ This is similarly a useful example for domestic states to implement, in the fulfilment of the aim of reparation. The resources shall be supplied from money and property collected through fines and forfeitures; however voluntary contributions can be made, and it reasonable to believe that such funds will make up a large part of the TF.¹¹¹⁰ If it is impossible to make an individual award, the reparation can be deposited with the Trust Fund, which shall then be kept separate from any other resources of the TF, until it is safe to make the individual reparation.¹¹¹¹ The TF has a dual function to; provide individual reparation as decided by the court; and to provide assistance in a broader sense to victims.¹¹¹² This indicates two modes of reparation; the first being the compulsory one fixed by the court in its judgement, based on compulsory contribution such as fines and confiscations, and voluntary contributions.¹¹¹³ As the total amount of the TF will govern the amount awarded, it is thus important that the reparation orders are not only based on the available offender-assets, as that will create inequity between victims, and inadequate reparations.¹¹¹⁴ The Assembly of State Parties will set up a Board of five Directors, who will set up the vital criteria necessary in order to manage the TF. Considering the right to freeze and seize assets before a judgement, these assets can, in combination with voluntary donations, be used as guarantees for reparation funds.¹¹¹⁵

¹¹⁰⁹ Art.79, the VT shall be set up and managed by the representative Assembly of States Parties.

¹¹¹⁰ *Id.* The award for reparations can also be made through the TF, and, can also be made to organisations, approved by the TF, Rule 98.

¹¹¹¹ Rule 98(2).

¹¹¹² Rule 97, 98(3).

¹¹¹³ Rule 98 stipulates that funds will be directly allocated when a court order for reparation has been given, and does not require further decisions. Art.79(2) and Rule 98 provide that money from fines or forfeiture shall go into the TF, as well as, according to Rule 98, the collective reparation. On the other hand, the second mode, voluntary contributions, require further decisions concerning allocation, as they may contain humanitarian assistance through an NGO that sends the TF a proposal. Such contributions are hence separate from court ordered reparations. Arts.75, 79 provide that it is in the competence of the Court to decide on the allocation of resources coming out of fines, but it is left to the Assembly of States to decide on the allocation of resources specially allocated to the fund and funds made by voluntary contributions. Art.79 mentions collected fines, art.115 state contributions, art.116 voluntary contributions. See 9th session of the Prep.Comms of the ICC, Apr.2002, PCNICC/2001/WGFIRR/RT.5; PCNICC/WGFI-VTF/DP.1, on sources of financing. Most states in the prep.comm supported the view that while the management can be with the Registrar, there must be a separation between the decisions of the Court on guilt and how and to what degree to assist the victims of crimes under jurisdiction of the ICC through allocating voluntary contributions. Under the Registry the Protection of Witnesses and Victims Unit already exists, and some expertise may be useful for the TF, while maintaining a relationship between the court and the fund, however many states support the creation of a Board of Directors set up under the Registrar. The Assembly of States Parties, art.112, must be made up by equitable gender and geographical distribution representing the world's legal systems.

¹¹¹⁴ See UN Secretary-General report on the UN Voluntary Fund for the Victims of Torture, 1999.

¹¹¹⁵ Art.93, seize fines.

In this connection, it should be further noted that Rule 153 envisages the possibility of appeal against reparation orders,¹¹¹⁶ and the victims can still seek reparation elsewhere.¹¹¹⁷

Concluding the fulfilment of fundamental aim of reparation in the prosecutorial processes, it has been indicated how the victim may not yet be a formal party to the trial. However, a right to be heard at all stages of the process, with legal representation is recognised, where victims can appear individually or collectively, and do not have to rely on the Prosecutor's proper representation. This is beneficial for both the victim and the Prosecutor. To assure equality and efficiency, in respect of the rights of victims, the right to request reparations should be made public and part of an ICC outreach program. The victim has to rely on the judge to correctly analyse the victim's right and suitability to intervention, which will have to take into consideration the fact that victim participation will affect the speed and efficiency of the trial. In fact, without further involving the judges from the beginning of the investigation, it is difficult to see how they are meant to assess, *ab initio*, the relevance of the victim's participation and his questions, without having all the evidence and documents of the Prosecutor and the Defence at hand.¹¹¹⁸ The victim or his representative will not have such documents or any knowledge of the strategy of the OTP, and, without the right to evidence, victim intervention may not be very valuable to the proceedings. The victim is entitled to apply for reparation in the form of restitution, rehabilitation or compensation. In his absence, the court may ensure that such victim's rights are respected, which is incredibly important when remoteness in geography and culture is taken into account.¹¹¹⁹ The victim's right to reparation is thus again entrusted to the judges, who must ascertain a great amount of technicalities, criteria and methods which should be laid down. The funding for reparations shall be taken from the resources of the TF; voluntary contributions, as well as money or property collected through fines or forfeiture, enforced by the member states. Lacking the Statute is a provision allowing the TF to take action when an offender or a state has not fulfilled the enforcement of the reparation order, or cannot do so, which will often be the case, especially where class actions for compensation is allowed. However, there is a right to appeal.

It must be recognised that the prosecutorial process will not be as expeditious, where a serious amount of additional work and knowledge is required, mainly by Chambers. However,

¹¹¹⁶ Rule 153(1) "The Appeals Chamber may confirm, reverse or amend a reparation order made under article 75. 2. The judgement of the Appeals Chamber shall be delivered in accordance with article 83, paragraphs 4 and 5. Still, the reparation order made, or not made, will not discriminate the rights of victims under national or international law"

¹¹¹⁷ Art.75(6). The victims may, in principle, seek reparation elsewhere.

¹¹¹⁸ At the same time, the Chambers and the OTP are separate organs, art.42.

¹¹¹⁹ The location of the court, its investigations, and hearings can certainly aggravate the difficulties, and endanger the prosecutorial process.

perhaps it is a worthy price to pay, in order to finally allow the victims some recognition.¹¹²⁰ In conclusion, it would appear that the prosecutorial process can grant the victim(s) a certain security in the rights included in the ICC, and that the victim's right to access to justice; effective reparation; and access to relevant information concerning the violations and reparation mechanisms can be fulfilled.¹¹²¹

5.3.5. RECONCILIATION IN THE PROSECUTORIAL PROCESS

Time has come to consider the last fundamental aim, reconciliation; an aim generally linked to restorative justice, perhaps mainly because of its intrinsically forward-looking healing nature, without a necessary association to the crime. As established in the theoretical examination of the fundamental aims, in chapter four, the aim of reconciliation represents a healing process that moves from the individual to the collective, where the individual focus of the prosecutorial process could possibly assist the participating individuals. The jurisdiction of the ICTs protects universal values, with a focus on a specific region and a specific time-period,¹¹²² which can be linked to the restoration and maintenance of international peace and security, in the respective territories. The ICTR's main objectives appear to be (criminal) justice and reconciliation, through its prosecutorial process; "convinced that...the prosecution of persons responsible for such acts and violations...would contribute to the process of national reconciliation and to the restoration and maintenance of peace."¹¹²³ The ICT Statutes are however silent on how to achieve this and the ICC Statute does not refer to reconciliation. In connection to the declaratory power of the prosecutorial process, the protection of the actors is vital, especially where the domestic system cannot be relied upon, due to, for example, a lacking police force and a trustworthy victim and witness protection program. Protection (and the removal of the persons that may stand in the way for reconciliation), in combination with official acknowledgment of the crimes and of the harm done to the victims, may increase reparative and healing values, towards reconciliation. While perhaps only a few victims can be included in the hearings, the authoritative acknowledgment serves the important value of recognition and a sharing with the community. By offering the public the possibility to listen to the victim's narrative, the prosecutorial process tries to ensure remembrance of the crimes and of the suffering; perhaps the most important lesson to be learnt from history.

¹¹²⁰ Perhaps the Assembly of States or an Ombudsman or any other experts, could be linked to the Victims and Witness Unit and the TF, in order to assist legal representatives and the judges.

¹¹²¹ Princip. 11, Bassiouni Principles, 2000.

¹¹²² Representatives of UN enforcement measures, under Chapter VII of the UN Charter.

¹¹²³ U.N. Doc.S/RES/955, 8 Nov.1994, creating the ICTR, Preamble.

In any case, it has hopefully been sufficiently identified how, with the assistance of the fulfilment of certain aspects of the fundamental aims, criminal justice should not be seen as a threat to reconciliation. The international prosecutorial process does not only attempt to establish individual criminal accountability, enforce a suitable penalty for the individual offender and generally deter; but it also aspires to individual and collective reparation. To what extent, if any, the prosecutorial process can also aspire to fulfil individual and/or collective reconciliation is therefore looked at in this part.

5.3.5.A. INDIVIDUAL RECONCILIATION

Truth is fundamental to the aim of reconciliation, recognised by the ICTY in “[d]iscovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.”¹¹²⁴ The prosecutorial process can fulfil the individual focus of the fundamental aim of truth, with an expressive, declaratory and public authority, yet the truth applicable to the prosecutorial process is only the truth relevant to the specific case tried. Although a chapter of, or an introduction to a judgement may include a broader account of past injustices,¹¹²⁵ the offender focus may hinder an accurate historic account, which is, at any rate, not acknowledged to the extent that just-desert punishment is.¹¹²⁶ The aim of reconciliation is thus limited to the truth established by the prosecutorial process, mainly in relation to just desert. Still, there may be a valuable reconciling effect to the ability to focus on an individual offender, his specific criminal acts and, perhaps, his victims; and to do so with legal authority will make denial of the past more difficult.

All the stages of the prosecutorial process linked to truth investigation and acknowledgement (investigation, public trial, judgement, and enforcement of penalty) can provide the individual with healing, reconciling sentiments. It may be of great importance to be able to recognise the significance of each case, with guilt, harm and sufferance included; through which the prosecutorial process enables the beginning of an individual reconciliation process.¹¹²⁷ “By ensuring that people are held individually responsible for the crimes they committed, the International Tribunal must prevent entire groups – be they national, ethnic or religious – from being stigmatised and must ensure that others do not resort to acts of revenge in their search for justice. It must

¹¹²⁴ *Supra*, *Prosecutor v. Erdemović*, 1996, #21.

¹¹²⁵ See e.g. *supra*, the ICTY *Tadić* case, §§53, at www.un.org/icty/tadic/trial2/judgement/index.htm

¹¹²⁶ Osiel, 1995, p.524.

¹¹²⁷ *Supra*, ICTY the *Erdemovic* case, #65 allowing those “sorely afflicted to mourn those among them who had been unjustly killed”, at www.un.org/icty/erdemovic/trials/judgement/erd-ts961129e.htm

neutralise the major war criminals and preclude them from sustaining a climate of hatred and virulent nationalism which will inevitably lead to future wars. By hearing the voices of victims in a solemn but public forum, it must assuage their suffering and help them to reintegrate into a society which has been reconciled. Finally, by establishing the legal truth on whose basis society can take shape, the International Tribunal must prevent all historical revisionism.¹¹²⁸ It appears, from this quote, that it is the prosecutorial process, taken as a whole that can assist reconciliation, *i.e.* through the fulfilment of the fundamental aims.¹¹²⁹

Reconciliation, as a process, involves, on the individual level, confronting the differences between the parties, often through simple means of mediation, or, in the international prosecutorial process (that is without direct mechanisms of mediation or rehabilitation) testimonies and victim participation.¹¹³⁰ This can clarify and aid the understanding of the other party's views and feelings,¹¹³¹ yet there is no space for offender-victim mediation, and there is no mechanism that encourages shame, remorse and apology, which could facilitate victim forgiveness.¹¹³² Forgiveness, on behalf of the victim, but also of oneself, may be facilitated by the communication opportunities provided, during which the offender can offer confession, remorse, and apology to the victim, and, indirectly, to the general community.¹¹³³ It must not be forgotten that the primary aim of the truth investigation, continued throughout the trial, is not focused on the psychological understanding and well-being of the actors.¹¹³⁴ Still, although individual reconciliation does not appear to be an aim within the prosecutorial process, a certain amount of individual, internal progression of self-acknowledgment, healing and forgiveness may take place. But, at this individual, victim and offender-focused level, the fundamental aim of reconciliation may necessitate, or at least benefit from the fulfilment of the other fundamental aims, where the introduction of the victim in the prosecutorial process of the ICC is valuable.¹¹³⁵

Besides the victim, taking into account Duff's communicative punishment, discussed with regard to the fundamental aim of just-desert punishment and deterrence, the offender is, through the

¹¹²⁸ ICTY President Jorda, 2001, at <http://www.un.org/icty/pressreal/p591-e.htm>

¹¹²⁹ *E.g.* fulfilling truth, deterrence and reparation can prevent stigmatising and revenge; just desert and deterrence can neutralise the criminals; truth and reparation can assist reconciliation and historic revisionism.

¹¹³⁰ See behind, previous part and ch.4.

¹¹³¹ Osiel, 1995, pp.471, describing the trial stages as therapeutic.

¹¹³² Except where the offender may express such sentiments as a mitigating factor, which the court then has to evaluate, in order to decide on its honesty. Very few offenders have expressed remorse, see www.un.org/icty/glance/detainees and, for the ICTR, see www.ictt.org/ENGLISH/factsheets/detainee.htm

¹¹³³ Haley, in Wright & Galaway, 1989.

¹¹³⁴ Where, *e.g.* cross-examination may not be very healing, but it may assist the truth of just desert.

¹¹³⁵ Further enabling victim narratives and recognition of the harm done to the victims in truth, just-desert punishment, deterrence, and reparation.

prosecutorial process, communicated to by the international community.¹¹³⁶ The communication, through trial and sentence, explains the wrongful conduct and the universal consensus to censorship. Whether the offender accepts the communication or not, the imposed punishment is justified,¹¹³⁷ and the offender has been treated as a member of the community, with communicative just desert, rather than simply imposed punishment.¹¹³⁸ A fair trial thus promotes the individual focus, which may aid the personal reconciliation and re-integration process. According to North's reconciliation process, detailed in chapter four, the offender must begin the healing process by recognising his act as criminal; second, publicly acknowledge this recognition, where remorse may be experienced, through which the internal process of reconciliation may begin.¹¹³⁹ As with deterrence, not every individual will feel regret and remorse, but the justice process should, at least, enable such sentiments.¹¹⁴⁰ North believes that the offender needs external, community, and perhaps victim forgiveness at this stage; where the prosecutorial process may support this through victim participation and the court's communicative role, on behalf of humanity.¹¹⁴¹

The individual offender focus of the prosecutorial process appears to promote certain internal and personal realisations; yet the limited involvement of the victims in the international prosecutorial process may not promote such an individual reconciliation process. Even when the victims can participate, *e.g.* in the appearance of a witness, the victim may not be able to speak

¹¹³⁶ Which is also representative of the local community, with regard to the recognition of exercised jurisdiction, see first part of this chapter. This raises an interesting point, only mentioned here in order not to pursue a new thread of argument. The fact that certain states chose not prosecute may indeed mean that they do not view these violations as criminal offences. However, the international core crimes' universal norms, of universal jurisdiction, justify punishment, *i.e.* every court should recognise the behaviour as criminal, and deserving criminal censure. See behind, universal jurisdiction.

¹¹³⁷ Justification is done through the just desert protection of commonly held values. The offender may deny membership to the community, *e.g.* former Serbian President Milosevic denies to the day the jurisdiction of the ICTY, however this may only mean that the offender does not accept the community's view, or that the offender belongs to another value-shared community (in this case criminal). However, in the context of international core crimes, universal values and principles are protected, to which membership is not voluntary, similar to how state-owned political-legal membership is not voluntary. As Duff points out, the "conviction communicates to him...the censure that he has been proved to deserve for his crime. He is expected (but not compelled) to understand and accept the censure as justified: to understand and accept that he committed a wrong for which the community now properly censures him." Duff, 2001, p.80.

¹¹³⁸ Without *e.g.* allowing the offender and his legal counsel the right to full participation and due process, the punishment could be said to be imposed.

¹¹³⁹ North's model indicates a possibility for offenders to reach rehabilitation and forgiveness, through self-forgiveness, see behind, ch.4. North, in Enright & North, 1998, p.33.

¹¹⁴⁰ See generally, Minow, 1998. Rehabilitation, through treatment, perhaps while imprisoned, took root in the early 19th century in the US, and healing programs became popular. Such programs only lessened in extent with mid-20th century realisation that rehabilitation is not always possible, and that prisons may not be the best place for it. The international prosecutorial process does not *per se* include such a focus. Still, outreach programs, on behalf of the ICTs, in their particular regions, exist. See ch.6, and behind, ch.4; Austin & Krisberg, 1982; Dittenhoffer & Ericson, 1983; Coates & Gehm in Wright & Galaway, 1989; Galaway & Hudson, 1990; Messmer & Otto, 1992; Umbreit, 1988, 1994.

¹¹⁴¹ Zehr, in 1990, and in 1995, argues that mediation processes are important for reconciliation. The prosecutorial process can aid such a process; by confirming the crime and the offender's actions as criminal, allowing a certain amount of questioning to further understanding, as well as victim participation.

freely, or give a full account of the personal, narrative truth.¹¹⁴² *Amicus curae* may be invited by a Chamber, during the trial proceedings, in order to assist the understanding, yet all such assistance is done within the individual offender and case-focus.¹¹⁴³ In most situations, the offender will not be allowed to speak freely either. In the hands of the defence, if so allowed, the offender will be allowed to speak, in relation to particular facts of the case, and may take the opportunity to apologise to the victims and to the general community. However, there does not seem to be any active support for an offender apology or remorse, communicable to the victim. Still, through publicly acknowledging the truth, in relation to the crime, guilt and just-desert punishment, the prosecutorial process may well pinpoint, isolate, and release anger, in terms of the individual actors. Where criminal justice can show that within its response to crime, that is, through its prosecutorial process mechanisms, there is a role for understanding, rehabilitating and maybe also forgiving, the criminal justice system would further the public's confidence in the system, and an understanding of the issues in a rational manner. Some attention is given to deterring and utilitarian values that can change the offender's disposition and provide support for reintegrating the offender into the community.

5.3.5.B. COLLECTIVE RECONCILIATION

After the prosecutorial process may have initiated an individual reconciliation process, through the fulfilment of the fundamental aims of truth, just-desert punishment, deterrence and reparation; a collective move towards reconciliation may be facilitated by the prosecutorial process declaratory power.¹¹⁴⁴ At the collective level, the fundamental aim of reconciliation, to a large extent based on the aim of truth, would thus gain from a collective, broad notion of the truth. The prosecutorial process does not attempt such fulfilment.¹¹⁴⁵ The prosecutorial process can neither provide a broad knowledge of the local conflict, nor can it prosecute in the actual territory.¹¹⁴⁶ The remoteness of the prosecutorial process may not facilitate but rather deepen cultural differences.¹¹⁴⁷ Still, criminal justice may aid collective reconciliation indirectly, by supplying an authoritatively

¹¹⁴² Similarly, a witness is called upon in order to make a statement in relation to the particular facts of the case only.

¹¹⁴³ ICC Rule 103(1) "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."

¹¹⁴⁴ *I.e.* truth acknowledgment through the public trial and judgement.

¹¹⁴⁵ Because the criminal justice focus is inherently individual, the lack of a collective focus is thus not a mistake on behalf of the prosecutorial process. See more, behind, ch.4.

¹¹⁴⁶ Although internationalised domestic prosecutorial processes are appearing, see ahead, ch.7.

¹¹⁴⁷ Judge Jorda, ICTY, has recognised that "bringing the Tribunal closer to the local population contribute to national reconciliation". 20 Nov.2000, Speech to the UNGA, at www.un.org/icty/pressreal/p540-e.htm

established legal, rational truth, free from e.g. conflicting ethnic versions; necessary in order to develop from the past.¹¹⁴⁸ Seen from this perspective, it could be concluded that the prosecutorial process will at least support a collective reconciliation process, although it may not be able to mechanically assist, control or monitor such a movement.

In sum, the fundamental aim of reconciliation is not prioritised by the prosecutorial process, but rather seen as a secondary aim to the process, possibly indirectly fulfilled, through the successful practice of the prosecutorial process. The invaluable declaratory authority, with collective censure of the wrongdoing, may assist reconciliation, where the individual as well as the collective actors know that truth, prosecutions, deterrence and reparations have been attempted. As such, the prosecutorial process should not be seen as damaging a reconciliation process. Of course international criminal justice, as a protector of universal principles, peace and order, also attempts to fulfil national reconciliation and respect for the fundamental rights of individuals. Still, the inherent focus on fulfilling the individual notion of truth, in order to fulfil just-desert punishment, makes the other aims instrumental to this, which is not, *per se*, dependent on the fulfilment of the aim of reconciliation.¹¹⁴⁹ Prospective aspirations of international law and the universalism of international core crimes can take the shape of requesting the restoration of civil and public administration and political stability, necessary to apply international law and prosecute according to international standards - on the whole, with the objective to fight impunity.

5.4. THE PROSECUTORIAL PROCESS IN REALITY

This thesis is not concerned with the advantages and disadvantages of the criminal justice system *per se*, but it is rather concerned with implementing the fundamental aims in relation to the international core crimes, in order to achieve international justice and fully assimilated justice. The previous parts of this chapter have identified the value of criminal jurisdiction and principles of universalism that support the principles of individual criminal accountability and a broad responsibility to prosecute and punish the offenders of the international core crimes. This part draws attention to the benefits of criminal justice and the prosecutorial process, in terms of the assimilated

¹¹⁴⁸ Post-1945 Germany focused on the prosecutorial process and individual offenders, and further invited the individual truth by opening the Stasi (secret police) files to the victims and the general community. Reparations have also been made by the state. The Nürnberg trial, which lasted for one year, only tried a few offenders, but still, according to Herz, 1982, the trial had the local and international community's attention, from which individual and collective understanding may stem. The prosecutorial process mechanisms of public trial, judgement and enforcement may involve a collective, communitarian notion of reconciliation. Through laying a foundation, with authoritative legal truth, respect for the rule of law, the prosecutorial process, justice and democracy may be achieved.

¹¹⁴⁹ Which is natural, as reconciliation is not a quick-fix aim, but rather a long-term process.

justice objective to fulfil the fundamental aims and involve the actors, which will be further advanced in chapter seven.

A primary recognition that is necessary to make is the fact that criminal justice and its prosecutorial process believes in, and requires punishment of those justly determined, by legal investigation, trial and sentence, to be offenders.¹¹⁵⁰ Since the IMT, and the different conventions and customary law that developed in order to safeguard the international core crimes and its victims, the ICC and its prosecutorial process represents a more human and social approach to fulfil international criminal justice. In fact, the combination of retributive and consequentialist ideals and a recognition of the victims may symbolise a model prosecutorial process that does not stand in the way for assimilated justice. However, it is narrow individual, legal justice, limited to prosecution and fulfilment of the fundamental justice aims of truth, just-desert punishment, deterrence and reparation that are attended to. Still, a broader understanding of truth, victimised communities and a need for reconciliation can be added to the assimilated justice equilibrium, by restorative justice. In fact, there appear to be no directly harmful effects of the prosecutorial process that could really harm or endanger national healing and reconciliation.¹¹⁵¹ In the overall fight against impunity, the prosecutorial process is beneficial, as recognised in the remarks made by Judge Gabrielle Kirk McDonald, ICTY; “[a] properly functioning permanent court will be humanity’s best chance yet to move out of its self-destructive cycle.”¹¹⁵² Besides normatively establishing just desert, the authoritative censure of the crimes should thus not be seen as a threat to reconciliation. In reference to new governments and transitional justices, the international prosecutorial process may identify a manner in which domestic states can proceed, without endangering the transition by threatening to undertake the impossible task of prosecuting every person who participated in the crimes. In the end, the primary actors of international justice are the domestic states, which have to establish institutional structures designed to establish truth, accomplish justice, and heal victims and the community.¹¹⁵³ Assimilated justice supports this, by focusing one side of the equilibrium on local particularities, in combination with universalism. In relation to domestic states, much responsibility is put on the prosecutor of the ICC, together with the investigation mechanisms at hand, and the decisions taken by the Pre-Trial Chamber, in order to ascertain whether or not the domestic state is

¹¹⁵⁰ See Von Hirsch, 1976, pp.49, recognising just desert and deterrence to be the major reasons for punishing offenders.

¹¹⁵¹ “No credible, lasting peace can be built upon impunity and injustice. The refusal to bring war criminals to account would be an affront to those who obey the law, and a betrayal of those who rely on it for their life and security.” Statement by Arbour, L. Prosecutor of the ICTY, ICTY Press Release JL/PIU/404-E 27 May 1999, at <http://www.un.org/icty/pressreal/p404-e.htm>

¹¹⁵² Remarks made to the Prep.Comm. for the ICC, 30 Jul.1999, ICTY Press Release JL/P.I.S/425-E, at <http://www.un.org/icty/pressreal/p425-e.htm>.

¹¹⁵³ For a discussion of how prosecutions for human rights violations should be grounded on a theory that emphasizes the preventive as opposed to the retributive, see Nino, 1996, pp.112.

in fact acting responsibly.¹¹⁵⁴ With regard to the shortcomings of the prosecutorial process' fulfilment of certain aspects of the fundamental aims, restrictions to the duty to prosecute and punish are recognised,¹¹⁵⁵ where, e.g. international lawyers support the view that selected trials may *qualify as legitimately restricted justice*.¹¹⁵⁶ While much authority and liberty remains with the *domestic states, this is a logic result of the principle of complementarity. The ICC Statute can still* guide and to some extent control conformity with the international procedures. *In fact, where domestic states act inaccurately and illegitimately restrict justice, the principle of complementarity of the ICC could cede the domestic jurisdiction to the ICC.*¹¹⁵⁷ The general advancement of a duty to prosecute and punish the offenders of the international core crimes supports the inclusion of the prosecutorial process and specifically the fundamental aim of just-desert punishment in assimilated justice.

The ICC has, theoretically, an enormous power to prevent impunity, given its powers to prosecute and repair. Besides the normative reasons raised concerning universal jurisdiction;¹¹⁵⁸ and a lack of individual accountability in other fields of international law; impunity remains the core reason to involve criminal justice as one side of the equilibrium of assimilated justice. Crimes of such horrendous nature, which create both individual and collective harm, are arguably required to be addressed by the prosecutorial process. International criminal justice development and practice indicate such a preference. The principles of individual criminal accountability and universal jurisdiction spread a universal fight against impunity. These principles furthermore secure the inclusion of the fundamental criminal justice aims of just-desert punishment and deterrence. Since 1945 and Nürnberg, criminal justice has transcended from national to international jurisdiction; from collective to individual accountability; offering a leeway to accountability without having to firstly reform the national legal system. Yet, the ICTs have definitely not lacked difficulties and limitations in their operations; practical problems which mirror the problems at national level, however further exposed at the international level. It is important to recognise similar *de facto* restrictions to the ICC and to the prosecutorial process in general.¹¹⁵⁹ Whether the prosecutorial

¹¹⁵⁴ Arts. 18, 53, ICC.

¹¹⁵⁵ See Cassese, 1998, recognising restrictions to international criminal justice yet arguing that justice must be attempted, preferably international justice.

¹¹⁵⁶ Joyner, 1998.

¹¹⁵⁷ ICC art. 17. As the enforcement of the sentence of the ICC remains with domestic states, the ICC can influence and control such behaviour, see behind, just-desert punishment and deterrence parts. However, see also ch. 7 and ICC art. 20 protecting the accused of being tried a second time; Llewelyn, 2001.

¹¹⁵⁸ E.g. the qualification of the international core crimes as *crimes* and not human rights violations, the *actus reus* qualifying as a crime, the *mens rea* qualifies as criminal culpability.

¹¹⁵⁹ "No judicial system, anywhere in the world, has been designed to cope with the requirements of prosecuting crimes committed by tens of thousands, directed against hundreds of thousands. In Europe, following the Second World War, it is doubtful whether 87 000 people [the number of people awaiting trial in Rwanda after the genocide – this number has

process is domestically maintained, by capacious national courts,¹¹⁶⁰ or maintained by the involvement of the international community,¹¹⁶¹ or there is at least a focus on bringing those bearing the most responsibility to justice;¹¹⁶² restrictions to criminal justice will exist. The practical problems faced by criminal justice are not due to the gravity of the core crimes; rather, the problems are increased because of the nature of the breaches, involving a great amount of responsibility, creating a practical difficulty of ensuring prosecution in all cases.

It may not be in the number of actual trials that international law and criminal justice have found its strength, but in its normative force; where national atrocities and impunity transcend to the international level, implying international norms (universalism).¹¹⁶³ It has been identified that the international prosecutorial process is not focused on retribution, in the meaning of exerting some punitive pay-back or revenge.¹¹⁶⁴ Criminal justice applies retributive just desert principles, throughout its process, as the focus remains on the offender. However, as indicated in the ICT case law and ICC Statute, the fulfilment of the aim of just-desert punishment does not oppose the aim of deterrence, which is another aim of the prosecutorial process. Retributive *and* consequentialist values support the prosecutorial process, which can not only be evaluated on the enforcement of penalties, although it must be recognised that retributive objectives may be more compelling, especially with regard to the importance of just desert. The visible reference to deterrence, to prevention, and to the protection of individual rights is based on consequentialist values. Simply rejecting punishment because it is difficult to evaluate its deterring and rehabilitating factor is not fair, or correct. Punishment is widely supported, not only by the victims, as Umbreit identifies in his research; “Without question, nearly all citizens at large and crime victims specifically want criminals to be held accountable through some form of punishment.”¹¹⁶⁵ It is also difficult to ignore the declaratory power of a criminal sentence, even though it may not deter some of the international core crime offenders.

since risen to almost 110 000 in 1999] were judged by all of the courts of the most highly developed legal systems. Even a prosperous country, with a sophisticated judicial system, would be required to seek special and innovative solutions to criminal law prosecutions on such a scale.” Schabas, 1996, p.534. See ahead, ch.7.

¹¹⁶⁰ E.g. where the domestic state of Rwanda attempts facing the practical problems, by implementing the *gacaca*, or where other types of hybrid courts are set up, as in East Timor. See ahead, ch.7.

¹¹⁶¹ E.g. through the establishment of the ICTs and the ICC, where the international community assists the attempt to face the practical problems and apply exemplary criminal justice.

¹¹⁶² E.g. through the hybrid internationalized domestic Special Court of Sierra Leone. See ch.7.

¹¹⁶³ Transitional justices often need and intend a move from the national legal system to a subscription of the international system believed to be less politicised with the national context. While Nürnberg sat international precedents and created international norms, the style was, and still is, national trials.

¹¹⁶⁴ This is generally the interpretation given of the criminal justice system and the prosecutorial process by restorative justice writers. See e.g. Umbreit, 1989; Van Ness, 1990, 1996; and see, for a supportive view of the criminal justice system, and the possibility for the criminal and the restorative justice systems to work together, Zehr, 1990; Barton, 1999.

¹¹⁶⁵ See Umbreit, 1989, pp.52.

in fact acting responsibly.¹¹⁵⁴ With regard to the shortcomings of the prosecutorial process' fulfilment of certain aspects of the fundamental aims, restrictions to the duty to prosecute and punish are recognised,¹¹⁵⁵ where, e.g. international lawyers support the view that selected trials may qualify as legitimately restricted justice.¹¹⁵⁶ While much authority and liberty remains with the domestic states, this is a logic result of the principle of complementarity. The ICC Statute can still guide and to some extent control conformity with the international procedures. In fact, where domestic states act inaccurately and illegitimately restrict justice, the principle of complementarity of the ICC could cede the domestic jurisdiction to the ICC.¹¹⁵⁷ The general advancement of a duty to prosecute and punish the offenders of the international core crimes supports the inclusion of the prosecutorial process and specifically the fundamental aim of just-desert punishment in assimilated justice.

The ICC has, theoretically, an enormous power to prevent impunity, given its powers to prosecute and repair. Besides the normative reasons raised concerning universal jurisdiction;¹¹⁵⁸ and a lack of individual accountability in other fields of international law; impunity remains the core reason to involve criminal justice as one side of the equilibrium of assimilated justice. Crimes of such horrendous nature, which create both individual and collective harm, are arguably required to be addressed by the prosecutorial process. International criminal justice development and practice indicate such a preference. The principles of individual criminal accountability and universal jurisdiction spread a universal fight against impunity. These principles furthermore secure the inclusion of the fundamental criminal justice aims of just-desert punishment and deterrence. Since 1945 and Nürnberg, criminal justice has transcended from national to international jurisdiction; from collective to individual accountability; offering a leeway to accountability without having to firstly reform the national legal system. Yet, the ICTs have definitely not lacked difficulties and limitations in their operations; practical problems which mirror the problems at national level, however further exposed at the international level. It is important to recognise similar *de facto* restrictions to the ICC and to the prosecutorial process in general.¹¹⁵⁹ Whether the prosecutorial

¹¹⁵⁴ Arts.18, 53, ICC.

¹¹⁵⁵ See Cassese, 1998, recognising restrictions to international criminal justice yet arguing that justice must be attempted, preferably international justice.

¹¹⁵⁶ Joyner, 1998.

¹¹⁵⁷ ICC art.17. AS the enforcement of the sentence of the ICC remains with domestic states, the ICC can influence and control such behaviour, see behind, just-desert punishment and deterrence parts. However, see also ch.7 and ICC art.20 protecting the accused of being tried a second time; Llewelyn, 2001.

¹¹⁵⁸ E.g. the qualification of the international core crimes as *crimes* and not human rights violations, the *actus reus* qualifying as a crime, the *mens rea* qualifies as criminal culpability.

¹¹⁵⁹ "No judicial system, anywhere in the world, has been designed to cope with the requirements of prosecuting crimes committed by tens of thousands, directed against hundreds of thousands. In Europe, following the Second World War, it is doubtful whether 87 000 people [the number of people awaiting trial in Rwanda after the genocide – this number has

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¹¹⁶¹ E.g. through the establishment of the ICTs and the ICC, where the international community assists the attempt to face the practical problems and apply exemplary criminal justice.

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¹¹⁶⁴ This is generally the interpretation given of the criminal justice system and the prosecutorial process by restorative justice writers. See e.g. Umbreit, 1989; Van Ness, 1990, 1996; and see, for a supportive view of the criminal justice system, and the possibility for the criminal and the restorative justice systems to work together, Zehr, 1990; Barton, 1999.

¹¹⁶⁵ See Umbreit, 1989, pp.52.

From the initiation of the process, the stages of investigation, trial, sentencing and enforcement of sentence are all instrumental to just desert principles, not only with regard to the offender, but also pertaining to the correct representation of universal values, censured by the international community. Thus, while a primary objective of criminal justice is to establish guilt, the reasons behind it represent a fusion of morally legitimate aims, such as promoting peace and justice, order and democracy, and the important introduction of the victim in the prosecutorial process is an overwhelming confirmation of this social agenda. In fact, the important conclusion to be made, in this chapter, is that criminal justice values, evident in the international prosecutorial process, are well combined with restorative justice values, in assimilated justice.¹¹⁶⁶ The restrictions enhance rather than undermine restorative potentials, and it remains to be seen how the truth discovery process fulfils the fundamental aims, in order to ascertain the strengths and weaknesses of the truth discovery process.

5.5. CONCLUSION

Chapter five has explored the application of the fundamental aims through the international criminal justice system's institutional process, as well as the importance of ascertaining criminal jurisdiction and principles of universalism.

The state responsibility to prosecute and punish, generally referred to in reference to the international core crimes and universal jurisdiction, implies a duty on the state to respect and abide by international human rights and humanitarian law.¹¹⁶⁷ Broadly interpreted state responsibility refers to a duty to prosecute and punish offenders of the international core crimes, as well as a responsibility to supply the actors with other mechanisms of justice, as outlined in the Bassiouni Principles.¹¹⁶⁸ At an influential conference, in 1989, it was established that no general obligation

¹¹⁶⁶ See generally Barton, 1999, who argues for their compatible potential, claiming that restorative justice criticism of criminal justice as retributive is out-dated and has therefore reached a *status quo*, pp.111.

¹¹⁶⁷ With regard to the international core crimes, genocide, crimes against humanity and war crimes, they are, under treaty law, protected by a positive state duty to prosecute and punish. Under customary law no broad-based duty to prosecute and punish appears to be confirmed. See generally Scharf, 1996; Cassese, 2001; Bassiouni, 1999, 1996; Meron, 1995, 1989; *Tadic case*, ICTY, 1995; *Furundzija case*, ICTY, 1998; Dugard, in *Bouterse case*, <http://www.icj.org/objectives/opinion.htm>; Randall, 1988, also considering war crimes and crimes against humanity to be customary international law crimes.

¹¹⁶⁸ *Supra*, Bassiouni Principles, 2000, adopted by UNHCHR Res.35, 2005. All three of the wide-ranging human rights treaties, the ICCPR art.2(3); the Inter-Am.CHR art.25; and the ECHR art.13, prescribe states to provide effective remedies to the violated actors. In fact, reading art.7 of the ICCPR on torture in connection to the general comments, the Human Rights Committee has asserted that: "It is not sufficient for the implementation to prohibit torture or other cruel, inhuman or degrading treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from art.7, read together with art.2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be

under customary law to prosecute the offenders exists.¹¹⁶⁹ In reference to a universal obligation to prosecute, Scharf likewise argues that customary law does not yet include a broad-based duty to do so, but limits it to the international crimes contained in treaties.¹¹⁷⁰ With regard to criminal justice limitations, it is important to recognise that the prosecutorial process and the justice focused-aims are demanding aims, requiring timely application of a legitimate criminal justice system.¹¹⁷¹ Domestic states, often states in transition, may struggle with the implementation of the prosecutorial process and the proper fulfilment of the fundamental aims. This may be a reason why a firm customary law duty to prosecute has not yet been established.¹¹⁷² Law, besides upholding important values, through implemented rights and duties, is also a science, which must be adaptable to societal changes and needs in order to maintain peace and public order. Neier believes that punishment can

held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.” UNDoc.E/CN.4/Sub.2/Add.1/963, 1982. For victim remedies, see ch.3.

¹¹⁶⁹ Aspen Institute, 1989; In the *Velasquez-Rodriguez* case, 1988, from the Inter-Am.CtHR, the duty to investigate, bring to justice, and provide victim reparation were prioritised: “This obligation [to ensure the rights of the Convention] implies the duty of the States Actors to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation...” Inter-Am.Ct.HR, ser.C.no.4, 1988, para.166. Similarly, the case *X v. The Netherlands* of the ECtHR clarified that punishment is at least a duty concerning the more serious violations: “This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.” ECtHR, ser.A, 1985, para.27. But, following the Third Restatement of the Foreign Relations Law of the US 1987, states are under a duty to punish offenders of those rights that are protected by customary law and this can include criminal prosecution. Generally, serious violations of human rights and physical integrity require states to punish such crimes, as supported by e.g. Orentlicher, 1991.

¹¹⁷⁰ Scharf, 1996; While criminal jurisdiction has not been ruled out in South Africa, and domestic criminal trials are held in, for example, Rwanda and East Timor, too many states, e.g. Cambodia have chosen not to prosecute in order to establish a general customary law duty to prosecute the international core crimes. Roht-Arriaza, 1995, p.47; Meron, 1989; Simma, 1995. (See ICTY Appeals Chamber Decision in *Prosecutor v. Tadic* case, 1996, where words (*opinio iuris*) were held as important as deeds in interpreting the existence of customary practice.)

¹¹⁷¹ The prosecutorial process requires fair, professional, quality application of the law.

¹¹⁷² However, this is not to say that domestic states are not, or have not been prosecuting. E.g. Greece started a prosecutorial process and “dejuntafication”, in July, 1974, when the dictatorship fell. As a result of the Pinochet trial, Portugal indicted the former Indonesian ruler Suharto, who, due to the indictment, cancelled a trip to Europe. Austria is prosecuting Ezzat Ibrahim Douri, a key aide to the former Iraqi President Saddam Hussein, who fled Austria in the summer of 1999 to Jordan. Ethiopia chose criminal justice to deal with the past accountability and the future healing of those that had suffered terror under the Mengistu regime. Charges of genocide and other crimes, together with the composition of a historical record of the abuses, were mandated to the 1992 Special Prosecutor’s Office. Two years later, about 30 prosecutors and 400 investigators staffed a largely internationally financed office. Many of the indicted high-ranking officials had left the country, which resulted in a multitude of charges without many actual trials. However, Amnesty International reported that approximately 5200 people had been indicted by early 1997, and approximately 550 witnesses had been heard by the end of 1998, AI News AFR 25/01/97. See Sarkin, 2004, p.XIII, pp.441; Sarkin & Daly, 2004, pp.661. In light of de facto impunity threats, discussed in chapter two, amnesties are still granted. “The Uruguayan government has decided to take measures of magnanimity or clemency utilizing a mechanism provided for in the Constitution of the Republic (the amnesty). The 12 years of dictatorship have left scars which will need a long time to heal and it is good to begin to do so. The country needs reconciliation to face a difficult but promising future. Amnesty International, Uruguay, 1987, AMR 52/02/87, quoted in Orentlicher, 1991, p.2545, note 26.

“honor and redeem the suffering of the individual victim”,¹¹⁷³ which this thesis values as a beneficial symbolic effect that should not be overlooked. The criminal law and the justice situation may reflect the political situation, where prosecutions that pose a genuine threat to peace and stability actually indicate a weak government and a weak rule of law. In such situations, or during the immediate transition, prosecutions may not always be supported, or indeed possible, and it is often under these circumstances that amnesties are granted.¹¹⁷⁴ International law has a special role to play in transitional justice. An international rule to prosecute or extradite the most atrocious crimes does not hinder other means of justice, in combination with the prosecutorial process, or perhaps instead of it, for non-distinguished human rights violations, *i.e.*, for non-international core crimes.

The world was not ready until after WWII to extend the scope of international law to individuals. With the international military tribunals, set up by the Allied Powers, the importance of individual subjects and an international forum were highlighted. The international and non-international conflicts of former Yugoslavia and Rwanda further advanced international law and the principles of individual criminal accountability and universal jurisdiction. Principles of *jus ad bellum* and *jus in bello* and article 2(7) of the UN Charter were applied, in order to maintain situations that threatened international peace and security, although the matters were essentially within domestic jurisdiction. The ICTs were set up, and with them domestic state jurisdiction was further limited, acknowledging principles of universal standing; international core crimes; and the role of the individual.¹¹⁷⁵ Of course state sovereignty, consent and cooperation are still necessary and essential for international law and international institutions. The important provisions of the ICTs and the ICC would mean little if states did not cooperate, respect, or implement the standards. Furthermore, it is difficult to think of a scenario where the international community would somehow be able to prosecute offenders and restore peace and order in a state that did not cooperate. Restoration of peace, *i.e.* reconciliation, is a process that inherently necessitates the cooperation of the local actors.

¹¹⁷³ Neier, in Weschler, 1990, p.244. At the same time, contrasting views argue that prosecutions may slow down restorative justice efforts of, for example, national reconciliation and healing. Zalaquett, 1989. There are conflicting views on the value of just-desert punishment and prosecutions in general, see *e.g.* UNDoc.,E/CN.4/Sub.2/1984/15, UN study on amnesty laws, where the special rapporteur argues that it far from encourages reconciliation it rather increases tensions.

¹¹⁷⁴ Amnesty-granting processes that include thorough investigations and truth acknowledgment can generally represent the essential break between the past and the future. Aspen institute, punishment or pardon, 1989, Zalaquett 1989. There must be a genuine and a serious attempt to prosecute, indicating equally genuine and serious difficulties not to prosecute. See ahead, ch.7.

¹¹⁷⁵ A humanitarian notion was added to this development. The principal purpose, expressed by the SC in the resolutions on former Yugoslavia, were to protect civilians, re-establish law and order, ensure humanitarian assistance, and prosecute violations of humanitarian law. *E.g.* SCRes.713, 1992; Res.770, 1992; Res.808, 1993; Res.827, 1993. Re. Rwanda, see *e.g.* SCRes.929, 1994; 955, 1994, all at www.un.org/documents/scres.htm

The prosecutorial process has proven necessary in the implementation of the fundamental aims, as representative of one side of the equilibrium, that of individual, legal justice. Perhaps more valuable than anything else in the prosecutorial process, is the legal authority attached to the process. Once investigation has been permitted, and hence, criminal jurisdiction, a universal communication of innocence or guilt is declared. Within that process of investigation, trial, sentence and enforcement of sentence, the justice aims of individual legal truth and just-desert punishment appear fulfilled. The value of deterrence, individual and collective, appears recognised, with a certain amount of influence possible, in just desert and the actual penalty. The enforcement of sentence does similarly appear guaranteed, to the extent where domestic criminal justice can be relied upon. Furthermore, the international prosecutorial process of the ICC, perhaps a model process of prosecuting offenders of the international core crimes, has included the victim as an actor in the process, with a right to participation, protection and reparation. Whereas broad collective and symbolic reparation, in the form of guarantees against non-repetition, for example, do not belong within the prosecutorial process, individual and collective victim-focused rehabilitation, restitution and compensation can be fulfilled, dependant on the resources of the offender and the international trust fund. The fundamental aim of reconciliation, together with the collective notion of truth and broader features of reparation do not appear to be direct aims of criminal justice, or directly fulfilled through the prosecutorial process. However, this does not mean that aspects of such notions cannot be fulfilled; however their secondary nature to the fundamental aims of justice must be acknowledged.

The ICC was created as a deterrent to impunity, as a means towards eliminating the world's most horrendous crimes, and as an instrument to repair the victims of genocide, war crimes and crimes against humanity.¹¹⁷⁶ However unfortunate the failure of the ICTs to order reparations and compensation to victims, they were well discussed during the ICC deliberations, and one of the primary purposes of the ICC is clearly to protect the victims, and further the inclusive truth. “[W]here the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, particularly in the interests of the victims, the Trial Chamber may...request the Prosecutor present additional evidence...”¹¹⁷⁷ This can assist the aim of truth, and not only just desert. A broader and publicly acknowledged truth may also, if less obvious, also function as a means to reconciliation. The ICC also addresses the problem of victim participation, protection and reparation,¹¹⁷⁸ by including the right to participate and ask for

¹¹⁷⁶ Bassiouni, 1997.

¹¹⁷⁷ Art.64, ICC.

¹¹⁷⁸ Arts.68, 75 ICC.

reparation in trial proceedings. This may, besides assisting the fulfilment of truth, deterrence and reparation, also advance the respect for the rule of law and awareness of international law and applicable rights, which, again, may also be means to reconciliation.

It is certain that the ICC will play a major role in terms of invoking the principles of individual criminal accountability and criminal jurisdiction, in order to protect universal values, at all instances where the involvement of criminal jurisdiction is required, but not acted upon domestically. The ICC will furthermore be of great importance in fulfilling the right to reparation for victims,¹¹⁷⁹ and evaluating issues concerning legitimately or illegitimately restricted justice, *e.g.* in the shape of granted amnesties.¹¹⁸⁰ It must be recognised that although most difficulties faced with prosecutions are domestic in character, international criminal justice faces enormous practical problems, not much different to the domestic ones. The application of restricted justice is therefore relevant, and must be further discussed. With the knowledge of what fundamental aims of assimilated justice the prosecutorial process successfully fulfils, it is thought that assimilated justice can improve such inherent restrictions through balancing such applications with restorative justice, with the result that assimilated justice will be less restricted.¹¹⁸¹ This will be further looked at chapter seven, once restorative justice and the fulfilment of the fundamental aims in the truth discovery process have been outlined in the next chapter.

CHAPTER 6: THE FUNDAMENTAL AIMS IN THE RESTORATIVE TRUTH DISCOVERY PROCESS

6.1. INTRODUCTION

This chapter follows a similar approach to the previous chapter, and briefly introduces restorative justice theories and approaches, with the goal of better understanding restorative justice practices. The truth-discovery process of truth commissions is considered in relation to the application of the fundamental aims, in order to know which fundamental aims are routinely applied in restorative justice and which actor the process focuses on. To be exact, the truth discovery process of commonly used restorative justice truth commissions is considered, through which the

¹¹⁷⁹ While procedural rights of the victims of international crimes tend to be difficult to actually put into practice, prosecutions can represent the interests of the victims by recognising the restorative aims and reparation through available means, *e.g.* amount, illiteracy and extreme poverty require a lot of assistance and timely process.

¹¹⁸⁰ See ahead, ch.6-7.

¹¹⁸¹ Honest efforts evaluated against the local context, such as a few individually granted amnesties and limited model prosecutions may well classify as legitimately restricted justice, when combined with the fulfilment of collective truth and reconciliation.

fundamental aims are applied.¹¹⁸² Particular attention is paid to truth commissions set up by domestic states and the international community as a substitute for prosecutions, focusing on the South African Truth and Reconciliation Commission (SA TRC).¹¹⁸³ The SA TRC has been widely acknowledged for its great effort to reconcile the apartheid-affected nation, and the view held here is that its truth discovery process represents a new *quasi*-judicial model of restorative justice.¹¹⁸⁴ The relevance of the SA TRC to assimilated justice is apparent in its main focus on truth and reconciliation; and although it was set up as an alternative justice process to the prosecutorial process, its individual amnesty-granting process has been individual offender-focused, similar to a judicial process.

6.2. RESTORATIVE JUSTICE THEORY

In order to better understand the practise of truth commissions and their truth discovery process, this section discusses restorative justice approaches, and the main objectives of restorative justice. This is important, similarly to the previous chapter's understanding of the fundamental aims applied by the prosecutorial process, in order to facilitate assimilated justice.

Restorative justice is a broad term, incorporating the fundamental aims of truth and reconciliation, with the ultimate goal of reconciling the actors and the collective community, based on a truth discovery process.¹¹⁸⁵ In aiming to restore the relationship between individuals, a social justice conception is supported by a fair and righteous justice system.¹¹⁸⁶ Such an objective is a valuable addition to criminal justice, in order to achieve the overall assimilated justice objective of fulfilling the fundamental aims and involving all the actors. Basically, the intention of restorative justice is to solve injustices, where injustice is understood as harm done to individuals by individuals. Restorative justice does not use the criminal law notions of injustices, where a crime is

¹¹⁸² This study does not pay attention to the grand scale of restorative justice mechanisms applicable in stable domestic democracies, where restorative institutions and programs are often linked, yet separated from, the criminal justice system. The focus remains on states in transition, and situations and circumstances evolving around international core crimes.

¹¹⁸³ Commissions of inquiry, which serve as an initial investigation mechanism, e.g. the UN War Crimes Commission, set up to investigate German war crimes, are not considered, as they do not represent restorative justice. See History of the UN War Crimes Comm. and the development of the Laws of the War, pp.443-50, 1948; and e.g. former Yugoslavia's commission of inquiry, UN Final Report of the Commission of Experts Established Pursuant to SC Res.780, 1992, 1994.

¹¹⁸⁴ Some later developed truth commissions (TCs) are looked at in ch.7.

¹¹⁸⁵ For a good, general read on restorative justice, see e.g. Johnstone, 2001, 2003; and Barton, 2000, which include the writings of many other writers of restorative justice, referred to through out, e.g. Braithwaite; Christie; Duff; Umbreit; Zehr.

¹¹⁸⁶ See Duff, A. *Restorative punishment and punitive restoration*, and Zehr, H. *Retributive justice, restorative justice*, in Johnstone, 2003.

defined as a violation of a criminal norm.¹¹⁸⁷ Neither the criminal law nor the prosecutorial process are directly intended, as just-desert punishment is not viewed as predominantly restorative; but other, more utilitarian goals, part of the fundamental aims of just-desert punishment and deterrence, can be incorporated.¹¹⁸⁸ Restoration of both material and emotional loss is seen as far more important, than imposing punishment; and offenders are therefore encouraged to make reparations to the victims and the community. Christie and Braithwaite, two influential writers on restorative justice, criticise criminal justice approaches. “Modern criminal control systems represent one of the many cases of lost opportunities for involving citizens in tasks that are of immediate importance to them.”¹¹⁸⁹ Instead, the writers support a focus on the three actors: offender, victim, and community; and their relationships.¹¹⁹⁰ Thus, unlike criminal justice approaches, which mainly emphasise the offender, restorative justice offers a focus on the individual victims, the victimised communities, and the offenders. Interesting with regard to assimilated justice, Fattah believes that the fundamental change from criminal justice system that restorative justice values can bring is to restore the victim’s lost status, to ensure victim involvement and to use a process of shared collective decision-making, in which the victim plays a vital role.¹¹⁹¹ Restorative justice theory is, generally, based on the belief that crime results in harm done by offenders to victims and communities.¹¹⁹² Restorative justice must therefore take into account all the actors. Accordingly, as crime is understood to consist of acts against people, within communities, those mostly affected by crime are given roles in restoring the peace, between individuals and within communities.

Mediation between the actors is a key feature of restorative justice, as the main purpose of restorative justice is thought to be that members of the community are enabled to share in decision-making processes.¹¹⁹³ “Restorative justice is a process whereby all the actors with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of offence and its implications for the future.”¹¹⁹⁴ Victims need recognition and participation, in order to heal, materially, and psychologically; offenders need rehabilitation, deterrence, and reconciliation, in order to repair and reintegrate; and communities need recognition, deterrence and reparation, in

¹¹⁸⁷ A violation of a rule constitutes infringement upon the interests and rights, which the rule protects, see e.g. Anzilotti, 1902; Grotius, 1925; Vattel, 1849; Eagleton, 1929. On the restorative justice approach, see e.g. Van Ness, 1986; Zehr, 1990; Messmer & Otto, 1992.

¹¹⁸⁸ However, Galaway and Hudson’s publications have expanded the restorative justice discussion without excluding the prosecutorial process or punishment. See Galaway & Hudson, 1980, 1996.

¹¹⁸⁹ Christie, 1977, p.7.

¹¹⁹⁰ Christie, 1977; Braithwaite, 1989.

¹¹⁹¹ Fattah, 1997.

¹¹⁹² Zehr, H. & Mika, H, *Fundamental Concepts of Restorative Justice*, <http://ssw.che.umn.edu/rjp/Resources/Documents/ZehMik97.pdf>

¹¹⁹³ See Appendix 2 for Zehr’s brief theoretical comparison between criminal and restorative justice.

¹¹⁹⁴ Marshall, T. in Llewellyn, 1999, p.355.

order to reconcile.¹¹⁹⁵ It is therefore believed by restorative justice supporters that recognition of the three actors must include active involvement in the justice process, something assimilated justice strives to do, through the application of the fundamental aims.

6.2.1 RESTORATIVE JUSTICE APPROACHES

Since the 1970s, restorative justice has developed into a recognised and much practised paradigm.¹¹⁹⁶ Restorative justice grew from theory into practice out of different but yet interrelated causes relating to the questionable success of criminal justice punishment, deterrence and rehabilitation.¹¹⁹⁷ Furthermore, a growing concern for victims recognised the need for crime victim-participation, combined with offender-punishment and victim-compensation. Yet another factor has been states in transition, in need of a system of justice able to deal with huge numbers of offenders and victims, as the result of human rights crimes, often state sponsored, on a grand scale.¹¹⁹⁸

Different arguments have been made in support of the restorative justice movement. Peacemaking theories represent a one of the less normative perspectives, often stemming from religious and socio-ethical studies, in the attempt to add moral legitimacy to the justice system.¹¹⁹⁹ Peacemaking theories paint a beautiful but utopian vision, lacking in practicality. However, such perspectives have a moral importance. Zehr has built a model where the offender goes through the formal criminal justice route to be judged and then through an informal, morally legitimate route, where remorse and mediation can take place, with the aim of restoring and repairing. In line with restorative justice, Zehr argues that crime “is not first an offense against society, much less against the state. Crime is first an offense against people, and it is here that we should start.”¹²⁰⁰ The aim is

¹¹⁹⁵ Empowerment of all the actors is the crucial factor, Barton, 1999, at www.voma.org/docs/barton_emp&re.pdf

¹¹⁹⁶ See generally, on the topic of how restorative justice mediation programs for offenders and victims have transcended to a paradigm for understanding issues of crime and justice: McCold & Wachtel, 2003; McCold, P. *Restorative justice and the role of community*, pp.85, in Galaway, & Hudson (Eds.), 1996; McCold, 2000; McCold & Wachtel, *Restorative justice theory validation*, pp.110, in Weitekamp, & Kerner, 2002; Wachtel, 1997; Wachtel, T. *Restorative practices with high-risk youth*, pp.86, in Burford, & Hudson, 2000; Wachtel, & McCold, *Restorative justice in everyday life*, pp.117, in Braithwaite, & Strang, 2000, at www.vorp.com/articles/justice.html

¹¹⁹⁷ Wachtel and McCold's theory of restorative justice has three distinct but related conceptual structures: the Social Discipline Window, Stakeholder Roles, and the Restorative Practices Typology, see literature in previous footnote, Wachtel, 1997, 2000; Wachtel & McCold, 2000; McCold, 1996, 2000.

¹¹⁹⁸ Cohen, R. 2001; Borneman, 1997.

¹¹⁹⁹ The origin is not only found in Christianity, but also in Marxism and Buddhism; with an aim to reform and humanise the system, asking for forgiveness. See Wood, 1991. A religious foundation may be found at the basis of criminal justice, and penal reform, and one can often trace moral reasoning back to religious beliefs, and natural law. The higher law was institutionalised with canon law, and where wrongs were seen as sins against God, crimes became wrongs against the state, rather than against the individual. For a discussion on the role that religion can play in supporting restorative justice, see Hutchison, P. & Wray, H. *What is Restorative Justice?*, United Methodist Church: General Board of Global Ministries, <http://gnm-umc.org/now/99ja/what.html>

¹²⁰⁰ Zehr, 1990, p. 182. See Appendix 2, for a selection of Zehr's comparative retributive/restorative lens.

to restore the victim, through offender-made reparation and rehabilitation; community support; and state action. Victims are thus equipped with the right to mediation and the right to reparation, which the offender may offer voluntarily but must ultimately be imposed upon the offender, as a sanction by the state (and the community).¹²⁰¹ Where there is a risk of further harm, the victim and the community are to be protected, by restricting the activities of the offender or, as a last resort, imposing incarceration.

Restorative justice norms are also in accordance with morally legitimate customary community practises. African traditions, for example, share the objectives of restoration of peace and reconciliation; they also encourage participation by the actors in a process of confession, accountability and reparation. These customary laws of the indigenous people were largely repressed by colonisation. However, their return can clearly be seen in the case of South Africa's TRC and Rwanda's *gacaca* courts.¹²⁰² The African understanding of justice is quite restorative in attitude, whereby the justice hoped for is restorative of the dignity of the people.¹²⁰³ However, rehabilitation, mediation, and restoration are not principles that only belong within the restorative justice paradigm. These values are also values of criminal justice, especially when focusing on the offender and Wright describes restorative justice as the part of criminal justice which deals with reparation of the victim.¹²⁰⁴ Wright argues that the main purpose of the criminal justice system is to restore the community and the victim. Further, by invoking more restorative justice objectives, such as compensation orders and victim support, the state enhances its moral.

Christie presents an abolitionist justification for restorative justice. In favour of non-punitive conflict resolution, abolitionists basically support a non-punitive participatory system, in order to reduce coercion and pain, and to move away from that which the people cannot affect.¹²⁰⁵ It is an "attempt to recover the opportunity for ordinary people to become directly involved in social responses which are victim-orientated."¹²⁰⁶

¹²⁰¹ See various articles in Wright & Galaway, 1989. Successful mediation requires honesty on behalf of both actors, and cannot be forced or seen as a mitigating factor.

¹²⁰² In South Africa, *ubuntu* has been the traditional focus. (*Ubuntu* – the common good of the community) Pre-colonial African societies mostly focused on the victim of crime rather than on the offender and reconciliation and reparation were considered crucial to restoring the harm caused by a crime. See more this chapter and ch.7 for Rwanda.

¹²⁰³ Archbishop Tutu in Rosenberg, 1996; Minow, 1998, p. 81.

¹²⁰⁴ Whether by the offender, or by the community, and the state. Wright, 1991; Wright, M. *Victim-Offender Mediation as a step towards a Restorative System of Justice*, in Messmer & Otto, 1992.

¹²⁰⁵ Christie, 1977, 1981. According to abolitionists, an approach away from formal institutions is the only way to reach the truth, and real solutions. See generally Foucault, 1975, 1980, and Habermas, 1984. Foucault's public knowledge and Habermas' communicative society theory form the necessary community involvement, away from formal institutions.

¹²⁰⁶ Hulsman, & van Ransbeek, 1987, p.36. While of interest, abolitionist reasons are not applied to assimilated justice. It is felt that the individual, and the collective criminal accountability, together with the individual, and the collective suffering, all caused by the international core crimes, appropriately demand all the fundamental aims, including just-desert punishment. See behind, ch.4.

The reasons of legitimacy of justice are used by Cragg,¹²⁰⁷ Braithwaite, and others,¹²⁰⁸ in their restorative justice theories, by invoking institutional reform. This approach is supportive of an assimilation of restorative and criminal justice, where the consistent reasoning is that criminal law is needed, but that it must invoke morality, through, for example, conflict resolution rather than solely inflicting just-desert punishment. The legitimacy is improved with the community's involvement in conflict resolution, similar to how assimilated justice adds legitimacy to restricted justice applications by recognising the dimension of universal principles, as well as the dimension of local particularities. Braithwaite refers to shaming, followed by forgiveness, as a type of victim-offender conflict resolution, and presents Japan and tribal societies as successful examples.¹²⁰⁹ This is very much in line with the all-embracing actor involvement. These discussions are valuable in discussing institutional reform and assimilated justice, however, a theory of non-punishment in place of social condemnation is not proposed.¹²¹⁰ Other reasons for restorative justice can be applied and shaped to fit assimilated justice. Moral legitimacy, through more social and restorative objectives, should be part of legitimate assimilated justice: and instead of discussing institutional reform, assimilated justice combines criminal and restorative justice values.

Restorative programs are, to differing extents dependent on the domestic system and the violation (crime) in question. They generally intend to shift the burden to the offender via fines, compensation and community service and so avoid the cost of punishment and trial. Restorative decisions are meant to alleviate the fear of revenge, of victims taking the law in their own hands or resorting to crime. Offenders, victims and the community may, through being actively involved in the justice process, feel that their rights (for example to truth, reparation, and reconciliation) are safeguarded. In turn, this may ensure trust in the reconciliatory efforts, the system, and the transition towards democracy and accountability. Cynicism about the capacity of the state or centralised institutions to solve crime problems have provoked the social movement that restorative justice represents and, although most restorative justice literature belongs in the domestic domain,¹²¹¹ restorative justice has given moral importance to institutions dealing with human rights and international crimes.¹²¹² Different approaches are used in support of restorative justice; methods

¹²⁰⁷ Cragg, 1992.

¹²⁰⁸ Braithwaite, 1989.

¹²⁰⁹ Braithwaite, 1989, p.40. The example of Rwanda, where tribal customs allow for cases to be heard, at the *Gacaca* tribunals, and discussed amongst the community, involve shaming. This has not lead to the exclusion of criminal trials. For restorative justice in Rwanda, see generally Ciabattari, J. *Rwanda Gambles on Renewal, Not Revenge*, www.womensenews.org/article.cfm/dyn/aid/301/context/archive; Sarkin, 1999, 2000; and see next chapter.

¹²¹⁰ See behind, ch.1; ch.4.

¹²¹¹ Where very different crimes are in focus.

¹²¹² See ch.3 for a restorative justice influence on actor rights.

such as reintegrative shaming,¹²¹³ community conferences¹²¹⁴ or at least a move towards a justice system that takes better account of the offender, the victim and the community, in different ways.¹²¹⁵ These approaches are only briefly discussed, in an attempt to show the foundation for the restorative justice, which is today applied in many states in transition.¹²¹⁶

- Offender-centred approaches promote alternatives to everything from incarceration to the entire institutionalised criminal justice system, working on new ways to integrate the offender in the restorative process.¹²¹⁷ Victim-offender mediation (VOM) and victim-offender reconciliation programs for reparation and reconciliation have developed as part of restorative justice.¹²¹⁸ As discussed in relation to rehabilitation and reconciliation in the prosecutorial process, the mediation movement started in the 1970s Canada and has since spread worldwide.¹²¹⁹ Rooted in ancient cultural practices of community-based justice, certain African traditions practice conflict mediation even in relation to very severe crimes, e.g. the *gacaca* system in Rwanda.¹²²⁰ VOM principles are applied in order for the offender to recognise the injustice and confess;¹²²¹ and for dignity to be restored, through confession, accountability, and emotional healing. Finally, confession, accountability and healing or forgiveness, must be put into practice, whereby the past is dealt with, in a reconciliation

¹²¹³ Braithwaite, & Strang, 2001; Braithwaite, at <http://www.restorativejustice.org/rj3/Full-text/Revisitingreintegrativeshaming.pdf>; Maxwell, & Morris, 1999, pp.14, at www.vuw.ac.nz/cjrc/publications/archived-pubs/news-articles.aspx

¹²¹⁴ Zehr describes two methods for advancing restorative justice: family group conferencing, and victim-offender reconciliation programs, Zehr, H. *Restorative Justice*, in Paffenholz, & Reychler, 2001; Price, at <http://www.vorp.com/educate.html> Victim-Offender Reconciliation Program (VORP) Information and Resource Center, USA.

¹²¹⁵ See Shaw, & Walgrave, at <http://www.restorativejustice.org>

¹²¹⁶ Varona, 1996; Barton, 2000, pp.41. The theoretical movements behind restorative justice applied in states of transition in relation to the international core crimes are only introduced, and not given further analysis due to necessary limitations on the research. Restorative justice programs include, at the national level, often-integrated in the legal system; small claims courts, mediation programs for victim-offender and family-group, and community conferences; at the national and international level, often separated from the legal system, truth commissions and human rights programs.

¹²¹⁷ Zehr, 1990, p.63: "Prisons themselves were originally promoted as humane alternative to corporal and capital punishment. Incarceration was to meet society's need for punishment and protection while encouraging reformation of offenders. Within a few years of their introduction, prisons became places of horror and the prison reform movement was born." See the abolitionist movement, Van Swaaningen, R. Introduction. What is Abolitionism? In Bianchi & Van Swaaningen (eds.), 1986

¹²¹⁸ Zehr, 1990, p. 158,171; Messmer & Otto, 1992; see more on mediation further ahead.

¹²¹⁹ In the US victims claimed a lack of participation in the criminal justice system. The North American movement may have been based on earlier European research, but actual VOM only began in Europe in the 1980s, and really took off in the 1990s, Aertsen & Willemsens, 2001.

¹²²⁰ See ch.7.

¹²²¹ Similar to the instrumental truth discovery of the restorative process. This may be an essential part of the initial reconciliation process of reaching forgiveness and rehabilitation.

process focused on the future.¹²²² Since mediation programs took off in Europe, they have been run inside and outside of the justice system,¹²²³ although most VOM programs focus on juvenile justice.

- Victim-centred approaches or movements intend to protect victim rights and needs. Geis claims that “the fundamental basis of the power of the victim’s movement lies in public and political acceptance of the view that its clients are good people, done in by those who are bad...It is a strong social, political, and personal appeal...”¹²²⁴ The victim movement ranges from social support-focused openness to extreme rights-focus and finds its origin in the civil rights movements of the 1960s.¹²²⁵ As seen in chapter three, it was in the 80s and 90s that both the Council of Europe and the United Nations included crime victims’ rights in official documents, trying to lay down effective reparation, participation and protection.¹²²⁶ Punishment was regarded as a “just” aim and as “just” reaction to crime. Victim-orientated programs were further introduced, establishing a criminal justice focus where the distribution of the costs of crime and crime control should be apportioned justly between the parties. The general aim of punishment was, as a result, extended with the aim of deterrence, with objectives such as rehabilitation, as separate aim from just-desert punishment. The inclusion of a Witness and Victim Support Section of the ICTs and the affirmative ICC-approach of including victim reparation in the statute, are examples of such a victim approach. While the victim approach has been influential, the protection of victims’ rights is

¹²²² Today, mediation is often viewed, and ordered as a reparative procedure, also delivering some offender-rehabilitation, and reconciliation, and it is often applied to minor offences, in western criminal justice systems. For an identification of different elements of mediation, see Davis, 1989; Barton, 1999 www.voma.org/docs/barton.

¹²²³ Sentencing circles have been tested in some countries, where affected actors, (offender and victim) and professionals meet to discuss pragmatic solutions, Pollard, 2000. This is in reference to less severe crimes in national criminal justice systems of the west.

¹²²⁴ Geis, G. *Crime Victims: Practices and Prospects*, in Lurigio, Skoga, & Davis (eds.) 1990, p.259.

¹²²⁵ The victims’ movement found followers both in the late 1960’s civil rights movement and liberal politics, and in the 1980’s conservative rights-focused governments. The United States’ civil rights movement, in the 60s, was much inspired by humanitarian ideals and women’s rights. By involving victims of crime in the criminal justice system, the US demonstrated a direct rights movement. Rights to be informed, and to participate and influence sentences, developed out of a great volume of serious crime, and American victims’ dissatisfaction with the court system. Europe developed affirmative victim-support out of community-based voluntary organisations, that which started more out of sympathy than as a lobby movement. Criminal justice in the Nordic countries moved in the 1960s towards social justice. “Good social-development policy is the best criminal policy” was the slogan, Anttila, 1986; see ch.4; United States Department of Justice, *New Directions from the Field: Victims’ Rights and Services for the 21st Century*, 1998; for an overview of popular US practices, see www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf; Fattah, 1992.

¹²²⁶ Jung takes the examples of the UK Victims’ Charter of 1990 and the 1994 Council of Europe’s study on the intimidation of witnesses as additional parts of the movement. Jung, 1995; *Recom.No.R(99)19 of the Council of Europe Concerning Mediation in Penal Matters; Communication on Crime Victims in the EU: Reflections on Standards and Action (COM(1999)349 final); Council Framework Decision Mar. 2001 on the standing of victims in crim. proceedings (2001/220/JHA., at www.coe.int: www.ojp.usdoj.gov/ovc/intdir*. The social-support movements can be seen in the work of NGOs, lobbying for victims and providing support outside of the state institutions, domestically, and internationally. Mainly human rights organisations provide such services.

still not fully recognised, and while stable democracies may be able to supply crime victims with reparation and reconciliation programs in addition to the criminal justice prosecutorial process, this is not so for the international criminal justice system, or, indeed, for states in transition.¹²²⁷ This underlines the need to assimilate criminal and restorative justice values.

- There is a third approach, which Varona refers to as “alternative dispute resolutions”.¹²²⁸ While the offender and victim-centred approaches concentrate on the direct actors (victim *vis-à-vis* offender, involved and affected by the crime) dispute resolution attempts to include the affected community.¹²²⁹ Dispute resolution approaches hence add a collective focus, argued to be a necessity in this thesis, in relation to entire communities that have suffered from the international core crimes.¹²³⁰ Whereas criminal justice inherently focuses on the individual, restorative justice is not limited to an individual focus, and in its prioritisation of reconciling relationships this approach involves the collective community. Mediation can be used in alternative dispute resolutions, with the aim to reconcile,¹²³¹ similar to many truth discovery processes of TCs, which focus on communication, both as a means and as an end.¹²³² Similar to how Duff’s communicative theory is held to assist legal authority and legitimacy, communication can also bring the actors together, which can be a pacifying and reconciling end in itself, previously discussed in relation to the prosecutorial process.¹²³³ Communication may support the fundamental aims of truth, deterrence, reparation, and reconciliation.¹²³⁴ Nevertheless, alternative dispute resolution approaches are not easy and may rely on the pre-existence of a community with a single identity (or at least very few differing identities) which, in regions affected by the international core crimes, may not be the case. Assuming a homogenous identity is dangerous when discussing accountability, as

¹²²⁷ Which often grant amnesty or exclude the prosecutorial process, see ch.5 and 7.

¹²²⁸ See e.g. Varona, 1996, p.21. Dispute-resolutions favour mediation and reconciliation through compassion, wisdom, and love, which are necessary to understand the suffering that all share. ‘How to stop crime’ becomes a ‘how to make peace’ approach, within society, and between people, as well as agents of the criminal justice system.

¹²²⁹ Keméni, 1995.

¹²³⁰ See ch.3.

¹²³¹ Varona, 1996, p.21. This approach is noticed in Chinese mediation commissions, and seems to refer to mediation as a broad collective communication tool, with more actors involved. However, while more actors have the potential of being involved, collective mediation has been difficult to incorporate with criminal justice. It demands narrowing down the concept of community to victim-offender-centred dialogue, with possible external commissions representing the victims at large community to be heard.

¹²³² Habermas communication theory refers to legitimate communication in relation to the institutionalisation of the public use of reason in the legal-political domain. Ideal communication, according to Habermas, depends on fair, democratic and communication ethics, which must involve pragmatic reasoning about how best to achieve the ends; ethical reasoning concerned with goods, values, and identities; and moral reasoning about what is just, fair and equally in the interest of all. McCarthy, 1994, p.48. Perhaps Habermas ingredients to ideal communication are also applicable to a successful dispute resolution.

¹²³³ See Duff, 2001, ch.5.

¹²³⁴ Messmer & Otto, 1992; Zehr, H. *Restorative Justice*, in Paffenholz, 2001; Braithwaite & Strang, 2001.

ethnic and cultural differences often exist in regions affected by the international core crimes. Such differences are important to come to terms with; and where a neutral authoritative accountability process of criminal justice does not need to assume a collective identity, a truth discovery process of restorative justice may have to.¹²³⁵ However, alternative conflict resolution generally criticises criminal justice and its offender focus, said to be rooted in the concepts of dispensing suffering and punishment, and perhaps only causing more suffering. Compassion, understanding and forgiveness are instead supported as the necessary deterrents.

All the above approaches are useful in furthering the involvement of the actors in assimilated justice, which, in combination with the prosecutorial process,¹²³⁶ must concentrate on victim-centred approaches and dispute resolution attempts to include the collective community.¹²³⁷ In agreement with Zehr,¹²³⁸ who argues that the imposed state sanction of the criminal justice system, which developed out of the 16th century protestant reformation, may be ready to slowly reform itself to a combination of punitive and more restorative objectives. We need only to look to the application of restorative justice in states of transition. New combinations of internationalised domestic tribunals and truth commissions have appeared and the latest international criminal justice development, the ICC, includes victim reparation in its statute, as well as a reference to reconciliation. Such assimilations are considered in the next chapter.

6.2.2. MAIN OBJECTIVES

The main objectives of restorative justice and truth commissions are truth discovery, restoration and reconciliation.¹²³⁹ These objectives and the local particularities play a large role in shaping TCs and they are briefly discussed in this section, as these objectives are also part of the fundamental aims of assimilated justice. Attention is again paid to the South African TRC because it is believed to represent the latest, perhaps *quasi*-judicial, restorative justice model, whose

¹²³⁵ Integrating the community in the criminal justice system, as in the example of community policing (neighbourhood watch), provides a way for members of the community and the police to work together in order to give citizens greater control over their own disputes.

¹²³⁶ Assimilated justice of this thesis incorporates the offender-focus of criminal justice and the fundamental aims of truth, just-desert punishment, and deterrence.

¹²³⁷ Especially since the prosecutorial process applies an individual offender focus.

¹²³⁸ Zehr, 1990.

¹²³⁹ See generally: *Restorative Justice: An Overview*, compiled by the UK Home Office, www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf. Other interesting websites are: Maiese, M. *Restorative Justice*, on www.beyondintractability.org/m/restorative_justice.jsp; Zehr, H. & Mika, H, *Fundamental Concepts of Restorative Justice*, <http://ssw.che.umn.edu/rjp/Resources/Documents/ZehMik97.pdf>; Marshall, T.F. *Restorative Justice: An Overview*, www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf; Hutchison, P. & Wray, H. *What is Restorative Justice?* <http://gbgm-umc.org/nwo/99ja/what.html>

institution and mandate is believed to influence future TCs. A good understanding of the SA TRC may therefore be helpful, with regard to understanding restrictions to truth discovery processes.

As the name “restorative” justice suggests, the aims of reparation and reconciliation can, together with the aim of truth, be viewed as the main restorative objectives,¹²⁴⁰ often applied through truth commissions. Restorative justice is often linked to states in transition, which may be without a functioning criminal justice system to deal with past wrongs; and TCs appear to be popular representatives of restorative justice.¹²⁴¹ Since the application of restorative values is shaped according to the particularities of each transition,¹²⁴² there is no particular model of a TC or of its truth discovery process. While the applicability of the local particularities catches the essence of restorative justice, there is a danger in this, that fundamental aims, e.g. reparation, may be affected by choices made in transitional politics, rather than its application being guaranteed.¹²⁴³ The primary objectives, applied by TCs, are usually achieved through truth discovery, in the form of an historic report; recommendations of reparations to the victims; and prevention, through recommending means of facilitating reconciliation. In a system aimed at social and collective reparation, it is hoped that multidisciplinary problems will be tackled by involving the community collectively. Reconciliation is facilitated by this involvement, while also responding to the moral needs of the community.¹²⁴⁴

Following Hayner’s extensive research, truth commissions have at least four common features.¹²⁴⁵ First, TCs focus on the past. This may be so, even though it is often argued that TCs, and hence restorative justice, are more prospective than retrospective in focus.¹²⁴⁶ Second, TC investigations cover a set period of time, rather than single events. Furthermore, they are *ad hoc*, of non-permanent character. And, lastly, truth commissions are officially sanctioned, often by the government. With the SA TRC, referred to in the quote below, a model of *quasi*-judicial bodies - authorised to hear and investigate witnesses, victims and offenders of crimes committed over a

¹²⁴⁰ According to Zalaquett, leading writer on truth commissions, past human rights abuses should be prevented and repaired before other objectives, e.g. retribution. Zalaquett, 1989.

¹²⁴¹ See Hayner, P.B. *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, in Kritz, 1995, pp.225, where Hayner discusses TCs in Argentina, Bolivia, Chad, Chile, Germany, Guatemala, Haiti, Honduras, the Philippines, Sierra Leone, South Africa, Uganda, and Uruguay. According to a 1996 survey by Harvard Law School, it has been suggested that victims want the truth exposed and acknowledged as compensation for their suffering, and value the therapeutic character of the process. See Harvard Law School, 1997, pp.13.

¹²⁴² *I.e.* the local particularities.

¹²⁴³ In fact, while the South African TRC aimed for reparation, the TRC Act only enabled the commission to recommend reparations to be made and as of this day, the SA government has not decided on one specific reparation policy that follows the TRC recommendations. See ahead.

¹²⁴⁴ Secondary, yet important objectives of restorative justice may be to assist the criminal justice system, where formal investigations and a published truth may lead to public support and political will to prosecute the acknowledged offenders.

¹²⁴⁵ *Id.* Hayner, in Kritz, 1995, pp.225.

¹²⁴⁶ *I.e.* by focusing on restoring relationships for the future.

defined period of time, sometimes followed by the granting of amnesty - has surfaced.¹²⁴⁷ “Truth commissions are not concerned with the past for its own sake, but take on the legacies and burdens of the past in order to overcome these and set them aside so that society can move on. Likewise truth commissions have complex transitional relations to law and justice: they at once look to quasi-judicial processes to resolve social and political needs and also seek to provide an alternative to that of criminal prosecution. Thus, while mediating the transition from a prior authoritarian regime, where law and justice itself were compromised and perverted in important ways, and while seeking to restore the rule of law and a culture of rights, truth commissions do so by providing a definite alternative to that of law and justice in dealing with the political crimes and human rights violations of the past not by way of prosecution and punishment under the criminal justice system, but by way of disclosure and amnesty.”¹²⁴⁸

Truth commissions must be distinguished from human rights inquiries and other investigations, governmental or not, which often commence their work during conflicts, in order to raise awareness.¹²⁴⁹ TCs mainly commence their work in the transitional phase, once the immediate conflict has ended. Following research, the Truth Commission Organisation, together with the International Centre for Transitional Justice, has established certain factors as playing the largest role in shaping TCs.¹²⁵⁰ Some such factors are briefly looked at, in order to assist assimilated justice assessment of local needs and practical problems that can restrict and shape a truth discovery process.

¹²⁴⁷ Truth commissions also arise after amnesty has been granted. For more on truth commissions and national reports see e.g. Hayner, 1994, 1996, 2001, pp.98; Kritz, 1995; Erasmus & Fourie, 1997, pp.705; www.usip.org/library/tc/doc/charters/tc; Sarkin, 1998. See, on the topic of the SA TRC, Bouckhaert, 1997, ranking South Africa’s transition to a vibrant multi-racial democracy as one of greatest achievements of this century; Sarkin, 1996, 2004.

¹²⁴⁸ Barton, 2000.

¹²⁴⁸ Du Toit, A. *The Moral Foundations of Truth Commissions. A Historical Interpretation of the South African TRC*, p.1 in Rotberg & Thompson, 2000; The definite alternative to law and prosecutorial process professed in the quote refers to the restorative justice process *per se*, where no judges of the court or legal precedent rules on the restorative hearings, however not excluding a link, a derivative giving rise to criminal justice prosecutions. It is an actual fact of today in South Africa that those denied amnesty and those that did not apply for amnesty, may still be prosecuted.

¹²⁴⁹ The first international commission of inquiry, in modern times, was the Carnegie Endowment for International Peace, investigating alleged atrocities committed against civilians and prisoners of war during the Balkan Wars 1912-13. After WWI, different commissions of inquiry have been set up, e.g. the UN War Crimes Commission to investigate German war crimes, and in the 1990s, TCs for many countries, e.g. El Salvador, Guatemala, and Somalia were internationally set up. Many domestic efforts have also been set up, e.g. in Argentina, the TC functioned as a step toward prosecutions. After the truth report was published, the government undertook to prosecute members of the military, responsible for some 9,000 disappearances of civilians. Yet, when the military rebelled, president Alfonsín’s successor pardoned the junta leaders. See Rosenberg, 1995, pp.134; Baker, 2001, at www.utpjournals.com/product/utlj/513/513_review_baker.html#11; Hayner, 1994, and supra, in Kritz, 1995.

¹²⁵⁰ According to the Truth Commissions organisation’s research, and a workshop 2-4 Dec. 2003, in New York for present and past Truth Commissions, entitled “Managing Truth Commissions.” The workshop wanted to identify the major challenges of managing truth commissions. TCs represented were Ghana, Peru, East Timor, Guatemala, Argentina, South Africa, www.TruthCommission.org; see more, later ch.

1. The nature of the violations to be investigated may demand different particulars.¹²⁵¹ If the nature of the violations qualifies as international crimes, prosecution may be a necessity rather than an option. Different violations demand different normative action and require professional knowledge, in order to estimate the type and extent of investigations, and exact drafting of the mandate.

2. The nature of the historic circumstances involved mean that most states opting for TCs are in a political transition, moving away from authoritarian/totalitarian regimes and towards democracy.¹²⁵² The historic circumstances are often also political. Political circumstances involve the different sides, often the previous and the newly elected regimes, having to reach an agreement concerning the choice of accountability process. The Nürnberg model is often referred to as 'victor's justice', since it does not derive from a settlement between the two sides, but rather the preferred choice of the winning side. It appears more common to opt for such criminal accountability mechanisms when no settlement, hence no real presence of previous regimes, is necessary.¹²⁵³ When settlements are necessary, the presence of the former regime often excludes the option of full criminal accountability or indeed any criminal accountability.¹²⁵⁴

3. Once the old regime has fallen, it will be necessary to establish how much of society is affected, and infected, by the previous regime.¹²⁵⁵ If the violations were carried out by many, and supported by the community at large, the regime may not just have been a regime of criminals, but a criminal regime.¹²⁵⁶ Collective responsibility may be an issue, requiring collective healing as well as accountability, which in turn affects the focus, mandate and staffing of the commission.¹²⁵⁷

4. The focus of the process is important, as the institution is only really a symbol of the message it puts forward.¹²⁵⁸ The focus does however not have to be one of choice between 'healing or justice' as the Truth Commission Organisation claims, although the reference is probably intended to point in the direction of determining whether it should be either a purely restorative process or a preliminary process linked to a prosecutorial process. The determination of the focus depends, more than anything, on the nature of the violations and the presence of the offenders.

¹²⁵¹ Nature of violence and human rights abuses to be investigated, www.TruthCommission.org. The nature of the violations are often examined and determined by human rights organisations in the field, and other expert investigations that may be sent out by the international community.

¹²⁵² Nature of political transition, www.truthcommission.org/factor.php?fid=0&lang=en In e.g. the South African case the transition was to move away from an apartheid regime to a non-racist democracy, having to focus not only on individual offenders guilty of crimes of apartheid, but also systemic guilt.

¹²⁵³ See e.g. Allied Germany, Rwanda and East Timor, ch.7.

¹²⁵⁴ See earlier chapter, ch.7, and e.g. the SA TRC was reached out of a settlement between the new and the old regime.

¹²⁵⁵ Extent of dominance and power of perpetrators after transition, www.TruthCommission.org

¹²⁵⁶ See Rosenberg, 1995.

¹²⁵⁷ For more on collective responsibility, see ahead, ch.5.

¹²⁵⁸ Prevailing focus on healing or justice, <http://www.truthcommission.org/factor.php?fid=0&lang=en#3>

When the violations amount to international core crimes, it may be necessary to fulfil legal obligations to prosecute and punish.¹²⁵⁹ If most offenders have escaped the country, it may prove difficult to bring them back to participate in the restorative justice process, unless an accountability process is involved and can, e.g. through extradition treaties, require other states to cooperate in their prosecution or extradition. Alternatively, the TC may be empowered to offer amnesty in exchange for e.g. a confession.¹²⁶⁰

5. Inter-linked and dependent on all these factors is public support which, in essence, asks of the TC to fairly represent all of society.¹²⁶¹ Equal representation of the community can be achieved through a non-ethnic focus of the mandate, staff representation, and general principles and goals of the TC, passed on by the media. The TC may furthermore have to allow space for true actor involvement (individual and collective), so as to gain public support. Public support, along with the support of the actors, anticipates moral legitimacy or “social justice” as the former South African Minister of Justice has referred to it.¹²⁶²

Added to the above is the decisive factor of financial resources, necessary in order to support the restorative mechanisms. This factor must be determined at the earliest stage, and will help determine the scope of investigations, as well as the number of staff, the time and the mandate. Financial resources may have to rely on public support and donations, whilst the restorative justice movement is at the same time dependent on proving the sufficiency of allocated resources, in order to garner adequate public support and credibility.¹²⁶³ Another determining factor is the amount of international influence in the country’s past and present affairs. If good working relationships and perhaps even reliance on non-national entities exist, public support may demand international backing. If on the other hand the international community is collectively viewed as having failed the country by not lending it a helping hand during or after past atrocities, a determining factor for the truth commission may be to make clear to the public that the restorative justice will be purely domestic, creating a collective national ownership of the process.¹²⁶⁴

¹²⁵⁹ Human rights violations may demand other ways of bringing the offenders to justice, as well as establishing truth and making reparations, see ch.3, 5.

¹²⁶⁰ E.g. in SA and East Timor, <http://www.truthcommission.org/factor.php?fid=6&mode=m&lang=en>; see ahead.

¹²⁶¹ Public support for a truth commission, www.TruthCommission.org. When e.g. the SA TRC chose to grant amnesty, it had to make that constitutionally legitimate, while hoping and asking for moral legitimacy through the victims’ support of such a process.

¹²⁶² Former Minister of Justice, Dullah Omar, of South Africa, have said that as SA is a nation of victims, whereby complete justice on an individual basis is impossible, a historical and collective justice for the people is achievable through social justice. See Villa-Vicencio, 2000.

¹²⁶³ See Appendix 5. Many TCs have been short-lived or not finished their work due to the lack of resources.

¹²⁶⁴ See ahead and e.g. the case of Rwanda, in ch.7, where a general mistrust in the international community existed post-1994.

The Truth and Reconciliation Commission of South Africa, set up to deal with the past apartheid regime, is a much discussed truth commission.¹²⁶⁵ What led to South Africa's TRC was a compromise between the previous regime,¹²⁶⁶ the National Party and Security Forces, all of whom argued for a blanket amnesty; academics, professionals and human rights organisations opposing any such amnesty; and the ANC Mandela-led new government. The ANC asked the government to set up what was later called the TRC, in order to investigate all human rights violations, by all; and so the SA TRC wheel was set in motion.¹²⁶⁷ In 1995, the Promotion of National Unity and Reconciliation Act, No.34, concluded that the TRC would deal with gross violations of human rights, committed between 1 March 1960 and 10 May 1994.¹²⁶⁸ Political acts could be amnestied because they were held to have been acted upon in the line of duty and under authority. Acts out of malice or personal gain were excluded from amnesty and the political character was to be determined on a case-by-case basis. The SA TRC would have 11-15 members, appointed by the President and Parliament, and was to represent the entire population. The TRC was empowered to summon persons, seize documents and take sworn oaths, similar to a judicial process, with the assistance of three committees. The first one, on human rights violations, was empowered to establish the identity of victims and propose reparations. The second committee, on amnesty, comprised Supreme Court judges so as to rule on amnesty cases; and the third committee, on Reparation and Rehabilitation, was to make it possible for the victims to be heard and repaired.¹²⁶⁹

¹²⁶⁵ Referred to as SA TRC. Because of its novel individual amnesties, magnitude and length of work, it deserves special attention. Other TCs are referred to throughout this chapter, and see ch.7.

¹²⁶⁶ The former regime was represented by former president De Klerk.

¹²⁶⁷ The TRC was not created in a single move; but in 1991, the Goldstone Commission reported on violence, however without assigning responsibility; and in 1992, the African National Congress set up an internal complaints mechanism; and an external human rights investigation commission in the following year. (The Douglas, Skweyiya and Motsuenyane commissions.) The TRC was then set up. See e.g. Sarkin, 1996, pp.617; Villa-Vicencio & Savage, 2001, p.152.

¹²⁶⁸ "The commission will deal with gross violations of human rights between 1 March 1960 and 10 May 1994: killing, attempted killing, abduction, severe ill-treatment or torture, committed by any state agent, political organisation or person with a political motive. - Political acts may be amnestied because they have been acted upon in the line of duty and authority. Acts for malice or personal gain are excluded from amnesty. The 'political' character will be determined on a case-by-case basis, taking into account whether the act was an order, its motive, gravity and general context - Those who suffered injury, suffering, pecuniary loss or impairment, including relatives and interventionists, are victims. - The Commission will have between 11-15 members appointed by the President and Parliament and should represent the entire population. - The Commission will be empowered to summon persons, seize documents and take sworn oaths. - There will be three subcommittees: One on Human Rights Violations, establishing the identity of victims and proposing reparation; one on Amnesty, with a Supreme Court Judge to rule on amnesty, indemnity etc. No person shall be criminally or civilly liable for amnestied acts; and one committee on Reparation and Rehabilitation, making it possible for the victims to be heard. Subject to availability, victims shall be able to seek compensation from a fund established." See §20(3)(f)(ii), Promotion of National Unity and Reconciliation Act of 1995; and see the SA TRC Act, at http://en.wikipedia.org/wiki/Truth_and_Reconciliation_Commission

¹²⁶⁹ http://en.wikipedia.org/wiki/Truth_and_Reconciliation_Commission

South Africa decided not to apply criminal justice of either domestic or international courts.¹²⁷⁰ The aim was to forgo prosecutions in exchange for truth and reparations and in so doing reach reconciliation.¹²⁷¹ Instead of criminal justice, the SA TRC welcomed moral legitimacy, in line with restorative justice aims of reinventing and reinforcing relationships.¹²⁷² Not only did South Africa lack a victorious side in the struggle against apartheid that could enforce criminal justice, but, had trials *à la* Nürnberg been implemented, long and costly proceedings could have run the risk of unsuccessful prosecutions with a legal system that was apartheid-regime-infected. There is also general belief that ideological fanaticism is not easily deterred or changed by punishment, but that it rather motivates fanatic persons to pursue their aims further on release.¹²⁷³ The Minister of Justice introduced the TRC by saying that its objective was not to conduct a witch hunt or to drag violators of human rights before the court to face charges. Instead the commission was seen as a necessary exercise, in order to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.¹²⁷⁴ It was thus set up as a collective exercise to establish truth and reach reconciliation, sensitive to the local particularities. The Mandela-led government was determined to claim national ownership of the restorative process and it was decided that no international influence would be necessary or even welcomed. The political nature of the transition, the past, and the specific violence involved, all influenced this decision, with a previous minority-rule white apartheid regime. Further influenced by the previous government, individual amnesties were held constitutional, in this way focusing on healing and reconciliation rather than accountability.¹²⁷⁵ The SA TRC was able to raise a great amount of money to aid the lengthy process, and gained public support through its healing and reconciling focus, close to the African tradition, publicly supported by the then President Nelson Mandela and Archbishop Desmond Tutu.¹²⁷⁶

¹²⁷⁰ Caputo, 1997, p.16; Caputo, 1993.

¹²⁷¹ Omar, D, SA Minister of Justice, in 1994, is said to have exclaimed that South Africa did not want Nuremberg type trials, but reconciliation.

¹²⁷² South Africa chose “ubuntu”, which translates into a process where “people are people through other people”, see Mani, 2002, p.116.

¹²⁷³ Following the writings on the Chilean truth commission by Correa, J. *Dealing with Past Human Rights Violations: the Chilean case after Dictatorship*, in Kritz, 1995

¹²⁷⁴ Minister of Justice Dullah Omar’s introduction to the TRC, at <http://www.polity.org.za/html/govdocs/legislation/1995/act95-034.html?rebookmark=1>

¹²⁷⁵ See earlier chapter for more on SA TRC and amnesty process, and ahead. Only politically motivated acts were amnestied. De Kock, 1998, argues that political institutions used non-political criminals to further the political struggle, promoting political offences, and preferring a politically motivated crime.

¹²⁷⁶ With Archbishop Tutu as Chairman, and other commissioners of similar stance, the religious or at least Christian background and influence was apparent, mixed with representation from medicine, law, politics and NGOs. Each commissioner was in charge of his or her workgroup or section, individually managing and administrating work and staff. The Haitian commissioners were four local nationals representing governmental and non-governmental organisations that worked full-time, and three international lawyers, who would only temporarily and momentarily be physically present. Others, like the Chilean and South African commissions, opted only for local commissioners. South

In Guatemala, none of the particular elements of public hearings, testimonies, individual amnesty, or the subpoena power of the SA TRC were present.¹²⁷⁷ It rather represented the many South American TCs, mandated to collect testimonies from victims (often in private) in order to prepare a final summary of its findings. In fact, TCs have generally not relied on amnesties for their work, and have thus had a lesser focus on the offenders, with a beneficial victim and collective community focus. In terms of adding equilibrium to the individual focus of prosecutorial processes, assimilated justice does not require a specific SA TRC focus. The Guatemalan TC was not allowed to name offenders, and its time reference did not start with the 1954 *coup d'etat*, but with the beginning of the guerrilla war. It could therefore not investigate those involved in the root cause of the conflicts.¹²⁷⁸ Guatemalan commissioners were a mix of national and international persons.¹²⁷⁹ The three commissioners, all commissioning part-time, represented a mix of legal and sociological analytical approach, wanting “examination of the causes and origins of the internal armed confrontation, the strategies and mechanisms of the violence and its consequences and effects.”¹²⁸⁰ Again, the focus was not as narrow as the criminal justice focus, and without a mandate that allows further investigation of e.g. specific individuals, the truth discovery reflected the social agenda that assimilated justice equilibrium would require. Whether and to what extent international influence is allowed in a truth discovery process may e.g. aid neutrality and expertise, but on the other hand may lack local cultural knowledge and understanding, something the UN-sponsored and commissioned El Salvador TC was criticised for.¹²⁸¹ In 1989 the UN became involved as a mediator between the

Africa's TRC contained as many as seventeen full-time commissioners, representing a broader spectrum of society than just lawyers and social scientists, in an attempt to represent as many of the cultural, ethnic and political areas as possible, later to become 15 due to resignations; TRC Report, Vol.1, p.246.

¹²⁷⁷ The Commission for Historical Clarification (CEH) was established in Oslo, 23 Jun.1994, and its report *Memory of Silence*, was issued 25 Feb.1999. *Accord on the Establishment of the Commission to Clarify Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer*, UNDoc A/48/954-S/1994/1751, 1 Jul.1994, reprinted in Kritz, 1995, pp.220. The UN moderator for the peace negotiations served as 1 of 3 members of the Guatemala TC. The Guatemalan TC was created by the Government of the Republic of Guatemala and the Guatemalan National Revolutionary Unity. See generally Armon, 1997; Guatemala Truth Commission Report Released, 25 Feb.1999, at <http://www.fhrg.org/truth5.htm>; *Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer*, USIP Library, Peace Agreements Digital Collection, 24 Jun.1994, at www.usip/library/pa/guatemala/guat_940623.html

¹²⁷⁸ Commission for Historical Clarification Report, TOMO I, http://hrdata.aaas.org/ceh/gmds_pdf/index.html. The TC was not allowed to attribute responsibility to any individual, and the TC's proceedings were confidential so as to guarantee the secrecy of the sources and the safety of witnesses and informants.

¹²⁷⁹ The Guatemalan commission contained two Guatemalan commissioners chosen to represent the native groups and one international commissioner, former UN special rapporteur with a good amount of local knowledge, see Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, at http://www.usip.org/library/pa/guatemala/guat_940623.html

¹²⁸⁰ TOMO, Recommendations and Conclusions, http://hrdata.aaas.org/ceh/gmds_pdf/index.html

¹²⁸¹ UN Report of the Commission on the Truth for El Salvador: From Madness to Hope, 1993. Some days after the publication of the El Salvador truth report, the government granted a blanket amnesty for all individuals identified in the report as responsible for serious acts of violence. Buergethal, 1994.

Salvadoran guerrillas and the government.¹²⁸² A peace agreement was reached and a UN TC and a Salvadoran *ad hoc* commission were established in 1992, to secure accountability from the reports collected from 12 years of violations. At the time Salvadoran society was so polarized that it appeared dangerous and non-credible to appoint Salvadoran commissioners.¹²⁸³ While credibility, transparency and legitimacy were improved by the international influence, it is important to highlight that as external viewers, the foreigners struggled to understand and reflect on local distinctions, and were naturally not implicit assets to national reconciliation. Unless such sensitive factors are realized, the truth discovery process may not be legitimate in the eyes of the community and the assimilated justice dimension reflecting local particularism will be lost.

6.3. THE FUNDAMENTAL AIMS IN THE TRUTH DISCOVERY PROCESS OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

Along the lines of the previous chapter, this section focuses on the application of the fundamental aims in the truth discovery process of restorative justice, with a particular focus on the truth discovery process of the SA TRC. As the overall goal of this thesis is to build assimilated justice through the application of the fundamental aims, which recognise and involve the actors of the international core crimes, it is of interest to assimilated justice to study the actual involvement of the fundamental aims and the actors in the truth discovery process. By identifying what aims the process can successfully fulfil and what its main actor focus is, assimilated justice can absorb the potential benefits of the two justice processes looked at. While the ICC has been emphasised as the latest model of the prosecutorial process, with regard to the assimilated justice dimension of universalism; the SA TRC is, throughout this thesis, emphasised as an influential model of the truth discovery process, in relation to the dimension of local particularism. As the restorative side of the assimilated justice equilibrium, in combination with criminal justice, must reflect local

¹²⁸² The commission was composed of three individuals appointed by the Secretary-General of the UN. [Http://www.usip.org/library/tc/doc/charters/tc_elsalvador.html](http://www.usip.org/library/tc/doc/charters/tc_elsalvador.html)

¹²⁸³ The mandate of the El Salvadoran commission put focus on the most significant violations with a broad impact on the community, with the aim to bring national reconciliation. Offices were established throughout the country to all witnesses and victims to come forward. The TC encountered difficulties the first months in receiving testimonies. Staff and commissioners interviewed government officials, NGO's, church and community leaders and media. This broad collection offered a general account of the civil war, with a few model cases but without including information about most of the victim testimonies taken. Thus the truth investigation lacked acknowledgement. The TC report instead provided extensive information about each model cases, with named offenders and victims. Each offender was invited to hear the charges and testify. Only cases with substantial evidence were included in the report. The report recommended lustration of all those named in the report; individual financial reparations to victims and their relatives; symbolic reparations in the form of public monuments and national holidays; and judicial and institutional reforms. However, the report did not recommend prosecutions. Americas Watch, 1993; El Salvador: Mexico Peace Agreements. Provisions creating the Commission on Truth, 27 Apr.1991, at http://www.usip.org/library/tc/doc/charters/tc_elsalvador.html

particularities and actors, there can be no *one* model that exemplifies the truth discovery process. Some reference to other truth discovery processes is therefore made, and the recently set up TCs of Timor-Leste and Sierra Leone are discussed in chapter seven.

The fundamental aims are applied in the truth discovery process stages of truth discovery, truth acknowledgment and recommendations, where the fundamental aim of truth may be viewed as both the foundation and the link to the different process stages, as well as to the other fundamental aims. Although there may be punitive responses to crime it is doubtful whether the fundamental aim of just-desert punishment is satisfied in the truth discovery process; similar doubts may extend to the specific focus of the fundamental aim of deterrence. As part of restorative justice, the fundamental aim of reparation and the fundamental aim of reconciliation are generally used in the restorative focus and involvement of the actors, perhaps symbolic of the main objectives of the truth discovery process.

6.3.1. TRUTH IN THE TRUTH DISCOVERY PROCESS

The truth discovery process of the SA TRC indicates well how the fundamental aim of truth is elementary to the entire process, determined to “establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period...including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.”¹²⁸⁴ The potential collective side of the fundamental aim of truth is thus referred to as an objective of the process. The second determination of the TRC process was to facilitate amnesty to individuals who made full disclosure of all relevant facts, hence supporting further truth discovery; healing individual victims and offenders; and acknowledging a collective memory of the past.¹²⁸⁵ In addition, the SA TRC was determined to establish the truth of the victims and their suffering, by recommending reparations.¹²⁸⁶ Again, the objectives were truth, reparation, and reconciliation, which, if fulfilled, could greatly assist the shortcomings of the fundamental aims in the prosecutorial process. South Africa chose truth for its inherent values to inform, remember and ultimately heal; truth was the tool to reach reconciliation, trying to prevent impunity while to a

¹²⁸⁴ TRC Act, S.3(1)(a); and see the TRC: Legislation, Process and evaluation of Impact, Paper 12, Ally, R. Jun.1999, at http://www.chr.up.ac.za/centre_publications/occ_papers/occ12.html

¹²⁸⁵ TRC Act, S.3(1)(b); and see the TRC: Legislation, Process and evaluation of Impact, Paper 12, Ally, R. Jun.1999, at http://www.chr.up.ac.za/centre_publications/occ_papers/occ12.html

¹²⁸⁶ Id. TRC Act S.3(1)(c).

large extent avoiding criminal justice.¹²⁸⁷ The truth discovery process was thus from the start recognising the potential value of the fundamental aim of truth, as both an end in itself; and as a means to serve the nation with reconciliation.¹²⁸⁸

Truth is thus fundamental to restorative justice and to its truth discovery process, applied by truth commissions. While truth remains an aim, *per se*, other, perhaps primary aims of restorative justice, such as reconciliation, demands the aim of truth to be investigated, reported on, and followed-up on, with recommendations for state action. "A society cannot reconcile itself on the grounds of a divided memory...Clearly, key aspects of the historical and ethical past must be put on the public record in such a manner that no one can in good faith deny the past. Without truth and acknowledgment, reconciliation is not possible."¹²⁸⁹ Zalaquett warns that if politically sensitive issues are not allowed to appear on the agenda they will boil beneath the surface, waiting to erupt, whereby truth is "almost always an absolute value."¹²⁹⁰ Zalaquett's warning is based on previous restorative justice efforts in Chile, which left many Chileans demanding justice and Pinochet's prosecution, more than 10 years after the establishment of its TC.¹²⁹¹ In combination with the struggle to fulfil the potential dual focus of the aim of truth, recognising its important value and reach, assimilated justice asserts the combination of legal authority, which should assist action upon the truth acknowledged.

6.3.1.A. TRUTH DISCOVERY INVESTIGATION

The final report of the SA TRC mentions four notions of truth:¹²⁹²

- Factual or forensic truth: the factual, corroborated evidence put in context.
- Personal or narrative truth: the individual truth as orally told in personal stories by the victim and offender.
- Social truth: the version discussed and debated through the participation of actors.

¹²⁸⁷ "The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past." *Id.* National Unity and Reconciliation (TRC) Act, S.3(1).

¹²⁸⁸ *I.e.* SA chose justice through truth, not truth through justice where the prosecutorial process reaches criminal justice, which supplies some truth through its findings. Although it was probably not an easy choice, the choice in SA at the time would otherwise have meant relying on either an apartheid infected legal system, general amnesty leading to impunity, or possibly an international *ad hoc* tribunal. See ahead, reconciliation, for Gibson's survey establishing that truth can in fact lead to reconciliation.

¹²⁸⁹ Zalaquette, in Borain, 1997, p.13.

¹²⁹⁰ Zalaquette, in Boraine, 1997, p.103.

¹²⁹¹ See www.TruthCommission.org; See generally Cuya, 1999, on TCs in Latin America; Chile's National Commission for Truth and Reconciliation *Report of the Chilean National Commission on Truth and Reconciliation* (the Rettig Report) Feb.1999.

¹²⁹² TRC Report, pp.110.

- Healing and restorative truth: the healing part with deterrent and reparatory effects.

The SA TRC used forensic and narrative truths to identify facts in individual cases (that is, micro-level truth, linked to particular cases and individual actors, similar to criminal investigations); and the other truths assisted the identification of the nature, extent and causes of the gross human rights violations (that is, macro-level identifications of a broader pattern).¹²⁹³ In turn, the micro-approach acknowledges individual memory, suffering and action, which can assist individual micro-reconciliation.¹²⁹⁴ And, the acknowledgment of a broad picture of the past can assist collective memory and collective macro-reconciliation.¹²⁹⁵

The South African articulation of different notions of truth, to be investigated and analysed, did not appear to the same extent in previous TCs, but the assumption, or hope that responsibility and reconciliation will come out of acknowledging contextual narrative truth is common.¹²⁹⁶ Truth can provide micro- and macro-responsibility, that is, truth relating to individual responsibility can be determined through a micro-focus on the individuals and specific cases, necessary in the South African truth discovery process, in relation to amnesty. Besides criminal guilt, according to Jaspers, moral and political guilt is important, and a society can only come to terms with moral dilemmas through a larger picture of the past, which can identify collective responsibility.¹²⁹⁷ Moral responsibility is the macro-truth and collective memory that truth commissions can be mandated to investigate, including a broader context of the systematic criminal organisation, e.g. the role of the media and the judiciary. The SA TRC hinted at the need to develop a collective memory of collective moral responsibility, again, using the aim of truth as a means to a reconciled end; “Reconciliation requires that all South Africans accept moral and political responsibility for

¹²⁹³ Promotion of National Unity and Reconciliation Act §1(4)(a)(ii), 1995; TRC Report, p.111. See ahead, 6.3.1.C.

¹²⁹⁴ *I.e.* between victim and offender.

¹²⁹⁵ *I.e.* between South Africans, between beneficiaries and the exploited, in the case of apartheid, between whites and blacks.

¹²⁹⁶ The Guatemalan TC, for example, was set up to deal with historical clarification, without specifying different truths. The analysis of the cases investigated involved historic, anthropologic, sociologic, economic and military data. The TC applied international human rights and humanitarian standards and principles in the selection of investigated cases. TOMO I, §101, http://hrdata.aas.org/ceh/gmnds_pdf/index.html; Zambrano, S. The Guatemalan Commission for Historical Clarification: Database Representation and Data Processing, in Ball, 2000; <http://hrdata.aas.org/mtc>; Argentina’s commission, established by the president, had a mandate to investigate the fate and whereabouts of the disappeared, and to produce a report to the president. The commission had access to all government facilities and the Security Forces were ordered to cooperate with the investigations. However no subpoena power to compel testimony was granted and all criminal evidence that was found was turned over to the courts, at <http://www.truthcommission.org/factor.php?fid=5&mode=m&lang=en>. The Haitian commission was mandated only to investigate the Cedras regime between 1991-1994 although previous dictatorships and gross human rights crimes began in 1957. See Rapport de la Commission Nationale de Vérité et de Justice, <http://www.haiti.org/truth/table.htm>

¹²⁹⁷ While Jaspers uses the terminology ‘guilt’, it is understood as ‘responsibility’, for reasons discussed in ch.4, on criminal guilt and responsibility. Jaspers, 1948, discussed guilt in relation to what the German society needed to deal with from the Nazi period, see Kritz & Finci, 2001.

nurturing a culture of human rights and democracy within which political and socio-economic conflicts are addressed both seriously and in a non-violent manner.”¹²⁹⁸

In South Africa, the Human Rights Violations Committee (HRVC) processed the most comprehensive truth investigation, concerned with victim- and offender-identification, hearings and statement-taking.¹²⁹⁹ Victim and offender statements and testimonies are often a primary source of information for TCs. Archbishop Desmond Tutu said, at the beginning of the SA TRC hearings that those who had hitherto been treated like rubbish could stand up and have their stories heard, adding different perceptions of the past to the truth.¹³⁰⁰ This indicates a certain amount of inclusive commitment to involve the actors in the process, in addition to the important narrative truth, which requires actor-involvement. According to the SA TRC Act, the victim had to have suffered harm, as a result of a gross violation of human rights; as a result of an act associated with a political objective for which amnesty had been granted; or as a result of such person intervening to assist persons contemplated.¹³⁰¹ The definition thus focused on the individual victim(s), rather extending a micro-approach to the truth discovery, by not allowing groups of systemic victimisation, e.g. gender, poverty or race, related to the crime of apartheid, which would have required macro-truth discovery, as well as a more collective notion of truth, and of participation. The community's role in contributing to the truth can play an important part to restorative justice and the truth discovery process, particularly if a macro-approach of collective truth is taken.¹³⁰² Active public participation brings a sense of ownership of the truth discovery process, which may strengthen the feeling that the justice process and reconciliation movement are inherently the community's.¹³⁰³

The SA TRC heard over 1,800 victims and witnesses in public, interviewed more than 21,000 victims and witnesses and processed 7,115 amnesty applications.¹³⁰⁴ The statements were received from the victims in their own language, and tested for credibility and corroborated against

¹²⁹⁸ TRC Report, Vol.5, ch.9. p.435.

¹²⁹⁹ TRC Act, S.3(3) and ch.3 TRC Act.

¹³⁰⁰ *Getting Away with Murder*, BBC documentary about the TRC, broadcasted 1 Nov.1997. See e.g. Field, *Memory, the TRC and the Significance of Oral History in Posts-Apartheid South Africa*, 1999, <http://www.trcresearch.org.za/papers.htm>; SA TRC report, 1999.

¹³⁰¹ Harm in the form of either physical, mental, emotional injury, pecuniary loss or impairment of human rights. See TRC Act, S.1, #xix.

¹³⁰² The HRVC conducted *ad hoc* sector hearings and special event hearings considering in-depth issues or periods. An initial approach to detailed interviews was later limited to save time and money and be able to hear more victims, a way to maybe include more victims under the RRC. We should however remember that more limited interviews lead to less narrative truth and thus less restorative and healing truth. Since victims did not appear as representatives of victimised collectives, e.g. a local black community or group, it is difficult to determine what the collective focus could have been, besides the few sector hearings. See TRC Report, vol.5, ch.9.

¹³⁰³ In e.g. both SA and Guatemala did the community participate through religious, political, human rights and other groups. NGOs and lobby groups often play an active role in informing and compelling the public to participate and attend hearings.

¹³⁰⁴ CSVR (Centre for the Study of Violence and Reconciliation) Transcript Analysis Project, in SA TRC Report, supplement 21 March, 2003; and see SA TRC Report 1, 1999.

forensic evidence and other unit's findings.¹³⁰⁵ Besides serving the truth discovery with forensic and narrative truth, the statements also gave the victims a first instance of restoring dignity. The issue of victims naming offenders was decided upon by the Supreme Court of Appeal, which ruled that the TRC process had to give prior notice about the hearing before subpoenaing people.¹³⁰⁶ Thus, if the possibility of being granted amnesty was the carrot, the TRC's stick was the right to search and subpoena offenders; seize information; and threaten with prosecution, if the offender did not assist the truth discovery process with 'full disclosure'.¹³⁰⁷

The HRVC hearings and statement-taking began with the individual account and then moved towards the collective context, making allowances for the four notions of truth.¹³⁰⁸ The method is thought to allow for a better knowledge of the past, which can lead to acceptance,

¹³⁰⁵ Victims' views based on CSVR reports and researcher's own visit. One of many memorable TRC cases is the case of P.P. Ndwandwe. She was a young black woman living in KwaZulu-Natal in the mid-1980s, involved in the underground military wing of the ANC. She was abducted and interrogated by security police in the summer of 1986, however she refused cooperation and was executed with a blow to her head and a bullet through her skull, undressed to prevent identification, with her pelvis covered with a plastic bag to protect her modesty, and buried in a secret grave on a remote farm. Thanks to the investigation process searching for the truth, the excavations found more than her bones. Her life, loyalty and death lead to her child being reunited with her parents, whom were given a chance to understand, and an extension of their daughter's lost life. Another case, that of student and community activist B. Langa, reminds us that the truth is not always clear-cut. He was killed by to ANC military wing members in the summer of 1984, both sentenced to death and executed for Langa's murder 2 years later. They were claimed to have been ordered by the ANC to kill Langa as he was believed to be an informer. This and an ANC apology came out of another member's amnesty application for Langa's death, claimed to have been the informer who led the murderers to Langa. The ANC person ordering Langa's death was found and died during his interrogation by the ANC. A third, very contested case was the opposed amnesty granted to Warrant Officer J. Benzien. Two of his torture victims opposed his story and the granted amnesty for not making full disclosure of the truth, and because his actions were argued to be disproportionate to his political motives. Such a case will be remembered for injustice and inconsistency in the TRC truth process. These are but a few of the individual stories adding to the truth of the grim realities of South Africa, both in the individual sense of criminality, but also, and mainly, as a part and result of the apartheid regime. While many of the stories represent gross violations of human rights, the vital truth, which comes out of the TRC report is that these acts are not coincidental but a direct result of the apartheid regime, something the TRC truth discovery process failed to advance. See TRC Report, Vol.3; TRC Report, Vol.2, at <http://www.doj.gov.za/trc/report/execsum.htm>. Of course there are many 'worse' truth scenarios, where the offenders tell different stories, and the dead remain silent.

¹³⁰⁶ *Du Preez & Another v. TRC* case 1997. This prior notice to named offenders was also necessary before the report was handed over to the president. Former president *De Klerk* relentless trying to prevent the publishing of its report, in *Fredrik Willem de Klerk v. TRC & Another*, 1998. The ANC and the former National Intelligence Service chief also tried to stop the publication. To not delay the report further the TRC blacked out the findings on De Klerk. This was seen by some as a failure of the TRC to promote goodwill and reconciliation. Further discussions between De Klerk and the TRC Amnesty Committee resulted in De Klerk admitting knowledge of certain acts previously denied, all included in the final two volumes of the TRC Report, released 21 March 2003, *Weekend Argus*, 22 March 2003.

¹³⁰⁷ TRC Act, S.4©. The offender's contribution to the truth discovery is further discussed below, in relation to the Amnesty Commission.

¹³⁰⁸ Hearings did also take part before the Amnesty Committee, and in informal local and regional Church meetings etc. From the beginning of the TRC, an information system was set up to deal with the statements taken, TRC Report, Vol.1. Its three main objectives were to identify a systematic pattern of violations through statistical analysis, describe the nature and extent of the crimes and evaluate its own activities. During the seven stages of its work: statement taking, registration, data processing, data sharing, corroboration of facts, regional pre-findings accepted or rejected on the basis of evidence, probability and mandate, and national findings to ensure consistency, the victims' testimonies were left out for not having any epistemological value. A lesson on how to collect and use data systematically could have been learnt by looking at the investigation and database of El Salvador's commission. Ball, 1996, 2000.

forgiveness and reconciliation, by setting the individual narrative in a social collective context.¹³⁰⁹ Unfortunately the original interview model intended for HRVC was abandoned a few months into the interviewing stage, limiting it to more closed-ended questions, resulting in reduced narrative accounts.¹³¹⁰ Besides individual narratives, public testimonies are central to truth discovery processes, recognised as a healing mechanism besides its truth-discovery potential. The SA TRC recognised public hearings for their social notion of truth, central to the work of the HRVC, conducting the public hearings.¹³¹¹ Not only forensic and narrative truths arise out of statements and testimonies, but also sentiments of shame and personal interpretations of the effect of societal problems. These can forward social truth, shame, deterrence and a general feeling of justice. In Weberian tradition, Habermas and the SA TRC's notions of truth show that subjectivity and interpretation must have its place, recognising that scientific facts are part of a larger framework of understanding.¹³¹² This is of importance to assimilated justice, where restorative justice is used to add anything beyond a judicial investigation of legal truth, where social and collective aspects do not fit in. The narrative truths helped the SA TRC to understand the reasons behind the forensic truth, and social, or dialogue truth, was then referred to as "the truth of experience that is established through interaction, discussion and debate"¹³¹³

By putting the facts found and discussed in their context, it was hoped that a healing truth could be produced in South Africa.¹³¹⁴ "Acknowledgment is an affirmation that a person's pain is real and worthy of attention. It is thus central to the restoration of the dignity of victims."¹³¹⁵ The truth established was thus meant as a means to other ends, of a healing, reconciling nature. The forensic truth was so dressed, held to be "required to help establish a truth that would contribute to the reparation of the damage inflicted in the past and to the prevention of the recurrence of serious

¹³⁰⁹ The next stage allowed the commissioners to place the individual suffering in a political narrative, saying that people had not died in vain, but for the liberation of the nation. Following this, forgiveness was invited. See ahead, reconciliation.

¹³¹⁰ From "long and complex narrative statements" to "fine-tune the structure of the protocol." TRC Report, Vol.1, p.139; Ball, 1996.

¹³¹¹ See e.g. the Report of the Chilean National Commission on Truth and Reconciliation, Berryman, 1993, pp.16; narrative stories were included in the Guatemalan report, but not referred to as truth, Commission for Historical Clarification Report TOMO I, http://hrdata.aaas.org/ceb/gmds_pdf/index.html; Report of the Commission for Historical Clarification, Conclusion and Recommendations, Guatemala Memory of Silence, 1999; Roth-Arriaza, 1998.

¹³¹² For Weber, replacing moral considerations by technical ones was characteristic of bureaucratic rationalisation, which impoverishes communication. Habermas, 1986. Habermas refers to ethics and legitimate communication in relation to the institutionalisation of the public use of reason in the legal-political domain. Ideal communication must depend on fair, democratic and communication ethics, which, in turn, involve pragmatic reasoning about how best to achieve the ends; ethical reasoning concerned with goods, values, and identities; and moral reasoning about what is just, fair and equally in the interest of all. McCarthy, 1994, p.48.

¹³¹³ Judge Sachs, TRC Report, p.113.

¹³¹⁴ Forensic and narrative truths were, together with social truth, referred to as the closest connection between the process and its goal, a healing restorative truth.

¹³¹⁵ Judge Sachs, TRC Report, p.114.

abuses in the future. It was not enough simply to determine what had happened. Truth as factual, objective information cannot be divorced from the way in which this information is acquired; nor can such information be separated from the purposes it is required to serve... What is critical is that these facts be fully and publicly acknowledged. Acknowledgment is an affirmation that a person's pain is real and worthy of attention. It is thus central to the restoration of the dignity of victims".¹³¹⁶ Where forensic truth is recognised by the truth discovery process, assimilated justice would not require the restorative process to investigate and involve such a micro-approach to truth discovery, as the forensic facts are ascertained by the prosecutorial process. Of more importance is the full and public acknowledgement of such truth in combination with broader social and healing truths.

In 1997, a decision by the Supreme Court shifted the TRC approach away from a victim-oriented healing approach towards an offender-focused *quasi*-legal approach, at least within the Amnesty Committee.¹³¹⁷ The micro-approach to truth discovery was thus extended for different reasons. For example, commissioners had to make findings, based on all the statements given and at the same time participate in the intense public hearings. This meant that data processors, research departments and statement-takers were generally the ones interpreting the statements, and with the amount of time and effort spent on data collection, the TRC did not use its potential to collect facts about the apartheid regime and its policies. Few of the leaders of the previous regime actually applied for amnesty,¹³¹⁸ whereby it proved difficult to extend the knowledge of the apartheid regime; and the Amnesty Committee applied a *quasi*-legal, micro-investigation approach to its hearings and decisions. The Committee did not appear interested in the ideologies surrounding the specific cases and the individuals that appeared before the Committee, which stopped any truth discovery that could indicate *why* such individual violations took place.¹³¹⁹ The amnesty hearings were conducted with a focus on the individual, and it was thus difficult to determine objective facts

¹³¹⁶ Id., p.114.

¹³¹⁷ The TRC was found "under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings...and might well be under a duty to hear the rebutting evidence forthwith or to permit immediate cross-examination...[T]he subject-matter of inquiries conducted by the Committee is 'gross violations of human rights'. Many of such violations would have constituted criminal conduct of a serious nature, or at any rate very reprehensible conduct. The Committee is charged with the duty of establishing, *inter alia*, whether such violations took place and the identity of persons involved therein. The Committee's findings in this regard and its report to the Commission may accuse or condemn persons in the position of appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their right of personality." Final report Vol.1, Ch.7 accounts for the Court of Appeal's decision on whether the TRC could escape existing rules of procedure and evidence; *Du Preez and another v. TRC* 1997 (3) SA 204 (A), at 233C-E.

¹³¹⁸ Most middle- and low-ranked security police officers came forward only once Eugene De Kock was prosecuted and he made certain disclosures in his amnesty application. The De Kock trial finished before the Amnesty Committee had reached a verdict on his amnesty application, and he was sentenced to 121 years imprisonment, TRC Report, Vol.5, p.202; and see Rauch, 2004, at <http://www.csvr.org.za/papers/paprcpt4.htm>

¹³¹⁹ Such investigations would have been necessary for macro-truth and an understanding of state sponsored crimes.

pointing in the direction of “as complete a picture as possible of the causes, nature and extent of the gross violations...including the antecedents, circumstances, factor and context of such violations”.¹³²⁰ Without verifying evidence or giving reasons for its findings, the decisions of the Amnesty Committee were brief in their legal reasoning and without precedents.¹³²¹ Moral elements of truth, aimed at reconciliation were often kept apart from legal narratives aimed at defining political objectives, in the work of the Amnesty Committee. “Almost all policemen giving evidence before the Amnesty Committee referred to their background and at the end of their testimony expressed regret for what they had done. This may be very relevant in an ordinary criminal hearing when extenuating factors are considered but these factors or any other factors relating to morality that may lend colour to an offence do not in terms of Act 34 of 1995 render one offence more justified than another. They are not requirements or relevant factors to be considered in the granting of amnesty or refusal thereof. They may however be factors that could contribute to reconciliation and better understanding of the conflicts of the past and for this reason the Committee allowed the evidence to be led”.¹³²²

Archbishop Tutu’s recognition that enough of the truth about the past had been established for there to be a consensus about it confirms the idea that the actual truth discovery phase of a truth discovery process may never reach an end,¹³²³ but only an acceptable version. The SA TRC treated truth as a means to reconciliation, and as the truth was established in order to contribute to the reparation of the damage inflicted in the past, and to the prevention of recurrence of serious abuses in the future, the aims of deterrence and reparation were recognised.¹³²⁴ It was thus not enough to only determine the facts. The value of the fundamental aim of truth was recognised for its factual,

¹³²⁰ TRC Act S.3(1)(a). The hundreds of model cases in the report did not help identify a systematic pattern of gross human rights violations, and a generalisation about micro-investigated individual cases is dangerous and hypothetical without precedents and further macro-analysis.

¹³²¹ The decisions largely contained the judges’ reading of the event, with unidentified factors influencing the rational legal narrative. What had to be determined was the *mens rea* of the crime: whether associated with a political objective or not, tested against the witness’ credibility and full disclosure of the relevant facts. However, the full disclosure test had no other definition than supplying the judges with legal attributes, accounted facts. See, for different amnesty decisions, Krog, 1998, and www.truth.org.za/amntrans/ct3/BIEHL01.htm Furthermore, the actual data coming out of the Amnesty hearings were only added to the TRC report in 1998, and were thus not part of the main evaluation process of the TRC. Figures stated in the final report indicate that over 21,000 statements were given, while only 1,818 were heard, indicating a necessary selection for the public hearings. Non-blacks, *i.e.* whites, Asians and coloureds were required to give as broad a picture as possible of the apartheid era, however, this in turn affected the outcome. Because the majority of affected South Africans were black but a larger percentage of the white population could more easily be publicly heard, it could negatively affect reconciliation, healing truth and show a misleading empirical truth, while including as many representative groups as possible could at the same time positively affect reconciliation, TRC Report, Vol.1. In deciding on truth in all the individual cases, a ‘balance of probabilities’ method was used, where something was held to be true if there was more evidence pointing in that direction than against it, TRC Report, Vol.5.

¹³²² Amnesty Decision 2773/96, <http://www.doj.gov.za/trc/amntrans/joburg/jhb.htm>;
<http://www.doj.gov.za/trc/decisions/am96.htm>

¹³²³ Tutu’s foreword to the TRC Report.

¹³²⁴ TRC Report, Vol.1.

objective source of information, while not separating it from the purposes it was required to serve.¹³²⁵

6.3.1.B. TRUTH ACKNOWLEDGMENT REPORTING

TCs are often responsible for producing a truth report that, besides being as objective as possible a version of the truth,¹³²⁶ publicly acknowledges sufferance, responsibility, deterrence mechanisms, educational recommendations, reparations and general recommendations to establish a democratic state.¹³²⁷ A truth discovery process can, through its statement-taking and public hearings, automatically trigger memory, mourning and healing. When the process is publicly acknowledged (as in the case of South Africa) collective commemoration enters the national consciousness. At the same time, public acknowledgement is central to the restoration of the dignity of the victim.¹³²⁸ Thus, the truth acknowledgment can further the means to the end of reconciliation, individually and collectively.

However, to be able to acknowledge the truth, compilation and assessment of the truths into a collectively acceptable version is necessary. This, in turn, requires obvious resources that can easily restrict and threaten the quality of the truth report.¹³²⁹ The duration of the truth discovery process is important here, and while the truth investigations must be allowed a reasonable time in order to allow quality work, there must be a time limit, or the commission may lose credibility.¹³³⁰ The way the mandate is created, by whom and under what circumstances are essential in order to

¹³²⁵ Id.

¹³²⁶ Or indeed the most widely acceptable version of the truth.

¹³²⁷ E.g. SA TRC Act S.3(1)(d).

¹³²⁸ The establishment of truth is an essential measure, not only towards accountability, but also reparation, where *e.g.* an apology, by the state or the offender, may follow the acknowledgment of past abuses. Instead of basically only being able to allocate a role for the victims that seek prosecution of offenders, as a witness, which would be the case in a prosecutorial process, the focal point of the truth discovery process is on the victims of the gross human rights abuses identified, allowing and needing the victims' narratives to start the healing process necessary for the fundamental aim of reconciliation (individual and, important for a state in transition, collective reconciliation). This is thought to begin with 'truth acknowledgement' hindering denial, promoting the truth, and also the dignity of the victim.

¹³²⁹ The Guatemalan TC consisted of approx. 200 staff, with a budget of approx. \$10 million. The SA TRC, with a staff of approx. 400 had a budget of approx. \$33 million. The Haitian commission was staffed by approx. 75 people, and its budget was approx. \$1million, see Commission for Historical Clarification Report, TOMO I, http://hrdata.aaas.org/ceh/gmids_pdf/index.html; Rapport de la Commission Nationale de Vérité et de Justice, <http://www.haiti.org/truth/table.htm>; TRC Report, pp.300.

¹³³⁰ The SA TRC handed in the final volume of the report, 976 pages long and heavy, 21 March 2003. The Guatemalan commission worked for 18 months, while many TCs are limited to a shorter period. Although the SA TRC spent 2,5 years working full-time, it also had a long period to investigate. Uganda's commission of inquiry into violations of human rights, created in 1986 to investigate the abuses committed under Milton Obote and Idi Amin between 1962-86, did not finish its report until 1994. By then the previous national and international media interest had forgotten about the Ugandan efforts, Ugandans had lost hope and belief in the commission's work, and the restorative justice aim of truth, justice and reconciliation had lost its effectiveness. Hayner, 1994, pp.597-655; United States Institute of Peace Library: Truth Commissions, 1999, at www.usip.org/library/tc/doc/charters/tc_uganda.html; Minow, 1998.

pin down the priorities of the TC. The presence of previous regimes often limits the mandate and the time period to be investigated.¹³³¹

What to report is also balanced against the method of reporting. One major aim of the reporting is to publish it and reach out to as many as possible, in order to extend the reach of the fundamental aim of truth, but also other aims.¹³³² The report generally includes recommendations for future state action, in order to improve or change the findings in the report. The international TC of El Salvador published its report approximately one year after the commencement of its work, with suggestions that over 100 military officers be removed from office.¹³³³ It further recommended deterring action through purges and other legal, political and administrative measures. The TC also recommended that a victim compensation fund be set up for the victims of violence. However many recommendations were actually made, the government rejected them all and issued a blanket amnesty for all those mentioned in the report, just days after it was published.¹³³⁴ Guatemala has had four TCs to report on disappearances, but none of the reports before the Commission of Historical Clarification were ever made public. Memory of Silence, the last report, was published, in 1999.¹³³⁵ Initially the TC was meant to investigate the 36 year period of human rights violations and to report “objective information about what transpired during this period [including] all factors, both internal and external and recommend specific measures to preserve the memory of the victims, to foster an outlook of mutual respect and observance of human rights, and to strengthen the democratic process.”¹³³⁶ The Guatemalan report was published in twelve volumes, with conclusions, recommendations and statistics of killings and victims and it was published in English and Spanish, nation-wide; making sure that it was accessible to all.¹³³⁷ In the rest of the report, the

¹³³¹ See earlier, this chapter; and see next section for more on micro- and macro-approaches.

¹³³² Through truth acknowledgement can aims of shaming, general deterrence and healing be sought, and maybe also other fundamental aims through allowing community interaction and participation in hearings and the reporting.

¹³³³ Issued March 1993. E.g. the resignation of the entire Supreme Court was recommended, but most were not removed. The president issued a statement after the TC report was issued, saying that the TC had exceeded its mandate. While the Peace Agreement said that the TC recommendations were binding, the UN did not do much for compliance. [Http://www.usjp.org/library/tc/doc/charters/tc_elsalvador.html](http://www.usjp.org/library/tc/doc/charters/tc_elsalvador.html); Popkin, 1997; UN Report of the Commission on the Truth for El Salvador: From Madness to Hope, 1993; Buergenthal, 1994, pp.497.

¹³³⁴ Still, the report was published, with offenders named, which was seen as essential public shaming, not believing they would ever be brought before a court. No criminal sanctions were applied as no just and fair legal system was in force, but a dismissal from office followed. A coalition of NGOs have brought a case against officers for the murder of several Jesuits, based on TC evidence, www.TruthCommissions.org

¹³³⁵ Report published Feb.1999, see Commission for Historical Clarification Report, TOMO I, http://hrdata.aas.org/ceh/gmds_pdf/index.html; Accord on the Establishment of the Commission to Clarify Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer, Oslo, 23 Jun.1994, UNDoc.A/48/954-S/1994/1751, 1 Jul.1994, in Kritz, 1995, 3 Transitional Justice, pp.262.

¹³³⁶ Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence that have Caused Suffering to the Guatemalan Population, June 23, 1994.

¹³³⁷ See TOMO, Conclusions and Recommendations part. Copies were distributed everywhere, press, internet and its own website. The report was intentionally re-written many times, as it passed through the different *insumo* stages, having all the teams work on all the sections, and profited from this time-consuming work in being a coherent

historical section is emphasised and most of the volumes contain case-details supported by theoretical arguments and statistics. The report gained nationwide support and the final granting of amnesty was subject to judicial approval.¹³³⁸

The SA TRC focused on writing down and reporting on all the findings, leading to a huge report that has not been widely distributed or broadcast over the radio or media, except in much shorter version (also published in the press).¹³³⁹ The report contained seven volumes, with philosophical essays, findings, cases, recognised victims, interim amnesty report, conclusions and recommendations. Moral conclusions, maybe based on public hearings, can be found in the first part, aiming at reconciliation; with more empirical truth-findings towards the end, without an apparent link.¹³⁴⁰ With a clear emphasis on reconciliation it is strange how the TRC was not, like the Guatemalan report, widely distributed, in order to achieve support, knowledge and understanding. Instead, while accessible on the internet for a limited time, it must be bought, at a price most South Africans cannot pay.¹³⁴¹

6.3.1.C. MACRO- AND MICRO-TRUTH

There are many reasons why truth commissions fail; one-sided truth investigations, partiality, prejudgments and, of course, more practical reasons such as lack of resources and unpublished or unfinished reports. However, trying to shape the truth as a means to an end as complicated as reconciliation requires ample societal commitment as well as individual and collective concurrence to the finished version and this restorative truth may thus, at least to some extent, diverge from the narrative and forensic truth. As outlined in chapter four, private and public memory changes with time and according to the environment, with the risk of infecting the truth. To collect detailed accounts from victims and offenders and corroborate narrative truth against forensic truth is demanding, and may require a judicial type of micro-approach, which in turn demands

clarification of at least one historic fact, the responsibility of the state - the same government that a few months later won the elections. Note that the Guatemalan commission was named 'Historical Clarification' and not 'Truth and Reconciliation'.

¹³³⁸ A 1996 law extinguished criminal responsibility for the crimes related to the political conflict but prohibited amnesty for the international core crimes. Since June 2001 cases have been solved amicably through acts of mediation and acknowledging the state's responsibility, but the judiciary is still struggling to hold trials. Report of the Commission for Historical Clarification, Conclusion and Recommendations, Guatemala Memory of Silence, 1999; Roth-Arriaza, 1998.

¹³³⁹ The Haitian TC investigations were concluded in a brief report handed to the President a few months behind schedule. The report was published half a year later, Feb.1996, in seventy-five copies, with a few more published a year later, but only locally. The report was the result of an external expert hired to finish it last minute, and mainly contained listings of the cases and victims reflecting a micro-approach to the truth and its investigations. See www.TruthCommission.org

¹³⁴⁰ TRC Report, Vol.1-5; Van Zyl, 1999.

¹³⁴¹ The UNOPS in Guatemala distributed thousands of reports.

trained staff and resources. The view put forward is that assimilated justice can avoid such unnecessary restrictions to the truth discovery process, where the prosecutorial process provides legal truth in its inbuilt micro-focused truth investigation. Instead, a collective and social macro-approach to truth, justice and reconciliation should be provided, without endangering the truth with difficult in-depth analysis.

Alternatively, macro-truth investigations usually mandate that the TC investigate and publish the truth found, with the broader contextual causes outlined, (perhaps analysed to a certain extent) commonly along with recommendations for social and political change. In Chile there were no public hearings as the TC tried to report on forensic truth rather than narrative truth.¹³⁴² “References to legal and institutional context are also necessary. The truth commission must go beyond offering excerpts from the oral testimony it has heard. It must also analyze evidence, present facts in a coherent framework while avoiding the most contentious aspects of historical interpretation, and arrive at substantiated conclusions.”¹³⁴³ As Zalaquett rightly points out, TCs sometime confuse the difference between revealing and interpreting facts. They should concentrate on the revelation of facts, which can be proven and is less dangerous, and not try to justify events or crimes. Different interpretations of the latter will always exist.¹³⁴⁴ Steiner continues this by comparing a truth discovery process of a TC with NGO work, which often consists of investigations and reports, rather than trying to interpret or justify the past. If they did this, Steiner says, “they would run the risk of eroding the legitimacy that comes from their holding to a self-declared role of reporter of facts rather than political analyst or social theorist.”¹³⁴⁵

The Commission for Historical Clarification in Guatemala investigated over 7,500 cases, held over 11,000 interviews, and documented 24,910 killings.¹³⁴⁶ This demanded databases, time and resources and, as Zalaquett warns, may easily lead to selectivity, model cases and suppositions, because the TC tries to interpret rather than just reveal the facts.¹³⁴⁷ The Guatemalan TC chose eighty-five model cases based on their specific impact (out of 7,200 non-public interviews) to

¹³⁴² See generally Cuya, 1999, on TCs in Latin America and Chile’s National Commission for Truth and Reconciliation Report of the Chilean National Commission on Truth and Reconciliation (the Rettig Report) Feb.1999.

¹³⁴³ Comment by Zalaquett, J. Truth Commissions: A Comparative Assessment, Interdisciplinary Discussion, Harvard Law School, May, 1996, at <http://www.law.harvard.edu/programs/hrp/Publications/truth1.html>.

¹³⁴⁴ Id.

¹³⁴⁵ Steiner, see Zalaquett, supra, 1996, Approximately 600 interviews were held during the first two months of the Haitian commission’s work, field studies resulted in area reports, and the truth coming out of this was compared and evaluated against forensics. The area reports were lost, no public hearings were held, Rapport de la Commission Nationale de Vérité et de Justice, at <http://www.haiti.org/truth/table.htm>.

¹³⁴⁶ Commission for Historical Clarification Report TOMO I, at http://hrdata.aaas.org/ceh/gmnds_pdf/index.html; Commission to Clarify Past Human Rights Violations and Acts of Violence that have caused the Guatemalan people to suffer, 1997.

¹³⁴⁷ Zalaquett, 1996; TRC staff complained that their reports of testimonies, interviews and research were cut down and edited to fit the final report, see Cherry, 1999; Posel, 1999 at <http://www.trcresearch.org.za/papers.htm>.

illustrate specific points in support of the statements the commission probably intended to make from the beginning.¹³⁴⁸ Without the need for *quid pro quo*, subpoena power and the granting of amnesty in return for truth, the TC represents a common model that does not rely on amnesty in their truth discovery. Offenders and victims offered their testimonies in exchange for confidentiality, which proved enough for thousands of victims to come forward and be heard. A limited number of offenders stepped forward to testify, and although it was considered a limitation to the hearings to not have more offenders testify, the general opinion was that the focus of the testimonies had to remain on the victims and that it was not worth granting the offenders amnesty to hear further testimonies.¹³⁴⁹ The Guatemalan approach challenges the South African view that “truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth which persons in the positions of the applicants so desperately desire...”¹³⁵⁰ Amnesty incentives are not inherently necessary for the aim of truth, nor are the offender narratives in the establishment of truth essential. The Guatemalan model supports the view that truth is so much more relevant as a means to heal, with the inclusion of victims’ narratives. If the offender impact is lessened due to the lack of an amnesty carrot, then so be it.¹³⁵¹

The mandate of the SA TRC was broad in terms of definitions, but the TRC chose a narrow interpretation of the human rights violations with a political motive that it was mandated to investigate.¹³⁵² The TRC was also mandated to determine as complete a picture as possible.¹³⁵³ A broad interpretation of this, with macro-investigations could have focused on understanding the root causes of the apartheid regime and how it affected and infected segments of the South African society. Taking into account the particular powers of the TRC to indict, search and even seizure

¹³⁴⁸ Report of the Commission for Historical Clarification, Conclusion and Recommendations, Guatemala Memory of Silence, 1999, pp.52. Secondary research followed the interviews, conducted by historians, with workshops. Forensic and human rights research conducted with data bases made available a few years before the 1996 truth commission could fortunately be used by the commission to save money and time, TOMO XII, Annex III.

¹³⁴⁹ Comment by Brigitte Suhr, previous Guatemalan investigator, in Human Rights Watch World Report 2004 Human Rights and Armed Conflict, at <http://www.ecoi.net/detail.php?id=19150&linkid=23426&cache=1&iflang=en&country=all>

¹³⁵⁰ Former Chief Justice Mr Mohamed, in *Azapo v. President of the RSA*, 1996, p.683.

¹³⁵¹ Amnesties were however later granted in Guatemala, in the context of an already begun criminal proceeding, where the offender confirmed the motive of the criminal act as political, in accordance with the national reconciliation law. See Human Rights Watch World Report, 2001, at <http://www.hrw.org/wr2k1/americas/guatemala.html>

¹³⁵² Committed between 1 March 1960 and May 1994, Promotion of National Unity and Reconciliation Act, Ch.1, Part 1, 1995; Asmal, 1997; Dorsman, 1999.

¹³⁵³ A picture of the causes, nature and extent of the gross violation, including the antecedents, circumstances, factor and context of such violations. SA TRC Act, Ch.2, Part 3.

information, which no other TC has been empowered to do, the SA TRC failed its potential.¹³⁵⁴ “The increasingly familiar refrain within white South African communities, that apartheid was merely a ‘mistake’ for which no-one was responsible, that somehow the system propelled itself impersonally, may be one of the more ironic, unintended consequences of the TRC’s rendition of the past.”¹³⁵⁵

To establish a version of the most widely accepted perception of the truth is difficult and dangerous.¹³⁵⁶ In victimised communities that do not have records of the past, can co-existing conflicting views of the past exist, in a heterogeneous social order. Social, legal and political institutions are infected. It is therefore especially important to agree on a past for a reconciled future. However, where there is no singular notion of truth or only one perception of the past, the focus of TCs should be to present a macro-level comprehensive report that includes the different versions of individual, local community and national truths. For the same reasons that some transitional states are not able to rely on the criminal justice system, (*e.g.* limited resources, infected institutions, presence of previous regime and hidden or destroyed evidence) for the same reasons are truth commissions limited in their investigation of the truth and thus should not expect to focus on such micro-level forensic truth that demands legal investigations. Although the SA TRC was said to have “a specific function beyond the ordinary norms and procedures of crime and punishment...it must not become ensnared in...the narrow business of determining individual guilt or innocence. We already have courts that can do that”.¹³⁵⁷ Parts of the SA TRC actually represent a process not that different from a fact-finding prosecutorial process. Consequences, such as a narrow picture of apartheid accountability may, amongst other things, be affected by the actual staffing of the TC, *e.g.* background, skills and practice of commissioners and committee members can affect the focus of the TC. In his studies on truth commissions, Sarkin argues that the actual representation potential of the commissioners is vital.¹³⁵⁸ Analytical approach and investigation methods are dependant on the intentions behind the truth commission. The positive aspects of the Guatemalan TC, for historic clarification, have been held to be the result of its method of constantly reorganising research teams to maintain a broad understanding of ongoing work in all sections.¹³⁵⁹ There was also great usage and familiarity with scientific research methods and databases, keeping statistics of

¹³⁵⁴ TRC Report, p.54. Although sector hearings were conducted, they did not lead to an insight of institutionalised racism, but of specific individual action.

¹³⁵⁵ Posel, 1999, p.29, at <http://www.trcresearch.org.za/papers.htm>

¹³⁵⁶ See earlier chapter on Truth as a fundamental aim.

¹³⁵⁷ Asmal, K. et.al, 1996, p.26.

¹³⁵⁸ *I.e.* it is important that the expertise and focus of the commissioners fit the TC focus, see Sarkin, 1996, at www.muse.jhu.edu/journals/human_rights_quarterly/v021/21.3sarkin.html; Sarkin, 22 May 1995.

¹³⁵⁹ TOMO I, *Insumu* model, pp.36, report section, http://hrdata.aaas.org/ceh/gmnds_pdf/index.html.

all testimonies to find patterns, later evincing that genocide by the Guatemalan state had been conducted mainly against Mayan indigenous communities.¹³⁶⁰

Truth as factual, objective information cannot be separated from the purposes it is required to serve.¹³⁶¹ For truth to serve both as an end and as a means to an end, the impossible separation referred to by the SA TRC in the above quotation appears not so much impossible as essential, failing which the TCs would, again in the words of Steiner, “run the risk of eroding the legitimacy that comes from their holding to a self-declared role of reporter of facts rather than political analyst or social theorist.”¹³⁶² The idea that TCs tend to look at the bigger picture that covers the causes and abuses of past regimes seems to be a misconception. Basically there was a lot of attention and hope for the SA TRC to reverse the misconception, *i.e.* to primarily focus on the bigger picture, that of the apartheid system and its beneficiaries, rather than individual acts of political violence. Instead, the macro-truth investigation into the systemic apartheid regime was to a great extent circumvented and the SA TRC chose micro-truth investigations focusing on the individuals involved in the human rights abuses identified.¹³⁶³ A second type of criticism, in line with the argument of this thesis, accepts the micro-approach on individual cases, but then demands, in line with the micro-approach of a case-by-case investigation in prosecutorial process, a criminal justice focus, requiring prosecution and punishment.¹³⁶⁴ Still, TCs respond to moral and political needs, rather than legal justice, and they are often mandated to identify and acknowledge the actual offenders and victims, which requires both the individual as well as the collective approach, in order to include systemic accountability and collective social truth, involving offender, victim and community. The forensic truth investigations must focus on individual cases, which can be used as evidence when hearing offender and victim-testimonies, not much different to how instrumental truth is instrumental to the prosecutorial process. In addition, TCs are mostly, if not always created to focus on gross human rights abuses and not the illegal or unjust systems supporting these abuses, and this inherently requires a case-by-case focus. These focuses unfortunately lead to the exclusion from the investigating of an understanding of social truth, patterns of systematic abuses and an identification of the causes.

6.3.1.D. MORAL LEGITIMATE ACTOR FOCUS

¹³⁶⁰ Id., TOMO III; TOMO XII, Annex III; Ball, 2000.

¹³⁶¹ TRC Report, Vol. 1, pp.55.

¹³⁶² Steiner, see Zalaquett, Id., 1996, at <http://www.law.harvard.edu/programs/hrp/Publications/truth1.html>

¹³⁶³ Although it is of course acknowledged that the SA TRC introduced a novel amnesty application and was mandated to spend a lot of time with a lot of staff investigating and hearing many people.

¹³⁶⁴ E.g. Nino, 1996, 1991; Orentlicher, 1991; Neier, 1990.

The importance of public support has already been discussed, which, in essence, demands that the TC fairly represent all of society, in order to be able to claim moral legitimacy.¹³⁶⁵ Public support also means official state support, also necessary in order to give effect to the recommendations. Public and, more specifically, actor support anticipate moral legitimacy, where the social and moral claims to justice are made through the recognition of the offender, the victim and the community.¹³⁶⁶ Moral legitimacy may be further advanced by the legal and religious relationship within the TC.¹³⁶⁷

Supporting the view that the prosecutorial process and the fundamental aim of just-desert punishment should be applicable to any justice process dealing with the international core crimes, one could conclude that a justice process that grants amnesty is unjust and that countries such as South Africa do not achieve conventional legal justice. However, conventional justice may not single-handedly be able to deal with unconventional circumstances, such as transitional justices coping with a past filled with atrocities and international crimes. Legal legitimacy may not be guaranteed in an accountability process of a state of transition, due to the historic, political and legal circumstances that may disfigure the judicial process, but the same circumstances may promote moral foundation and legitimacy for that precise reason. The moral justification for TCs is important in perspective, in practice, and in principle.¹³⁶⁸ South Africa was willing to pay the price of not implementing criminal justice for a faster transition to peace through a transitional model of restorative justice, founded on moral and political legitimacy based on the country's specific historic, political and legal circumstances.¹³⁶⁹ Rotberg says that it is crucial for TCs to establish

¹³⁶⁵ See first section of this chapter.

¹³⁶⁶ The claim to justice refers to social justice, involving the victim and the community and the restoration of their dignity, which is thought to take place through truth acknowledgement, recognition and reparation. Under different circumstances, such claims should not be necessary as, ideally, human and civic dignity and rights can never be lost, according to the theory of Kant, where all persons are equals, moral agents with self-respect as ends in themselves. However, during decades of human rights atrocities, victims of torture and other human rights abuses have not had a voice or a forum able to acknowledge what has been denied them, nor recognise the justice needed. See Kant, 1887. Restorative justice in transitional states may be morally justified based on the space given to the victims and their narratives, followed by acknowledgement, with recognition of the human and civic dignity and rights that may not be secured and even denied by the institutions infected by the previous regime and hence require a regime change and affirmative action. It is not difficult to envisage that South African blacks, and to some extent the South African coloureds were denied their dignity during the apartheid regime and that human and civil rights were not assured by the shift in power without public confirmation through acknowledgement and recognition. See e.g. Honneth, 1995.

¹³⁶⁷ The powers and resources of the SA TRC were more significant than those of previous TCs, with strong statutory powers. The TRC also had an extraordinary religious component, without an obvious separation of church and state. Yet it seems to have worked in SA, where there is a great religious diversity but with a Christian subtext of repentance and forgiveness. See Heine, 1998; Gibson, 2001, mentioning the positive effect that the religious undertone may have had on truth leading to reconciliation.

¹³⁶⁸ Gutmann, A. and Thompson, D. The moral foundations of Truth Commission, in Rotberg & Thompson, 2000, pp.22.

¹³⁶⁹ See Id.; Verwoerd, 1997; Huyse, 1995.

legitimacy and credibility from the beginning.¹³⁷⁰ In that respect, Rotberg says, South Africa is an important model.¹³⁷¹ With its transparent regulations the procedures run in a fair and *quasi*-judicial way, and Rotberg argues that the possibility of amnesty has to be there, as the carrot, and the stick in each case has to be prosecution.¹³⁷² The moral legitimacy founded on these circumstances in the SA TRC could be that the “killers and torturers are not to be prosecuted and punished but may be granted amnesty conditional on full disclosure in a context where provisions had also been made for the victims of such gross violations of human rights to have their civic and human dignity publicly restored”.¹³⁷³ Moral legitimacy may further purport, in accordance with Rotberg’s advice, that such a process brings the offenders forward and into a process of accountability for their actions. Offenders that came before the SA TRC were held accountable for their actions in the way of making full disclosure of the facts, without the guarantee of an amnesty but with a discretionary decision-making process.¹³⁷⁴ The hearings were public and the offenders could be questioned by the state and affected individuals, such as a victim or a victim’s family.¹³⁷⁵

Sensitive to the local particularities, the flexibility of the truth discovery process may assist the actors in a way that more rigid prosecutorial processes cannot, *e.g.* by shifting its focus to existing collective victims if necessary. In South Africa, however, a very individual offender and victim focus was taken, through its micro-treatment of individual victims and offenders, and it is doubtful to what extent the individual ‘dealing’ or ‘healing’ can reach the collective.¹³⁷⁶ In fact, where the truth discovery process focuses on a micro-approach to truth discovery, restorative justice may well be subjected to unfortunate restrictions, such as selectivity, similar to the prosecutorial process, *i.e.* only allowing some individuals to come forward. By excluding legal legitimacy, moral legitimacy becomes imperative, whereby actor inclusion and support is vital.¹³⁷⁷ Moral legitimacy

¹³⁷⁰ *Id.*, Rotberg, President of the World Peace Foundation and director of programs on inter-state conflict at Harvard’s Kennedy School.

¹³⁷¹ New York, 7 Aug. 2001, Radio Free Europe/Radio Liberty (RFE/RL) <http://www.rferl.org>

¹³⁷² *Id.* The amnesty decree depends on all the circumstances determining the process, whether to grant individual amnesty, on what conditions, and by whom; or blanket amnesty without further obligations by *e.g.* the head of state.

¹³⁷³ Rotberg, *Supra*, 2000.

¹³⁷⁴ The full disclosure test was drafted by the former president of the European Commission of HR, C.A. Norgaard. §20(3)(f)(ii) Promotion of national Unity and Reconciliation Act of 1995. See ahead.

¹³⁷⁵ International law was read in a manner to positively support the granting of amnesty, not like many other transitions where governments have declared a general blanket amnesty to cover the troublesome period the state is trying to move away from. Such an amnestied transition may lead to impunity rather than an incentive to establish the truth through confessions, to finally reach moral reconciliation. Of course where *the SA TRC did not grant amnesty, or where amnesty was denied or not applied for*, such individuals can still be exposed to criminal and civil accountability, through legally legitimate justice. Orentlicher, 1991; Art. 6(5) Protocol II to Geneva Conv. “at the end of the hostilities, the authorities shall endeavour to grant the broadest possible amnesty.”

¹³⁷⁶ See *e.g.* Zalaquett & Steiner, *supra*, 1996, concluding that TCs are most useful where broad sectors of society do not acknowledge critical facts, at www.law.harvard.edu/Programs/HRP/Publications/truth1.html; Zalaquett, 1992.

¹³⁷⁷ The same is not necessarily true for the prosecutorial process, where legal legitimacy will not necessarily be lost with the lack of actor involvement, as long as the court can establish the facts according to the normative requirement of

and social justice do however depend on many factors, factors that determine the establishment of the TC and the success of the entire process, as well as future reconciliation of the nation.¹³⁷⁸

Concluding this part, it is important to highlight that the fundamental aim of truth in the truth discovery process of most TCs cannot be one of complete justice or of complete truth. The aim must rather be investigated and report upon, based upon the local particularities' different truths, perhaps as well as a socially acceptable version of the truth that can lead to reconciliation.¹³⁷⁹ The structure of the SA TRC is unique in terms of its amnesty process and may have created a new truth discovery process, balancing legal and moral legitimacy through its accountability process that included victims, offenders and communities.¹³⁸⁰ The truth discovery process of the SA TRC was in fact similar to the legal truth emerging from a prosecutorial process, focusing on individual truths applicable to a particular case. However, when Tutu says "[w]e believe we have provided enough of the truth about our past for there to be a consensus about it", there are hints of collectiveness, in reaching a consensus about the past, and in fact truth appears to be secondary to the aim of reconciliation.¹³⁸¹ In fact, TCs do not appear to pursue the fundamental aim of truth as an end in itself to any extent, but rather as a means toward other ends, such as deterrence, reparation and reconciliation. Thus, while the truth discovery process may not treat the fundamental aim of truth that different to the prosecutorial process, it is the actual *process* that does, through its truth acknowledgment and victim inclusion. As discussed, the micro-approach to truth discovery, (asking who, when, where) is influenced by a legal attitude to truth investigations, visible in many TCs. The macro-approach to truth, focusing on the bigger societal picture, requiring social and political

the specific crime. Of course every justice process will benefit from being able to claim moral legitimacy, through public support.

¹³⁷⁸ All circumstances relating to the past atrocities must be acknowledged and dealt with through a mandate and institution that can rely on great public support. The democratic process of South Africa was represented by multiparty negotiations, not public referendum. While certain rights are affected by this choice, amnesty processes, argued by supporters of such amnesties, are able to bring forward the truth through actor participation, providing further justice done to the victims. The aim of the South African transitional pursuit was to a great extent to reveal the truth, and supporters of such amnesty processes argue that criminal justice only manages to reveal a limited truth, linked to one individual act at a time (instrumental truth of a prosecutorial process). Victim reparation and offender rehabilitation were other motivations of the TRC, see SA TRC Act, 1995.

¹³⁷⁹ The SA TRC slogan (reconciliation through truth) chosen as a moral response to the particular circumstances of South Africa and its transition seems to assume that it is evident who needs to be reconciled and what truth is required.

¹³⁸⁰ See the SA Promotion of National Unity and Reconciliation Act, S.20: The commission will deal with gross violations of human rights between 1 March 1960 and 10 May 1994: killing, attempted killing, abduction, severe ill-treatment or torture, committed by any state agent, political organisation or person with a political motive. Political acts may be amnestied because they have been acted upon in the line of duty and authority. Acts for malice or personal gain are excluded from amnesty. The 'political' character will be determined on a case-by-case basis, taking into account whether the act was an order, its motive, gravity and general context; Id., S.20(3)(f)(ii).

¹³⁸¹ SA TRC Final Report, Tutu, Vol.1, p.18.

questions relating to the identification of common identities of the violations, is not as visible in the work of TCs.¹³⁸²

6.3.2. JUST-DESERT PUNISHMENT IN THE TRUTH DISCOVERY PROCESS

This part looks at how the restorative justice paradigm processes the fundamental aim of just-desert punishment.

The first section of this chapter identified how crime is primarily viewed as an injury to individuals and communities in the restorative justice paradigm, and only secondarily as an injury to the state or the international order. The purpose of intervention, through the truth discovery process, is thus to promote peace in the local community by repairing the injury, promoting rehabilitation and, eventually, facilitating reintegration and reconciliation. Although punishment can be referred to both as the unpleasant response to crime inflicted upon the offender, and as symbolic denouncement of the crime in the restorative paradigm, the general attempt is to avoid inflicting harmful punishment. “Unlike punishment, which imposes a penalty or injury for a violation, restorative justice seeks to repair the injustice, to make up for it, and to effect corrective changes in the record, in relationships, and in future behavior.”¹³⁸³ Thus, while restorative justice interventions do not necessarily reject punitive or retributive mechanisms, it provides a prospective focus of restoration, which can be assimilated with the consequentialist focus of the fundamental aim of just-desert punishment. Assimilated justice can thus provide a retrospective and a prospective focus, which adds moral legitimacy to the aim of just-desert punishment and to the prosecutorial process. Legal legitimacy can furthermore be attached to the restorative, prospective aspects, of *e.g.* shaming, which could otherwise be legitimately weak, at least where the collective community and/or the victims do not recognise such intervention. “In practice, restorative justice responses incorporate punitive and retributive measures and elements in what appear to be optimum doses and degrees. Typically, they are mixed in with other measures such as increased social and community support to eliminate the underlying causes of the offending, and where indicated, further education and treatment. Indeed, it is difficult to see how restorative justice processes could become a widely accepted, let alone the preferred, response to crime, unless they were either complemented by punitive responses through other fora, such as the courts...”¹³⁸⁴ However, although public

¹³⁸² E.g. SA TRC was mandated to establish “as complete a picture as possible of the causes, nature and extent of the gross violations...including the antecedents, circumstances, factor and context of such violations”, thus requiring more than a quasi-legal approach to truth, TRC Act §4; TRC Report, Vol.1, pp.158.

¹³⁸³ Minow, 1998, p.91.

¹³⁸⁴ See ch.4; Barton, 1999, p.10.

denouncement with a shaming effect may be a restorative justice punitive response, basically, restorative justice tries to exchange imprisonment for affirmative reparative action on behalf of the offender.

Restorative justice values the deterrent worth of punishment, deriving from utilitarian theories that if people fear punishment they rationally choose not to act criminally.¹³⁸⁵ Criminologists Hudson and Galaway support the involvement of the restorative justice paradigm in criminal justice, where the prosecutorial process could be assisted with active participation by victims, offenders and their communities, in order to find solutions to the conflict.¹³⁸⁶ Zehr, an important writer in the restorative justice paradigm, supports a justice process aimed at restoring the victim through the offender, the community and the state's support system.¹³⁸⁷ The punishment, or the imposed sanction and type of reparations to be made can be decided upon by the state, or the community, balanced against the offender's ability. Some type of shaming or denouncement should potentially be involved, as would the chance to partake in active mediation between the actors.¹³⁸⁸

Mediation can indicate the needs and the wishes of the victim; mediation can also indicate the offender's capacity for remorse, apology and acceptance of accountability.¹³⁸⁹ Roach deals with the notion of accountability on three levels: literal accountability, where the individuals are forced to account for their actions;¹³⁹⁰ organisational accountability, where organisations have to account for their actions;¹³⁹¹ and social accountability, where, depending on the social recognition of the problem, individuals, organisations, community and the state account for their actions.¹³⁹² Roach's study reveals that truth discovery processes can focus on collective public and social accountability, something courts are unable to do. However, while it is important to recognise such potential benefits of a truth discovery process - publicly acknowledging the information, soliciting victim participation and offender testimony and thereby enhancing community involvement - the accountability investigated and acknowledged remains social in notion and not criminal.¹³⁹³ Thus, instead of criminal justice infliction of harm balanced against just desert principles linked to criminal guilt; restorative justice proposes the imposing of duties of reparation and community

¹³⁸⁵ See ch.4, and Braithwaite, 1989, p.131.

¹³⁸⁶ See Hudson & Galaway, *An Introduction to Restorative Justice*, in Larsen & Burtch (Eds.) 1999.

¹³⁸⁷ Zehr, 1990.

¹³⁸⁸ Zehr, 1990, on reintegrative shaming, and see Zehr and Toews (Eds.) 2004.

¹³⁸⁹ Wright, in Messmer & Otto, 1992.

¹³⁹⁰ Similar to the prosecutorial process, where the responsibility of the individual is investigated according to legal criminal norms and a sanction is imposed.

¹³⁹¹ This may include collective responsibility, criminal organisations and the state; and may require the discussed macro-approach to truth discovery.

¹³⁹² Roach, 1995.

¹³⁹³ *Id.*, pp.269-70. "[M]ost courts continue to put individuals, not organizations, on trial. They stress individual responsibility for wrongs and not the structural shortcomings of institutions, even if only organizational reform can prevent similar wrongs in the future." p.273.

service to make amends to the victim and the community, perhaps along with elements of shaming. In line with previous chapters, the assimilated justice of this thesis recognises the criminal norms of the international core crimes and the importance of establishing legal guilt in relation to the fundamental aim of just-desert punishment. Without a link to the criminal justice system, restorative justice does not calculate just-desert punishment according to criminal norms. The fundamental aim of just-desert punishment is therefore looked at from the perspective of public denouncement in the truth discovery process and its restorative shaming.

6.3.2.A. SHAMING PUBLIC DENOUNCEMENT

Restorative justice literature makes an important distinction between guilt and shame. Whereas accountability (legal guilt) arises from externally imposed judgement, shame arises from internal acknowledgment that what one did was blameworthy. Where the prosecutorial process is designed to expose and punish criminal behaviour, a restorative truth discovery process may promote shame by publicly denouncing the action and obliging the offenders to face the victims and see the effects of their crimes. Besides the punitive effects that public denouncement may have on the individual offender, restorative justice supports shaming the offender. Braithwaite supports reintegrative shaming, that is, he argues that community reconciliation and reintegration of the offender can be more effective at imparting shame. Yet, not all persons will react equally to denouncement and shame, since not all individuals feel shame. In such cases, shaming faces the same criticism directed at deterrence and rehabilitation mechanisms, whose results are difficult to determine.

Externally imposed shame involves different social processes, such as the public practice of a TC, which expresses disapproval, with the intention or effect of shaming the offender.¹³⁹⁴ It is believed that, through the participation of the victim in the process, the offender will realise how others view his actions, which may lead to humiliation. Internalised shaming, on the other hand, may lead to the reintegration of the offender, according to Braithwaite, who argues that simply humiliating the offender will not assist reintegration and reconciliation.¹³⁹⁵ Instead, reintegrative shaming involves the community's expressions of disapproval, but these must be followed by acts of reacceptance by the community. The success of reintegrative shaming thus depends on the identity of the community and the need to feel accepted by the community, in which case shaming

¹³⁹⁴ Braithwaite, 1989, p.100.

¹³⁹⁵ *Id.*, pp.55. In fragile societies the community may react with extended hatred.

can be delivered by the community, in the community.¹³⁹⁶ In situations of serious crimes, the commitment of the offender, (perhaps part of a collective) may reduce the notion of accountability to something meaningless. Moreover, if the accountability is socially established, *e.g.* by a TC, it may not lead to successful shaming.¹³⁹⁷ Still, Braithwaite believes in a successful application of reintegrative shaming in the Rwandan *gacaca* system, where the local communities are still very interdependent and where offenders and victims live as neighbours, *i.e.* with natural dialogue and mediation potential between the actors. Where a high percentage of the community is rightfully shamed for their crimes, reintegration may not be as difficult. In societies like Rwanda, where a strong dual yet interdependent culture exists, a large percentage of shamed offenders may help reconcile and repair the community. If the community or the offender is shameless, shaming can however serve the opposite goal. A strong collective of offenders can create shamelessness, where the crimes were not seen as wrongful in the first place. Shaming will then not be the right means for encouraging remorse and reconciliation. Thus, while shame may appear after the external expression of denunciation, or just-desert punishment, restorative shaming should be integrated in the truth discovery process, where it can be followed up with supportive mediation, for example.

“Shame is a rare and precious thing. ‘You cannot legislate repentance,’ Desmond Tutu says, ‘That is where faith comes in.’ The Truth Commission is likely to inspire more genuine repentance than any other approach yet tried, but it will still reach only a small portion of apartheid’s criminals and bystanders.”¹³⁹⁸ TCs can shame the offenders publicly, symbolic of official denunciation, generally with the objective of furthering truth discovery, through confession, remorse and apology, perhaps with a primary objective to fulfil other aims, such as deterrence and reparation. The SA TRC process was public, in order to bring the offender face to face with the victim, with the possibility of consequently adding shaming as well as deterring effects. Nonetheless, the possible shaming consequences were more of a by-product of the primary objective of establishing the truth with an inclusive truth discovery process with the potential creation of a collective memory.¹³⁹⁹ It is difficult to direct shame, whereby it may only affect the direct offender, but it can also be felt by a collective, and can therefore reach large parts of the community. However, as mentioned, the community has to be sensitive of shame and honour for such an objective to make sense, both in the

¹³⁹⁶ The usage of shaming as a means of punishment can be seen in cultures where one’s reputation is of utmost importance, *e.g.* Japan. Braithwaite, 1989; Young & Goold, 1999.

¹³⁹⁷ *I.e.* the offender may simply not care, and the truth discovery process is left with no other means of sanction. It will not matter if the accountability is accepted, or if it has shaming effects, if established in the prosecutorial process, as just-desert punishment is not dependent on the offender accepting his guilt.

¹³⁹⁸ Rosenberg, 1996, p.95.

¹³⁹⁹ Without forgetting the repairing effect this can have on the victim, punishment and deterrence is possible by making the offender understand his wrongful deeds with the help of the voice and face of the victim. For a view on how victims view shaming and naming names as punishment, see Felstiner, Abel, & Sarat, 1980.

eyes of the offender and the victim. Shame may reach far if a strong sense of community exists, whereby membership in that community is vital. However, it is important to know firstly whether the community views the wrongdoing as a crime.¹⁴⁰⁰ Otherwise, the institutional mechanism will not meet the aims set out. Shaming may also have inequitable consequences, where e.g. non-responsible family or community members are affected by the shaming mechanisms and suffer. If the shaming is not reintegrative, the community may also react violently against having the offender return. According to Whitman, this can happen when shaming is delegated from the judiciary to the public, where the offender is shamed according to public opinion.¹⁴⁰¹ Shaming is thus a dangerous game that can be counterproductive.¹⁴⁰²

The actual truth discovery process of the SA TRC has been of great importance to the entire justice process, including the legal relevance of the individually granted amnesty. With regard to the possibility to receive amnesty, the fundamental aim of truth was instrumental to the different stages of truth investigation and corroboration of evidence, similar to the prosecutorial process determining truth and accountability. The full disclosure test did not only assure that the truth was individual in focus, applicable to the specific case, and investigated accordingly, but the qualification of full disclosure could also shame the offender, and gave the TRC an opportunity to publicly denounce the action.¹⁴⁰³ The individual hearings, necessitating full disclosure of the facts, meant that the amnesty applicant publicly associated himself with the crime(s) and further acknowledged the specific involvement, by disclosing all the facts.¹⁴⁰⁴ Denouncement laid in the amnesty being individually tested, rejected where no political motive for the violations could be found, or where the violation was disproportionate to the political motive. Further denouncement laid in shaming the offender by requiring public confession.¹⁴⁰⁵

¹⁴⁰⁰ With ethnic crimes, such as genocide or crimes against humanity, shaming could have the reversed effect.

¹⁴⁰¹ Whitman, 1998. This has been noticed in national jurisdiction concerning the reintegration of offenders of sexual crime, and has given rise to the issue of the right of privacy of the offender. Shaming is thus not the right objective if the offender's identity cannot be made public.

¹⁴⁰² There is a lurking risk that shaming turns into humiliation and this may be counterproductive for the aim of reintegration, Braithwaite, 1989, p.12; Cohen, R. 2001.

¹⁴⁰³ The full disclosure test was drafted by the former president of the European Commission of HR, Mr. Norgaard. The decision whether to grant or not to grant amnesty in the SA TRC basically depended on the full disclosure test and the political objective requirement. See SA TRC §20(3)(f)(ii) Promotion of National Unity and Reconciliation Act, 1995.

¹⁴⁰⁴ It had to be decided whether the particular offence was associated with an applicable political objective, based on whether the offence was advised, planned, directed, ordered, or committed within SA between the specific dates, by or on behalf of either a publicly known political organisation, liberation movement, state agency or member of the security forces, an in light of the specific criteria set forth in the 1995 Act. The criteria include an examination of the motive, context, gravity, and objective of the offence, whether the offence was committed under direct order or approval, and whether the offence was committed for either personal gain or out of personal malice, ill-will or spite directed against the victims, in art.20(3) of the 1995 Act. If an amnesty would subsequently be granted, the legal relevance of the amnesty compare to a pardon.

¹⁴⁰⁵ Biggar, 2002.

While the SA TRC reached as far in its accountability process as to name offenders and leave the path to criminal prosecutions open,¹⁴⁰⁶ the reason not to prosecute can be found in the Interim Constitution: "...there is a need for understanding but not vengeance, a need for reparation but not for retaliation, a need for ubuntu, but not for victimization."¹⁴⁰⁷ Criminal jurisdiction was rejected once individual amnesty was granted.¹⁴⁰⁸ South Africa was faced with the choice between criminal and restorative justice, between "at least first cousins...between the silence of perpetrators without justice being done and learning the truth without perfect justice having been done."¹⁴⁰⁹ The TRC did not apply punitive sanctions, nor did it require the offender to show remorse, to apologise or to make financial reparations.¹⁴¹⁰

Other non-criminal sanctions, not discussed at any length here, are, for example, purges and reparation orders.¹⁴¹¹ Joinet, in his report to the UN on the question of the impunity of perpetrators of human-rights violations, proposed that societies with a history of abuses, should suspend, transfer, demote, or dismiss officials with important decision-making power.¹⁴¹² Individuals may be removed from office because they held influential positions in the previous regime or because they have actually been found accountable. Purges are not necessarily limited to governmental offices, but can, depending on the society, include roles in other influential businesses. Administrative purges, although more informally applied than criminal sanctions, can create a feeling of justice and leave the victims with the knowledge that the offenders will not remain in their influential positions.¹⁴¹³ Even in relation to serious crimes can a lifetime of having to make reparations be

¹⁴⁰⁶ In SA not everyone applied for amnesty, and not all that applied were granted amnesty, and those can, at least hypothetically, still be prosecuted. However, it appears unlikely that we will see more than 10 model prosecutions take place in the next few years in SA, although the government recently promised the nation that no blanket amnesty would be issued, see ahead.

¹⁴⁰⁷ Postamble, SA Interim Constitution, Act 200, 1993.

¹⁴⁰⁸ Until amnesty was granted, criminal investigation and prosecutions could be held. The largest trial, based on the Goldstone Commission's report, is that of Colonel de Kock. He was charged with 121 crimes, including 8 counts of murder. Here, and in other trials going on during the work of the TRC the accused waived their amnesty appeal.

¹⁴⁰⁹ Sulcas, A. interviewing Bizos, in *Sunday Independence*, SA, 1999.

¹⁴¹⁰ Instead, the TRC awarded the offenders who had made a full public confession, with amnesty.

¹⁴¹¹ In line with the assimilated justice focus on the international core crimes, and the involvement of international criminal justice, and the fundamental aim of just-desert punishment, non-criminal sanctions are not prioritised.

¹⁴¹² Joinet, *The Administration of Justice and the Human Rights of Detainees: Question of the impunity of perpetrators of violations of human rights (civil and political rights)*, 1996, Princip.48-50.

¹⁴¹³ Post-communist Germany applied administrative purges to remove those affiliated with past abuses. Other post-war countries, France, and Italy applied purges to thousands of people in both public and private sectors. Greece's accountability process for abuses committed during the 1967-74 military junta rule included prosecutions, but also thousands of purges. See further Kritz, 1995; 1996. The *ad hoc* El Salvadoran commission (established at the same time as the internationally influenced TC) reviewed human rights records of military officers and confidentially reported to the President and the UN Secretary-General recommending more than a hundred purges of governmental and military officers. It was created 1992 under the peace accord; composed of three El Salvadoran civilians, Kritz, 1996; http://www.usip.org/library/tc/doc/charters/tc_elsalvador.html. The Dayton peace obligated the actors to undertake "the prosecution, dismissal or transfer, as appropriate of persons in military, paramilitary, and police forces, and other public servants, responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups."

hardship.¹⁴¹⁴ “In my opinion, I think the best way to demonstrate a truthful commitment to peace and a truthful commitment to repentance is that perpetrators of acts of violence would make a contribution, a financial contribution to the families of victims and, in that way, they would then cleanse themselves of their own guilty, and they will then demonstrate with extreme confidence that in fact they are sorry about what they did.”¹⁴¹⁵ Reparations paid by the offender, however unusual, are a symbol of shame and accountability,¹⁴¹⁶ yet the SA TRC did not oblige offenders to make any direct reparation to the victims. Of course the entire TRC, set up by a new government representing a changed country, is an act of reparation, however it is not one of punishment which, to be punitive, must be ordered as a penalty that burdens the offender.

Truth commissions often operate in states of transition that have, for different reasons, opted for restorative justice and, while the truth discovery process has not taken on the role of the prosecutorial process, prosecutions are not necessarily ruled out. What is important to note however, is that the truth discovery process generally does not provide a link to potential prosecutions. Resistance to prosecutions exists, in line with restorative justice theory and belief that prosecutions may disturb the transition towards reconciliation.¹⁴¹⁷ Yet, general support for the continuation of the fundamental aim of just-desert punishment, through the prosecutorial process, exists and supports the conclusion that the truth discovery process does not fulfil the fundamental aim of just-desert punishment. The Argentine TC and its *Nunca Más* report recommended deterring measures for the state and pressed for judicial investigations.¹⁴¹⁸ Guatemala’s Commission of Historic Clarification urged the law of national reconciliation to be applied, fulfilling the obligation to prosecute the crimes that were not excluded by the same law.¹⁴¹⁹ Whether and to what extent the

General Framework Agreement for Peace in Bosnia and Herzegovina, Dec.14, 1995, Annex 7, Art.1(3)(e), at www.oscebih.org/overview/gfap/eng/

¹⁴¹⁴ If we link material and symbolic reparation to South American transitions, moving away from military rule; we may link restoration to post-communist Eastern Europe, where reparation was often compensated in the form of restored or returned property. Reparation by compensating for damaged goods transcends *ex post facto* property rights, and therefore not only makes good past wrongs, but also moves towards a democratic future with such rights recognised and protected.

¹⁴¹⁵ TRC final report, Vol.5,Ch.9, p.99.

¹⁴¹⁶ One rare exception found in the South African TRC is Colonel Eugene de Kock who asked for forgiveness and donated the royalties of his book to the reparations fund. For a few more examples see TRC final report Vol.5,Ch.9.

¹⁴¹⁷ Even so, in e.g. Guatemala, Argentina, South Africa prosecutions have occurred. Chile’s 1978 amnesty law has not stopped the courts from prosecuting a few offenders for their role in the past regime. In 1999 five Senior Military Officers were prosecuted because of their role in the disappearances, and see the *Pinochet* case.

¹⁴¹⁸ *Nunca Más* report of the Argentine National Commission on the Disappeared (Conadep), 1984. For the important link to the courts, the TC recommended, amongst other things, that the collected documents and conclusions found by the commission were brought before the courts; laws should be passed declaring forced abduction a crime against humanity; repressive laws should be cancelled; legal rights to reparation should be enacted; and the processes should be considered with the utmost urgency. See e.g. www.TruthCommission.org

¹⁴¹⁹ Following art.8 of the same law ‘genocide, torture and forced disappearances, as well as crimes not subject to prescription or those that do not allow the extinction of criminal liability’ in compliance with domestic and international law. Administrative measures were recommended for responsible state officials and it was determined necessary to, in

truth discovery process will concern itself with the identification of accountability and make recommendations for legal action much depend on the conditions of the transitional state, e.g. availability of a judicial system, the quality of professionals and remaining influence of the previous regime. Reasons why states in transition do not prosecute are, for example, a lack of effective resources and power. If the previous regime maintains a hold on the existing system, it will be difficult to successfully prosecute important leaders without putting justice at risk.¹⁴²⁰ Lacking finances may likewise delay the process to the extent that it loses its credibility.¹⁴²¹ There is also, depending on how the conflict ended, a risk that the prosecutions will be a type of 'victors' justice', where 'show trials' are played out by the new regime.¹⁴²² Even in situations where a prosecutorial process is possible, the international core crimes involve a great number of cases, and the judicial process becomes selective in the number of cases.¹⁴²³ While selective prosecutions are not necessarily wrong, the restricted justice process needs support, through assimilated justice that can deal with and recognise the collective need to knowledge, acknowledgment, reparation and reconciliation.¹⁴²⁴ Legitimate and illegitimate restrictions to justice processes are discussed in the next chapter, in relation to *quasi*-assimilated justice processes.¹⁴²⁵

Apart from practical difficulties, there are of course other reasons not to prosecute. The transitional period towards democracy may involve elections or referendums to help shape the new state that express a wish to forgo prosecutions and focus on truth and reconciliation.¹⁴²⁶ As a result of practical difficulties and choices not to prosecute, non-criminal sanctions exist and will continue to exist. The truth discovery process of the SA TRC has showed that a democratically elected, *quasi*-judicial TRC, which applies thorough investigations, with testimonies and hearings, and only

the strengthening of the legal system, proceed with traditional forms of conflict resolution able to complement the courts that had been ignored by the authorities for decades to be able to exclude political participation of indigenous peoples. See Recommendations, in the Commission for Historic Clarification report, *Memory of Silence*, 1999.

¹⁴²⁰ A lacking or vulnerable judicial system can further hurt peace and democracy, if unskilled, biased, or corrupt staff is involved. See e.g. Correa, 1992; Zalaquett, 1992, discussing the problem of Chile after Pinochet.

¹⁴²¹ The UN influenced truth commission of El Salvador concluded that the national legal system was incapable of dealing with the violations, Pasqualucci, 1994.

¹⁴²² The 'show trial' and execution of Ceauscescu in Romania probably did not do anything to promote criminal justice, see [www.truthinmedia.org/truthinmedia/Columns/wt7-05\(Kosovo\).htm](http://www.truthinmedia.org/truthinmedia/Columns/wt7-05(Kosovo).htm)

¹⁴²³ Prosecuting every single participant in the planning, ordering, implementation or collaboration of the crimes would be logistically and financially impossible and could destabilise the transitional political and social phase.

¹⁴²⁴ E.g. if the selection criteria only deals with the highest ranking officials, or the most severe crimes, as it otherwise runs the risk of being ignored or misunderstood as pardoning all other offenders. See previous chapter. For a discussion of selective prosecutions and the Argentine experience, see Nino, 1991.

¹⁴²⁵ International conventions recognize reasons such as holding trials in a 'state of emergency' a legitimate factor, but there are other practical limitations to states in transition that are recognised as legitimately restricting criminal justice, see Roth-Arriaza, 1990; and next chapter.

¹⁴²⁶ See e.g. Nino, 1991; Zalaquett, 1992; Marks, 1994, notes that Cambodians appear to promote peace before prosecutions, thus not necessarily supporting Khmer Rouge trials, "Cambodian Buddhism teaches reconciliation in a way that does not necessarily require justice or retribution" p.38.

grants individual amnesties,¹⁴²⁷ applicable to political acts conditioned upon publicly telling the truth, can be recognised as a legitimate justice process. This is so, even though punishment was not, or was only slightly imposed, in the form of publicly shaming the few offenders that chose to appear before the Amnesty Committee.¹⁴²⁸

In sum, TCs cannot and should not be implemented as a substitute for prosecutions, but this is not to say that the truth discovery process cannot assist the aim of just-desert punishment.¹⁴²⁹ While not fulfilling the aim, certain utilitarian ends of deterrence, rehabilitation and reintegration may be satisfied. The truth discovery process will therefore be recognised for its potential denouncing effects, however secondary to the fundamental aim of just-desert punishment in the prosecutorial process. Zalaquett has explained that, in the case of Chile, even the slightest exposure of an individual's involvement in the crimes committed would mean a measure, however tenuous, of punishment.¹⁴³⁰ Although Zalaquett may thus support shaming mechanisms, this thesis holds the view that public denouncement must not be utilised as a means of fulfilling the aim of just-desert punishment. Shaming mechanisms cannot pinpoint specific facts, cases or offenders, and it has been recognised that criminal accountability is individual. Zehr has argued for a radical shift in paradigm away from criminal justice just-desert punishment towards restorative justice methods of shaming and mediation, in order to deal with the majority of crimes.¹⁴³¹ Still, even if public denouncement of specific offenders and their crimes could be correctly applied, it is doubtful whether shaming can qualify as suitable punishment for offenders of the international core crimes. This is especially doubtful when viewed from the victims' perspective, whose views are important in order for the justice process to operate legitimately. Neier, a writer on war crimes and TCs, finds that in the case

¹⁴²⁷ This type of amnesty must be differentiated from self-granted or blanket amnesties and may be permissible in other jurisdictions as perhaps a mitigating factor at the sentencing stage or at the prosecutor's discretion, see ch.2 and follow ch.7. Although: "It would be senseless to argue, or on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a state say, taking national measures authorizing or condemning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any treaty provision...would not be accorded international legal recognition...[P]erpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime." ICTY, *Prosecutor v. Furundzija*, 1998, #155.

¹⁴²⁸ The reasons South Africa chose restorative justice before selective criminal trials have been outlined in an earlier part of this chapter; the political circumstances were not those of 'victor's justice', but those of a 'compromise' between the present and the past, and thus selective trials of the officials of the apartheid regime would have been too politically sensitive, and the past regime could have had influence on such trials. Likewise, criminal justice and a prosecutorial process were said to put too much focus on the individual offenders, on a case-by-case basis, rather than looking at the overall regime and the state-sponsored crime of apartheid, in Asmal, 1997, p.18. Yet, the broad focus of the truth discovery process appears to be lacking.

¹⁴²⁹ See generally Kritz, 1996.

¹⁴³⁰ Zalaquett, 1989. As the rule of law should be established properly, and as the worst violations often end during the transition, remorse and forgiveness can be facilitated without immediate prosecution and punishment.

¹⁴³¹ Zehr, 1990; Meier, 1998, argues against restorative justice as a new paradigm; Johnstone, 1999. In national criminal law it is generally believed that shaming is too gentle a punishment for the higher crimes such as murder. Whitman, 1998; Landsman, 1996.

of Argentina, selective prosecutions of the top commanders would have been advisable.¹⁴³² In fact, this was the intention, as the president at the time undertook such prosecutions, however followed by the successor's pardon.¹⁴³³ This is an important practical problem of the truth discovery process, which process can have symbolic effects, but which report can only recommend, rather than enact certain specifics. Assimilated justice is hence given further ground, where the universal legal dimension adds legal authority and certainty to the otherwise healing dimension of restorative justice. Méndez, another writer in the field of restorative justice and TCs, has held both the Chilean and the Argentine attempts timid and weak toward the military regimes, lacking legal and moral legitimacy to restrict the prosecutions to the top officers.¹⁴³⁴ Again, the aim of just-desert punishment should be a fundamental aim of any justice process occupied with international core crimes. This is especially so where any restorative attempt of shaming or punishing offenders has not ascertained the offender's just desert, according to legal norms; and which effects cannot be ascertained or guaranteed. Punishing influences of restorative justice should thus not be prioritised, or even intended, and will not be necessary in assimilated justice, where the criminal justice dimension must instead be relied upon. In reference to doing justice and involving the fundamental justice aim of just-desert punishment, it is difficult to applaud the SA TRC or to ascertain whether its truth discovery process had any punishment aims or effect. The truth discovery process' focus on the offender related to amnesty and did not even impose reparation upon the offender. The possible shaming effect that the public denouncement of the hearings and of the final report could have had would only have involved the few offenders that applied for amnesty or otherwise appeared before the TRC. Also, and dangerously so, the shaming effect could have extended to collective sentiments of shaming. The lack of specifying guilt and any punishing aim can undermine the transition to peaceful coexistence.¹⁴³⁵ A lack of accountability and a failure to repair the victims may have given leeway to further crime.¹⁴³⁶

¹⁴³² Neier, 1990. On Argentina, see Cuya, 1999, at www.derechos.org/koaga/iii/1/cuya.html; Argentina's National Commission on the Disappeared report *Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas*, 20 Sep.1984, at www.nuncamas.org/investig/articulo/nuncamas/nmas0001.htm

¹⁴³³ After the publication of the TC report, the government tried to prosecute members of the military responsible for some 9,000 disappearances of civilians. Rosenberg, 1995, pp.134.

¹⁴³⁴ Méndez, 1997; Id., Cuya, 1999; Chile's National Commission for Truth and Reconciliation *Report of the Chilean National Commission on Truth and Reconciliation* (the Rettig Report) Feb.1999.

¹⁴³⁵ When some believe that heinous killers do not deserve to go free, then the amnesty-forgiveness may deepen polarization, Crocker, 2000. The South African criminal justice system was given little or no attention until post-1996, which may have furthered an urban (miss)understanding of justice, fed crime and failed the truth discovery process. Violence and crime is constant. Whatever the exact link is between disappointed and generally bitter victims of a previous regime's accountability process (or lack of it) and growing crime under the new regime, without machinery that encourages accountability as a result of truth investigations and victim support, the positive effect of reconciliation efforts without criminal justice involvement is doubtful. See Hamber, 1997, discussing the feasible reaction that the granting of amnesty in return for truth feeds mistrust in the criminal justice system. One of the problems has been the mistrust in the police, the investigations and prosecutions. Pre-1994 intimidation and harassment of witnesses (and

6.3.3. DETERRENCE IN THE TRUTH DISCOVERY PROCESS

Building on the previous section, restorative justice generally views truth discovery as deterring, without additional deterring mechanisms.¹⁴³⁷ The fundamental aim of truth is thus again instrumental to the aim of deterrence. As the previous part highlighted, public denouncement may be shaming, which may better assist the fundamental aim of deterrence than that of just-desert punishment. This is similar to how the prosecutorial process may deter through communication of sentence, rather than focusing on deterrence in the actual principles of just desert. If the truth discovery process can claim moral legitimacy, and thus public support, the public denouncement may be deterring.¹⁴³⁸

Generally, restorative justice supports a social policy of deterrence that includes rehabilitation, mediation and certain crime-related penalties, such as imprisonment for the small number of serious criminals that threaten security. In combination with public denouncement and possible shame, is restorative justice argued to behold a holistic theory and approach to justice. Through its truth discovery process it can achieve both specific and general deterrence.¹⁴³⁹ Where

hence victims) alerted the SA Law Commission to begin work on a Witness Protection Program based on the Goldstone Commission of Inquiry on the Prevention of Public Violence and Intimidation Act of 1993, a vital contribution to stemming the high crime rate. However, lack of funds has limited the service. The affirmative action plan of the Department of Correctional Services of 1995 with the Correctional Services Act 111 of 1998 takes into consideration, besides many other national crime prevention strategies, community involvement. See Correctional Services Amendment Act B8, 2001, in Government Gazette No 22020, 25 Jan.2001. For most South Africans, and especially the blacks, the judicial system has been alien to their history, culture, language, with different legal systems co-existing, namely a tension between highly formal legality and community-based, popular justice operating fundamentally within the realm of dispute resolution. Since the 1990s, popular justice in the form of street, community and squatter committees and the people's court developed because they were accessible and inexpensive. The South African transitional period has tried to change this, with a great transformation of the judiciary, recognising the locally based victim-offender mediation schemes. See Muntingh & Shapiro, in Camerer, 1995. It must be pointed out that the victim-offender mediation programs focus on crimes of a non-violent nature.

¹⁴³⁶ In interviews with South Africans from across the spectrum, most did not support amnesty after accountability had been found; "blame undermines forgiveness, and few who do not forgive are willing to support amnesty...South Africans want justice, not reconciliation, and justice within the fractured political landscape of the country is an extremely volatile concept." Criminal justice is popular off the public stand, where victims argue that individual justice is not being reached through the amnesty process, but such views expressed are not easily found in the final TRC report, maybe because the aim was primarily to reconcile, where victims' testimonies were to a large extent excluded. Research conducted in 1997, see Gibson & Gouws, 1999. A series of post-TRC prosecutions may soon take place, depending on the outcome of the special amnesty committee, the Scorpion TRC prosecution unit, headed by McAdam, Weekend Argus, 11 Oct. 2003.

¹⁴³⁷ "...aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission..." Intro. to SA TRC Act, 1995, p.1.

¹⁴³⁸ See behind, ch.5.

¹⁴³⁹ Biggar, 2001; Cragg, 1992. While the SA TRC does not argue to have either completely succeeded or failed, its supporters purport its suitability over prosecution. However, see the ESRC Violence Research Project, arguing that for community-based justice to be restorative, it must undergo radical changes, Know, 2000, at www.busmgt.ulst.ac.uk/research/ESRC/findings.pdf; According to Braithwaite, a holistic and plural understanding of crime and the offender is needed in order to find a range of deterring possibilities. This notion is based on the

the process is inclusive in its truth discovery approach, one of the objectives of restorative justice, deterrence, or prevention, is given roots, through placing the process in the hands of the actors. The knowledge of what led to the criminal behaviour belongs to the actors, and through their involvement in the justice process can efficient deterring mechanisms be recommended. Inclusive actor participation may automatically trigger deterrence, general with regard to the community's reaction to the process, and specific with regard to the offender's possible reaction.

Villa-Vicencio, the former SA TRC Research Unit Director, argues that restorative justice bases its deterrence aims on the newly restored relationship between the actors involved.¹⁴⁴⁰ The fundamental aim of deterrence and deterrence mechanisms, such as education, thus appear dependent on the means of the fundamental aim of reconciliation.¹⁴⁴¹ The SA TRC's objective was to reach reconciliation through the fundamental aim of truth, whereby the aim of deterrence also seems dependent on successful truth discovery. The informing, acknowledged and repairing efforts of the actual truth discovery process, *i.e.* public hearings, public and published truth report and support policies are means of general deterrence. Furthermore, guarantees against non-repetition show the affirmative action taken by South Africa, for example by ratifying international treaties and conventions, with effect in domestic law.¹⁴⁴²

Chile applied a holistic restorative approach in order to deter, through the fundamental aims of truth and reconciliation. Truth was recognised for its deterrent value in itself, and as a means to achieving other deterrence measures. Establishing truth and reconstructing deterrents, such as the judicial system and the rule of law, were seen as basic pillars, on which to reconcile.¹⁴⁴³ The Chilean TC report demanded changes in all departments, in order to generally deter human rights violations. Deterrence mechanisms included changing national laws according to international human rights law; ratification of international treaties; the establishment of defence mechanisms in the legal system and the participation in non-governmental human rights organisations.¹⁴⁴⁴ The TC

understanding that most crime problems have multiple causes and can only be prevented in multiple ways, Braithwaite, at <http://www.restorativeprctices.org/>).

¹⁴⁴⁰ Villa-Vicencio, 2000.

¹⁴⁴¹ Reconciliation may be achievable through the transitional move towards democracy and the rule of law that strive to end hostilities and institute peace.

¹⁴⁴² To ensure effective respect for human rights teaching of human rights is important and consists of the formation of respect and tolerance, through education.

¹⁴⁴³ See generally Cuya, 1999, on TCs in Latin America and Chile's National Commission for Truth and Reconciliation *Report of the Chilean National Commission on Truth and Reconciliation* (the Rettig Report) Feb.1999.

¹⁴⁴⁴ *Id.* The legal reformation was held to include reformation of the military jurisdiction to ensure respect for the constitutional guarantee to receive trial by an independent court, revision of the procedural rules of the Code of Military justice to ensure respect for the constitutional guarantee of due process, complying with the orders give by the courts, habeas corpus and protection remedies to make them, truly effective mechanisms for the protection of human rights, establishing the importance of consolidating an interpretation of the law that is respectful of human rights, reforming criminal procedures to ensure the constitutional guarantee of due process and the respect for human rights and the right to defence.

further suggested that an Ombudsman be set up with the specific purpose of protecting individuals from the abuse of power; increasing the punishment for the crime of torture; making forced disappearances a specific crime and promulgating laws that impede amnesty.¹⁴⁴⁵ The Guatemalan Commission of Historic Clarification recommended administrative measures for public officials responsible for human rights violations to be recognised as preventative rather than punitive.¹⁴⁴⁶ It was also recommended that the Guatemalan curricula, at all educational levels, include the causes, development and consequences of the conflict. And the state was asked to urgently ratify most human rights and humanitarian law treaties.

6.3.3.A. DETERRING SHAME

Restorative justice is known to use the principle of shaming, not only punitive in effect, but also deterring. Braithwaite maintains that the key to deterrence is shaming the offenders, provided it is followed by efforts to reintegrate such shamed individuals back into the community.¹⁴⁴⁷

Specific deterrence appears dependent on the fundamental aim of truth and the success of the truth discovery process, at least to the extent where the process focuses on the offender. Where only a macro-approach to truth discovery is taken, there can be no definite aim of specific deterrence. However, in the South African micro-approach to the offender asking for amnesty, specific deterrence was not equipped with any devices, but rather appears dependent on successful shaming and offender remorse. As there was no policy of VOM programs, the TRC did not seem to aim for specific deterrence. While shame may affect an entire collective, *e.g.* the South African apartheid beneficiaries, this is yet again dependent on the identity of the collective and the need to belong. Without a stronger macro-approach, followed by public denouncement of the past regime, it is difficult to find shaming ingredients in the SA TRC process.

International core crimes are often state sponsored crimes of political and ethnic ideologies, where offenders may be indoctrinated militant defenders of some obsession. Without punitive sanctions, specific deterrence may only be successful where the individual offender experiences remorse and possibly shame. While the general community may be generally deterred with the assistance of a broad account of the truth and public truth acknowledgment, it may not deter a collective of offenders. Critics of using shaming as a deterrent argue that the presumed community

¹⁴⁴⁵ Ensalaco, 1994, pp.656.

¹⁴⁴⁶ Recommendations, Commission of Historic Clarification Report, Memory of Silence, 1999, CEH online report, at <http://shr.aaas.org/guatemala/ceh/>. The President was urged to establish a commission to examine the conduct of army and state security forces.

¹⁴⁴⁷ Braithwaite, 1989; Sullivan, Tiff & Cordella, 1998; and see behind.

the offender will be reintegrated into hardly exists today, but actually refers to traditional indigenous societies.¹⁴⁴⁸ What may be required is small, family- or group-based communities where shaming is well noticed and effective, and not independent singular households.¹⁴⁴⁹

Concluding the fulfilment of the fundamental aim of deterrence in the truth discovery process, restorative justice generally supports the active participation of the actors in the process, whereby, in combination with the objective to discover and acknowledge truth and facilitate reconciliation, it will assist healing, while also working towards specific and general deterrence.¹⁴⁵⁰ The objective is to get the offender to understand the harm done and by denouncing and shaming the offender, specific deterrence may be achieved. By further actor and community participation, and perhaps identified offender confession and compassion, the community may be willing to reintegrate the offender. Crucial to this, according to Zehr and Braithwaite amongst others, is that the shaming process is done respectfully, with professional facilitating of the shaming process into understanding that the shameful part is the criminal act and not the person; this is the critical factor of a deterring process.¹⁴⁵¹ It is believed that through this rather psychological process, the offender can make an honest apology, take responsibility and change for the better. Reintegration and acceptance back into the community will be possible once honest changes are visible in the offender. "Shaming and reintegration do not occur simultaneously but sequentially."¹⁴⁵²

6.3.4. REPARATION IN THE TRUTH DISCOVERY PROCESS

The time has come to look at how the truth discovery process fulfils the fundamental aim of reparation. Yet again, the truth discovery process may be repairing in itself; where the truth discovery involves victim narratives and truth acknowledgment acknowledges the suffering and the dignity of the victims. This takes place through the statement taking and the public hearings that offer a rare place for the victims to tell their stories. The TC may also aim at reparation directly, as a fundamental aim. The process then views the fundamental aim of truth instrumentally, with the assistance of its inclusive truth process, in order to highlight what reparation is needed where and by whom, whereby the truth acknowledgment of the final report includes recommendations of the

¹⁴⁴⁸ See e.g. Blagg, 1997, pp.481; Young & Goold, 1999; Braithwaite, 1993; and Whitman, 1998.

¹⁴⁴⁹ Referred to as isolationists, in Kgosimore, 2002, p.6; Johnstone, 1999; Karp, 1998.

¹⁴⁵⁰ See generally Braithwaite, 1989. The offender is invited to participate in a 'restorative conference', a meeting where the offender, his family, the victim, the victim's family, other supporters and a professional restorative justice facilitator such as a police officer, are all present. Family group conferencing is used in community-oriented models in e.g. New Zealand, Australia, Canada, US and UK, in Aevertsen & Willemsens, 2001.

¹⁴⁵¹ Braithwaite, 1989; Zehr, 1990.

¹⁴⁵² Not *only* through material reparation, but also and maybe more importantly through symbolic reparation, Braithwaite, 1989, p.101.

topic. The aim of truth and the truth discovery process are thus both instruments to assist the fundamental aim of reparation and they can also serve as symbolic reparation.

Restorative justice supporters argue that the possibly punitive and deterrent effects of a shaming process may also be instrumental to the aim of reparation, in the sense of symbolic and psychological reimbursement that shaming can create.¹⁴⁵³ Such reparation cannot be guaranteed, because “symbolic reparation will occur to the extent that shame and related emotions are evoked and acknowledged by the participants. On the other hand, symbolic reparation will not occur to the extent that shame and related emotions are denied...if the offender can come to the point of “sharing and communicating” shame, instead of hiding or denying it, the damage to the bond between the offender and other participants may be repaired...Disguised and denied shame inhibits the participants from repairing the bonds between them; it therefore blocks symbolic reparation.”¹⁴⁵⁴ Linking restorative conferencing and reintegrative shaming processes to mediation and public hearings of TCs, it is realistic to believe that public hearings with the offender, the victim and the community invite active participation and answer many questions, which might lessen the grieving and support the healing. However, it is not directly focused on fulfilling the fundamental aim of reparation and it lacks direct victim focus. Instead, the aim of reparation can only be fulfilled if it is a primary aim in its own right; similar to how the ICC has incorporated the right to reparation. Assimilated justice must therefore recognise and contain specific means that focus on repairing the victim.

Confession and apology appear in truth discovery processes. Both acts can also appear in the prosecutorial process. Confession may be ordered, e.g. as part of South Africa’s full disclosure requirement and apologies can follow as a sign of remorse.¹⁴⁵⁵ Both can be reparative and thus represent more than just acknowledgment of accountability. Confessions give the community a reason to recognise the wrongs of the past and the suffering of the victims. “In its fullest form, the apology has several elements: expression of embarrassment and chagrin; clarification that one knows what conduct has been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.”¹⁴⁵⁶ While the two acts may include a punitive effect on the offender, apology cannot be ordered as its value lies with the honesty of the

¹⁴⁵³ Zehr, 1990; Retzinger, S. & Scheff, T. *Strategy for Community Conferences: Emotions and Social Bonds*, in Galaway & Hudson (Eds.) 1996.

¹⁴⁵⁴ Id., Retzinger & Scheff, p.318.

¹⁴⁵⁵ See behind, just-desert punishment, this chapter.

¹⁴⁵⁶ Goffman, E. *Relations in Public*, 1971, p.113, cited in Cohen, S. 2001, p.237.

apology. Its aim must be reparative and victim-focused, where it can be psychologically important to the victim.

In states that have suffered from international core crimes and, perhaps, lengthy transitions, it is difficult to achieve material reparation, mainly because of a general lack of finances of the offender and the state. It is important to remember that no matter the amount of acknowledgment, apology, recognition and compensation, the dead will not return nor will all levels of suffering disappear.¹⁴⁵⁷ But, because all forms of reparation actually serve the same end, that of healing, it is nonetheless a value that must be acknowledged, especially as individual, material reparation is costly and thus difficult to enforce. Both individual and collective symbolic and material reparations acknowledge the individual's suffering and assist the victim and the community to come to terms with the past.

6.3.4.A. RECOMMENDED REPARATION

Most TCs are mandated to make recommendations with reference to the victims and to the aim of reparation. Chile offered identified victims an extensive reparation scheme, with the assistance of a UN-established Trust Fund, a voluntary fund to receive contributions and distribute humanitarian, legal and financial aid to persons whose human rights had been violated.¹⁴⁵⁸ The Chilean TC set the trend away from offender-focused amnesty laws, towards a victim-oriented focus.¹⁴⁵⁹ Victim statements and testimonies were taken without cross-examinations, so as to make the victims feel comfortable.¹⁴⁶⁰ Thousands of cases were investigated and published as part of the

¹⁴⁵⁷ See Wise, 1993, discussing the German reparation of holocaust victims, where the Federal Republic of Germany has paid out more than 50 billion, to Israel and to survivors, with another \$20 billion more by the year 2030, when according to its current calculations the last survivor will have died.

¹⁴⁵⁸ Established by GA Res.A/RES/36/151, 16 Dec.1981. In 1978, Chile issued a general amnesty for crimes committed between 1973 and 1978, but when President Aylwin won the 1989 elections, the Rettig TC was set up. Pinochet remained Commander-in-Chief of the Army through 1997 and most of the judiciary had been selected by Pinochet, and the Senate was dominated by military supporters. The TC mandate was to provide an overview of the repressive system; to account for every person who died or disappeared between Sept. 1973 and Mar. 1990; propose measures of reparations; and propose deterrents. The commission was given 9 months to investigate and report without subpoena or judicial powers, and the report did not name those responsible for the crimes described. The Chilean TC had nine commissioners, represented politically by Pinochet supporters and opponents. The TC had approx. 60 staff members, plus social workers addressing the needs of victims and relatives. The information found was handed over to the courts. The Commission received over 4000 testimonies from victims, relatives and a few members of the military who voluntarily testified. NGOs and churches also contributed to the truth investigated. See generally www.truthCommissions.org; Report of the Chilean National Commission on Truth and Reconciliation, 1991, at http://www.chile-esmeralda.com/documents/report_of_the_chilean_national_91.htm

¹⁴⁵⁹ Chile recognised international law that prohibits statutes of limitations concerning war crimes and other human rights crimes Law No.19.123, establishing a "National Corporation for Reparation and Reconciliation" Feb.8, 1992.

¹⁴⁶⁰ There was thus an initial reparative victim focus. Report of the Chilean National Commission on Truth and Reconciliation, 1991, at http://www.chile-esmeralda.com/documents/report_of_the_chilean_national_91.htm

truth report, followed by a reparation process.¹⁴⁶¹ Material and symbolic reparations were recognised as a necessity in the transition towards democracy, while, at the same time, respectfully acknowledging the difficulty in correlating reparation with real suffering. Chile saw reparations as a symbol of expression, recognition of state and collective community responsibility,¹⁴⁶² and the final report included detailed reparation recommendations. Collective symbolic reparation was recommended, e.g. in the form of commemoration, transformation of the judiciary, ratification of international treaties and public reparation of the dignity of the victims included national redemption of the good name of the victims.¹⁴⁶³ Individual material reparation schemes were assisted by the National Corporation for Reparation and Reconciliation set up as a result of TC recommendations, with a two-year mandate to deal with 600 reparation and reconciliation cases that the TC had not been able to resolve.¹⁴⁶⁴ Reparation claims could be brought by those whose names had been included in the TC report, with the result that those who appeared before the TC were recognised as victims. The individual, material reparations included pensions; payments of fixed sums; health; and educational benefits.¹⁴⁶⁵ The Guatemalan TC made a number of detailed

¹⁴⁶¹ Unfortunately the Chilean TC only addressed human rights violations resulting in death and thus reported 2115 individuals killed by government forces, 164 victims of left-wing violence, names each victim, the approx. number of 200,000 victims of gross human rights violations were not included. These victims were neither given the opportunity to provide testimony.

¹⁴⁶² President Alywin apologized to the victims and their families on behalf of the state and also sent a letter to each family apologizing, with a copy of the Commission's report.

¹⁴⁶³ *Supra*, Report of the Chilean Truth and Reconciliation Commission, 1991, at <http://www.chile-esmeralda.com/victims.htm>. Symbolic projects for remembrance of what occurred were installed; the erection of a commemorative monument with the names of all victims; a public park in memory of the victims; a National Human Rights Day etc. Legal and administrative recommendations were held to include a resolution of the victim's legal situation, civil status, inheritance, custody of children, and a procedure for declaring the death of detained-disappeared persons. There were also recommendations related to social welfare and security urging the government to take initiatives for a better quality of life, releasing social security without legal and administrative obstacles. Recommendations relating to health recognised a duty of the health authorities to implement programs using a comprehensive diagnosis of each person. The report went on with detailed educational recommendations asking for new creative efforts to quickly spread education. It was likewise discussed in some detail how to continue searching for unfound victims, the government was asked not to abandon the task of discovering the whereabouts of the victims and it was recommended that any concealment of information should be criminalized.

¹⁴⁶⁴ The corporation was established in 1992 as a decentralised organ under the Ministry of the Interior. On 21 Jun.2001 the Chilean Congress approved an agreement reached between human rights lawyers and civil society concerning further truth investigations and compensation measures. However, out of the requests submitted, not many have been dealt with.

¹⁴⁶⁵ Chile has been committed to a reparation scheme with monthly pension reparation fixed to 140000 Chilean pesos for the relatives of victims, distributed by giving 40% to surviving spouse, 30% to decedent's mother Secondary victims, whose income is below the poverty line, also benefit from free health care, and for all victims' families there exists medical, social and psychological services free of charge. Children of victims are also entitled to educational benefits up to the age of 35, and there is no mandatory military service for children of victims. Reparation schemes in Argentina exist in the form of pension funds, equal to 75% of the minimum lifetime earnings to the next-of-kin of the disappeared. Compensation through instalments is payable to those placed at the disposal of the National Executive, or who, as civilians, suffered detention by virtue of acts of military tribunals. For a victim to receive such compensation, the arrest order and order of liberty have to be presented, documents that were typically refused by the military government and of which the new government has not disclosed information. Many victims in Argentina have refused compensation, as they feel paid off and because they do not view reparation a substitute for lacking truth investigations, truth acknowledgement and prosecutions. See *Nunca Más*, the Report of the Argentine National Commission on the

reparation recommendations.¹⁴⁶⁶ Symbolic reparation included measures preserving the memory and the dignity of the victims, asking the President to publicly recognise the truth acknowledged in the final report, including the apportioning of responsibility.¹⁴⁶⁷ Further recommendations involved healing programs, as well as legal aid and an important system for continuing investigations into the disappeared. The need for collective reparations was recognised, especially with regard to the collectively victimised Mayan people.¹⁴⁶⁸ A national material reparation program was also recommended, supported by a legislative bill. Material restoration was highlighted in the case of land; as well as compensation for the most serious injuries and losses as a result of gross human rights violations.¹⁴⁶⁹

Following the South American examples of extensive recommendations coming out of a truth discovery process, it is important to recognise that no TC has been mandated to make or order reparations. TCs can thus not control the implementation of its recommendations, except for the amount of symbolic reparations that the truth discovery process can automatically supply. The theoretical recognition of and emphasis on different individual and collective material and symbolic forms of reparation are nevertheless of value, both directly and indirectly. Such reference to and

Disappeared (CONADEP), 1984. See Law 23.466 & Act No.24.043, 23 Dec.1991 on victim compensation. Existing compensation consists of, for each day of detention, one thirtieth of the highest category of civil service salary, for death during detention, the above plus an extra five years of the same sum, for serious injuries suffered during detention, same as caused death minus 30%. For those able and willing, compensation claims had to be filed within 180 days of the publication of the law, and the claimant must waive the right to other compensation. Because of fear of reprisal and maybe inaccessible hearings, as well as disappeared or destroyed military records, evidence about the disappeared was difficult to collect. So while the Argentine TC documented almost 9000 disappeared people, and provided in graphic detail model cases, secondary victims did not find out much about the whereabouts of the disappeared. The TC held press briefings to raise general knowledge about the previous regime and in July 1984 presented a summary of testimonies on national TV. In Sep.1984 was the final report issued to the President; 50,000 pages of documentation that became a bestseller. *Nunca Mas* was sold with an annex including the names of 8961 of disappeared cases. The report also included a list of all military personnel believed to be involved in the disappearances. Since the 2001 annulment of the amnesty laws, government officials have expressed some reluctance with the judicial efforts and do not ensure military cooperation with the courts or with non-domestic courts for that matter. Substantial financial contribution would come from the international community to help the prevailing economic conditions of El Salvador. The international El Salvadoran TC recommended that the UN promote and coordinate the initiative, with at least 1% of all international assistance going to a reparation fund. Symbolic reparation was also recommended, including national monuments with the names of the victims, official recognition of the victims and a national memorial day to serve as a symbol of reconciliation, see www.usip.org/library/tc/doc/charters/tc_elsalvador.html. See CSVR, 1994, at <http://www.csvr.org.za/papers/papedel.htm>.

¹⁴⁶⁶ The CEH considered truth, justice, reparation and forgiveness to be the bases of the process of peace and national reconciliation. It was recognised to be the responsibility of the state to promote a policy of reparation. See Recommendations, Guatemalan Commission of Historic Clarification, *Memory of Silence*, 1999. at <http://shr.aaas.org/guatemala/ceh/report/english/>

¹⁴⁶⁷ The national reparation program was recommended to be state funded through e.g. decreased military spending and international funding from states that lent aid to the actors during the violations. The Congress was also asked to issue a declaration reaffirming the dignity and honour of the victims, and the ex-commander of the National Revolutionary Unity was demanded to ask forgiveness in public while assuming responsibility. Recommendations, Guatemalan Commission of Historic Clarification, *Memory of Silence*, 1999, Id.

¹⁴⁶⁸ The Mayan peoples were the most victimized group.

¹⁴⁶⁹ Reparatory recommendations are found at <http://shr.aaas.org/guatemala/ceh/report/english/recs3.html>. Guatemala has a 35-point program to end impunity and human rights abuses as part of its 2003 National Reparation Program. For more details see http://www.idrc.ca/en/ev-83241-201-1-DO_TOPIC.html

recommendation of reparations can have a direct effect on the victim's healing; indirectly, such reference may, in the long-term, affect government policies.¹⁴⁷⁰

The SA TRC Reparations and Rehabilitation Committee (RRC), the least published of the three committees, was established in the hope of acknowledging, restoring the dignity and repairing the victims who had suffered gross human rights abuses. To its assistance were the actual truth discovery process and a mandate to recommend collective and individual symbolic and material reparation.¹⁴⁷¹ The victim's right to reparation is important to recognise for the moral legitimacy it can add to the justice process, compensating for the offender-focused amnesty process, where victims automatically lost the right to claim damages; and as a symbol of the present regime's acceptance of responsibility, brought about by the previous regime. The RRC considered matters referred to it by the HRVS and the Amnesty Committee, but it did not hold its own hearings. There was thus no direct victim-focused element of the truth discovery process. Reparations were only applicable to those who made statements to the TRC, or were referred to by someone else, which thus promoted individuals to come forward to participate in the process.¹⁴⁷² The RRC proposed a reparation and rehabilitation policy that took into account most principles of reparation, as seen in previous chapter three of this thesis. It was recommended that the reparation policy encompass urgent interim reparation (UIR);¹⁴⁷³ individual reparation grants (IRG);¹⁴⁷⁴ symbolic reparation with legal and administrative measures; community rehabilitation programs, and institutional reform.¹⁴⁷⁵

¹⁴⁷⁰ This is so, especially where the recommendations are published and knowledge of reparation is spread throughout the community, whereby the actors may begin to demand such policies.

¹⁴⁷¹ "The policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims." S.4(f); S.1.(xiv) reparation includes any form of compensation, ex gratia payment, restitution, rehabilitation or recognition; S.15, and see generally ch.5, Promotion of National Unity and Reconciliation Act, 1995.

¹⁴⁷² Any person referred to the Committee in terms of #25(a)(I) may apply to the Committee for reparation; #26(1) of the 1995 Act.

¹⁴⁷³ S.26(1), 1995 Act. UIR was meant for those victims referred by the HRVC or the Amnesty Committee, in urgent need of reparation and includes referral to appropriate services depending on the need of the victim and limited financial assistance to pay for the services. The measures should begin to restore a sense of dignity to victims, related to the loss suffered, to the socio-economic and cultural context of the victim, and demand idiographic details of each victim. No victim will receive more than R23.032 per year according to the recommendations. Those found to be victims would first be given an urgent payment of approx. R2000 up to R6000 in exceptional circumstances. After this, the IRG would take over, see TRC Report Vol.6, S.2, Ch.1., at http://www.info.gov.za/otherdocs/2003/trc/2_1.pdf

¹⁴⁷⁴ Id. The IRG was recommended as a special individual financial grant scheme paid out over a period of six years to the direct victim or to the dependants/relatives of the deceased victim, to provide services, information and advice needed. It was proposed that the IRG would be calculated based on the ease of access to services and the victim's daily living costs, with a suggested amount between R17000-23000 each year. But see ahead, final decision of the government.

¹⁴⁷⁵ Id. Further recommendations included symbolic reparation to help the individual, collective communities and the nation to remember the past. The individual could be repaired through death certificates, burials and headstones and clearance of legal and administrative matters. Community benefits could be reached through renaming streets, buildings, and cultural ceremonies and through national remembrance, memorials and monuments the entire nation could be symbolically repaired. Community rehabilitation, the largest of part of the recommendations, proposed community based and culturally sensitive services to promote community reparation and reconciliation through healing. Healing was to take place through many different services, such as housing and health care programs adapted to the

The RRC was, similar to other TCs, only mandated to make recommendations regarding the appropriate measures of reparation for victims, via the suitable institutions to help prevent further human rights violations, leaving the final decision on policy up to the President and the Parliament.¹⁴⁷⁶

6.3.4.B. REAL REPARATION

In the case of South Africa, financial compensation was not initially suggested as a means of reparation but, taking into account the victims' demands for compensation and the amnesty provisions barring civil claims,¹⁴⁷⁷ the TRC shifted towards recommending some financially-based reparations, without excluding the use of individual and collective symbolic reparations.¹⁴⁷⁸ Social, collective forms of reparation were seen as very important in the search for reconciliation in South Africa, but it must be recognised that if collective and symbolic means of reparation are used *in lieu* of individual reparation, the psychological healing of the victim may be unsuccessful.¹⁴⁷⁹ Social reconstruction should thus be separated from direct victim reparation.¹⁴⁸⁰

Two additional volumes of final recommendations were presented by the TRC to President Mbeki, on 21 March 2003. They included a request for an apology by the President to all victims of apartheid on behalf of the previous regime. This was seen as necessary due to the lack of collective systematic responsibility patterns in the truth discovery process and in the final report; and because reparations had not been made to the extent recommended.¹⁴⁸¹ In a final effort to safeguard the reconciliation movement, the TRC Chairman Desmond Tutu asked government and business to attend to the issue of reparation as soon as possible. "They have waited long, too long, for their reparations. As a nation we have a legal but, more important, a moral obligation to honour in paying

regional political and economical problems. More than mental health programs were educational and therapeutic programs dealing with disappointment through violence, a large youth problem in SA. The recommendations were handed over to the then President Mandela, 29 Oct. 1998.

¹⁴⁷⁶ S.27, TRC Act.

¹⁴⁷⁷ The *Azapo* case highlighted that because of granted amnesty, no civil claim would be possible for the victim, and that while the offender walks away with amnesty, the victims are left with nothing of direct value. *Azapo v. TRC* case, 1996.

¹⁴⁷⁸ "Thirty-eight per cent of the Commission's deponents [*those who gave statements*] requested financial assistance to improve the quality of their lives. In addition, 90 per cent of deponents asked for a range of services which can be purchased if money is made available – for example, education, medical care, housing and so on." TRC final report, Vol.5, Ch. 5, p.68.

¹⁴⁷⁹ Where the victim may feel forgotten, or ignored.

¹⁴⁸⁰ If used as a form of reparation it would help if it was labelled, where *e.g.* a community's new roads are labelled in memory of their suffering.

¹⁴⁸¹ So far urgent interim reparations had been paid to a total amount of R50 million, to approx. 18,000 individuals. The additional volumes further asked all ministers involved with victim reparation to annually report on the development and status of victims and the Education Department should allow those that left education during the struggle re-entry into education. Vol.6-7, final TRC Report, 21 March 2003, supplement, Weekend Argus, 22 March 2003.

reparations.”¹⁴⁸² The final recommendations stated that, while spending a substantial amount on military equipment, the SA government had maintained that it was under too much financial pressure to be able to meet the minimal commitment to the recommendations previously made; these claims were found unconvincing. One chapter was devoted to companies profiting from apartheid, holding such companies directly accountable to the victims, asking them to make contributions in addition to the government’s obligation to pay individual reparations.¹⁴⁸³ The TRC took a new step with these recommendations, asking the government to make companies contribute. “The unresolved TRC issue is accountability for reparations for apartheid human rights violations. Today, we call on the corporations to respect the rule of international human rights law by making a commitment to reparations.”¹⁴⁸⁴ Although any such TC effort to guarantee reparations can only be voiced and not directly implemented, those efforts must be recognised for trying to solve the practical problems facing the justice process, especially when done in the name of the victims. Indeed, reparation is a difficult aim that government may not want take responsibility for, which is why any symbolic means must be acknowledge for its repairing effects. It could perhaps have been more beneficial for the SA TRC to recommend policies obliging named offenders and amnesty recipients to make reparations.

Public lobbying for reparations begun in 2000 in South Africa, asking the government to act upon the reparation recommendations made by the TRC.¹⁴⁸⁵ The President’s Fund, established by the President in consultation with the Minister of Justice and the Minister of Finance, is the source of finances payable to victims by way of reparation. In the government’s response to the final TRC recommendations, in April 2003, the President asked all South Africans to make contribution to this

¹⁴⁸² Final TRC Report, 21 March 2003, supplement, Weekend Argus, 22 March 2003, p.6.

¹⁴⁸³ Because of the broad context of violations, certain sectors were targeted in the final report mainly dealing with socio-economic violations of apartheid, showing oppressed communities. A voluntary business trust, set up for reparations, had, in 2003, only received R800 million from the private sector, while a Swiss established fund has secured a commitment of 0.02% of the profits made during the 1980s apartheid regime by Swiss firms. The recommended trade contributions included a one-off wealth tax imposed on trade to compensate victims; other tax incentives encourage businesses to contribute further to the reparation budget; and the setting up of a trust fund to which all beneficiaries of apartheid contribute. Sunday Argus, 23 March 2003, p.6. The TRC even went as far as arguing that foreign trade profited from apartheid, recommending contributions from e.g. Swiss banks, the ANGLO-American Corporation, and indirectly supported lawsuits recently filed by victims against such foreign companies, final TRC report, March 2003.

¹⁴⁸⁴ Gabriel, N. Jubilee2000SA, help organisation for victims suing corporations, 21 Mar. 2003, at <http://www.aidc.org.za/j2000/index.html>

¹⁴⁸⁵ A first march in April 2000 to parliament presented a petition with more than 2500 names showing support for victim reparation. In a march to Parliament, one of the marchers was 70-years-old Ganca, who had testified before the TRC in 1997, declared a victim and promised reparations. So far he has only received R4500 in interim reparations, The Star, March, 2003. About a year later the government responded with a few lines in the annual budget speech, and in a final governmental reply with full parliamentary concurrence 15 April 2003.

fund,¹⁴⁸⁶ while denouncing the recommended wealth tax and civil suits brought against companies that benefited from apartheid. “While the government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC. We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts, which bear no responsibility for the well-being of our country.”¹⁴⁸⁷ While the government agreed with the TRC findings that companies had benefited from apartheid policies, it replied: “what do we do – do we shit on all of them? All whites benefited from apartheid – do we go around smacking them because they are beneficiaries?”¹⁴⁸⁸ This may have been a hyperbole solution, yet amnesty beneficiaries could at least have been considered to make reparations.

The final individual reparation recommendations of the TRC asked for a minimum amount of R17000 per year, over a period of six years, to which President Mbeki gave his word that the government would respond speedily to the issue of compensating the long waiting 22,000 victims, with a R30,000 once-off payment.¹⁴⁸⁹ “Combined with community reparations and assistance through opportunities and services...we hope these disbursements will help acknowledge the suffering these individuals experience, and offer some relief. We do so with some apprehension, for as the TRC has underlined, no one can attach monetary value to life and suffering.”¹⁴⁹⁰ The announced compensation represents about a quarter of the amount recommended and ignores the recommended IRG and the recommended company tax, thus giving rise to wide disappointment and further lobbying for reparations.¹⁴⁹¹ It appears more important than anything else that the TC makes realistic recommendations, as it will otherwise run the risk of failing its fulfilment of the aim of

¹⁴⁸⁶ “All South Africans, inspired by common patriotism, must contribute towards reparation.” SA President Mbeki, live broadcast e-TV, 15 Apr. 2003.

¹⁴⁸⁷ Cape Times, 16 Apr. 2003.

¹⁴⁸⁸ Minister of Justice and Constitutional development Mr Maduna in an interview with the Mail&Guardian 17-24 Apr. 2003, p.7. However the SA government does not have the power to stop the suits. Victim support groups Khulumani and Jubilee2000 that brought civil lawsuits in the US against foreign companies in 2002, say that they are “committed to securing reparations from the multi-nationals. They must pay.” Jubilee2000/SA press conference, Cape Town 16 Apr. 2003.

¹⁴⁸⁹ SA President Mbeki, live broadcast, 15 April 2003; Cape Times, 16 Apr. 2003; Mail&Guardian 17-24 April, 2003; and see TRC Report Vol.5 Ch.5.

¹⁴⁹⁰ SA President Mbeki, live broadcast, 15 April 2003; Cape Times, 16 Apr. 2003; Mail&Guardian 17-24 April, 2003.

¹⁴⁹¹ Former TRC researcher Villa-Vicencio held that the victims’ disappointment was legitimate, Cape Times, 16 Apr. 2003, p.6. A Khulumani lobbyist exclaimed that the only thing the government did do properly was to forget the victims, Shelley Gunn, Khulumani, in an interview held by e-TV, 15 Apr. 2003. Former TRC Commissioner Ntsebeza commented on the President’s communication, in the same interview, saying that it lacked an answer to why only R600,000 would be paid out, and not the TRC recommended amount. He also said that the truth must be exposed for what it is, and only then can reconciliation be discussed.

reparation and of recognising the victims. The final recommendations of the SA TRC did not appear unrealistic, taking into account the limited amount of victims that the reparation scheme was intended for. The amount of victims could have been a much greater amount, remembering that the real South African victims are those who suffered from the apartheid regime. Still, if some idealistic reparation recommendations are discussed and published, the victim-focused objective of restorative justice is bound to fail, and may cause more harm than good, as it can feed dissatisfaction.

The main criticism of the SA TRC concerns the lack of reparation and the delayed response to the recommendations. In South Africa today, the 19,000 victims that qualified for urgent interim reparations have been paid, and the one-off financial compensation of R30000 has been limited to those 22,000 victims that made statements and fitted the TRC description of a victim.¹⁴⁹² Indeed, financial reparations are arbitrary in the sense that nothing can compensate for the killing of an individual or the sufferance caused by *e.g.* the crime of apartheid. However when, at the same time, the victims have been allowed to hope for compensation and promises have been made, disappointment and disappointment threaten the peaceful transition and the fundamental aim of reconciliation.¹⁴⁹³ It is therefore of importance for assimilated justice to perhaps involve the aim of reparation in the legal justice dimension, with an inbuilt individual focus that can legally assess individual material reparation. The still very important and valuable symbolic reparation may, on the other hand, be better assessed in the restorative dimension, which is also representative of the local context, and can, therefore, hopefully assess realistic means of repairing the victims.

When individual compensation and other types of costly reparations are not made, it is even more important to remember and recognise the importance of other, symbolic reparations. “[T]he greatest act of reparation is liberation itself – the construction of a democratic South Africa. Our Constitution and its Bill of Rights, including socio-economic rights, is the supreme prize that should serve as a foundation for corrective, pre-emptive and proactive action so the past never returns.”¹⁴⁹⁴ Whereas the truth discovery process focused on micro-truth discovery, to fit the individually

¹⁴⁹² According to press-released figures, the amount available to reparations amounts to 22% of the TRC recommended amount, or 0.66% of the R100 billion made available to create a small amount of black mine owners, Giyose, M.P., Sunday Argus 27 Apr. 2003, p.25.

¹⁴⁹³ Going after the liability corpus of businesses benefiting from the apartheid regime is likewise somewhat arbitrary, (without denying the fact that today’s South Africa was built on the denial of basic human rights) when many individual and collective offenders, white apartheid era politicians, civil servants, black local councillors have not been subjected to individual or collective accountability. SA businesses have incurred social responsibility expenses through *e.g.* black economic empowerment policies and equity requirements. According to a recent press releases, the Reconstruction and Development program still has R923 million available, which the government decides over; the Revenue Service collected R1,5 billion more than budgeted for in 2002; and the government has committed to arms deals spending at least R30 billion.

¹⁴⁹⁴ Netshitenzhe, J. in Sunday Times, 20 Apr. 2003, p.19.

granted amnesty program, the TRC appeared more inclined to macro-reparations with political truth acknowledgment and symbolic reparations. Whereas a lot of attention was paid to the truth discovery process, with the aim of healing the nation, the healing, reconciling objective forgot how important the individual victim is to a successful start. The lack of attention to the individual victim (while directly granting amnesty to the individual offender) and the harsh limitation to reparation are, unfortunately, contrary to Tutu's healing, repairing and reconciling process. In fact, without a macro-approach to publicly acknowledging and denouncing the collective apartheid regime while repairing its collective victims, South Africa chose not to restore the dignity of the collective victims. Popular SA TRC references to healing, forgiveness and reconciliation therefore appear anecdotal.

TCs have had limited success with pressure put on national governments to provide appropriate victim compensation. While South Africa has struggled, the Chilean report, with its inclusive reparative commitment led to the Parliament enacting a law to implement the recommendations, yet with limitations due to granted amnesty.¹⁴⁹⁵ It appears that while the victim has not lost its position in restorative victim approaches, where the truth discovery process is able to include, hear and recognise a large amount of victims, the aim of reparation is often removed, ignored or unachievable.¹⁴⁹⁶ In relation to the UNHCHR adopted principles on the right to redress and reparation,¹⁴⁹⁷ the victim's right to access to justice; effective reparation; and access to relevant information concerning violations and reparations cannot be guaranteed by the truth discovery process. Instead, individual victim focus and means of reparation must be incorporated in the prosecutorial process. Assimilated justice can then allow the restorative dimension to focus on symbolic means of reparation. The SA TRC process is over and while the government does not intend to stop any civil law suits, according to latest press releases, it does not support class actions against corporations. It is thus difficult to perceive of any material reparation for the South African victims. The SA government assures the victims that if the National Directorate of Public Prosecutions comes to any legal arrangements with any of the offenders and cases coming out of the

¹⁴⁹⁵ See "Creating the National Corporation for Reparation and Reconciliation", Law No.19, 123, 31 Jan.1992, in Kritz, 1995, 3 *Transitional Justice*, pp.685; Orentlicher, D.F. *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, in *Human Rights: An agenda for the next century*, pp.425, in Henkin & Hargrove (Eds.) 1994.

¹⁴⁹⁶ SA Institute for Justice and Reconciliation's national survey indicates that less than 10% of the white population take individual responsibility for the reconciliation process, Jaffer, Z, IJR, Cape Times, 14 Apr.2003, p.11. A state supported victim compensation scheme in SA does not exist, however there is a great amount of lobbying supporting such a move since the TRC recommendations. The Reconstruction and Development Program is argued to need the funding formally set aside for material individual reparation, with the aim to provide social security benefits and may serve to cover the most immediate needs of crime victims. The RDP would probably serve as a first instance mechanism if a victim compensation scheme would be introduced. Unfortunately the picture is rather bleak regarding the treatment of crime victims in SA, see Naudé, 1997 for an overview on how to improve the South African situation.

¹⁴⁹⁷ *Supra*, Bassiouni Princip.11, adopted by UNHCHR Res E-CN_4-RES-2005-35.

TRC, the views of the victims will be canvassed.¹⁴⁹⁸ This is further evidence of the recognition of the victim as an actor in the process and in restorative justice; however it may not extend beyond this. The volatile fulfilment of the fundamental aim of reparation must not lessen the victim's possibility to participation in the truth discovery process. The volatile fulfilment of the aim of reparation is furthermore a reason for assimilated justice involvement of the other fundamental aims, in order to secure any benefits for the victims.

6.3.5. RECONCILIATION IN THE TRUTH DISCOVERY PROCESS

Last but not least is the exploration of the fundamental aim of reconciliation. Chapter four identified the aim of reconciliation as a process with different levels of function. From basic coexistence to peaceful coexistence with an understanding and sharing of the past with collective restoration and willingness to establish a full relationship all involve a move from reluctance to willingness to progress together.¹⁴⁹⁹ This begins with the individual, on a person level and can advance to collective community levels. This part looks at both individual and collective reconciliation fulfilment in the truth discovery process of South Africa.

As the title of the South African truth discovery process confirms, truth and reconciliation were the main objectives, where the fundamental aim of truth, in combination with the truth discovery process were, at least to some extent, assumed to contribute *ipso facto* to reconciliation.¹⁵⁰⁰ SA TRC was set up to heal evil, reconcile and repair with a “need for non-political politics”;¹⁵⁰¹ and to do so, a collective memory (common grounds) had to be identified as it was recognised that a “society cannot reconcile itself on a divided memory”.¹⁵⁰² According to the South African Education Minister, South Africans had nothing to re-turn to, nothing to re-store, there was nothing to re-conciliate. Rather, South Africans had to turn the amnesia, come together, conciliate and build afresh.¹⁵⁰³

The SA TRC and its truth discovery process recognised the different levels of reconciliation, as observed in the final report; where reconciliation is discussed as relationships, such as individuals between themselves, between victims, between survivors and perpetrators, within

¹⁴⁹⁸ Sunday Times, 20 Apr.2003, p.19.

¹⁴⁹⁹ See the process of North, discussed in ch.4.

¹⁵⁰⁰ See behind, truth, this chapter, discussing the different means of achieving the general objective of “national unity and reconciliation in the spirit of understanding which transcends the conflicts and divisions of the past.” TRC Act, S.3.

¹⁵⁰¹ Words of Vaclav Havel, quoted by SA Education Minister Asmal, K., live broadcast e-TV, 15 Apr.2003.

¹⁵⁰² Words of José Zalaquett, quoted by SA Education Minister Asmal, K., live broadcast e-TV, 15 Apr.2003; see Gibson, 2001.

¹⁵⁰³ SA Education Minister Asmal, K., live broadcast e-TV, 15 Apr.2003.

families, between neighbours, between communities, within institutions, between generations, between racial and ethnic groups.¹⁵⁰⁴ As discussed with reference to the fundamental aim of truth, the SA TRC's micro-approach focused on the relationship between individuals,¹⁵⁰⁵ between victim and offender; whilst a macro-approach to truth discovery focus on the relationship between social groups, between beneficiaries and victims. "The apartheid system was maintained through repressive means, depriving the majority of South Africans of the most basic human rights, including civil, political, social and economic rights. Its legacy is a society in which vast numbers of people suffer from pervasive poverty and lack of opportunities...The psychological effects are multiple and are amplified by the other stresses of living in a deprived society. Hence, lingering physical, psychological, economic and social effects are felt in all corners of South Africa. The implications of this extend beyond the individual – to the family, the community and the nation...South Africa's history of repression and exploitation severely affected the mental well-being of the majority of its citizens."¹⁵⁰⁶

6.3.5.A. INDIVIDUAL RECONCILIATION

Reconciliation at the individual level aims at personal healing and may include offender and victim rehabilitation and mediation programs for the victim to meet with the offender, and psychological support groups. The public hearings and official testimonies of truth discovery processes can assist in channelling the victim's pain and anger into more constructive action. Roht-Arriaza writes that traumatic experiences can be integrated with contextual political and social events, as well as personal history, by systematising and summarising testimonies.¹⁵⁰⁷ This appears to have been the intention behind the HRVC hearings, where the four notions of forensic, narrative, social and healing truths were treated.¹⁵⁰⁸

Each individual must find his own process of reconciliation, in order to deal with the truth of the past; decide whether further mediation with the offender may help; whether to try to forget or learn to live with the past and hope for forgiveness. Truth is a prerequisite, as the SA TRC, and other TCs have identified, at least with regard to truth acknowledgment; and the actual process of truth discovery can assist therapeutic counselling through its public hearings and reports, which may free bitter retributive emotions and enable the embracing of forgiveness. In the midst of the

¹⁵⁰⁴ TRC report, 1998, Vol.5, Ch.9, pp.350.

¹⁵⁰⁵ Where, by the way, it was assumed that truth to some extent necessitate amnesty.

¹⁵⁰⁶ TRC Report, Vol.5.Ch.4, at http://www.news24.com/Content_Display/TRC_Report/5chap4.htm

¹⁵⁰⁷ Roht-Arriaza, 1995, p.19.

¹⁵⁰⁸ See behind, Truth in the Truth Discovery Process.

South African truth discovery process, victims and their families granted forgiveness to their offenders.¹⁵⁰⁹ Whereas the SA TRC did not have an all-encompassing counselling program, the opportunity to save one's dignity and rehabilitate oneself, with the help of the established and publicly acknowledged truth should not be ignored. Nor should the opportunity of a process where the victim can be heard by the offender and the public and listen to the offender be ignored.

"Reconciliation has not yet been reached, but however long the road we will have to travel – we will reach it."¹⁵¹⁰ In South Africa, like in many other countries, the situation is one of coexistence between communities, between poverty and wealth. In order to improve the socio-economic situation, the SA TRC aimed at reconciliation between the people of South Africa rather than focusing on reconciling the past, in order to reach national unity and the well-being of all South African citizens. Yet, with collective reconciliation in mind, in 1993, the means to reconciliation was simply to grant amnesty in a spirit of reconciliation, thus focusing on the individuals.¹⁵¹¹ No mention of other means, such as human rights violation hearings or recommendations regarding reparations were made until the TRC Act was developed.¹⁵¹² The Act, written two years after the constitution, mandated the TRC, as already discussed, to, for example, establish as complete a picture as possible of the truth, facilitate the granting of amnesty and recognise victims and reparations.¹⁵¹³ Informal dispute resolution mechanisms were referred to in the Act,¹⁵¹⁴ applicable to facilitate reconciliation and reparation, but the Act did not emphasise which of the committees would implement such informal mechanisms, and no formal policy of mediation or other such mechanisms were ever implemented. Instead a *quasi*-judicial micro-approach was noticeable, reached by the legal professionals of the amnesty committee. Fair and just legal principles, guiding the individual accountability process, became immune to other sentiments of moral, social and political character. In this way an offender would be granted amnesty whether or not he expressed guilt and remorse, as long as the legal criteria were fulfilled.¹⁵¹⁵ Victim narratives were not central to the amnesty process either, whereby the amnesty hearings actually resembled the prosecutorial process.¹⁵¹⁶ The individual process of reconciliation does not appear to have mattered much to the micro-approach of the truth discovery process. The HRVC did not

¹⁵⁰⁹ See amnesty decisions, with victim statements, on the TRC website, www.truth.org.za/amntrans/ct3/BIEHL01.htm

¹⁵¹⁰ SA President Mbeki, live broadcast e-TV, 15 Apr. 2003.

¹⁵¹¹ Amnesty for politically motivated acts committed within a specific period. See Epilogue to the Interim Constitution of 1993.

¹⁵¹² See National Unity and Reconciliation Act, July 1995.

¹⁵¹³ *Id.*, S.3(1).

¹⁵¹⁴ *Id.*, S.11(g).

¹⁵¹⁵ Judges of the amnesty committee expressed wishes that the amnesty committee had better been implemented apart from the TRC, which may explain the invisible reconciliation discourse. For examples of amnesty decisions, see the TRC website, www.truth.org.za/amntrans.htm

¹⁵¹⁶ Generally acting as witnesses, in order to assist the truth investigation.

necessarily deal with the individual focus of the aim of reconciliation either, probably because of the great amount of victims, where extensive statement-taking and hearings were limited in time and in scope of the questions. These hearings were meant to be, and could have been, of a symbolic healing nature, where forgiveness was meant to come from truth acknowledgment, but unfortunately the HRVC lacked the capacity afterwards to follow up on the individual cases.¹⁵¹⁷ The healing and symbolic character of a restorative justice process can thus supply indirect symbolic reparation, assisted by reconciling means, on the individual and collective level.

6.3.5.B. COLLECTIVE RECONCILIATION

In order for a truth discovery process to reach collective social reconciliation, it would seem important that the TC recommendations are based on participatory truth discovery, taking into account the actors, as their support is necessary for the legitimacy of the process. If the recommendations are widely supported, it will be more difficult for the government to avoid acting upon them. It is important that both the final report and the state take into consideration the continuation of institutional reform towards democracy, as democracy and respect for the rule of law may be necessary, if not for the truth discovery process, then at least in order to sustain the newly reconciled relationship.

Social or collective reconciliation presuppose certain common grounds, such as a common understanding of the past, a collective memory, assisted by an all-embracing truth discovery process.¹⁵¹⁸ Truth would hence appear to be an essential foundation for successful reconciliation. “A collective memory is an accepted version of the truth about the country’s past.”¹⁵¹⁹

Where collective notions of responsibility and, perhaps, state sponsored crimes may be part of the past, it would appear vital for the truth discovery process to remain truthful and acknowledge such truth, in a macro-approach. If not, reconciliation would appear problematical, as individuals may feel that certain truths have been hidden, and it may not be the difficulty of the truth that hinders reconciliation, but the truthfulness of it. If a large amount of individuals share a memory of the past, it must be recognised, and made part of the collective social knowledge. With the assistance of thorough truth discovery, certain individual accountability was amnestied in the SA TRC. Yet, if the truth discovery process ignores collective responsibility, (e.g. from a lacking

¹⁵¹⁷ The SA TRC did not sponsor any direct mediation program. The religious narrative, mainly stemming from the Chair, Desmond Tutu and the RRC, was supportive of the forgiving nature, there to assist both the individual and the collective notion of reconciliation.

¹⁵¹⁸ See Gibson, 2001, p.13, for an interesting survey on how truth and reconciliation are linked.

¹⁵¹⁹ *Id.*, p.30.

macro-approach, which could otherwise provide the nation with broad patterns explaining the past) resentment and mistrust in the political machinery and leadership may exist, rather than belief in collective reconciliation.¹⁵²⁰ Truth and reconciliation programs, on the regional and national level, must then include further acknowledgment and education, encouraging acceptance of a collective past.¹⁵²¹

The SA TRC notion of social reconciliation was in 1993 envisaged as a historic bridge between the past of a deeply divided society.¹⁵²² According to the SA TRC final report, reconciliation requires a commitment, especially by those who benefited from the past, to transform unjust political and social inequalities.¹⁵²³ The 1996 constitution is a sign of such transformation,¹⁵²⁴ but whereas one was required to come forward and tell the truth in order to be granted amnesty, it was not required that one condemn the past or show any willingness to transform.

Reconciliation must not be projected at full speed, as complete acknowledgment of the truth takes preparation, such that that which is neither easily denied nor forgotten may slowly become the common memory of the nation. Remembrance is important, as a moral duty to the victims, and as a deterrent against future crimes. However, there is a fine line between remembering and moving on one the one hand, and remembering and being incapacitated by tragic memories on the other. The reconciliation mechanisms must embrace such memory publicly and collectively. If South Africa is able to collectively accept responsibility and remember the past, while showing a collective will to transform, one can conclude that the TRC was triumphant.¹⁵²⁵ There is a political responsibility to

¹⁵²⁰ In Gibson's survey on how truth has led to reconciliation in South Africa, it is identified how most South African, of every race, agree that apartheid was practiced as a crime against humanity in South Africa; but not everyone sees apartheid as evil; four out of ten whites agree that whites were the beneficiaries of the apartheid, and generally the truth discovery process has exposed abuses made by both sides. Gibson, 2001, pp.37.

¹⁵²¹ This can assist understanding and respect between different communities of the regions and country.

¹⁵²² Draft Interim 1993 Constitution, Act 200, in response to a need for understanding, reparation and ubuntu. In the Guatemalan reconciliation effort it was strongly recommended in the final report to incorporate and spread knowledge and respect for human rights to overturn the previous long-term culture of violence that resulted in mistrust and a lack of respect. Nationwide distribution and teaching of the truth commission report was recommended, and followed through, seen as one of the great successes of the Guatemalan truth commission. Recommendations, Guatemalan Commission of Historic Clarification, Memory of Silence, 1999, at <http://shr.aaas.org/guatemala/ceh/report/english/recs3.html>

¹⁵²³ TRC Report, Vol. 5.

¹⁵²⁴ "We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land... We therefore, through our freely elected representatives, adopt this constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law..." Preamble to the 1996 Constitution of SA, at www.polity.org.za/govdocs/constitution/saconst.html

¹⁵²⁵ In a long editorial, published in 1998, the SA TRC final report was described as the founding document of the new South Africa. Compared to the otherwise well-written constitution, the final report was held to define South Africans, collectively. 'With all its horrors, it is the earthly product of the blood and tears attendant on a difficult birth. It is a testament to the equality of man, if more in the disregard for the tenets of humanity than the observance of them. In a sense it bestows the legitimacy of experience on the Constitution, which might otherwise seem remote to our society.' In the Mail & Guardian Editorial, 6-12 Nov.1998. The South African constitution creates a democratic framework, but

tackle this problem, as already laid down in the SA TRC report.¹⁵²⁶ Beside this division, alarming reports suggesting that white South Africans do not accept responsibility for the apartheid regime may hinder the reconciliation process to climb to another level.¹⁵²⁷ Peaceful coexistence, with political and social stability may have been attained in today's South Africa, yet there is no link between the SA TRC and the criminal justice system.¹⁵²⁸ The creation of a new culture, respecting the rule of law and human rights may still be at its early stages, but with the acute lack of concrete mechanisms of conflict resolution and interaction with local communities, the widespread violence mirrors dissatisfaction. According to a South African academic: “[c]rime and violence – which became endemic in the apartheid era – are being perpetuated in the post-apartheid period, causing havoc among the poorest half of the population. Aids and other infectious diseases accentuate and perpetuate abject poverty...It is unbecoming of the ANC, as an erstwhile liberation organisation, to neglect the impoverished majority – who are also the real victims of colonialism, apartheid and the struggle – so profoundly.”¹⁵²⁹

It has been recognised that the established collective truth of South Africa involved micro-investigations of victim testimonies and the assigning of individual offender accountability; and yet the objective was to achieve collective reconciliation. The individual notion of reconciliation involve the individual's chance to participate and meet with the other actors involved, however, in the South African process, there was no complementary mediation program. The fundamental aim of reparation may, through rehabilitation programs and pension funds, also assist the individual's

the great disparity between rich and poor puts great strains on the social rather than racial reconciliation process of today. South Africa's socio-economic gulf is among the top ten in the world, with millions in shacks, even more without access to drinking water or sanitation, and with a growing number of AIDS victims.

¹⁵²⁶ The widening gap between the rich and poor should only be a disturbing legacy of the past, but it has not been reduced by the democratic process. See generally TRC Report Vol. 5.

¹⁵²⁷ Approximately 44% did not think the former system unjust, but that it was a bad implementation of a good idea. Approx. 60% did not think apartheid victims should be compensated. Theissen, 1998, pp.7; but see Gibson, 2001, pp.77.

¹⁵²⁸ Violence in SA is growing, and with crimes such as Mrs de Klerk's murder on 3 Dec.2001, there are signs of disappointment with the reconciliation process. Even if restorative justice within the TRC application had proved sufficient, neither system can survive parallel to one another without a link. South Africa has been in a state of transition since April 1994, and the rights and needs of the victims have to a large extent been neglected during this transition. Lately, many objections to the disadvantageous position of the crime victims have been raised. The new constitution and Bill of Rights give victims a voice, and there is ongoing lobbying for further development. There is an increasing concern about the rising crime rate and accusations have been made that neither the state nor other social agencies are addressing the plight of the victims. The rising crime rate was attributed to a breakdown in the criminal justice system. The legal profession can play an important role by focusing more on the rights and needs of crime victims. 3,200 attorneys in the Western, Eastern and Northern Cape agreed in March 2003 to render at least 24 hours a year of pro bono services to benefit the poor. This alone puts R115 million into the community, and if the Law Society of SA and its 14,000 attorneys nationwide would adopt the process, R500 million would be raised. A 'Know your Rights' campaign is also sponsored by the Cape Law Society, aimed at informing the poor about their legal rights and legal aid claims. SA Law Commission and the Cape Law Society, in Cape Times, 31 March 2003, p.4.

¹⁵²⁹ Terreblanche, S. in Sunday Times, 20 Apr. 2003, p.19.

reconciliation process, as may all the fundamental aims.¹⁵³⁰ Yet, the lack of individual reparation in South Africa has not meant that there has been no reconciliation. Still, transformation with a focus on the individual, including equal rights, protection from crime, available housing and affordable healthcare, free education etc. must be given its fair place before collective reconciliation beyond peaceful coexistence can really be attempted. Had the initial micro-approach of the SA TRC been the honest focus throughout the truth discovery process, then the objectives of the TRC could have been victim-centred. This would have put the victims at the centre of policy making. Instead, the individual offenders were in focus during certain stages of the process, with regard to receiving amnesty, after which the truth was swiftly instrumental to collective healing and reconciliation. An individual focus prioritising public prosecutions of those who did not request amnesty did not exist, nor were the final reparations or recommendations victim driven. “South African society still has to reconcile; it still has to know much of the truth about its past; it still has to attain contrition and forgiveness. This does not mean the commission has failed. No commission could have uncovered the truth in its entirety, unearthed each and every perpetrator or accessed all the victims. It was not the commission’s mandate to hand us a reconciled society.”¹⁵³¹

In sum, if the SA TRC cannot claim to have fulfilled the fundamental aim of reconciliation, it may still have laid the foundation for its process; “Suffice it to say, that, for all the failures of the Commission, it is largely as a result of its work that few, if any, South Africans can ever again ...say ‘We did not know’.”¹⁵³² The truth discovery process was participatory, and although a more prominent micro-approach to truth was taken, different racial and social groups coexist peacefully in South Africa, and, at least on the individual level are new relationships being formed.

6.5 CONCLUSION

Different theories of and approaches to restorative justice exist, and a combination of victim- and community-focused alternative dispute resolutions may assist the offender-focused prosecutorial process. Represented by different TC models and processes, much due to different local particularities, truth discovery processes are flexible by nature.¹⁵³³ This characteristic may be essential, as local is the key word to the truth discovery process and thus also to the local justice dimension that it represents, also within assimilated justice.¹⁵³⁴ If it would lose touch with the actual

¹⁵³⁰ See ch.4, discussing the potential overlapping of values.

¹⁵³¹ Netshitenzhe, 2003, p.19.

¹⁵³² Villa-Vicencio, 1999.

¹⁵³³ *I.e.* there is no fixed model of a truth discovery process.

¹⁵³⁴ In comparison to international criminal justice principles of the universal dimension.

actors affected by the past, it could never claim to include or fulfil the fundamental aims of truth or reconciliation. The restorative justice process could similarly never claim moral legitimacy, or success, as legitimacy and success depend on the recognition and involvement of the actors in the actual justice process.

We have discussed how the restorative justice system focuses on the social dimension of the particular local context, with the truth discovery process relying on those fundamental aims which are believed to safeguard the restoration of the community and receive public support. Restorative justice should thus be closely related to the actors, by including them and their narrative truths, with a reconciled collective community as an objective. Legitimacy comes in the shape of objectiveness, and public support. The truth discovery process must be factually true (according to forensic truth); and true to integrity (according to narrative truth), through *e.g.* allowing victims to testify and then publishing the victims' narratives without shaping narrative truth to fit the overall objective of the truth discovery.¹⁵³⁵ Without acknowledging factual and narrative truths (including the victims and their testimonies and suffering); there can be no talk of knowledge or insight, forgiveness, healing or reconciliation (healing and social truths). Without lessening the importance of the collective notions of healing and social truths, it appears that factual and narrative truths initiate such truths. Without forensics and corroborated testimonies, it is difficult to develop social aspects of the truth: and their achievement is very much a matter of degree, linked to other social and collective aspects of any reconciling objective. Certain aspects of truth can be established, with some certainty, which reconciliation, and reconciling notions of truth cannot be. It is therefore considered vital to not overlook the perhaps primary truth objectives, that is, forensic and narrative truth, although the overall aim of the truth discovery process may be reconciliation.

The fulfilment of the fundamental aim of truth can thus depend on the overall objective of the TC, as the truth discovery process can choose a micro- or macro-approach. The fundamental aims of just-desert punishment and deterrence are difficult to fulfil in the truth discovery process, where no punitive sanctions are implemented and the potential effect of shaming those responsible cannot be guaranteed. Whereas the collective notion of reconciliation may be built on a truth representative of the entire nation, victim narratives should be recognised and explained, through which a collective notion of responsibility and suffering may appear. Hearings should be public, and the

¹⁵³⁵ Zalaquett, 1989, p.34 lists three conditions for a legitimate setup: the truth must be known; the aims must represent the nation's will; and must do so in accordance with international law. Hayner, 1994, 1996, proposes as a necessity public participation, represented by the SA TRC.

report made widely available.¹⁵³⁶ These essentials lay the foundation for public support, moral legitimacy and social justice.

No truth commissions are alike, representing the different transitions they operate in. In accordance with Hayner's research on TCs,¹⁵³⁷ the focus tends to be on the past, even though the objective is more prospective than retrospective, with the truth discovery process investigating a specific period of time, in line with the institution's non-permanent character and usually with the hope of creating a peaceful and reconciled future. Running the risk of being influenced to different degrees by the past regime, the setting up of the TC must be carefully planned and staffed. In a state clouded by a non-representative government, strong ethnic, religious or political groupings, international involvement may lend credibility.¹⁵³⁸ The ownership of the truth discovery process is however as important as the quality of the process, which led to South Africa's choice of a purely South African TC. The criteria used by South Africa to appoint commissioners included, amongst other things, impartiality, moral integrity, absence of a high political profile and commitment to the aims of human rights, truth and reconciliation.¹⁵³⁹ Problematic limitations include, amongst other things, the question of which period to investigate, especially in countries troubled by violence over many decades. While a longer period may enable the commission to take into account important historic events and represent many of the different aspects of the society, resources and other constraints normally tend to limit the period of investigation. Exactly what to investigate is of course vital and as broad as possible a definition allows for flexibility.

The SA TRC had a detailed mandate with a broad objective to establish truth and reach reconciliation. Restorative justice flexibility, in style and process, was represented by individually granted amnesty mechanisms, a great budget, a large amount of staff, as well as a longer time span than usual, in the SA TRC. The country chose a *quasi*-judicial micro-truth discovery process that established truth, recognised individual accountability in return for individual amnesty, with the objective to reach collective reconciliation, followed by a limited amount of individual reparations. However, generally, before South Africa, TCs have not had the power to grant such amnesty, and perhaps a more macro-focused truth investigation of systematic patterns could have been the result, had offender-focused amnesties been excluded. This is important to highlight and remember, for

¹⁵³⁶ Hayner, *Commissioning the Truth*, 1996; Argentina published names of victims but not of offenders, whose names were instead passed on to the courts; Chile presented their report on national TV by the president asking for forgiveness on behalf of the previous regime.

¹⁵³⁷ Hayner, 1994; 1996; 2001, and in 2000, in Villa Vicencio & Verwoerd, (Eds.) pp.32.

¹⁵³⁸ Roth-Arriaza, 1995; Kritz, 1996, p.127; p.145: "There are obviously times when an international institutional response is necessary, either as a complement or as an alternative to a country's domestic reckoning with its own abuses and atrocities. El Salvador, Bosnia and Rwanda arguably each fit this category."

¹⁵³⁹ Sarkin, 1996, 1998, 2004. One issue often dependent on the support of the international community is financial assistance to allow for sufficient staff and resources.

future practices, where the granting of amnesty may fade away.¹⁵⁴⁰ In line with the overall objective to fight impunity a 'no amnesty approach' must be the preferred approach. It is supported and it has been argued that the potential legitimacy and success of a non-amnesty-granting TC, or a *quasi-judicial* individual amnesty granting process, may be less restricting on the justice process and, thus, run a lesser risk of exhausting public support and legitimacy. Yet, *quasi-judicial* elements may converge with legal legitimacy, making such an approach the second best option. If the truth process is allowed to go through the different stages of truth and evidence investigation and corroboration, similar to the prosecutorial process, truth and accountability have thus been established. If an amnesty would subsequently be granted, the legal relevance of the amnesty will be much similar to a pardon; closer to admittance by the criminal justice system and legal legitimacy; and it would pose a lesser threat of impunity.¹⁵⁴¹ It would similarly pose a lesser threat to loosing the support of the victims, and the support of the community, again, seemingly necessary for moral legitimacy. Thus, although not the preferred solution, *quasi-judicial* amnesty processes, imperfect as such, can at least offer offender focus and a realistic practical solution to *de facto* restricted justice.¹⁵⁴² To not close the door on the criminal justice system, but actually recognise the link, or even go as far as assimilate the systems, could enforce the legitimacy even further.

A TC must be established with official endorsement and, as the state must support and recognise the truth discovery process in order for it to operate legitimately, the government should thus implement the TC recommendations. This can however not be guaranteed by the truth discovery process, which jeopardises the fundamental aim of reparation and the success of the entire process.¹⁵⁴³ Some states issue blanket amnesties, such as El Salvador, after its internationalised TC had published its report. Argentina prosecuted a limited number of offenders and published its truth report, which named victim, offenders and specified the crimes, with many

¹⁵⁴⁰ The granting of general amnesty does however not necessarily exclude a restorative justice process. *E.g.* in Guatemala some offenders did participate behind locked doors, some in private meetings, without a carrot in the shape of amnesty; and see next chapter.

¹⁵⁴¹ However, although such an approach is possible in assimilated justice, and can be recognized legitimately restricted justice (see ch.7) equilibrium in assimilated justice is improved by a legal micro-approach in combination with a restorative macro-approach, thus not necessitating a *quasi-judicial* truth investigation.

¹⁵⁴² However, such an approach cannot by it self represent assimilated justice, as the collective and social notions can be lost in the narrow *quasi-legal* justice focus, which furthermore bar a certain amount of prosecutions. Such approaches can however be incorporated into assimilated justice, see ahead, ch.7.

¹⁵⁴³ The reality is mainly un-paid or un-kept promises for making reparations in South Africa. Chile and Argentina followed up on some of the recommendations, with some progress with regards to enforcing reparation programs and limited insurance and pension funds. Guatemala has continued to work for a reparation policy, through human rights organisations. See behind and generally, TruthCommission.Org research on follow-up on TC recommendations, at <http://www.truthcommission.org/factor.php?fid=8&mode=m&lang=en>; <http://shr.aaas.org/guatemala/ceh/report/english/recs3.html>

recommendations for future accountability.¹⁵⁴⁴ The Chilean TC was created by presidential decree due to a lack of support in Congress, and as a blanket amnesty law had been passed, only crimes committed after that could be prosecuted. The report did not name any offenders, but sealed that information for the courts, not wanting to attach responsibility without due process. The country also embarked on a detailed reparation scheme. Guatemala's TC produced a macro-truth investigation, with the objective to clarify the country's history. The SA TRC was created by law and given powers to grant individual amnesty in return for disclosure, and the TRC gained public support in its assumption that amnesty was necessary to its truth discovery, which in turn was held necessary in order to reach reconciliation, although it had a micro-offender approach. In today's South Africa, impunity at the individual level may exist, with regard to a lack of criminal justice and a government policy to hold those outside of the TRC process accountable. Still, nobody would suggest that South Africa has not made an important move towards a reconciled and democratic state, or that its truth discovery process did not discover and acknowledge a comprehensive truth report as well as an honest attempt at social collective reparations, perhaps mainly through a rather inclusive actor process.

CHAPTER 7: *QUASI*-ASSIMILATED JUSTICES

7.1. INTRODUCTION

In the fight against impunity, attention to the rule of law and criminal justice, inspired by the international criminal tribunals and the international criminal law of the ICC, is visible in the states that today find themselves in transition from a past filled with human rights violations. Such post-conflict states are dependent for assistance and funding on the international community, whose focus is visibly on criminal justice, an area in which the domestic legal system is given at least a partial role. International and domestic legal justice efforts are of great importance and this chapter identifies how such efforts concentrate to a large extent on the rule of law dimension,¹⁵⁴⁵ through

¹⁵⁴⁴ Argentina and Chile, arguable the more successful TCs before 1994, appointed commissioners from all sectors and groups of society, Zalaquett, 1989, Hayner, 1994; Cuya, 1999, at www.derechos.org/koaga/iii/1/cuya.html

¹⁵⁴⁵ The assimilated justice concept of justice includes the rights-based approach, within the rule of law dimension, together with the local restorative justice dimension. Assimilated justice concisely represents truth, criminal justice (just-desert punishment, deterrence), reparations, and reconciliation. It was argued, in ch.4 that, in the umbrella concept of justice, assimilated justice integrates and promotes a relation between the rule of law (universally applicable general legal norms) and social and moral values of the community (local particular norms). In this way, the notion of assimilated justice can be both backward looking, represented by criminal justice, and forward looking, represented by restorative justice. It is argued that the social and moral aspects assimilated justice is concerned with, besides criminal

the fundamental aims of just-desert punishment, deterrence, and reparation.¹⁵⁴⁶ Corresponding to the overall objective of assimilated justice, to fulfil the fundamental aims, of both criminal and restorative justice character, and to involve the actors, domestic states also realize the value of truth and reconciliation, and the significance of local ownership of the process. Inspired by South Africa's truth and reconciliation commission, with its individual amnesty granting process, a growing number of countries are setting up restorative justice institutions to help them cope with the truth of the recent past and future reconciliation. Rwanda, Timor-Leste, and Sierra Leone are examples of today's truth, criminal justice and reconciliation efforts. They are relevant and complicated because of co-existing criminal and restorative justice institutions and processes that reflect both the universal dimension and the dimension of local particularities.

The first part of chapter seven introduces *quasi*-assimilated justice, that is, the existence of different models that combine institutions of both criminal justice and restorative justice character, which are, however, not fully assimilated. A critical demonstrative outlook is taken, with regard to the domestic Rwandan model; and the models of Timor-Leste; and Sierra Leone, which represent a new kind of internationalised, yet domestic, hybrid criminal justice. These approaches represent a *quasi*-assimilation of truth, (criminal) justice, and reconciliation, in different ways. These *quasi*-assimilated institutions are analysed with regard to relevance of assimilated justice fundamental aims and actors, in relation to their reflexive institutional and objective commitment to fulfil the fundamental aims and involve the actors. The chapter considers whether such present day examples actually represent a genuine paradigm shift towards fully assimilated justice, or whether they rather represent an initial theoretical phase, or even just an accidental shift towards assimilating criminal and restorative justice aims. In order to add further clarity to assimilated justice, this chapter emphasises what *quasi*-assimilated justice is not (yet), as opposed to what fully assimilated justice is. A look at the prosecutorial process is also taken, as is a look at the truth discovery process, in order to assess the fulfilment of the fundamental aims, and legitimately restricted justice.

Basically, *quasi*-assimilated justice does not (yet) represent a full commitment within the institutions and constituencies to contribute to assimilated justice. Such a commitment is not only about international imposition, though this may help and be necessary. It must be an internalised commitment, within the institutions, by the domestic officials, required to make these institutions work. The commitment must furthermore be inclusive, representative of assimilated justice,

justice, can be further assimilated with the rule of law, as this chapter identifies in the *quasi*-assimilated justice models studied.

¹⁵⁴⁶ Reparation to the extent where it is recognised as an individual legal right to be able to seek compensation through the courts; but the fundamental aim of reparation is also part of socially collective justice, where restorative justice mechanisms seek symbolic reparation, for example.

referring to all the affected actors, including those most neglected, namely the victims; and the commitment must also be cooperative, rather than competitive. If the institutions are not committed to a cooperative relationship, (where they find themselves working together, within the assimilated justice paradigm) optimal equilibrium between the fundamental aims cannot be found, or guaranteed. Optimal equilibrium requires such reflexive commitment, sensitive to local particularities and to universalism. The reflexive commitment must inherently also be progressive, looking for the best solution to the local particularities; the universal dimension must acknowledge universal standards and the emerging genus of hybrid models that attempt to solve practical problems of restricted justice.¹⁵⁴⁷ Although different amount of such reflexive commitment can be found in the models looked at, fully assimilated justice also contains the objective to achieve the fundamental aims and balance the involvement of the actors. Without such an objective, serendipitous combinations of institutional commitment would lack the necessary awareness to maintain and progress assimilated justice.

The second part of the chapter underlines the relevance of the assimilated justice paradigm, where restrictions to the prosecutorial process and restrictions to the truth discovery process are discussed in relation to *quasi*-assimilated justice restrictions. Legitimate restrictions are scrutinized in order to draw attention to weaknesses and limitations related to criminal justice and restorative justice. Such restrictions provide further foundation for assimilated justice.

7.2. RWANDA

Rwanda has suffered ethnic conflict for long periods of time throughout its history, with ethnic clashes between the Tutsi and the Hutu.¹⁵⁴⁸ Without repeating the already well-known facts about the genocide, hundreds of thousands, mainly Tutsi, were killed, over a three-month period, after the failure of peace talks and the killing of the Rwandan President 6 April 1994.¹⁵⁴⁹ In July 1994, the Tutsi-led Rwandan Patriotic Front assumed the reins of government and was, like many other new governments in transition after serious violations of human rights, faced with the question whether to prosecute and punish those responsible, begin a truth discovery process, and/or

¹⁵⁴⁷ This is referred to in the case analysis that follows, where flexibility is required in the context-transcending theories and practices.

¹⁵⁴⁸ Rwanda has been torn by deeply rooted ethnic conflict between Hutu (85% of the population) and Tutsi (14% of the population) although Hutu and Tutsi communities share common culture and religion. Rwanda became independent 1 Jul.1962 after rule by Germans and Belgians. Recurring mass killings against the Tutsi community started in 1959. See e.g. Staub, 1989; Prunier, 1995; Gourevitch, 1998; Sarkin, 2001, 2000, 1999; Secretary-General Letter, UNDoc. S/1999/1257, 15 Dec.1999, at <http://www.un.org/News/press/docs/1999/s991257.html>; and see Olejede, Rwandan genocide series rewarded the 2005 Pulitzer award, at <http://www.newsday.com/news/nationworld/world/ny-rwanda-flash.flash>

¹⁵⁴⁹ Prunier, 1995, p.213.

grant amnesty.¹⁵⁵⁰ How was the country to deal with the great number of victims on the one hand, and on the other a great number of genocide offenders? After the 1994 genocide, Rwanda decided that amnesty was not an option and that somehow all offenders were to face the prosecutorial process, be it through the national or the international system, in order to achieve retrospective justice and prospective reconciliation, eradicating the culture of impunity forever.¹⁵⁵¹ Together with the fundamental aims of truth, just-desert punishment, deterrence, reparation and reconciliation Rwanda chose to prosecute and punish those responsible for the genocide, recognise the right to reparation of the victims, and assist reconciliation through two, mainly restorative, institutions and by so doing, Rwanda intended to balance the needs and interests of the victims and the Rwandan community as a whole.¹⁵⁵²

In this critical look at Rwanda's justice system, the prosecutorial process (prioritised by Rwanda) is of particular interest. The second part of this section looks at the *gacaca* system, the traditional justice practice of Rwanda, which has been given further importance since the 1994 genocide. The section ends with an evaluation of the concurrent practices of Rwandan justice, *vis-à-vis* assimilated justice. Not only must the restricted justice processes be evaluated, in order to see if they are legitimately restricted, but the level of assimilated justice commitment and objective is also necessarily assessed. Further analysis of the inherent restrictions to the justice processes and of assimilated justice is also taken in a later section of this chapter, where the different examples can be compared.

7.2.1. THE ICTR & NATIONAL COURTS

The initial focus of Rwanda was to prosecute all the offenders of the genocide urgently, in order to indicate the beginning of a transition towards peace, justice and democracy and to satisfy a possible urge to take personal revenge. Not holding trials was seen not to be a choice in Rwanda, where prosecution and punishment were highly valued by the new Tutsi government, and with the ICTR investigating within the country, and holding trials in a neighbouring country,¹⁵⁵³ the

¹⁵⁵⁰ Morris, 1997, p.352; Versi, Jun.1994; Sarkin, 2000, 1999.

¹⁵⁵¹ The Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, Organic Law NO. 08/96, 30 Aug.1996, at <http://www.preventgenocide.org/law/domestic/rwanda.htm>

¹⁵⁵² Rwanda called for for innovative justice to deal with the overwhelming tasks while ruling out any amnesty possibilities. Rwanda has recognised the right to reparation, and out of the cases heard, some victims have been granted large sums, however no payment has been made to date. Sarkin, 2000; Gourevitch, 1998.

¹⁵⁵³ ICTR, 1994, see ahead, and at www.ictor.org. The UN's role and reaction to what occurred in Rwanda authorised states to take military action, SCRes.929, 1994. Same method was used against Iraq, SCRes.678, 1990; in Somalia, SCRes.794, 1992; and Bosnia-Herzegovina, SCRes.1031, 1995.

prosecutorial process holds a central position in the Rwandan transition to truth, justice and reconciliation.

The ICTR was established in November 1994 and, after having found that the Rwandan conflict posed a threat to international peace and security,¹⁵⁵⁴ the tribunal was equipped with primacy of jurisdiction, *i.e.* subject-matter jurisdiction.¹⁵⁵⁵ The ICTR was set up in order to prosecute those responsible for genocide and other serious violations of international humanitarian law committed in Rwanda between January 1, and December 31, 1994. The primacy of jurisdiction is temporal and territorial, and thus *ad hoc*, it being linked to the restoration and maintenance of international peace and security in the territory.¹⁵⁵⁶ With regard to beneficial effects, the ICTR may have been able to demand the arrest, detention and prosecution of some of the more serious of the genocide offenders who fled the country, something Rwandan courts would have been unlikely to be able to do.¹⁵⁵⁷ Although subject to inherent restrictions to its prosecutorial process,¹⁵⁵⁸ the tribunal has been successful with regard to the indictment and arrest of some of those most responsible and the development of international law. It has, at the date of writing, sentenced 25 offenders¹⁵⁵⁹ and tried nearly half of the individuals in detention, however at a very high cost.¹⁵⁶⁰

Yet, at the same time, tensions between Rwanda and the ICTR have existed since day one, with disappointment on the Rwandan side at not being able to host the seat of the ICTR; at the imbalanced high quality detention facilities; and at the non-application of the death penalty by the

¹⁵⁵⁴ “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” art.39, UN Charter. The fundamental idea behind the creation of the UN, after WWII, was to maintain international peace and security and analogous to this aim are the principles of individual criminal accountability and universal jurisdiction, limiting state jurisdiction when necessary to protect international peace and security.

¹⁵⁵⁵ Statute of the International Tribunal for Rwanda, ILM 1994, p.1598.

¹⁵⁵⁶ See behind for jurisdiction.

¹⁵⁵⁷ Surrender from the US to the ICTs, *Ntakirutimana v. Reno*, 1999. This was the only case where the application of the surrender agreements between the US and the ICTs was litigated in US courts. Furthermore, it is the only agreement on surrender of suspects the ICTs signed with a domestic state, principally because it is legally not necessary, as member states of the UN are obliged to fulfil their obligations according to the UN Charter, and the ICTs receive their authority from the same source; Godinho, 2003. The perhaps most beneficial reason to institute the ICTR, and a reason for the calling of other ICTs, in *e.g.* Timor-Leste and Cambodia, is the Chapter VII UN Charter power; see ahead.

¹⁵⁵⁸ *E.g.* only a certain amount of offenders can be tried, and only a limited amount of victims can appear, as witnesses, before the court.

¹⁵⁵⁹ Although the tribunal is not restricted to specific offenders, but to persons responsible for serious violations, the reality has restricted the indictments to the more influential and serious offenders, art.1, ICTR Statute. The Tribunal has found 22 guilty and has acquitted three; 63 detainees, 25 of which are on trial, at <http://www.ictor.org/ENGLISH/factsheets/detainee.htm>; and www.un.org/ictor, 20 May 2005.

¹⁵⁶⁰ The ICTR has only been given a number of years to complete its work. With the numbers of cases outstanding it looks difficult for it to finish in this time frame. The ICTR is therefore discussing the possibility of transferring a number of detainees for prosecution to a number of national jurisdictions, at www.justicetribune.com/index_uk.htm. See budgets of the ICTs: www.un.org/icty/glance/index.htm; www.ictor.org/default.htm

ICTR.¹⁵⁶¹ No individual in the custody of the ICTR has been deferred to allow Rwandan courts to prosecute, but the ICTR has encouraged other countries to prosecute.¹⁵⁶² Initially, Rwanda encouraged the setting up of the international tribunal and supported the involvement of the international community in the justice process, as it would “enhance the exemplary nature of a justice that would be seen to be completely neutral and fair”.¹⁵⁶³ Corresponding to Rwanda’s prioritisation of the prosecutorial process and the rule of law in the fight against impunity, the country saw it necessary to involve the international community in bringing offenders who had fled the country to justice.¹⁵⁶⁴ However, at the final vote in the Security Council on the ICTR Statute, Rwanda chose to vote against SC Resolution 955. Not only was the temporal jurisdiction limited to 1994, and thus not inclusive of the planning of the genocide, which may have begun in 1990, but Rwandan also felt that the seat of the ICTR should be within the country. Rwanda felt excluded from such benefits as being able to “teach the Rwandese people a lesson...promote the harmonization of international and national jurisprudence”, and support reconciliation.¹⁵⁶⁵ Indeed its reasons were sensible and in line with assimilated justice, where the justice process and the universal dimension have to be domestically integrated, even if internationally imposed. Had the ICTR been situated in Rwanda, its process would not have been as restricted, as it could have assisted in the harmonisation of international and national law, the local population would have been able to participate and follow the process and it could in the end have created a sense of ownership of a prosecutorial process of international standards. Yet, there was no international commitment to internalise the process, although such commitment did exist in Rwanda. Interestingly, some of the points raised by Rwanda, concerning its discontent with the ICTR, appear to have been accepted by the international community in its later efforts to bring criminal justice to

¹⁵⁶¹ E.g. 3 Nov.1999 the ICTR decided to release genocide suspect Barayagwiza because his due process rights had been violated (one and a half years had passed from the time of his arrest to the time of his actually being charged). Barayagwiza was a central figure in the genocide. His release caused anger and resentment in Rwanda, and caused the government of Rwanda to suspend its cooperation with the ICTR. This resulted in the denial of the granting of an entry visa by Rwanda to the ICTR Prosecutor, although a visa was later granted. 31 Mar.2000 the ICTR revised its position, holding that the extent to which Barayagwiza’s rights were infringed did not justify the release, see Schabas, 2000, p.563 and the *Barayagwiza v. Prosecutor* case, 1997, at www.ictor.org; ICTR art.25. Former civic leader Rutaganira was issued the shortest sentence to date, six years in prison, 14 Mar.2005, which means another 3 years, as 3 years have been served in detention. There were mitigating factors such as turning himself in, good behaviour, ill health, confession, guilty plea, expressed remorse, no previous criminal record, and no active partaking in the killings, AllAfrica 14 Mar.2005, www.newsfromafrica.org

¹⁵⁶² 18 Mar.1999 the ICTR released Ntuyahaga, accused of killing a former Rwandan Prime Minister together with 10 Belgian peacekeepers, and encouraged transfer to Belgium to face trial there, ICTR Update 014, 18 Mar.1999; IRIN-CEA, UN OCHA Update No.637 25 Mar.1999 <http://www.reliefweb.int/IRIN/index.phtml>; <http://www.reliefweb.int/IRIN/cea/weekly/19990528.htm>

¹⁵⁶³ See Rwanda’s comments to the UN, UNDoc.S/PV.3453, 8 Nov.1994, p.14, <http://www.un.org/documents/index.html>

¹⁵⁶⁴ Id.p.14.

¹⁵⁶⁵ Id.p.15-16.

Timor-Leste and Sierra Leone. Such efforts are looked at in the next two sections. Judicial intervention, through the prosecutorial process, can have extensive prospective benefits generally, and through its legal authority it can declare accountability; set standards for the state, the legal system, and the community; and it can demonstrate that nobody is above the law. This is thought to be especially important in states in transition towards prospective democracy and retrospective accountability.¹⁵⁶⁶ International trials may steer clear of illegitimate amnesty and immunity and may more easily apply international standards, where domestic trials might struggle because, for example, of political pressure, military justice or domestic lack of expertise.¹⁵⁶⁷ However, Rwanda did not grant any amnesty or issue immunity protection, hence avoiding external restrictions to the prosecutorial process. Instead, the government invited legal experts to reform the domestic law and prioritised the domestic prosecutorial process, once it realised that the ICTR would not fulfil its demands and could only provide for a small number of prosecutions. Consequently, Rwanda committed to solve some of the practical problems of the international prosecutorial process itself, with a reflexive commitment that attempted the universal dimension of international principles, in combination with the local particularities.

Another resolution for Rwanda was the reformation of the domestic criminal justice system, clearly indicating the objective to fulfil the fundamental aims. The Rwandan community and its genocide victims primarily opted for criminal justice as the system of justice with the necessary authority to end its culture of impunity.¹⁵⁶⁸ Directly after the genocide, the government was resolved to complete the task of creating freedom in Rwanda, begun by the Rwandese Patriotic Forces, for example by applying principles of national reconciliation, rebuilding the country and promoting a democratic culture.¹⁵⁶⁹ According to Schabas, there never was a justice system in place in Rwanda that deserved to be referred to as representative of justice.¹⁵⁷⁰ Impunity reigned and unprofessional and untrained people had staffed the justice system for years. Not only did the law have to change, but professionals also had to be trained quickly to deal with the many genocide

¹⁵⁶⁶ The importance of the prosecutorial process and the rule of law is widely recognised, not only by Rwanda, but see e.g. Schabas, 1996, p.534 “[P]rosecuting the perpetrators of genocide is a most urgent priority. It is essential for the restoration of Rwandan society that the wheels of justice begin to turn with respect to the crimes committed during 1994”; Osiel, 1997; Des Forges, 1999, p.747 “The guilty must be found guilty...The proper prosecution of the genocide could permit the Rwandan state both to end impunity and to lay the foundation for the rule of law.”

¹⁵⁶⁷ Neier, 1998, p.xii holds that individual criminal trials, preferably international, ensure that violations of certain standards are followed by severe consequences; Nino, 1996. However, see Prunier, supra, 1997, p.354, arguing that it was only correct of Rwanda to ask for the trials and the application of the death penalty, instead of applying some foreign international standards. Only death could symbolically counterbalance the suffering and hatred. Today’s Rwanda does however show signs of restoration and reconciliation, without having had mass trials or a wide application of the death penalty.

¹⁵⁶⁸ Schabas, 1996. Organic Law NO.8/96, adopted by the Transitional National Assembly 5 May 1995, at <http://www.preventgenocide.org/law/domestic/rwanda.htm>

¹⁵⁶⁹ Id., Organic Law.

¹⁵⁷⁰ Schabas, 1996, p.531.

trials the country had chosen to hold.¹⁵⁷¹ The national criminal justice system was indeed given a lot of national and international attention and support, in the aftermath of the genocide. However, any legal system would struggle with the number of offenders and victims concerned and Rwanda recognised the limitations of its frail legal system. In October 1995, at a Kigali conference, the necessary new law was discussed, using a classification scheme to single out the organisers of the genocide and offering those offenders that come forward and confessed the possibility of a lighter sentence.¹⁵⁷² The law on the crime of genocide and crimes against humanity came into force 1 September 1996, creating four categories of offenders that would appear to assist the restricted and struggling prosecutorial process.¹⁵⁷³ Category 1 covers the most serious offences, including planners and inciters of the genocide;¹⁵⁷⁴ category 2 includes intentional homicide; category 3 serious assault; and category 4 involves property offences. In order to speed up trials and perhaps to some extent to recognise and reward remorse and apology, the genocide law invites the offender to confess in a detailed manner and apologise, in exchange for a lighter penalty.¹⁵⁷⁵

With the political will of Rwanda and international support, legitimacy has been brought to the new government, clearly indicating a Rwandan will to reconcile and move on.¹⁵⁷⁶ Respect for the rule of law and due process rights are improving within the national justice system, but it is still weak and overburdened by the many awaiting trials.¹⁵⁷⁷ Domestic trials started in December 1996 at a very slow pace, with serious defects in quality, restricting the aims of truth and just-desert punishment.¹⁵⁷⁸ Yet, the legal system has been completely revised, with the help of the international

¹⁵⁷¹ Although Rwanda may have begun prosecution at a stage where the infrastructure of the legal system was still weak, it was important to show the many Rwandans who had fled the country in the aftermath of the genocide that the country was willing and able to hold the offenders accountable, <http://www.ijr.org.za>

¹⁵⁷² New Rwandan law was introduced within the domestic criminal justice system that would recognise plea-bargaining in return for a lighter penalty. <http://www.rwandemb.org/prosecution/law.htm>

¹⁵⁷³ Organic Law No. 08/96, 30 Aug.1996. The civil law legal system, headed by the Supreme Court, only deals with a minority of cases, the traditional customary tribunals are still dominant, see ahead, *gacaca*.

¹⁵⁷⁴ E.g. notorious murder, planning and executing the genocide, sexual torture. A conviction generally equals the death penalty. Art.9 of the Organic Law No. 08/96 requests the Public Prosecution Department to maintain and publish a list of category 1 suspects and accused.

¹⁵⁷⁵ Arts.5-6, Organic Law; art.9, category 1 offenders can be de-categorised as categ.2, and thus not have to face the death penalty if they accept the confession and plea bargain; arts.14-15, categ.2 offenders can decrease their sentence from the original life sentence to a sentence between 7-11 years; <http://www.rwandemb.org/prosecution/law.htm>

¹⁵⁷⁶ International professionals have assisted in the application of international law and in training domestic staff, e.g. the NGO *Avocats sans Frontière*; See official website of the Government of Rwanda on Justice and Genocide, at <http://www.rwanda1.com/government/genocidep.html>.

¹⁵⁷⁷ Ch.V. Organic Law establishes Specialised Chambers within the courts of first instance and the military courts to deal with genocide, crimes against humanity and other connected cases. There is a right to appeal and a possibility for victims to bring forward prosecutions, art.29. The right to counsel is recognised, but not legal aid, art.36; Amnesty International, 2000, <http://www.amnesty.org>

¹⁵⁷⁸ There are reports of serious limitations of rights, especially for defence counsel. There have been instances when the trial has not been allowed in French, although French, English and Kinyarwanda are all official languages, and the right to cross-examination has been ignored. Amnesty International reports on some trials being over in 4 hrs, see Amnesty International, 1997, 1998, at http://www.amnesty.org.uk/news/press/releases/27_april_1998-0.shtml. There is a lack of defence counsel willing and able to defend those accused of genocide, and although the right to defence exists,

community,¹⁵⁷⁹ and the efforts made to face the practical problems must be respected. While international criminal law has developed into a complex mass of humanitarian, human rights and criminal law, making it possible to prosecute and punish offenders according to international criminal law norms for genocide, crimes against humanity and war crimes, the task is often unrealistic because of the great number of offenders.¹⁵⁸⁰ It must be recognised that although most difficulties faced in relation to prosecutions are domestic in character (as, for example, the lack of political and financial support) the ICTs have certainly not been short of difficulties and practical problems with regard to their own operations.¹⁵⁸¹ Yet, the individual notions of the fundamental aims of truth and just-desert punishment may not be as vulnerable in an international prosecutorial process, where the universal principles may be more easily applied.¹⁵⁸²

Rwanda practises concurrent jurisdiction and has promoted the domestic prosecutorial process.¹⁵⁸³ There is great awareness in the country of the Rwandan effort to create justice and accountability through the number of prisoners taken and trials held, possibly fulfilling the aim of general deterrence and respect for the rule of law. Although there was a considerable amount of interest in the early operations of the ICTR, the outreach events of the OTP were often only held in Kigali and not in the local language of Kinyarwanda, causing interest in the ICTR to fade.¹⁵⁸⁴ The fundamental aim of deterrence may therefore have to rely on the symbolic threat of the domestic prosecutorial process. One of the inconsistencies that resulted from the dual system of international and national prosecutions is an imbalance in quality where, for example, the international tribunals

it is hardly ever applied and maybe not widely known. See the report on the Rwandan criminal justice system by Van Lierop, 1997.

¹⁵⁷⁹ Rwanda also values criminal justice as the system to establish authoritative truth, and generally prepare the communities and victims for reconciliation, but reliance is not only put on the international tribunal, international law, prosecutions of high-ranking offenders, and domestic courts; Rwanda also relies on local *gacaca* tribunals and a reconciliation commission linked to the government. All have assisted and supported the Rwandan choice to prosecute and not grant amnesty. See ahead. Rwanda continues to pass death sentences, however it is reported that no executions have been carried out since 1998, see Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda UNDoc.A/55/269, 2000, #101.

¹⁵⁸⁰ See ahead, next chapter.

¹⁵⁸¹ However the pros and cons of the ICTs are not further discussed in this dissertation. See e.g. Prunier, 1995; Schabas, 1996, 2000; Magnarella, 2000; ch.6.

¹⁵⁸² International expertise and surveillance can provide less qualitative restrictions. Both the ICTR and domestic Rwandan courts have practiced joint trials, in order to speed up the prosecutions, and while the individual nature of the prosecutorial process may not be compromised by this approach, it means that the corroboration of evidence, and hearing of the same witnesses, linked to the same events, can be heard in a joint trial. The ICTR has linked the accused by groups linked to e.g. the military or business. See Report on the situation in Rwanda prepared by the Special Representative of the Commission on Human Rights pursuant to ECOSOC decision 1998/266, 30 Jul.1998 UNDoc.A/53/402, #45.

¹⁵⁸³ 7000 out of 125,000 prisoners (approx.numbers) were tried between 1994 and Jan.2000, IRIN-CEA, UN OCHA, Update No.834 6 Jan.2000 <http://www.reliefweb.int/IRIN/index.phtml>; Morris, 1997

¹⁵⁸⁴ Human Rights Watch report, 2004.

may try the more serious cases; domestic courts often impose more severe sentences.¹⁵⁸⁵ While the existence of the ICTR could have given rise to more possibilities of assistance and positive effects on the Rwandan judicial system, it is doubtful whether any legal system could handle the amount of offenders and accused. It is therefore important to assimilate the efforts made, in order to coherently fulfil the fundamental aims, and reduce restrictions to the processes. Rwandan efforts are being made to speed up trials, to improve disclosure of charges and quality of defence.¹⁵⁸⁶ Reform of the legal system is constant, and even with the assistance and quality control of the international community, the reconstruction obviously requires more than the 11 years that have now passed. Most importantly, there is a domestic commitment to provide criminal justice, and fulfil the fundamental aims of truth, just-desert punishment and deterrence.

With regard to the fundamental aim of reparation, Rwanda's recognition of the right to reparation allows individuals to file damage claims against offenders.¹⁵⁸⁷ The Statute of the ICTR recognises the right to reparation as a right of the victim which may be pursued in national courts.¹⁵⁸⁸ However, most offenders are poor with no means to pay.¹⁵⁸⁹ Today's problems in Rwanda are many and urgent. Not only is the country fighting a costly war in the DRC, but also it must deal with its justice situation, and somehow raise a considerable amount of money for reparation. While victims are yet to receive individual reparation, it is important to draw attention to the collective and symbolic community reparations that Rwanda's population is being rewarded through commemoration, satisfaction and restitution of museums, roads and schools. It must also be a priority to inform the citizens that individual compensation must be limited to the extent within the means of the nation. Thus, just as the right to see justice done through prosecutions may have to be limited in circumstances where the rights of the offender cannot be guaranteed, so does the right to reparation.¹⁵⁹⁰ However, in order to supply justice to the victims, who have to accept and come to

¹⁵⁸⁵ Schabas, 1997, p.468. The ICTR supplies a detention facility, which, in comparison to Rwandan prisons, is luxurious; see more, *supra* Schabas; Magnarella. See Rules of Procedure and Evidence, ICTR, Rule 101(B) provides some sentencing guidelines. This means that the offenders the ICTR convicts, generally also the commanding minds of the genocide, are treated more leniently than those tried by Rwanda, who are generally not important leaders of the genocide, as the ICTR has primacy of jurisdiction over most such individuals.

¹⁵⁸⁶ In 1999/2000 Rwanda swore in 26 new prosecutors and 71 judicial defenders, IRIN-CEA, UN OCHA, Update No. 831 29 Dec.1999 <http://www.reliefweb.int/IRIN/index.phtml>

¹⁵⁸⁷ The Organic Law No.08/96, arts.30-32.

¹⁵⁸⁸ ICTR art.23(3); ICTR Rules of Procedure and Evidence, Rule 106. The ICTR can also order restitution. See Rule 88(B) allows the tribunal to make finding of unlawful taking of property; Rule 105 the tribunal can order restitution either of property or proceeds or make such other order as it may deem appropriate. www.ictor.org

¹⁵⁸⁹ See ahead, *gacaca*.

¹⁵⁹⁰ Schabas, 1996, p.532 "Realizing judicial guarantees ...depends on resources, these rights cannot be guaranteed in the same way in a poor country as in a rich country, despite the admonition in relevant international instruments to the contrary. They are positive rights, not negative rights, in that they require a state to act, not to abstain from acting. Consequently, a state, such as Rwanda, must make hard choices between investing in its judicial and correctional system in order to meet the norms set out in the ICCPR or to invest in education, health care and environmental protection, so as to respect the claims of the ICESR..."

terms with the fact that the promised reparation may not be made to the extent wished for, it is vital that other means of reparation are supplied.

Domestic trials began late 1996 and, even with the co-existing ICTR, it was quickly recognised that the criminal justice system was in urgent need of assistance. The hazard of relying only on one type of domestic justice process to fight impunity, to tell the truth, to prosecute, to deter, to repair and to reconcile was felt in Rwanda.¹⁵⁹¹ While Rwanda realised the importance of the prosecutorial process, it did so without forgetting the victims or the community, by adding mechanisms to the court practice, thus showing evidence of a progressive commitment to face the practical problems. Due to the number of genocide offenders, victims and suffering communities and the weak justice system and lacking social service structures, traditional Rwandan justice practices have been revived and reformed. In combination with the national criminal justice system, local representatives are in charge of *gacaca* tribunals, with the objective of involving the community in the justice process and supplying further means to reconciliation.

7.2.2. GACACA

Reconciliation is, besides just-desert punishment, a fundamental aim in Rwanda's transition and one that is as demanding as prosecution.¹⁵⁹² The harm done to the Tutsi community created deep wounds, hatred and fear that constitute serious obstacles to a peaceful coexistence between the two communities.¹⁵⁹³ In the aftermath of genocide, with a large number of offenders, victims, refugees and returnees, there is no reliable or functioning collective community. There is thus no immediate stable representation to rely on for initiative, support, or truth telling. However, today, more than a decade after the genocide, the Rwandans themselves, with the assistance of the government and local NGOs, apply community-based *gacaca* tribunals and reconciliation camps for released genocide prisoners, both requiring active community participation.¹⁵⁹⁴ This exemplifies an internalised commitment to both the universal dimension and to the local particularities. In a forward-looking manner, a restorative process, dependent on community support, for its participatory social justice process, and also for moral legitimacy, thus appears accepted, with a

¹⁵⁹¹ 3700 out of 125,000 prisoners (approx. numbers) were tried between 1994 and Jan.2000, IRIN-CEA, UN OCHA, Update No.834, 6 Jan.2000 <http://www.reliefweb.int/IRIN/index.phtml>. The detained have had to await trial in overcrowded prisons in appalling conditions.

¹⁵⁹² See Assefa, 1999, *Supra*, Reconciliation, ch.4.

¹⁵⁹³ The new Tutsi-led government has, since 1994, been responsible for violence against Hutu refugees, which has furthered the division, UN SC Statement S/PRST/1998/20 13 Jul.1998.

¹⁵⁹⁴ Hearings began 10 Mar.2005 in 118 of more than the 10,000 tribunals that will begin proceedings in 2006, AllAfrica, 8, 10, 11, 14 Mar.2005; New Times, 9 Mar.2005. Organic Law No. 40/2000, from 26 Jan.2001 on the *gacaca* jurisdiction, <http://www.minijust.gov.rw>; <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm>

generally will to reconcile. These efforts add further legitimacy to the inherent restrictions to the justice process.

With Rwanda declaring that every person involved has to be prosecuted and punished, in order to end a tradition of impunity, restricted justice was believed avoidable through the introduction of the *gacaca*.¹⁵⁹⁵ Beside the additional system of the ICTR in neighbouring Tanzania, and in addition to the 12 domestic courts specialised in hearing genocide cases,¹⁵⁹⁶ Rwanda has chosen to institute near to 11,000 *gacaca* community tribunals.¹⁵⁹⁷ Approximately one million people, an eighth of the population, are expected to be heard by *gacaca* tribunals that are supposed to be fully functioning by 2006. Since 2002, 751 disorganised pilot *gacaca* investigation panels have questioned thousands of individuals, with trials resulting from these investigations begun in March 2005.¹⁵⁹⁸ In many ways similar to public hearings of TCs, public denouncement and possible shaming may sustain the restricted justice aims of the prosecutorial process and, more than so, general deterrence has been given a voice. Rwanda's alternative justice process does thus appear to include the objective to fulfil the fundamental justice aims.¹⁵⁹⁹ After a lengthy preparation phase, the beginning of the hearings has had to face problems of sabotage and boycott by former Hutu militia, claiming bias and unevenness. Although people have fled their districts and even the country, in the fear of being called before a *gacaca*, which highlights the imperfections of the system, it also highlights a public denouncing and shaming potential, especially as a great amount of individuals have appeared for the opening hearings.¹⁶⁰⁰

¹⁵⁹⁵ *Gacaca* is a Kinyarwandan word meaning "grass", a traditional system working at the grass-root level, initially with meetings held sitting on the grass. Limited prosecutions take place in all systems, and Rwanda's *ad hoc* ICT is a further example of limited prosecutions, see ch.2, 6; Hayner, 1996; Joinet, 1997.

¹⁵⁹⁶ Ch.V, Organic Law 08/96 establishes Specialised Chambers within the courts of first instance and the military courts to deal with genocide, crimes against humanity and other connected cases. There is a right to appeal and a possibility for victims to bring forward prosecutions, art.29. The right to counsel is recognised, but not legal aid, art.36; Amnesty International, 2000, <http://www.amnesty.org>. See Genocide and Justice official website of the Government of Rwanda <http://www.rwanda1.com/government/genocidedp.html>.

¹⁵⁹⁷ Rwanda enacted the *gacaca* law in Feb.2000, and Justice Minister de Dieu Mucyo stated that high-ranking officials may be immune from such hearings and have to go through the domestic courts, WorldNow International News Report, BBC broadcast on e-TV, SA 12 Apr.2005.

¹⁵⁹⁸ Hearings began 10 Mar.2005 in 118 of more than the 10,000 tribunals that will begin proceedings in 2006, AllAfrica, 8, 10, 11, 14 Mar.2005; New Times, 9 Mar.2005. Within 2 weeks of starting, 3 community courts have summoned 3 high Rwandan dignitaries: Prime Minister Bernard Makuza; Minister of Defense General Marcel Gatsinzi; prefect of Ruhengeri province, Boniface Rucagu, to answer charges relating to the 1994 genocide. The appearance of these important Hutu officials, who became members of the governing Rwandan Patriotic Front, means that Rwanda is determined to get answers from everyone, although it may also be a way to shame the few remaining Hutu leaders. http://www.justicetribune.com/article_uk.php?id=3018

¹⁵⁹⁹ African newspapers reported that, on the first day of trials, thirty genocide suspects were convicted, one was acquitted, and sentences varied from one to thirty years' imprisonment. AllAfrica, 8, 10, 11, 14 Mar.2005; New Times, 9 Mar.2005.

¹⁶⁰⁰ Id. Militias have encouraged people to fight the government rather than participating in the *gacaca*.

Hearings and truth telling are thus occurring at a very local level today, through these grass-root tribunals (people's courts).¹⁶⁰¹ The *gacaca* is believed able to bring the justice process closer to the people, and in this way contribute to the fulfilment of the aims of truth, justice and reconciliation in an integrated fashion. Such commitment, to the objective of assimilated justice and to integrate and combine universalism with local particularities is a sign of at least *quasi*-assimilated justice thinking. However, restrictions to the fulfilment are recognised, where the aim of truth is, so far, without any assorting or compiling tools, thus mainly see as an end in itself.¹⁶⁰² Parallel to this, the traditional system applies the plea bargaining system, hence focusing on confession and apology, and it is therefore considered a relief to the restricted prosecutorial process, assisting the criminal justice aims, as well as adding important healing possibilities, which can assist individual and collective reconciliation. It is predicted that *gacaca* may also deal with reparation claims, as the local tribunals may also serve as the civil division of the Rwandan legal system. With the assistance of other government performances and the prosecutorial process, the ability of the *gacaca* to provide a place to tell individual narratives, confess and apologies, may be able to assist the individual victim and offender to pass through the individual elements of e.g. honestly acknowledging the harm inflicted; sincerely regret the harm done; apologize as well as forgive and let go of the anger. Without mechanisms of consistent truth acknowledgement, the truth discovery that the *gacaca* process can provide should be recognised for its public, participatory and healing values, in combination with automatic, yet local dissemination of the truth heard. A difficult but crucial step is the honest acknowledgment of the harm caused, in order to begin a dialogue with the aim to reconcile.¹⁶⁰³

Another progressive element added to face practical problems is the presidential decree that the Rwandan government took, releasing approximately 50,000 imprisoned genocide suspects.¹⁶⁰⁴ It was felt that the overloaded prisons and overworked courts could not continue without having to release many of the prisoners that had been imprisoned since 1994, releasing women and elders first.¹⁶⁰⁵ They were released on the basis of having confessed; expressed remorse; not having received a trial; and having served more time in detention than they would have, had they been

¹⁶⁰¹ Id.; e-TV, 30 Mar.2005 a former minister of government was heard by a large *gacaca* tribunal that was set up at the Kigali stadium in order to invite as many Kigali residents as possible. The minister had confessed, and publicly apologised and told the truth.

¹⁶⁰² Still, individual truth is relevant to the investigations required by the *gacaca* and the prosecutorial process, as instrumental to just-desert punishment; deterrence; reparation; and reconciliation.

¹⁶⁰³ Assefa, 1999. *Supra*, ch.4.

¹⁶⁰⁴ 1 Jan.2003.

¹⁶⁰⁵ The approx. number of 115,000 genocide related prisoners amount to more than 90% of the Rwandan prison population. IRIN-CEA, UN OCHA, Update No.834 6 Jan.2000 <http://www.reliefweb.int/IRIN/index.phtml>

convicted of the crimes allegedly charged with.¹⁶⁰⁶ The released prisoners are first placed in *Ingando* solidarity camps, a sort of rehabilitation camp in which the released have to spend three months, supposedly preparing for reconciliation.¹⁶⁰⁷ The released are those who have accepted the plea-bargaining principles and are thus willing to confess and tell the truth before the *gacaca*. The released are thus not pardoned, whereby Rwanda has avoided imposing unnecessary restrictions to the criminal justice aims, but, instead, it has recognised the necessity to support the restricted prosecutorial process with values of truth and reconciliation. Process legitimacy should not be threatened by such releases, as they require public support, without which the released cannot be reintegrated. The accused are obliged to tell the truth, similar to the SA TRC full disclosure obligation, and express a willingness to reintegrate. The *Ingando* camps may thus be seen as a repairing and reconciling mechanism.

Ordinary citizens, elected by the local communities, have been trained as people's judges to decide upon crimes allegedly committed in their communities.¹⁶⁰⁸ Customary law has officially been revived, in order to help in dealing with the thousands of people in prison, awaiting trial. The investigative time-period is between October 1990 and December 1994. The focus is thus placed, to some extent, on the build-up to the 1994 genocide and not narrowly confined to the 100-day genocide, whereby a broader account of the past may emerge.¹⁶⁰⁹ The *gacaca* are able to try all but the most serious genocide crimes, and will hear stories of both victims and offenders. Not trying the main genocide organisers does not mean that the *gacaca* cannot assist the domestic courts with evidence, which may materialize in the local hearings. As the instance for less severe crimes, the tribunals are in charge of two, or three of the four categories of crimes based on the 1996 genocide law.¹⁶¹⁰ The main inciters of the genocide, belonging to category one of the genocide law, are referred to the national courts.¹⁶¹¹ Category two, which includes individuals suspected of serious attacks and murder, may be tried and sentenced by commune *gacaca*, and appeal could in that case be possible before prefecture *gacaca*. Category three offenders are those suspected of serious harm, tried by sector *gacacas*; and category four offenders are those suspected of damaging property, tried

¹⁶⁰⁶ In some cases there may have been insufficient evidence to warrant continued detention as well.

¹⁶⁰⁷ Supra IRIN 6 Jan.2000. Approx. 23,000 were released from the camps in May, 2003. A further 20,000 were released from 18 camps later in the year.

¹⁶⁰⁸ There are no candidates for judges. They are chosen by the population as wise elders, *Inyangamugayo*, on the basis of integrity, honesty, good conduct, being free of discriminatory attitudes, etc. There are thousands of *gacaca* judges at all levels. Elections of 260,000 judges took place Oct.2001. <http://www.rwanda1.com/government/newsupdate.htm>

¹⁶⁰⁹ Following Organic Law No.08/96, 30 Aug.1996; Organic Law No. 40/2000, 26 Jan.2001 <http://www.minijust.gov.rw>; <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm>

¹⁶¹⁰ Id., and see generally Sarkin, 1999, 2000, 2001; Official website of the Government of Rwanda, <http://www.rwanda1.com/government/newsupdate.htm>. According to Bishumba, at www.NewsfromAfrica.org 16 Mar.2005, the *gacaca* will only try categories 3 and 4.

¹⁶¹¹ Or indeed the ICTR.

by cell *gacacas*.¹⁶¹² Today many such people's courts are spread throughout the nation, at regional, provincial and local levels, and they are incorporated under the Supreme Court and the Ministry of Justice, which has created committees to monitor the operations. Each *gacaca* also has a general assembly that fixes the dates of the hearings according to the local community's demands, gathers information from the local cell,¹⁶¹³ and assesses the tribunal and the bench, which must reach a decision and sentence the offender on the last day of the proceedings, in order to avoid external influence. In order to provide further quality control, the bench (the Court Council) is able to call upon legal professionals as experts in a case. Capital punishment is possible for the first category of offenders, with lesser sentences available for the *gacaca* categories, sentences which can be shortened if the offender confesses in line with the plea-bargaining principles.¹⁶¹⁴ Life imprisonment is possible, but if legally trained staff is lacking the *gacaca* bench, offender rights and just desert principles may be at danger.¹⁶¹⁵ Still, as most offenders that appear before the local tribunals will be from category three or four,¹⁶¹⁶ released prisoners who may have already served their sentences while waiting for trial, the aim of just-desert punishment may correctly not be the primary focus. Category four offenders can be expected to pay compensation and do community service, but where imprisonment is sanctioned; pre-trial detention must be taken into account. Unfortunately the alternative route of the criminal courts may not guarantee due process rights to any further extent, but in order not to extend already existing restrictions to the criminal justice aims, the processes must correlate its applications. The *gacaca* may use shame or denunciation as a sanction through its hearings, where the offender and the crimes are local.¹⁶¹⁷ However, unless the *gacaca* process can truly supply a process that is impartial to ethnicity, public denouncement can lead to further hatred and collective blame of all Hutu, endangering reconciliation. It is vital that the *gacaca* is not only supported by the Tutsi population but also by the Hutu, and if offenders decide

¹⁶¹² Sarkin, Ch.3, in Villa-Vicencio & Savage, 2001.

¹⁶¹³ Cell is a very local area. The general assembly is supposed to provide evidence re. reported deaths etc. during the genocide. <http://www.rwanda1.com/government/newsupdate.htm>

¹⁶¹⁴ See earlier part, e.g. category 2 offenders who do not confess receive a prison sentence of 25 yrs. to life; 12-15 yrs. with confession during trial; 7-12 yrs. with confession before trial, see De Dieu Mucyo, Ch.3, in Villa-Vicencio & Savage, 2001; Organic Law NO.08/96, 30 Aug.1996.

¹⁶¹⁵ According to Amnesty International " 'gacaca may become a vehicle for summary and arbitrary justice that fails defendants and genocide survivors alike'." The Guardian, Nigeria, 17 Jan.2005, <http://ngrguardiannews.com>.

¹⁶¹⁶ Id. Category 4 does not prescribe imprisonment, and category 3 average sentences would come to approximately five years. See generally UN Report on the Situation of Human Rights in Rwanda, 1999; IRIN-CEA, UN OCHA, Update No.636 24 Mar.1999 <http://www.reliefweb.int/IRIN/index.phtml>

¹⁶¹⁷ Category 1 offenders may not be sensitive to being shamed, or reintegrated in a local community, and this may be a reason why the criminal courts practice exclusive jurisdiction over this category. See ahead, ch.7 for more on restorative justice punishment in the shape of shaming.

to confess and sincerely apologise, with assistance and support in the justice process, in order to be able to reintegrate with the local community, this may be achieved.¹⁶¹⁸

It is difficult to evaluate what voice and rights the victims will be given. In order to supply a just and fair justice process, representation of all sections of the Rwandan society is important. This, in turn, may cause fear among the victims, who may have to face offenders or Hutu activists. However, if the hearings allow and recognise victims both individually and collectively, support will exist, and the main danger in the Tutsi governed country will be to provide defence for the offenders.¹⁶¹⁹ The tribunal must be prepared to supply support mechanisms for such encounters or else it may fail as a forum inviting discussion and testimony.¹⁶²⁰ It seems the legal system may have been aware of this problem and this is why the different monitoring bodies and the possibility of involving legal experts have been provided for.

An enormous amount of training, of a large body of staff, who must in turn be able to represent each side, is necessary in order to ensure some form of consistency throughout the country. However, perhaps consistency and fairness is most important at the very local level. The locals involved in the *gacaca* hearings and the truth telling are able to claim ownership of the justice they create together. The trained locals, elected by the local community, can represent the local particularities of the collective community, and focus on the issues relevant to the particular community, and in this way contribute to the fundamental aims of truth, just-desert punishment, deterrence, reparation and, finally, reconciliation.¹⁶²¹ The *gacaca* is thus, in theory, able to claim at least local community representation and legitimacy, through its nature of being a people's court, a community-supported process. It can thus work towards truth, however only representative of the very local community involved in the particular hearing. The truth can thus be instrumental. Indeed, it can aim for general deterrence; symbolic reparation for the victim and the community,¹⁶²² through, for example, the offender's public testimony and possibly expressed remorse; and in turn, with the assistance of the *Ingando* camps, reconciliation. Yet, a collectively acceptable version of the truth is not the concern of either of the processes discussed.

¹⁶¹⁸ According to the latest reports from Busingye, the Secretary General of the Ministry of Justice, many former Rwandan leaders and parliamentarians do not support the *gacaca*, which also lacks financial support, www.NewsfromAfrica.org 16 Mar.2005.

¹⁶¹⁹ Most offenders being of Hutu origin.

¹⁶²⁰ Perhaps the support and presence of the elders of the local community is most important.

¹⁶²¹ A local NGO, LIPRODHOR (*Ligue Rwandaise pour la Promotion et la Défense des Droits de l'Homme*), carried out research in 1999-2000, where it was identified that a large majority of the population understood and supported the purpose and general function of the *gacaca* process. The process is generally identified as a conflict resolution process with punishing and healing mechanisms combined (author's own notes).

¹⁶²² Perhaps also individual compensation in the future.

Traditionally, the local *gacaca* would meet to resolve conflicts relating to family and land issues. Through the traditional usage, where respected elders of each individual community would meet, hear the testimonies of all involved and come to a conclusion, the tribunal mainly served as a mechanism for healing and reconciliation. While today's *gacaca* may be interpreted as Rwanda's main restorative justice response, it is also part of the criminal justice system. In order to provide criminal justice and assign just-desert punishment, professional staff, application of the rule of law and uniformity in decisions are important and difficult requirements. *Gacaca* convictions are meant to lead to punishment, but it is not yet sure whether all convicted can be justly treated, and whether they have been allocated sufficient resources. However, the same is true for the domestic prosecutorial process, and efforts are being made to improve due process and other rights of the individuals involved in the justice process. Although human rights are at risk, there does not appear to be a more realistic option for Rwanda, than to supply the fight against impunity with attempts at justice (including legal truth, just-desert punishment, deterrence, and reparation) and reconciliation.¹⁶²³ Rwanda chose, intentionally, to use the traditional *gacaca* system as the appropriate instrument to respond to the needs of both criminal and restorative justice. The country was aware of its reconciliation potential, through the traditional usage of the system, where local problems can be heard and in this way serve as a forum for reconciliation. The country was also aware of the strain and restrictions on the national courts, as well as the limited number of prosecutions by the ICTR and, having prioritised the rule of law to fight impunity, the most urgent issue for the *gacaca* was thus to deal with criminal accountability.

7.2.3. ASSIMILATED JUSTICE

Rwanda may serve as an example of a process where criminal justice exists alongside some form of restorative justice, however not in the form of a truth commission. The 1993 Arusha Accords provided for the setting up of the National Unity and Reconciliation Commission, but due to the genocide and complete disintegration of the country, the commission was not formed until 1999.¹⁶²⁴ An international commission of inquiry existed pre-1994, exclusively staffed by international NGOs, with the objective of investigating mass graves and human rights violations

¹⁶²³ Other essentials for the *gacaca* could be the relevant issues of land distribution and community services. Besides dealing with Rwanda's history of violence, land reform is still a sensitive policy.

¹⁶²⁴ Peace Accords signed in Aug.1993. The new government of National Unity, formed on 19 July 1994, started the programme of unity and reconciliation of the Rwandans and is charged with broad responsibilities. In general, it is to use all possible means that would assist in the sensitisation of Rwandans about unity and reconciliation and how to enhance it. Established by law n° 03/99, 12 Mar.1999.

since 1 October 1990.¹⁶²⁵ The commission of inquiry was formally welcomed by the then president of Rwanda, however it met with great hostility once present in the country and the report, widely distributed and published, focused on governmental action and the Rwandan government's response was to point a finger on the rebel movement. The TC was invited back to investigate the rebels' action just before the genocide broke out.¹⁶²⁶ Although of no previous success, the new Rwandan authorities recognised the importance of having a forum for debates, truth discovery and acknowledgement, with actor participation, and a need to complement the struggling criminal justice system. "We must break the spiral of reprisal and counter-reprisal...I said to them in Kigali 'unless you move beyond justice in the form of a tribunal, there is no hope for Rwanda'. Confession, forgiveness and reconciliation in the lives of nations are not just airy-fairy religious and spiritual things, nebulous and unrealistic. They are the stuff of practical politics."¹⁶²⁷ After a dialogue with South Africa, the National Commission for Unity and Reconciliation (NCUR) was constituted in Rwanda, in 1999, and was believed to be Rwanda's response to further the aim of reconciliation.¹⁶²⁸ Kritz and Finci argue that the reasons a TC was not supported in Rwanda at the initial stages were greatly linked to the fact that the genocide completely demolished the Rwandan society.¹⁶²⁹ A large part of the population fled the country, and communities and families were destroyed. Since refugees started returning and the country began to take shape again, the 1999 commission has received little attention.¹⁶³⁰ Instead, Rwanda revitalised the *gacaca* system, in February 2000, as a legitimate nation-wide effort to extend the justice process to a forum where the community was involved and supported. However, the *gacaca* may never have been implemented as a response to a TC and, as there has been no other truth reported or collectively acknowledged in Rwanda than individual truth relating to specific cases,¹⁶³¹ one is led to believe that the NCUR was established as yet another governmental means to reconciliation. As the name purports, the

¹⁶²⁵ See Report of the International Commission of Inquiry into the Human Rights Violations in Rwanda since 1 Oct.1990, Human Rights Watch, 1993; Hayner, 1994; Goldstone, 1995.

¹⁶²⁶ Id., Report, Human Rights Watch, 1993. After the genocide, different commissions reported and investigated responsibility. E.g. a commission of experts was established in 1994, which led to the ICTR, see UN Letter from UN Secretary-General to the President of the Security Council, 1994; Report of the HCHR on the Activities of the Human Rights Field Operation in Rwanda 1996; France investigated its responsibility, see IRIN-CEA, UN OCHA, Update No.567 15 Dec.1998 <http://www.reliefweb.int/IRIN/index.phtml>; the UN investigated its activities, see IRIN-CEA, UN OCHA, Update No.635 23 Mar.1999 <http://www.reliefweb.int/IRIN/index.phtml>; Des Forges, Human Rights Watch, 1999.

¹⁶²⁷ Desmond Tutu, SA TRC Report, Ch.9, 1998.

¹⁶²⁸ Law No.3/99, 12 Mar.1999. Rwandan officials hesitated for a few years, believing that as they preferred and prioritised justice through prosecutions, a truth commission could wait. "We don't need truth we know who did what", comment by Minister of Transport, <http://web.sn.apc.org/wmail/issues/970131>. NCUR was given an annual budget of USD 300,000 by the EU and the US.

¹⁶²⁹ Kritz & Finci, 2001, p.54.

¹⁶³⁰ Ciabattari, 9 Oct.2000, Women's E-news, at www.womensenews.org/article.cfm/dyn/aid/301/context/archive

¹⁶³¹ Previous commissions did not directly involve local Rwandans and mainly focused on responsibility, rather than the establishment of a broad social truth report.

objective of the NCUR seems to be to promote national unity and reconciliation. Since the establishment of the NCUR, national summits have been held, in different villages, discussing leadership, history, justice and poverty.¹⁶³² Unity and reconciliation resolutions support the government's anti-divisionism agenda,¹⁶³³ along with civic education (including a national syllabus to promote national unity and reconciliation).

With regard to the fundamental aim of truth, the NCUR has perhaps facilitated truth telling between Hutu and Tutsi peoples by, for example, supporting the solidarity camps. However, it is unclear whether Rwanda intends a truth report to be written up, and if so, by whom.¹⁶³⁴ Legal truth, applicable to individual criminal accountability, is being investigated on a large scale, by the prosecutorial process and the *gacaca*. Yet, supportive social justice mechanisms that can create a broad inclusive truth are not visible. Perhaps the value of truth reporting has been overlooked in this commission, which could possibly be the best equipped institution to disseminate a broad picture of Rwanda's past. Even individual legal truth relevant to each case, whether before a national court or a *gacaca* tribunal will remain in danger, together with just-desert principles and victim rights as long as the legal system remains weak. Nonetheless, the intentions to fulfil these aims and recognise the individual actors, appear honest in the case of Rwanda, through the more individual, yet difficult and time consuming focus. A certain amount of institutional commitment does thus exist, at least in terms of external collaboration rather than competition. However it is doubtful whether the internal objective commitment to fulfil the fundamental aims extends to the aim of truth. A certain amount of commitment to balancing the involvement of the actors would appear to have been a reason to extend the justice process to the *gacaca*. Collaboration between *gacaca* tribunals and the Public Prosecutor's Office has been worked on, in order to assimilate the truth investigations, and this can, indirectly, affect and improve individual actor rights.¹⁶³⁵ Files from the Prosecutor's Office should immediately be sent to the applicable cells, where, according to the Ministry of Justice, the prisoners are supposed to have committed their crimes, and it is more suitable to gather evidence at the location and then classify the prisoners in categories. At the same time, the Prosecutors' Offices

¹⁶³² The 1st National Conference on Unity and Reconciliation was held 18-20 Oct.2000, 1 yr after the setting up of the NCUR. In 2001, consultative meetings were held in all districts Apr.-Oct.2001, with the aim to evaluate the resolutions on unity and reconciliation and to identify obstacles to unity and reconciliation, as well as the wishes of the people. <http://www.rwanda1.com/government/newsupdate.htm>.

¹⁶³³ See ahead.

¹⁶³⁴ The NURC's work is mainly visible in its support of the solidarity camps, which it provides with food and training for those who have confessed and have therefore been released from prison. See generally UN Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda, 2000, section XIII.

¹⁶³⁵ <http://www.inkiko-gacaca.gov.rw/En/EnCollaboration.htm>

will continue to receive complaints and to investigate, but the files are now sent to the cell *gacaca*, rather than to the courts.¹⁶³⁶

Yet, in terms of fulfilling the fundamental aims, there is an objective achievement to fulfil all but truth in its broad and inclusive notion. Linked to the lack of this particular internal commitment, is the lacking inclusive commitment to involve all the actors. Discussed in chapter four, the fundamental aims have a potential to overlap, which assists a balanced involvement of the actors. Yet, where a potential broad inclusive truth is not part of the internal commitment to achieve assimilated justice, then there is no external inclusive institutional commitment either, which could otherwise work towards further victim participation, especially with reference to the aim of truth. Concerning the lacking collective truth, such investigations could be assisted by having *gacaca* at hand to hear testimony from offender, victim and community. Such practice may also ease the courts' burden of collecting evidence, confessions and recognition of victims.¹⁶³⁷ Identification, involvement and knowledge of the community are also provided for through the *gacaca* practice, as indeed the practice depends on its involvement. The importance to be able to investigate and establish the truth beyond the 1994 genocide, looking at the violence both before and after 1994, is something the *gacaca* can facilitate. Rwanda and the Great Lakes region have been occupied with violent attacks for so long that nobody can easily establish the causes of the 1994 genocide as simply Hutu against Tutsi.¹⁶³⁸ Understanding the different sides' reactions and current attitudes should be a recognised step in creating a collectively acceptable and publicly acknowledged truth. This has not yet taken place in Rwanda, although truth has been acknowledged and made public with the assistance of legal authority, through domestic courts and the ICTR, where expert witnesses have assisted the writing of a general picture of the build-up to the 1994 genocide.¹⁶³⁹ If the different *gacacas* are, or can be unified, the truth collected could be digested and made public, in order not to let the truth discovered and told to become nothingness.¹⁶⁴⁰ The general truth existing in Rwanda today have made people in the public life, and people in general, worried of being misinterpreted and found guilty of "divisionism". Divisionism was the fuel of the 1994 Rwandan genocide,¹⁶⁴¹ and is today seen as a serious public sin. In order to end all such inclinations to divisionism, Rwanda is deleting all labels referring to ethnicity and, in the rewriting of the past;

¹⁶³⁶ Id. Supervision and control of *gacaca* activities is the responsibility of the Department of the *Gacaca* courts created in the Supreme Court.

¹⁶³⁷ With regard to cases that the *gacaca* cannot hear, evidence collected can, and should be systematically referred to the national courts; *Rwanda's Unfair Trials: Justice Denied*, Amnesty International, 1997; Sarkin, 1999.

¹⁶³⁸ *Rwanda: Ending the Silence*, Amnesty International, 1997.

¹⁶³⁹ See <http://www.ictor.org/> and e.g. *Prosecutor v. Akayesu*, ICTR, 1998, e.g. #122 establishing how the genocide took place in Rwanda; *Prosecutor v. Barayagwiza*, ICTR, 1997.

¹⁶⁴⁰ See behind, ch.4, on truth and memory.

¹⁶⁴¹ This was being preached by the previous President Pasteur Bizimungu, *Prosecutor v. Barayagwiza*, ICTR, 1997.

the genocide guilt has been pinpointed to a small group of public leaders. In so doing, Rwanda is not only turning its back on notions of collective responsibility but it is also excluding and perhaps dangerously suppressing ethnic origins, public debate and criticism related to ethnicity.

Perhaps the *gacaca* representation of restorative justice is enough in response to Rwandan needs and demands for criminal justice, the right to reparation and, with the help of both the *gacaca* and the NCUR, the focus has extended to collective involvement to further reconciliation and, hopefully, collective truth. Of great significance is the recognition that assimilated justice is reflexive in its commitment, yet progressive in its fulfilment of the aims and the involvement of the actors. This correlates to a model of flexible assimilated justice, which, in Rwanda, allows the contextual solution to the local particularities come in the shape of *gacaca*, without losing sight of universal principles. It seems correct of the Rwandans to not assign the already overloaded criminal justice system with more truth investigations and to ask the legal system to provide for therapeutic and healing mechanisms would not have been a realistic option. The government attempted such mechanisms through setting up the NCUR and then turned to *gacaca*.¹⁶⁴² On the question of legitimacy and credibility of the justice process, it is important to raise the issue of ownership, which may be particularly important for new governments and states in transition. Mandela said thanks but no thanks to an internationally influenced TRC panel for the sake of keeping it truly South African.¹⁶⁴³ El Salvador's international TC struggled with the particulars of the country's history and cultures, and one may draw comparisons between Salvadoran and Rwandan ethnic societies.¹⁶⁴⁴ The previous commission of inquiry in Rwanda, which was internationally influenced, did not achieve broad public acceptance.¹⁶⁴⁵ Moreover, while the Rwandans have accepted aid from the international community, mainly in the reform of the rule of law, experience with the international community has generally been bitter. Rwanda wanted to host the ICTR, in order to feel part of the international tribunal. Instead the Rwandan society has had to accept ICTR investigation and prosecution teams visiting the country, without being able to claim ownership of the process. There was also a sense of general blame and disappointment in the country after the genocide, because of the international community's lack of intervention and the withdrawal of troops before and during the 1994 genocide. As a result, Rwanda returned to its traditional practices, not only purely domestic in character, but also representative of the very local

¹⁶⁴² In order to continue the development of the rule of law and quality application of the criminal justice system, it would not be possible, or recommendable to operate too many different justice processes at the same time in an already burdened country.

¹⁶⁴³ Ch.2, 7; SA TRC Report, 1998.

¹⁶⁴⁴ See ch.7.

¹⁶⁴⁵ *Supra*, Report of the International Commission of Inquiry into the Human Rights Violations in Rwanda since 1 Oct. 1990, Human Rights Watch, 1993; Hayner, 1994.

communities. In an already frail society, the incorporation of peoples' courts, under the criminal justice umbrella may assist Rwanda to continue its retrospective accountability focus on the offenders, according to the fundamental aims of individual truth, just-desert punishment, and deterrence.

Still, it must be recognised that the prosecutorial process is restricted, internationally, at the ICTR, and nationally and to ignore reparation and dangerous attitudes, which a broad truth investigation could uncover, will only serve to undermine the chances of reconciliation and the possibility to focus on the victim and the community. Whether and to what extent *gacaca* can assist in the fulfilment of the recognised right to reparation depends on what funds the system may be assigned. Collective, symbolic victim and community reparation is being rewarded, with the help of international community development projects, in the shape of restitution and rehabilitation. Governmental steps towards satisfaction and guarantees of non-repetition are visible in the effort to create reconciliation and democracy, by, for example, rebuilding the legal system; applying sanctions against offenders; recognising commemorations and other victim tributes;¹⁶⁴⁶ and generally strengthening human rights.¹⁶⁴⁷ Through the local tribunals, the individual and collective victims have at least been given a further means to be heard, to hear the offender and, since the implementation of plea bargaining and solidarity camps, healing values of confession and official apology is made possible.

The Rwandan genocide law aims at reconciliation. So does the Preamble of the ICTR Statute; "in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would...contribute to the process of national reconciliation and to the restoration and maintenance of peace."¹⁶⁴⁸ However, these prosecutorial processes cannot alone establish a collectively acceptable truth or provide general discussions of disturbing community issues, which, to a large extent, are instrumental to a sound foundation for reconciliation. Had the Rwandan law and prosecutorial process not been assisted by the *gacaca* process and the NURC, the aim of reconciliation would have been too restricted to claim any fulfilment. The meeting of minds at *gacaca* hearings may be further facilitated, for example by hearing those released, who have attended the solidarity camp before being summoned by the relevant *gacaca*. This should indeed support individual and collective reconciliation, as should the NURC's forward-looking means of countrywide consultations, with promotional and educational

¹⁶⁴⁶ E.g. through creating genocide museums and memorial sites; based on author's experience and notes in Rwanda, in 1999.

¹⁶⁴⁷ This has particularly been done with regard to training military forces, law enforcement officials, and university education, through the assistance of e.g. UNHCR.

¹⁶⁴⁸ ICTR Statute, Preamble, at www.ictr.org.

material, workshops and conferences, e.g. in the form of reintegrating returnees.¹⁶⁴⁹ The reconciliation efforts of Rwanda, successful to date,¹⁶⁵⁰ must be able to open up to debate and acknowledgment of sensitive issues, in order not to allow for new ethnic hatred to start boiling under the surface.¹⁶⁵¹ The underlying reason for the conflict can be of importance, making the fundamental aim of truth instrumental to the aim of reconciliation.¹⁶⁵² Collective responsibility is an issue important to take into consideration in shaping the road to reconciliation, as is the fact that the atrocities of the past mainly consisted of ethnically motivated genocide. Involvement in the genocide was widespread in Rwanda, from government policies, supported by the local authorities, to the ordinary Rwandans carrying them out, all sharing the same basic belief that by exterminating the Tutsi, the world would be a better place.¹⁶⁵³ The dual post-genocide society, which Rwanda represents, must deal with the collective responsibility of the previous regime; and the large group of collective victims who must successfully coexist.¹⁶⁵⁴ The underlying reason for the ethnic hatred that Rwanda must today recognise may perhaps have been inequality, which is amendable, e.g. with the exclusion of ethnic labels and with the assistance of supportive political policies. Hintjen and Andersen have found that the division between Hutu and Tutsi has mainly to do with political domination and exploitation of power; and the fact that Hutu and Tutsi have shared the same history, language, religion, and land in the past is a good enough reason to attempt reconciliation.¹⁶⁵⁵ A process able to directly involve the actors – as the *gacaca* have – may, through its restorative mechanisms, use shaming and mediation in order to move past ethnic division.¹⁶⁵⁶ Simply sweeping divisionism under the carpet does not mean that the problem is permanently

¹⁶⁴⁹ UN Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda, 2000, section XIII, p.37.

¹⁶⁵⁰ As Hutu and Tutsi live and share the same community lives. Rwanda has created a Constitutional Commission, with the purpose to discuss the constitution, elections, and issues related to general human rights, and Hutu participation and Tutsi security. Prendergast, & Smock, 1999, at <http://www.usip.org/oc/sr/sr990915/sr9990915.html>; National Human Rights Commission, adopted by Rwandan National Assembly 19 Jan.1999.

¹⁶⁵¹ The Sunday Independent, SA, 11 Apr.2004.

¹⁶⁵² Ethnic conflicts may differ from ideological conflicts, and different responses of justice may be required, taking into account the local particularities. Although the international core crimes share certain common denominators that have made them rise to the top of the hierarchy of criminal norms, such as the level of atrociousness, great amount of victims, it is important to distinguish e.g. crimes against humanity from genocide. Ch.6 briefly introduces the crimes, where genocide consists of killing or injuring committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, art.2, Genocide Conv. 1948. Crimes against humanity involve knowingly committing, as part of a widespread or systematic attack directed against any civilian population, e.g. murder, enslavement, extermination, deportation, torture, or persecution, art.7, ICC Statute, 1998.

¹⁶⁵³ Gourevitch, 1998, p.6; Des Forges, 1999, p.770.

¹⁶⁵⁴ In South Africa the racial crime of apartheid had to be dealt with in its pluralistic society of oppressors and victims. See Verwoerd, 1997.

¹⁶⁵⁵ Hintjens, 1999; Andersen, 2000.

¹⁶⁵⁶ And, indeed, other urgent problems facing Rwanda, such as HIV/AIDS and the influx of returnees. See e.g. IRIN-CEA, UN OCHA, Up-date No.638, 26 Mar.1999 <http://www.reliefweb.int/IRIN/index.phtml>; IRIN-CEA, UN OCHA, Update No.499, 10 Sep.1998 <http://www.reliefweb.int/IRIN/index.phtml>; IRIN-CEA, UN OCHA, Update No.831 29 Dec.1999 <http://www.reliefweb.int/IRIN/index.phtml>.

solved. Until shame, guilt and healing can take place, it may be difficult for a Tutsi, who has lost his entire family, to think of his Hutu neighbour as just another Rwandan citizen. In the *gacaca* proceedings, the offender is invited to face his victims and the local community, which may promote confession, shame and a wish to reintegrate in the local community, under the identity of a Rwandan citizen.¹⁶⁵⁷ This may be possible with regard to the majority of offenders, who must rely on reintegration in the local community, in order to begin a new life, away from ethnically organised groups, which may still have some power in the prisons, are powerless in today's Rwanda. On the other hand, some category one offenders, such as Akayesu, (tried by the ICTR) have not indicated any remorse.¹⁶⁵⁸ As chapter four indicated, with reference to the fundamental aims of truth and reconciliation, individual memory, truth and forgiveness is partly an internal process that cannot be forced or rushed. Perhaps the most challenging issue for the Rwandan government is to demonstrate that it is not inequitably pro-Tutsi.

To sum up, Rwanda's criminal courts, *gacaca* system and reconciliation commission can embody *quasi*-assimilated justice, however flawed, through the application of the fundamental aims. The restorative truth discovery process is integrated in the criminal justice system, representative of the need to respond to both criminal and restorative justice aims. Rwanda's *quasi*-assimilation is thus not accidental. The government purposely turned to the traditional system as an addition to the struggling prosecutorial process, perhaps because it was easier to achieve community support for familiar community trials, than for a TC. It being a familiar system, *gacaca* tribunals spread throughout the country and provided reconciliation potential through their means of involving the local communities in the decision-making process. At the same time, the country has been able to continue to prioritise the rule of law, in the fight against traditional Rwandan impunity, and to reforme the criminal justice system.

Thus, in the fight against impunity, and under a still struggling criminal justice system, the Rwandan government has not only promoted an international tribunal and an entire reformation of the domestic criminal justice system. Rwanda has also realised that restricted justice exists, without the granting of amnesty, in the form of limited prosecutions and limited actor recognition. The country has, as a result, intentionally combined traditional truth discovery and reconciliation efforts,

¹⁶⁵⁷ In fact, the number of prisoners that are willing to confess, be released and put through rehaiblitation camps before apologising and telling the truth before the local *gacaca* is growing, Supra, WorldNow, e-TV, 12 Apr.2005.

¹⁶⁵⁸ IRIN-CEA, UN OCHA, Update No.512, 29 Sep.1998, at <http://www.reliefweb.int/IRIN/index.phtml>; *Prosecutor v. Akayesu*, ICTR-96-4-T, 1998; Alfred Musema, a businessman convicted by the ICTR of genocide and crimes against humanity, never showed remorse, despite his conscious participation in the atrocities. *Prosecutor v. Musema*, ICTR, 2000, at <http://www.ictr.org/ENGLISH/judgements/Musema/8.Sentencing.htm>; Ruggiu, a former journalist, pleaded guilty to genocide and asked the ICTR for forgiveness, ICTR Press Release ICTR/INFO-9-2-232.EN, 15 May 2000, at <http://www.ictr.org/ENGLISH/PRESSREL/232.htm>

with the prosecutorial process. The decision to reform the traditional tribunals in order to speed up the justice process, while simultaneously encouraging reconciliation, correspond to the need of ownership of the justice process in its entirety. The legal truth that comes out of Rwandan and ICTR cases is established with legal authority and can therefore be acknowledged and applied by the *gacaca*. The fundamental aim of just-desert punishment is applied with regard to those responsible, by the ICTR and by the domestic courts, however with due process rights at risk. In an attempt to recognise just-desert principles, Rwanda continuously releases women, elders and others who have been detained for longer periods. The aim of deterrence may be specifically fulfilled in the prosecutorial process and in the *gacaca* process, and the latter can also process general deterrence. A right to reparation is recognised and symbolic collective community reparation is made. However to what extent the *gacaca* and the NCUR can assist the victims and the fulfilment of this aim's individual focus is yet to be seen. With regard to reconciliation, Rwanda has recognised that the prosecutorial process needs supplementary mechanisms and provides the released with *Ingando* camps, in order to prepare for individual and collective reconciliation, supported by the NCUR.¹⁶⁵⁹ The released are however not pardoned, but the fight against impunity has rather been given further means through the investigations, hearings and decisions of the *gacaca*. However, in line with ownership of the justice process and the country's past, present and future, a broad social and inclusive truth can only be established and accepted by the Rwandans themselves, and may be an important deficit. An acceptable truth report could not only assist coherence in the *gacaca* practice, but also nationwide collective reconciliation.

The justice system of present day Rwanda is believed to actually represent a much unpolished model of assimilated justice and not an accidental shift towards assimilating criminal and restorative justice aims. Reflexive institutional commitment, combined with an objective to fulfil the fundamental aims exists, however flawed. In fact, it is proposed that Rwanda exemplifies assimilated justice better than it represents a combination of purely criminal and restorative justice mechanisms, mainly because the reformed *gacaca* system is neither purely criminal nor restorative, and the process does not have a TC. Although the criminal justice process and the *gacaca* process are linked, belong to the same umbrella concept of justice under the rule of law, and they do not compete with each other, it is uncertain whether, once the *gacaca* are fully operational, they will represent one coherent assimilated justice process. The normative choice of Rwanda seems to prioritise criminal justice aims over truth and reconciliation, and there are serious restrictions, mainly to the individual focus of the aims. However, they may be able to assimilate, as both apply

¹⁶⁵⁹ Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda, 2000, section XIII.

criminal norms, relevant to the offender-categories, and the *gacaca* also follow a less formal and more restorative approach for those accused that have been released from prison, which does not contradict the prosecutorial process.¹⁶⁶⁰ According to Sarkin's extensive work in and on Rwanda, there is great opportunity for cooperation between the prosecutorial process and the *gacaca*, where the *gacaca* is basically taking over certain parts of the criminal justice system,¹⁶⁶¹ while also fulfilling its restorative justice aims. The government intentionally turned to the *gacaca* process, asking it to hand down criminal sanctions, without limiting its traditional healing role, but rather consciously combining it. The restorative justice nature of *gacaca* is believed inherent in the nature of its process, where, for example, a *gacaca* hearing may be less intimidating to attend, with the potential of inclusive actor participation. The *quasi*-assimilation of *gacaca* with the prosecutorial process has however not included a conscious paradigm shift. Although *gacaca* was traditionally not directly linked to the criminal justice system, elders met, heard complainants, and pronounced decisions through the *gacaca*. It was perhaps thus not inherently conflicting to include fundamental aims of the criminal justice process in its practice.

Nevertheless and not surprisingly, Rwanda supplies us with far from fully assimilated justice, where an objective commitment to balance the involvement of the actors is necessary. Other restrictions are mainly linked the amount of reform of the rule of law and general domestic infrastructure that was, and still is necessary.¹⁶⁶² The most important aspects, in need of improvement, are restrictions to the prosecutorial process, where the individual focus on the offender and the victim, through the fundamental aims of truth, just-desert punishment, and reparation cannot be guaranteed. Furthermore, for those offenders who remain imprisoned and tried by the domestic courts, it is unsure whether any restorative justice means can be distributed, and it is uncertain how coherent the *gacaca* practice will become.¹⁶⁶³ Another important aspect is the collective social truth. The actor focus may exist in *gacaca* processes, but it is yet doubtful whether a broad national, and not just local and legal truth can be agreed upon. Because of this shortcoming, Rwanda's *quasi*-assimilated justice may not represent perfect equilibrium in the application of the

¹⁶⁶⁰ Plea bargains, solidarity camps, confessions and apology are recognised before the relevant *gacaca*.

¹⁶⁶¹ If the *gacaca* was further separated from the criminal courts, the *gacaca* could e.g. collect confessions and research cases, (and can thus still provide a healing forum) that would then be handed over to the courts and thus facilitate for the criminal justice system. See Sarkin, ch.3, in Villa-Vicencio & Savage, 2001; and generally Sarkin, 1999b, 1999c.

¹⁶⁶² All the actors are in focus, through finding all the fundamental aims involved in the Rwandan justice processes. However, the offender-focus may still be faulty, especially with regard to the offender's contribution to the legal individual truth, and just-desert principles; and although victim-involvement may exist in criminal and *gacaca* processes, the fundamental aim of reparation may only be recognised for its collective and symbolic focus.

¹⁶⁶³ If these offenders accept the plea bargain principles of the Rwandan genocide law, perhaps they can still be put through the reconciliation camps and appear, as tried and sentenced offenders, before *gacacas*, in order to support the restorative process. The *gacaca* may need the national police force, as the latest reports from Rwanda, in April 2005, talk of Rwandans taking refuge in neighbouring countries in fear of being called to *gacaca* hearings. See Nerikes Allehanda, Sweden, 25 Apr.2005, p.11.

fundamental aims or in the focus on the actors, where the victims are less focused on in the prioritised prosecutorial process.

Still, the justice process may be legitimate, finding victim and general community support.¹⁶⁶⁴ Rwanda appears to have found internal peace¹⁶⁶⁵ and Rwandans do not seem too unhappy with the way Rwanda is heading.¹⁶⁶⁶ This may be, at least to some extent, a result of Rwanda's applauded efforts to prosecute the offenders, and not allow impunity.¹⁶⁶⁷ Rwanda has made available a forum that welcomes testimonies from all, thus increasing the prosecutorial process focus.¹⁶⁶⁸ This not only advances truth, responsibility and reconciliation, through individual rehabilitation and truth acknowledgement. At the same time, the prosecutorial process may aid remembrance and collective consciousness and Rwanda has allowed and equipped the *gacaca* system with this instrumental usage in the pursuit of justice, together with restorative justice aims, under the rule of law umbrella.¹⁶⁶⁹ Combining the prosecutorial process and its justice aims, with a prospective focus on reconciliation, is an official statement that accountability and democracy are recognised,¹⁶⁷⁰ even if not all the guilty can be prosecuted and not all the prosecuted can be put through this rough cut model of assimilated justice, as yet.

7.3. TIMOR-LESTE

¹⁶⁶⁴ Generally, when violence persists it is a sign that the general public is disappointed with the overall promotions of the government. See Huyse, L. *Justice After Transitions: On the Choices Successor Elites Make in Dealing with the Past*, in Kritz, 1995, p.104.

¹⁶⁶⁵ Although violence has not ceased to exist in the Great Lakes Region, further evidence indicating that Rwanda is in honest search of peace and democracy took place 30 July 2002 when signing a Peace Accord with the DRC.

¹⁶⁶⁶ The situation in Rwanda today may not be too different too how it was pre-1994, in terms of daily life. Rwanda is still a very poor and underdeveloped country, struggling with development, and distribution of land and rights. However, the rule of law is gaining respect in the 'new' Rwanda, and international human rights standards are being implemented. The UN has declared April 7 as an "International Day of Reflection" for Rwanda. Celebrating 10 years of peace, rather than democracy since the genocide refers to Rwanda not yet begin a democracy, according to Umeseso, Rwanda's independent newspaper, in *This Day*, SA, 8 Apr.2004. Rwanda's transitional face was extended in June 1999 when the government moved the elections to 25 Aug.2003. President Kagame won the elections.

¹⁶⁶⁷ Instead of accepting a limited amount of prosecutions, by the ICTR and national courts, solidarity camps facilitating the modified *gacaca* hearings are intended to satisfy such restrictions.

¹⁶⁶⁸ This can facilitate truth investigations of the causes and events leading up to the genocide, which can finally establish a truth report, which is more than a court can do. The *gacaca* forum, making available the truth, at the same time welcomes a dialogue between all the actors involved, which supports recollection of the facts and sentimental remembrance.

¹⁶⁶⁹ Goldstone, 1996, Nino, 1991 and Orentlicher, 1991 - all supporting justice in the form of criminal trials, as a tool for peace-making.

¹⁶⁷⁰ Establishing individual criminal accountability is important, also for the victim to be able to attach the blame to somebody beside himself, and collective responsibility reaffirms the fact that the entire nation is involved and cannot escape the past without a move towards reconciliation. Osiel, 1996.

In 1975, Portugal left what was then called East Timor to independence, but Indonesia occupied the territory.¹⁶⁷¹ A process of reconciliation, involving Timorese nationalist movements, began in 1984, but due to further violence, peace talks were delayed.¹⁶⁷² Finally, in May 1999, the UN established a UN Mission, to oversee a scheduled popular referendum.¹⁶⁷³ After the UN-administered vote for independence, late August 1999,¹⁶⁷⁴ armed militia, supported by the Indonesian security forces attacked Timor-Leste, which resulted in half of the civilian population displaced or disappeared. Since UN-led forces arrived, in order to restore peace and aid in the country's transition to independence and democracy,¹⁶⁷⁵ has the world been informed of the transition to an independent Timor-Leste. With Indonesia's total withdrawal, in November 1999, Timor-Leste was left without any administration, or services, so the UN Transitional Administration in Timor-Leste (UNTAET) was established.¹⁶⁷⁶ UNTAET was mandated to set up and administer judicial affairs, civilian police, economic, financial and development affairs, public services and electoral operations. Humanitarian assistance and emergency rehabilitation were also seen as essential, with so many refugees and internally displaced persons, in addition to the military component.¹⁶⁷⁷ On the advice of the UN Commission on Human Rights, an International Commission of Inquiry was set up to report on the situation, and found, in 2000, a pattern of serious violations of fundamental human rights, with over 1400 people killed, 75% of the population displaced and approximately 250,000 evacuated to Indonesian West Timor.¹⁶⁷⁸ Early in 2000, the

¹⁶⁷¹ From 1975 to 1982, the GA called for Indonesia's withdrawal and recommended action by the Security Council. UN resolutions on the topic: SCRes.384, 1975; SCRes.389, 1976, at www.un.org/documents/scres.htm, which recognized self-determination and called upon Indonesia to withdraw; GARes.3485(XXX), 31/53, 32/34, 33/39, 34/40, 35/27, 36/50 and 37/30, at www.un.org/documents/resga.htm; Schreuer, 2000; and see Amnesty International documents on Timor-Leste (East Timor) www.amnesty.org/library/eng-tmp/index. For all UNTAET regulations see www.un.org/peace/etimor/UntaetN.htm and www.easttimor-reconciliation.org/Documents.htm

¹⁶⁷² The Nationalist Convergence was established in 1986. Peace talks were taken up, in 1994 in London and in 1996 in Austria, but further violence, in September 1999, delayed the reconciliation process. East Timor's President Xanana Gusmao speech at Stockholm International Forum on Truth, Justice and Reconciliation, 23 Apr.2002, at http://www.stockholmforum.com/extra/news/?module_instance=1. See UNDoc.S/1999/513 Annex I-III, UNTAET was set up to administer the East Timor territory, with legislative, executive and judicial power; and see UNDoc.S/RES/1272, 1999.

¹⁶⁷³ (UNAMET). SCRes.1236, 1999; SCRes.1246, 1999; SCRes.1257, 1999, at www.un.org/documents/scres.htm; Due to further instability the UN Secretary-General asked the SC to prolong the stay, SCRes.1262, 1999. Timor-Leste became independent 20 May 2000, as the democratic republic of Timor-Leste; head of state Mr X. Gusmão; head of government Mr M. Alkatiri.

¹⁶⁷⁴ On August 30, 1999, East Timor voted in favor of independence from Indonesia. 21.5% of votes were in favour of autonomy within Indonesia, 78.5% against; Schreuer, 2000; Strohmeier, 2000; UN Letter to the Secretary-General, 2000; Linton, 2001.

¹⁶⁷⁵ SCRes.1264, 1999, in accordance with art.39 UN Charter, the situation in East Timor constituted a threat to peace and security. INTERFET (International Force East Timor).

¹⁶⁷⁶ SCRes.1272, 1999, Report of the Secretary-General, 4 Oct.1999, S/1999/1024.

¹⁶⁷⁷ The UN Mission of Support in East Timor (UNMISSET) was mandated to provide assistance to core administrative structures, provide interim law enforcement and assist in the development of the Police Service and to contribute to internal and external security. See www.indonesia-ottawa.org/news/Issue/HumanRights/ham-kpp-timtim-0131-2000.htm; www.un.org/peace/etimor/untaet

¹⁶⁷⁸ Barber, 2004; www.smp.minihub.org

Indonesian set-up National Commission for Human Rights also issued a report, listing 32 ministers and military officials suspected of human rights violations.¹⁶⁷⁹

Today's transitional criminal justice system of Timor-Leste is still, to some extent, internationalised, to which attention will be paid in the first part, followed by a study of its domestic truth discovery process. Finally, these processes will be looked at in the light of assimilated justice, similar to the previous section, on Rwanda.

7.3.1. SPECIAL COURT

One of the greatest and most novel efforts of the Timor-Leste transition was to build, rather than restore, a justice system, capable of handling the international crimes that had taken place. A functioning legal system was seen as essential from the beginning of the transition of Timor-Leste, whose nationals strongly supported a prosecutorial process, similar to how Rwanda prioritised criminal justice.¹⁶⁸⁰ East Timorese nationals and NGOs requested the UN to set up an ICT, as Timor-Leste had no legal system to rely upon, and because a weak national system would not be able to cope with investigations of such large scale, again similar to Rwanda.¹⁶⁸¹ The arguments supporting the setting up of an ICT also included Indonesia's unwillingness to investigate and take legal action, with regard to its military action in Timor-Leste.¹⁶⁸² However, UNTAET ignored such wishes, and spent two months, under the protection of INTERFET, in order to search for local professionals to support a domestic prosecutorial process. The transitional judicial service was established in January 2000,¹⁶⁸³ and appeared successfully supported by the population. This was a first step for the new nation that had struggled for independence and the right to self-determination to take control over the transitional system, and Rwanda's complaints about not hosting or partaking in the ICTR might have been a reason for the emphasised national approach, albeit with international influence and control. "It is fundamental for the future social and political stability of

¹⁶⁷⁹ (KPP-HAM) set up Oct.1999, report issued Jan.2000. It held that General Wiranto had overall responsibility and recommended further investigations and prosecutions, and the return of displaced East Timorese, at www.indonesia-ottawa.org/news/Issue/HumanRights/ham-kpp-timtim-0131-2000.htm; <http://www.easttimor.com/archives>

¹⁶⁸⁰ See previous section. The prosecutorial process was thus the main focus, and Timor-Leste decided not to follow the examples of e.g. Guatemala or South Africa's restorative justice mechanisms, which were implemented while slowly rebuilding the legal system. See ch.7.

¹⁶⁸¹ In 2000 the International Commission of Inquiry on East Timor recommended an ICT for East Timor, UNDoc.A/54/660; UNDoc.A/54/726; S/2000/59.

¹⁶⁸² www.pcug.org.au/.wildwood/01aprfast.htm

¹⁶⁸³ However, similar to Rwanda, the local professionals lacked practical experience and higher studies. Strohmeyer, H. 2000, p.264. The International Commission of Inquiry assisted in the establishment of an international human rights tribunal, with members from East Timor and Indonesia. It suggested that the court would sit in all the relevant territories to receive complaints and try the accused. Barber, 2004, at www.smp.minihub.org

East Timor, that the truth be established and those responsible for the crimes committed brought to justice.”¹⁶⁸⁴

The urgency to set up courts was much due to the almost immediate arrest and detention of accused, as Timor-Leste did not have an operational administration or judiciary. However, learning from Rwanda, the prosecutorial process marks an important landmark for truth, justice and reconciliation that should not be put at risk by rushing the domestic and fragile process.¹⁶⁸⁵ UNMISSET was instructed to design the framework for the legal system (which was to leave behind all traces of abusive Indonesian law), to construct the actual infrastructure and organise educational programs for the legal staff.¹⁶⁸⁶ “The international community should give maximum priority to training East Timorese at all levels.”¹⁶⁸⁷ Obviously, the young transitional legal system was in need of education, in order to enforce and sustain new legislation and prosecutions.¹⁶⁸⁸ Timor-Leste could be classified as a willing, yet unable country to provide truth, justice and reconciliation, and the inability to provide justice was due to lacking legal mechanisms, which were believed to be solved with the assistance of a hybrid internationalised yet domestic Special Court.¹⁶⁸⁹ It was, and still is hoped that Indonesia will fulfil its prosecutorial obligations without the threat of an international tribunal for Timor-Leste.¹⁶⁹⁰

The hybrid, internationalised yet domestic, Dili Special Court was a court set up with exclusive jurisdiction for serious crimes, which ceased operations 20 May 2005.¹⁶⁹¹ Timor-Leste is

¹⁶⁸⁴ UN Report of the International Commission of Inquiry on East Timor 2000, #148ff; Australia and its legal profession has greatly supported Timor-Leste. See Report on Visit to East Timor For East Timor Project Committee, in Australian Section of the International Commission of Jurists, Mar. 2000, at <http://www.icj.org>. Ownership of the justice process was probably important for the new state.

¹⁶⁸⁵ Especially taking into account the jurisdiction of international crimes, previously a foreign subject to both Rwanda and East Timor; UNTAET Reg. 2000/11.

¹⁶⁸⁶ Regulation No.2000/15 established mixed judicial panels with exclusive nationwide jurisdiction of newly defined gross human rights violations that the Indonesian laws had ignored, see laws and regulations on www.un.org/peace/etimor/untaet. Indonesian law may still play a role in East Timor, with regard to domestic crimes.

¹⁶⁸⁷ Gusmao, at the International Donor’s Conference, Tokyo Dec.1999, *The Way Forward for East Timor*, in the International Herald Tribune, 20 Dec.1999, p.8.

¹⁶⁸⁸ Another issue that young nations in transition towards an affluent criminal justice system must deal with, initially by the help of international donors, experts and local NGOs, is local and regional legal aid. *Yayas an Hak* (Rights Foundation) is one such existing effort of a group of young East Timorese lawyers.

¹⁶⁸⁹ In addition to much assistance in other fields. Other district courts were also set up, all with the intention to become domestic, at a later stage, today confirmed to take place between May 2005 – May 2006. See SCRes.1543, 2004 and Secretary-General report, May 2005, S/2005/310. This idea of a hybrid court was further extended in the development of justice for Sierra Leone and Cambodia. See ahead, later part of this chapter.

¹⁶⁹⁰ To a large extent ignoring East Timor’s National Council recommending the establishment of an ICT, the UN chose to set up an internationalised, yet domestic court in East Timor, UNDoc.A/54/660.

¹⁶⁹¹ UNTAET Reg.2000/11, exclusive jurisdiction concerning the most serious crimes including genocide, war crimes, and crimes against humanity. This Special Court is similar to what was being discussed with regard to Sierra Leone and UN-Cambodian efforts to set up a tribunal, www.pcug.org.au/~wildwood/01maytribunalpetition.htm; press briefing UNAMET, 19 Apr.2000, “The credibility of these trials would be insured because the model under consideration for Cambodia was being used in East Timor.” at www.un.org/peace/etimor/DB/DB20000419.htm; 24 May 2005, www.jsmp.minihub.org

a state party to the ICC and the new legislation, applicable to the Special Court, relied heavily on the law of the ICC Statute.¹⁶⁹² Criminal law and proceedings are thus in line with the ICC Statute¹⁶⁹³ and victim and witness protection has been provided for.¹⁶⁹⁴ UNTAET regulations also provided for a Victims Trust Fund¹⁶⁹⁵ and the right of victims to claim compensation.¹⁶⁹⁶ The Dili Special Court consisted of a serious crimes unit (SCU),¹⁶⁹⁷ in charge of investigations and prosecutions, formed with mixed international and national judges and a prosecutor's office, staffed by international as well as a few national prosecutors. The Special Court also had a Special Panel for Serious Crimes,¹⁶⁹⁸ comprising two international judges and one national judge, responsible for

¹⁶⁹² The ability to adopt already available international criminal law might have aided the urgency to set up the criminal justice system, and not having any existing national legal system made it easier to implement international law to prosecute the international crimes. UNTAET Reg.2000/15 promulgated 6 Jun.2000, holds the relevant definitions of the international core crimes for genocide, war crimes, crimes against humanity and torture. Murder and sexual violence is prosecutable under domestic law, the Indonesian Penal Code, as of 31 Mar.2004. Indonesian provisions do not recognise rape within marriage, or male victims, and is thus incompatible with international law, see *Prosecutor v. Akayesu*, ICTR 1998; *Prosecutor v. Furundzija*, ICTR 1998; *Prosecutor v. Kunarac*, ICTY 2001. This is as yet an important and unsolved issue for East Timorese legislation, see <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>

¹⁶⁹³ And should therefore be read with the ICC Statute, its *travaux préparatoires*, the jurisprudence of the ICTs and domestic courts dealing with international crimes.

¹⁶⁹⁴ UNTAET Regulation 2000/15, Witness Protection S.24.1 "The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the panels shall have regard to all relevant factors, including age, gender, health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children." S.24.2 "Procedures regarding the protection of witnesses shall be elaborated in an UNTAET directive." At <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>

¹⁶⁹⁵ Id. Trust Fund. S.25.1 "A Trust Fund may be established by decision of the Transitional Administrator in consultation with the National Consultative Council for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims." S.25.2 "The panels may order money and other property collected through fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund." S.25.3 "The Trust Fund shall be managed according to criteria to be determined by an UNTAET directive."

¹⁶⁹⁶ Id. Claim for Compensation by the Alleged Victim. S.50.1 "Independent from the commencement or completion of a criminal proceeding, an alleged victim may claim compensation for damages or losses suffered or inflicted by a suspected crime by filing a civil action before a competent court." S.50.2 "As a part of its disposition of a criminal case in which the accused is convicted of an offense as to which there are victims, and notwithstanding any separate civil action which goes forward pursuant to Section 50.1 of the present regulation, the Court may include in its disposition an order that requires the accused to pay compensation or reparations to the victim in an amount determined by the Court. Any payment made by an accused to a victim in compliance with such an order shall be credited toward satisfaction of any civil judgment also rendered in the matter." S.50.3 "The procedure to be followed and the evidence to be heard in making the Court's determination concerning compensation or reparations to victims pursuant to section 50.2 of the present regulation may be regulated in a separate UNTAET directive."

¹⁶⁹⁷ The SCU was set up following UNSC Res.1272, 1999, and UNTAET Reg.2000/11; Reg.2000/15, at <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>

¹⁶⁹⁸ The Special Panels have jurisdiction over genocide, crimes against humanity and war crimes wherever and whenever they occurred and over murder, sexual offences and torture that occurred in East Timor between 1 Jan. and 25 Oct.1999. A Court of Appeal was also created. UNTAET Reg. 2000/30 Transitional Rules of Criminal Procedure, individual criminal accountability reflects the ICC, defences reflects those of the ICC, see e.g. *Prosecutor v. Kupreskic*, ICTY 2000; *Prosecutor v. Tadic*, ICTY 1997; www.etan.org. Unfortunately in Oct.2003 East Timor signed an 'article 98 agreement' with the USA, which promises that East Timor will not transfer current or former government officials, employees or military personnel of the USA to the ICC. The ratification was a result of US threats to terminate military aid to any ICC signatory countries that did not ratify the 'article 98 agreement' before 1 Nov.2003, see 21 Nov.2003 East Timor jamp.minihum.org; and see previously, ch.2.

trying those accused by the SCU.¹⁶⁹⁹ UNTAET headed the SCU, until Timor-Leste gained independence on 20 May 2002 and the UN Mission of Support in Timor-Leste (UNMISSET) was set up.¹⁷⁰⁰ The SCU was then assigned to the Timor-Leste Attorney General's Office, with an uncertain future.¹⁷⁰¹ The Dili Special District Court has been exclusively responsible for conducting investigations and preparing indictments concerning the most serious crimes, including genocide, war crimes and crimes against humanity.¹⁷⁰² It is one out of four district courts, covering four separate geographical jurisdictions,¹⁷⁰³ however the subject matter jurisdiction of the other three district courts is identical and extends to all matters, as courts of first instance.¹⁷⁰⁴ These courts are the only courts, civil and criminal, of Timor-Leste.¹⁷⁰⁵

The judicial system and the Special Panels have been threatened by the lack of resources, inefficient planning and case management, inexperienced judges, prosecutors and public defenders. Delays, failure to follow correct procedures, detention, conditional release and continued use by the courts of Indonesian law¹⁷⁰⁶ (rather than UNTAET transitional rules of criminal procedure), have been common practice.¹⁷⁰⁷ Prosecutors have been reported to have compromised their independence, judges have failed to apply the proper considerations at sentencing stage, and public defenders are generally not prepared. Due to language barriers and differences in legal systems, the

¹⁶⁹⁹ The SCU, headed by a Deputy General Prosecutor, had, in December 2003, 38 international staff of prosecutors, case managers, investigators, forensic experts and translators. SCU update X/03, [jsmp.minihub.org](http://www.jsmp.minihub.org), 22 Dec.2003.

¹⁷⁰⁰ The SCU was retained by SCRes.No.1410, 17 May 2002, on the establishment of UNMISSET; Nashidik, 28 Apr.2004, at www.jsmp.minihub.org.

¹⁷⁰¹ UNMISSET was supposed to end its mission in May 2004 and downsizing began in Aug.2003, according to SC Res.1543, of 2004. The Secretary-General requested, 29 Apr.2004, a one-year consolidation phase extension of UNMISSET, pursuant to SCRes.1410, 2002, <http://ods-dds-ny.un.org/doc/UNDOC/GEN/NO4/323/42/PDF/NO432342.pdf>; SCRes.1573, of 16 Nov.2004 decided to extend until 20 May 2005; 27 Apr.2005 the ICTJ requested the UN to reconsider the final date of UN assistance to the Special Court and to extend beyond May 2005 and SCRes.1599, of 28 Apr.2005 decided to establish the UN Office in Timor-Leste (UNOTIL) until 20 May 2006; Secretary-General Report, May 2005, S/2005/310.

¹⁷⁰² UNTAET Reg.2000/11, exclusive jurisdiction concerning the most serious crimes including genocide, war crimes, and crimes against humanity; Section 7.1. District Courts; Baucau District Court; Suai District Court; Oecussi District Court, at http://www.jsmp.minihub.org/courtmonitoring/district_courts.htm.

¹⁷⁰³ The national and international personnel are appointed by the Transitional Judicial Services Commission, where a majority of national and some UNMISSET staff sit. However, in practice the international judges have been appointed without passing through the Judicial Services, thus avoiding the recommendations by the bilateral commission. UNTAET Reg.1999/3; Reg.2000/15; Reg.2000/25. For all UNTAET regulations see www.un.org/peace/etimor/UntaetN.htm and www.easttimor-reconciliation.org/Documents.htm

¹⁷⁰⁴ S.6, UNTAET Reg.2000/11. District Courts have territorial jurisdiction.

¹⁷⁰⁵ http://www.jsmp.minihub.org/courtmonitoring/district_courts.htm; and see Reg.2001/25 on the amendment of UNTAET Reg.2000/11 on the organisation of courts in East Timor and Reg.2000/30 on the transitional rules of criminal procedure.

¹⁷⁰⁶ Difficulties with regard to applicable subsidiary law of East Timor have been discussed at the Court of Appeal, where both Portuguese and Indonesian law have been referred to as apt subsidiary law. The Indonesian Penal Code applies as of 31 Mar.2004.

¹⁷⁰⁷ 6 Jun.2003; 12 Apr.2004, E.Timor Justice Update, 23 Mar.-2 Apr.2004; Justice Update 8-22 Mar.2004; Justice Update 1-7 Mar.2004, at www.jsmp.minihub.org, at <http://www.theage.com.au/articles/2003/06/05/1054700335049.html>

cooperation between international and national staff has also proven difficult.¹⁷⁰⁸ The hybrid prosecutorial process has therefore been restricted, from the start. 13 indictments were filed in 2002. Progress in bringing suspects to trial was slow, because judges were unavailable to serve on the Special Court and so only 9 trials were completed in 2002.¹⁷⁰⁹ The speed of indictments and trials in 2003 was improved through training programs¹⁷¹⁰ and to date, the Special Court has filed 81 indictments against 369 accused, trying less than one quarter of those indicted.¹⁷¹¹ The Court of Appeal only heard an average of 3 cases per month, during the first three months of 2004, and out of 142 appeals filed between 2001 and March 2004, the Court of Appeal has taken a decision on 86 of these.¹⁷¹²

The Special Panels and the Serious Crimes Unit of the Dili Special Court have suffered from strikes and complaints by locals, and since it is unknown whether the Timor-Leste Prosecutor's Office will continue with the serious crimes process, victims still call for an ICT and for justice to be done.¹⁷¹³ Although the Special Panels of the Dili Court have an investigation judge to oversee due process rights of the actors, suspects have been detained for extended periods without trial, in Timor-Leste and also in Indonesia. This may be due to the scope of jurisdiction of the Special Court, which, although just and in accordance with international law, is unrealistic, with regard to the fragile new system.¹⁷¹⁴ However, as the next part will clarify, immunity from prosecution is

¹⁷⁰⁸ Id. Portugal has proposed exchange programs, where eight District Court judges and four prosecutors go to Portugal for 12 months of intensive training in Portuguese language and legal practice, while Portuguese counterparts would spend one year at East Timor courts. Legislative training is currently on the way, funded by Portugal. See 25 May 2005, www.jsmp.minihub.org

¹⁷⁰⁹ Judge Benfeito left the Special Panels 6 Apr.2003, resulting in insufficient judges for the Special Panels to carry out trials in East Timor. Under UNTAET Regulations, the Special Panels must be comprised of two international and one East Timorese judge. The appointment of 3 new international judges followed and with the appointment of a President of the Court of Appeal and of the Superior Council of the Judiciary, steps towards the establishment of a developed and effective judicial system in East Timor are being taken. 22 Jul.2003 www.jsmp.minihub.org.

¹⁷¹⁰ At the end of 2003, 46 convictions, mainly of lower-level East Timorese militia, 1 acquittal and 2 indictment dismissals have been held at the Special Court. SCU update X/03, www.jsmp.minihub.org 22Dec.2003; <http://web.amnesty.org/report2004/tmp-summary-eng>

¹⁷¹¹ In Dec.2003, 281 of the 369 indicted persons remained at large in the Republic of Indonesia. 55 trials were held since the SPSC were established in 2000, with 84 convictions; Human Rights Watch briefing paper, Oct.2003, www.jsmp.minihub.org; During the last period, Feb-May 2005, 87 defendants were tried, (a total of 8 trials with 11 defendants), Secretary-General Report, May 2005, S/2005/310, S.2; 24 May 2005, www.jsmp.minihub.org

¹⁷¹² The Court of Appeal began hearing cases in 2004, see Timor-Leste and Development Partners meeting 4 Jun.2003 www.jsmp.minihub.org/. Justice Update 1-7 Mar.2004, at www.jsmp.minihub.org; 6 serious cases are pending the Court of Appeal as of May 2005, see Id. Secretary-General Report May 2005, #20.

¹⁷¹³ People claim the Special Court came to a premature end. The jsmp organisation reminded the UN and the international community that UN SCRes.1264 and 1272, of 1999, both demand that those responsible for the violence in Timor-Leste in 1999 be brought to justice. This is yet to be done, see 24 May 2005, www.jsmp.minihub.org. In the past, a general lack of resources led to strikes in Oct.2000, www.abc.net.au/news/2000/10/item20001010023441_1.htm; www.un.org/peace/timor/DB/DB111000.htm; UNDoc.E/CN.4/2001/37; *East Timor Still Awaits Justice One Year After UN Call for International Tribunal*, ETAN Press Release, 31 Jan.2001, at <http://www.etan.org/news/>. For all UNTAET regulations see www.un.org/peace/etimor/UntaetN.htm and www.easttimor-reconciliation.org/Documents.htm

¹⁷¹⁴ Regulation 2000/15 is basically too wide from a realistic perspective, although the reason behind it may have been to implement as correct as possible a rule of law system of justice.

possible, in return for certain specifics required by community reconciliation agreements, organised by the domestic TC, in cooperation with the courts and also in cooperation with the UNHCR.¹⁷¹⁵ This may ease the restricted prosecutorial process and assist the fulfilment of the criminal justice aims. Cooperative procedures have been worked out, where the Special Court, in seeking to assist the reception and reintegration of people into their communities, must still be able to exercise its exclusive jurisdiction. How these two institutions cooperate will be discussed in the assimilated justice part.¹⁷¹⁶

The work of the Serious Crimes Unit has also been troubled by external restrictions, in the shape of amnesty threats.¹⁷¹⁷ The Dili Special Court has not had a smooth run either, due to Indonesia's refusal to transfer suspects and to allow access to witnesses and evidence.¹⁷¹⁸ Depending on the extent of future international support, lack of funds may hinder the completion of serious crimes trials.¹⁷¹⁹ The closure of the current SCU and Special Panels have met with concern amongst victims¹⁷²⁰ and the importance for Timor-Leste to continue the work of the serious crimes prosecutions has been stressed. Reliance on the Indonesian courts to try offenders is dubious.¹⁷²¹ Due to international pressure on Indonesia to prosecute, Indonesia established an *ad hoc* human rights court to try 18 defendants on crimes against humanity charges.¹⁷²² The Indonesian law recognises the state as responsible for the human rights violations, either by act or omission. The law of Indonesia also indicates the adoption of a right to reparation, as the victim's right and the state's responsibility.¹⁷²³ However, reparation claims and indictments are in reality yet to be acted

¹⁷¹⁵ See ahead, CAVR, UNTAET Reg.2000/11; 2001/10.

¹⁷¹⁶ Reg.2001/25 on the amendment of UNTAET Reg.2000/11, on the organisation of courts in East Timor, and UNTAET Reg. 2000/30 on the transitional rules of criminal procedure, Part IV, Community Reconciliation Procedures, S.22.

¹⁷¹⁷ Besides the TC granted immunity. See ahead, assimilated justice.

¹⁷¹⁸ Because of numerous threats to justice, including the recently proposed law on amnesty and pardon, the ICTJ has urged the UN to extend the UNTAET mandate, of the SCU and Special Panels, beyond the existing date, 13 May 2005. Proposed law 24/1/2 Law on Amnesty and Other Clemency Measures, in Report on the Amnesty and Pardon Law, 5 May 2004; 27 Apr.2005, www.jsmp.minihub.org; www.draft%20Amnesty%20Law%202004%20_e_.pdf.

¹⁷¹⁹ However, Timor-Leste has taken important steps in strengthening the legal framework, with the adoption and approval of human rights and justice improvements. See UN *End of mandate report of the Secretary-General on the UN Mission of Support in East Timor*, 2005, #3.

¹⁷²⁰ The handing over of SCU documentation is taking place with the retention of some Special Court staff. *Id.*, #18-19.

¹⁷²¹ www.un.org/peace/etimor/DB/db011200.htm

¹⁷²² Law No.26/2000 Indonesian Human Rights Court, The law established that a TC could look into gross human rights violations that had occurred prior to the law, art.47; Government Regulation No.3/2002, 8 Sep.2004, all at www.jsmp.minihub.org

¹⁷²³ Law No.26/2000 on the Indonesian Human Rights Court, with the Government Regulation No.3/2002 stipulating victim compensation, e.g. restitution, compensation, rehabilitation and a guarantee that the gross human rights violations will not recur, is a right of the individual victim and also the direct family and relatives, who indirectly bear the direct victim's plight. See e.g. the *Priok* trial, 8 Sep.2004 http://www.indonesia-house.org/focus/HumanRights/2004/03/030904Rights_tribunal_to_summon_Tommy_in_Priok_trial.htm; www.jsmp.minihub.org

upon, by what would appear to be a sham court.¹⁷²⁴ In 2003, 6 defendants were found guilty and sentenced to imprisonment terms below the legal level, although all currently remain free, pending lengthy appeal processes.¹⁷²⁵ “Recent acquittals by the Indonesian *ad hoc* court on East Timor of Indonesian security officers accused of crimes against humanity have strengthened calls for genuine justice for East Timor. This dramatically illustrates the need for international mechanisms to address serious crimes including an ad hoc international tribunal for past crimes in East Timor and an uncompromised permanent international court for current and future crimes.”¹⁷²⁶ The unwillingness to set up an ICT for Timor-Leste was probably related to the focus of the international community on the ICC, and the very costly and slow operations of the ICTY and the ICTR.¹⁷²⁷ It is hoped that the ICC can be relied upon in similar circumstances today, especially with regard to the difficulty of Indonesian cooperation to hand over indicted individuals to the Special Court.¹⁷²⁸ States in transition cannot try all offenders of crimes of such magnitude in any way more than an ICT can do so, unless never-ending resources and time are available, and the restrictions recognised to the prosecutorial process of Timor-Leste are not only due to the hybrid court, but affected by the lack of a domestic justice system. Although the Dili Special Court amounts to a great effort, on behalf of Timor-Leste and the international community, to create justice in Timor-Leste, the main problem lies in the fact that although the crimes were committed in the territory of Timor-Leste, and the majority of victims are Timorese, the offenders are mainly found in Indonesia.¹⁷²⁹ The effort to prosecute and punish the offenders must be shared by the two nations, which would accelerate indictments and the time between detention and trial. Whereas Timor-Leste is willing and to some extent today also able to prosecute and fulfil the criminal justice aims,

¹⁷²⁴ For criticism, see e.g. International Centre for Transitional Justice, *The struggle for truth and justice*, Jan.2004; *Intended to fail*, Aug.2003, at www.ictj.org

¹⁷²⁵ Since proceedings began in Mar.2002, more acquittals have taken place. See generally www.jsmp.minihub.org In the interim, pro-democracy activists are jailed for defacing pictures of the Indonesian President, 9 Jun.2003, www.jsmp.minihub.org More than 90 religious leaders and organizations from the US have urged the US government to support the establishment of an ICT for East Timor. This followed the acquittal by an Indonesian court of former Indonesian military commander Suratman for crimes against humanity committed in East Timor in 1999. Amnesty International likewise denounced Indonesia's trials of human rights crimes committed in East Timor as "dishonest, false and unjust", urging the UN to set up an international court to try Jakarta's atrocities, 15 Apr.2003, at www.amnesty.org/library/eng-tmp/index; also at 26 May 2003, at www.etan.org/action/action2/relig.htm; Justice for Timor-Leste: The way forward, Amnesty International & JSMP report, 13 Apr.2004 www.jsmp.minihub.org

¹⁷²⁶ Secretary-General Press Release, SG/SM/7793, 4 May 2001; Miller, 27 Aug.2002, www.etan.org

¹⁷²⁷ See the budgets of the ICTs: www.un.org/icty/glance/index.htm; www.ictcr.org/default.htm UNDoc.S/2000/915.

¹⁷²⁸ The ICC Statute was not in effect when the crimes were committed in 1999.

¹⁷²⁹ The Special Court constitutes part of the domestic justice system. Of course, as the Special Court lacks UN Chapter VII powers that oblige governments to cooperate with the court, the court depends on the cooperation of member states with its requests.

Indonesia does not appear to be willing to prosecute or to cooperate with the courts of Timor-Leste.¹⁷³⁰

7.3.2. TRUTH COMMISSION

Besides the prosecutorial process, the restorative Reception, Truth and Reconciliation Commission (CAVR)¹⁷³¹ was set up in Timor-Leste in 2001, in order to look into the pattern of human rights violations committed, in the context of its independence struggle from 1975 to 1999.¹⁷³² A decision was taken by the government to extend the TC's mandate, and final TC hearings were held in March 2004.¹⁷³³ The TC was a domestic, independent authority, mandated to investigate, establish and report the truth; and to facilitate community reconciliation, through public hearings and policies welcoming returnees.¹⁷³⁴ Key areas investigated include significant massacres, forced displacement, famine, political imprisonment, impact of violations and war on women and children, the Indonesian military and the civil war period.¹⁷³⁵ The statements were supported by a database, identifying types of violations reported, and the evaluation workshops aimed at developing democratic policy development. The truth discovery, with the objective to complete a truth report, was thus done through a macro-approach to truth. While 90% of those interviewed expressed satisfaction with the TC, offender participation was at least initially low, (hence the inviting reconciliation process, see ahead) and with prosecutions lacking and an Indonesian refusal to extradite indicted military leaders, impunity exists in the region.¹⁷³⁶ Monthly national evaluation workshops have been held with national and regional commissioners, together with the TC senior management team. An Advisory Council has been set up, with the recruitment of national and international staff, in order to enhance the status and credibility of the TC and offer assistance by

¹⁷³⁰ While the larger amount of the offenders must be dealt with by the domestic courts of East Timor and Indonesia, resembling Rwanda's situation, an ICT would be able to access evidence, witnesses and offenders in Indonesia, and elsewhere. This would allow the Special Court to focus on the domestic situation.

¹⁷³¹ CAVR – the Portuguese acronym for the TC, www.easttimor-reconciliation.org

¹⁷³² 20 Jun.2001, the National Council approved the TC, followed by the UNTAET Reg.2001/10 Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 Jul.2001.

¹⁷³³ Due to present its final report, the mandate was extended to be delivered to the President of Timor-Leste before 7 Jul.2005, at <http://www.easttimor-reconciliation.org>. It is believed that CAVR community reconciliation processes will continue, even after the truth reports has been published, in response to traditional justice. See more 4 Jun.2003; 31 May 2004, www.jsmp.minihub.org; Secretary-General Report, May 2005, S/2005/310, #21.

¹⁷³⁴ Supporting victim participation and promoting forgiveness. The TC was also mandated to make recommendations for further action. UNTAETReg.2001/10, establishes the TC.

¹⁷³⁵ Id. The truth investigations focused on taking statements, and national thematic hearings of e.g. businesses, similar to the SA TRC. By the end of January 2003, 203 offender statements had been received, and 103 hearings had been held in 10 districts, 31 May 2004 www.jsmp.minihub.org; and supra www.easttimor-reconciliation.org.

¹⁷³⁶ Interviews held by the Political Affairs Officer of the UN in East Timor, Mr Robinson, Sept.2003, see 31 May 2004 www.jsmp.minihub.org.

providing authoritative advice and feedback to the commissioners.¹⁷³⁷ This should support legitimate operations, as well as collective truth acknowledgement.

Besides investigating and reporting on the truth, the importance of active cooperation and information sharing with the Timorese living in West Timor, also confirmed the need for a returnee and reconciliation program for those wishing to return.¹⁷³⁸ The second main function of the truth discovery process was thus collective reconciliation, assisted by truth discovery. Individual reconciliation was perhaps not given any direct assistance, besides the truth discovered, in both the prosecutorial and the truth discovery processes. The TC based its collective reconciliation program on the principle that genuine reconciliation requires justice and that individuals must accept responsibility for their actions. Offenders of serious crimes were not directly involved in the reconciliation programs,¹⁷³⁹ however, it was recognised that most offenders that wished to be reconciled with their communities had committed less serious crimes.¹⁷⁴⁰ The TC therefore facilitated Community Reconciliation Agreements, between the local community and the offenders of less serious crimes. Legitimacy was thus based on the necessary community support. Any individual who returns to Timor-Leste and who committed a crime during 1999 either faces the prosecutorial process or the community reconciliation process. As the community reconciliation program could affect the work of the Special Court,¹⁷⁴¹ a necessary determination of the seriousness of the crime involved both processes and the potential overlap is discussed in the next part. Where Rwanda and its *gacaca* referral decided to keep the most serious offences away from the *gacaca* practice, Timor-Leste similarly allows the lesser crimes to be reviewed by the community reconciliation process, present in villages and towns that seek both to establish the truth and to

¹⁷³⁷ The Advisory Council includes East Timorese and international members.

¹⁷³⁸ http://www.easttimor-reconciliation.org/Reg_Summary-E.htm2. Community Reconciliation.

¹⁷³⁹ Offenders of serious crimes are liable to prosecution, Reg.2000/15 SCI and Special Panels with Exclusive Jurisdiction over Serious Criminal Offences.

¹⁷⁴⁰ Reg.2001/10, at <http://www.un.org/peace/etimor/untaetR/Reg10e.pdf>

¹⁷⁴¹ Id.; Reg.2001/25, on the amendment of UNTAET Reg.2000/11 and on the organisation of courts in East Timor and UNTAET Reg.2000/30, on the transitional rules of criminal procedures. Part IV Community Reconciliation Procedures, S.22.1 of this Reg.2000/30 reads: "In seeking to assist the reception and reintegration of persons into their communities, the Commission may facilitate Community Reconciliation Processes in relation to criminal or non-criminal acts committed within the context of the political conflicts in East Timor between 25 April 1974 and 25 October 1999 considered appropriate by the Commission under Section 24." S.22.2 "Nothing in the present Regulation shall prejudice the exercise of the exclusive prosecutorial authority of the General Prosecutor and Deputy General Prosecutor for Serious Crimes under Section 14 of UNTAET Regulation No. 2000/16 nor the exclusive jurisdiction over serious criminal offences of the Serious Crimes Panel of judges established within the Dili District Court in accordance with Sections 1 and 2 of UNTAET Regulation No. 2000/15." S.22.3 "In undertaking its functions under Part IV, the Commission may give priority to facilitating Community Reconciliation Processes in respect of acts committed during 1999." S.22.4 "The Commission may undertake a Community Reconciliation Process only in cases where a person has made an admission of responsibility based on a full appreciation of the nature and consequences of such admission and has voluntarily requested to participate in a Community Reconciliation Process." The Commission and the Formal Justice System, <http://www.easttimor-reconciliation.org/justicesystem.htm>; <http://www.un.org/peace/etimor/untaetR/Reg10e.pdf>

promote reconciliation. "In no circumstances shall a serious criminal offence be dealt with in a Community Reconciliation Process."¹⁷⁴² Once accepted for participation in a reconciliation meeting, the person must make a written statement, with a confession and a detailed account of his actions, obliging the accused to 'full disclosure', similar to the SA TRC.¹⁷⁴³ Once the local community has been identified, hearings take place at that level, with local leaders calling the meeting with offender, the victims and the local community present. Beneficial actor participation is thus recognised in the fulfilment of restorative aims, as well as the possible fulfilment of shaming and deterrence. During questioning, a person's refusal to answer, can lead to a referral to the prosecutor's office. If the hearing is considered satisfactory by the elders, an act of reconciliation is recommended, such as public apology, community service, or compulsory attendance at different types of rehabilitation and reconciliation groups, often linked to the church.¹⁷⁴⁴ CAVR is thus equipped to grant low-level offenders amnesty, by way of community reconciliation agreements,¹⁷⁴⁵ which are registered with the nearest District Court and bar any legal action, regarding the acts in question. Still, criminal justice for special crimes is a priority, as the General Prosecutor can scrutinize amnesty applications.¹⁷⁴⁶ The state-sponsored TC, not meant to deal with offenders of serious crimes, should thus hand such offenders over to the Dili Court.¹⁷⁴⁷ The amnesty provisions

¹⁷⁴² UNTAET Reg.2001/10, Section 4, Schedule 1 annex.

¹⁷⁴³ Id. Section 23.1 "A person responsible for the commission of a criminal or non-criminal act who wishes to participate in a Community Reconciliation Process in respect of such act must submit a written statement to the Commission. This statement must contain the following: (a) a full description of the relevant acts; (b) an admission of responsibility for such acts; (c) an explanation of the association of such acts with the political conflicts in East Timor; (d) an identification of the specific community in which the Deponent wishes to undertake a process of reconciliation and reintegration; (e) a request to participate in a Community Reconciliation Process; (f) a renunciation of the use of violence to achieve political objectives; and (g) the signature or other identifying mark of the Deponent." S.23.2 "The Commission shall endeavour to provide such assistance as is necessary to facilitate Deponents' making a written statement. Such assistance may take the form of assistance by Commission staff and/or coordinated assistance from non-government organisations." S.23.3 "Prior to the Commission accepting a statement under this Section, the Deponent must be informed that a copy of the statement will be sent to the Office of the General Prosecutor and that its contents might be used against him or her in a court of law should of the Office of the General Prosecutor choose to exercise jurisdiction. Only in circumstances where the Deponent indicates acceptance of this process and annotates the statement accordingly shall the statement be accepted by the Commission." S.23.4 "In cases where the Commission is of the opinion that a statement does not fulfil the requirements of Subsection 23.1, the Commission shall notify the Deponent of this view, providing details of the deficiencies of content. A Deponent may submit a revised statement for consideration by the Commission." <http://www.un.org/peace/etimor/untaetR/Reg10e.pdf>

¹⁷⁴⁴ 5 Dec.2002, at www.easttimor-reconciliation.org. UNTAET Reg.2001/10, S.27.7, following a hearing, the Panel shall deliberate upon the act of reconciliation which it considers most appropriate for the Deponent and inform the Deponent of the outcome of their deliberations. The act of reconciliation may include: (a) community service, (b) reparation; (c) public apology; and/or (d) other act of contribution. See <http://www.un.org/peace/etimor/untaetR/Reg10e.pdf>

¹⁷⁴⁵ Failure to fulfill the agreement is a criminal offence, with up to 1 yr. imprisonment and/or a fine of up to \$3000. See generally http://www.easttimor-reconciliation.org/Reg_Summary-E.htm

¹⁷⁴⁶ Id., and UNTAET Reg.2001/10, S.22.2. prioritising criminal justice, holding that nothing will prejudice the authority of the Serious Crimes institutions, and that the General Prosecutor will scrutinize applications for amnesty. See next part.

¹⁷⁴⁷ UNTAET Reg.2001/10 establishing the RTRC, S.4, Schedule 1 annex, reads: "In no circumstances shall a serious criminal offence be dealt with in a Community Reconciliation Process", and S.22.2.

are unfortunate, although supported by many of those refugees who fled to West Timor and who would, of course, prefer to return to Timor-Leste under the protection of amnesty.¹⁷⁴⁸ The amnesty granting power may not, in theory, hinder the Special Court and the prosecutorial process, concerned with trying the perpetrators of international core crimes, but may actually have been the reason why the different institutions and processes had to collaborate. Legitimately supported by the local communities, and individually granted, the amnesties may furthermore assist a broader truth and further reconciliation.

Indonesia's National Commission on Human Rights issued a report early 2000, charging ministers and military officials with human rights violations, recommending further investigations, prosecutions and the return of displaced East Timorese.¹⁷⁴⁹ The failure of the Indonesian *ad hoc* human rights court,¹⁷⁵⁰ combined with the ignored TC recommendations, leads one to doubt the intentions behind the latest proposal. In March 2005, the Presidents of Indonesia and Timor-Leste decided to initiate a joint TC.¹⁷⁵¹ The joint Commission of Truth and Friendship (CTF), due to begin its two-year mission in August 2005, is proposed to be fully owned and operated by the two nations. Indonesia does thus seem to have succeeded in persuading Timor-Leste to exclude the UN from any further involvement in the justice process.¹⁷⁵² The TC is meant to reveal and establish the conclusive truth relevant to the nature, causes and the extent of human rights violations that occurred in the period leading up to, and immediately following the Timor-Leste elections in August 1999.¹⁷⁵³ The joint TC is not meant to prejudice any ongoing judicial process, but will work

¹⁷⁴⁸ From Dili Court records, none of the militia leaders involved in reconciliation process have been indicted, www.jsmp.minihub.org/; Ruth-Heffelbower, Spring 1999, at www.fresno.edu/pacs/docs/indorj/pdf

¹⁷⁴⁹ (KPP-HAM) set up Oct.1999, report issued Jan.2000. It held General Wiranto the overall responsible, and recommended further investigations and prosecutions, and the return of displaced East Timorese, see www.indonesia-ottawa.org/news/Issue/HumanRights/ham-kpp-timtim-0131-2000.htm; <http://www.easttimor.com/archives>. A step taken to achieve truth and reconciliation in East Timor and Indonesia was the mutual assistance agreement between East Timor and Indonesia, 6 Apr. 2000, Memorandum of Understanding. However this led to nothing. As previous recommendations, and art.47 of the Law 26/2000 on the *ad hoc* human rights court spoke of a TC, Indonesia discussed the setting up of a TC, with a new bill proposing a TC modelled after the SA TRC, 7 Sep.2004, see González, 2004, www.indo.trc.comment.pdf; <http://www.easttimor.com/archives>.

¹⁷⁵⁰ See first part of this section.

¹⁷⁵¹ 10 Jan.2005; 9 Mar.2005, www.jsmp.minihub.org.

¹⁷⁵² A UN-sent commission of inquiry, with a panel of experts to report on the judicial progress of East Timor and Indonesia, was refused entry visas into Indonesia, although the 3 experts were welcomed into East Timor 9 April 2005. The UN experts were announced 18 Feb.2005 to have been appointed to an "independent Commission of Experts to review the prosecution of serious human rights violations committed in 1999 in Timor-Leste". It can also look into ways of assisting the joint Commission of Truth and Friendship, which Indonesia and Timor-Leste agreed to establish in December. *Timor-Leste: UN announces expert commission*, see 4 Mar.2005, 9 Mar.2005, 14 Apr.2005, at www.jsmp.minihub.org; http://www.justicetribune.com/article_uk.php?action=view&id=2899&start=0&sort=date%20desc&search=east%20timor&jid=&langue=UK, see 4 Mar.2005, 9 Mar.2005, 14 Apr.2005. See UN *End of mandate report of the Secretary-General on the UN Mission of Support in East Timor*, 2005, #8.

¹⁷⁵³ Mutually agreed terms of reference are built on Indonesian law, (Indonesia Law No.27/2004 and all materials documented by the Indonesian TC established in 1999 (KPP-HAM), and also the few cases tried by the *ad hoc* Indonesian human rights court on East Timor) and East Timorese law applicable to its TC (East Timor Law No.10/2001, and CAVR and Special Court cases and findings). The terms were agreed upon 10 Mar.2005 in Jakarta by

towards reconciliation through recommending, amongst other things, amnesty for those who cooperate in revealing the truth, and rehabilitation for those who have been wrongly accused.¹⁷⁵⁴ ICTJ President Méndez has called on the Commission for Truth and Friendship to address past failures, in order to achieve justice and respond to the needs of victims, rather than focusing on bilateral diplomatic interests of the two governments.¹⁷⁵⁵ The joint TC so far has not made provisions for reparations and it has not found the necessary legitimising support, from victim groups, who were never consulted about the TC and reportedly believe it is another means of impunity.¹⁷⁵⁶

Although it is too early to pass judgement on this proposal, diplomatic relations between the two countries have at least been achieved and further bilateral relations can of course promote further reconciliation within and between the countries.¹⁷⁵⁷ However, it is also important for the two countries to realise the difficulties and dangers that lie ahead and recognise the sentiments of the victims. If a common version of the truth cannot be agreed upon, it may create further division between the countries, which, combined with amnesties hindering prosecutorial process and the lack of reparations, will cause further difficulties with regard to Timor-Leste's transition to truth, justice and reconciliation.¹⁷⁵⁸

7.3.3. ASSIMILATED JUSTICE

International law and the most important human rights treaties are rooted in Timor-Leste's legislation.¹⁷⁵⁹ The enactment of these instruments and the implementation of international law have

the 2 Presidents, and were referred to the countries' parliaments for ratification. The terms preclude the TC from recommending prosecutions or reparations and allow amnesties to individuals responsible for committing serious abuses. See International Center for Transitional Justice (ICTJ), www.ictj.org 10 Mar.2005; 14 Apr.2005, www.jsmp.minihub.org

¹⁷⁵⁴ However, if there is no distinction between crimes, illegitimate amnesty may be granted for the international core crimes. Further discussed in ch.2, 6, it has been confirmed that amnesty for genocide and crimes against humanity are not allowed. See, e.g. *Prosecutor v. Anto Furundzija* ICTY Judgment, 1998, #155; *Barrios Altos*, 2001, Inter-Am.CtHR; *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, *Prosecutor v. Kallon and Kamara*, SCSL, Appeals Chamber, 2004; UN Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, 2004.

¹⁷⁵⁵ ICTJ, www.ictj.org 10 Mar.2005

¹⁷⁵⁶ 14 Apr.2005, www.jsmp.minihub.org

¹⁷⁵⁷ Timor-Leste has made improvements in many areas. Besides already mentioned human rights legislation and the taking over of serious crimes prosecutions, general law enforcement and border control between Timor-Leste and Indonesia has improved, still with UNMISSET assistance. SCRes.1599, 2005 deploys military components under UNOTIL's control; see generally Secretary-General Report, May 2005, S/2005/310, ##43.

¹⁷⁵⁸ The problems do not only relate to extradition. The courts may not be able to indict offenders because they have been granted amnesty. The proposed law is 24/1/2 Law on Amnesty and Other Clemency Measures

¹⁷⁵⁹ With human rights legislation, Security Council resolutions and UNTAET regulations, East Timor has updated its legislation: Magna Carta, 25 Apr.1998, UNSCRes.1272, 1999, UNTAETReg.1999/1, promulgated by the UN Transitional Administrator on 27 Nov.1999, lists 7 human rights instruments; UDHR; ICCPR; ICESCR; Conv. on the

assisted the fundamental aims of truth and just-desert punishment. They may also work as deterrence *per se*. But, more importantly, respect for and adherence to this law, in the fight against impunity, must be guaranteed in the transition towards a stable democracy.¹⁷⁶⁰ Timor-Leste is an example of reflexive institutional commitment, which has had a certain amount of international imposition to assist the legitimately restricted justice processes. To what extent this commitment to have institutional collaboration with the objective to fulfil the fundamental aims and balance the involvement of the actors will function domestically will depend on the progressive commitment. Although the SCU and the Special Panels have not completely ceased to function,¹⁷⁶¹ the prosecutorial process is at risk and so is confidence in the rule of law, due to continuous general amnesty threats, inaction on behalf of Indonesia to hand over accused individuals and a general lack of professionalism and expertise in Timor-Leste. Yet, CAVR, which includes militia in its amnesty and reconciliation process, excludes serious crimes and collaborates with the courts. The TC practice further deals with each offender individually and publicly, with demands for confession, apology and acts towards community reconciliation.¹⁷⁶² The restrictions to the individual focus of the criminal justice aims may thus be narrowed by the truth discovery process. The hybrid model introduced in Timor-Leste has had limited success, but, sensitive to local particularities, at least to the extent where it requires domestic staff, similar, yet different hybrid models are present in Sierra Leone and currently being developed for Cambodia, where a universal dimension is thus allowed.

The fundamental aim of reparation has not played an active role in the restorative process, however the Special Court does, at least, provide for a Trust Fund and the possibility of seeking compensation.¹⁷⁶³ The right to protection, assistance, and reconciliation may exist collectively; however the reconciliation mechanisms in place appear to be focused on the offenders, similar to the SA TRC amnesty process and it is uncertain to what extent victims can come forward and tell their stories. Again, more than anything, the *quasi*-assimilated justice character cannot (yet) claim to involve a shared objective to balance the involvement of the actors, which is linked to the inclusive commitment of the institutions and the objective to fulfil all of the fundamental aims. An

Elimination of All Forms of Racial Discrimination; Conv. on the Elimination of All Forms of Discrimination Against Women; Torture Conv, and Conv. on the Rights of the Child.

¹⁷⁶⁰ The established independent Transitional Judicial Service Commission by UNTAET is one such guarantor, UNTAET Reg. 1999/3; Stohmeyer, H. 2000.

¹⁷⁶¹ Supra Secretary-General, 29 Apr.2004, <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/323/42/PDF/N0432342.pdf>; Secretary-General May 2005, S/2005/310.

¹⁷⁶² For definition of serious crimes, see UNTAET Reg.2001/11. See Reg.2001/11, arts.32-33 and Reg.2000/11, Schedule 1 for CAVR amnesty.

¹⁷⁶³ Supra, UNTAET Regulation 2000/15, S.24 Witness Protection; S.25, Trust Fund; S.50, Claim for Compensation by the Alleged Victim, <http://www.un.org/peace/etimor/untactR/Reg0015E.pdf>

increased focus on truth and reparation appears more necessary than anything else, which would involve institutional collaboration as well as inclusion of the victims.

The truth discovery process has cooperated with West Timor and Indonesia, and has broadcasted weekly on national radio and TV, focusing on individual and collective truth and reconciliation. By participating in the truth discovery process, individuals could tell the truth, hear the truth, acknowledge and, perhaps, forgive; where participants were enabled to apologise and demonstrate, to the community, that they were willing to reconcile.¹⁷⁶⁴ Capacity-building teams have been created to provide support and training in the communities, aimed at victim-supported reconciliation.¹⁷⁶⁵ The effect that truth discovery can have on the nation must not be forgotten, with reference to the fundamental aims of truth and reconciliation and the truth report can acknowledge this.¹⁷⁶⁶ The Roman Catholic Church, the dominant religious body in the country, participated in the commission and supported the virtues of the TC to go beyond issues of crime and punishment, to allow offenders the opportunity to confess and apologise and to provide a forum for victims to express forgiveness as well as detail their suffering. This can play a key role in national healing.

In the truth discovery process, it is important to clarify whether a crime is a serious crime, in which case the Special Court has jurisdiction, or whether it is a less serious crime, in which case immunity from prosecution can be given.¹⁷⁶⁷ CAVR and the prosecutorial process are thus combined. Amnesty is conditional on the individual contacting a CAVR office, submitting a statement, describing the crime, confessing, participating in hearings and undertaking the act of community reconciliation so ordered by the TC.¹⁷⁶⁸ In the cooperation between the restorative and

¹⁷⁶⁴ Of course legal action against those who have not used the TC process is not ruled out.

¹⁷⁶⁵ Public information teams prepared informative and educative reports to support truth investigations, reconciliation and human rights education. See 4 Jun.2003 www.jsmp.minihub.org

¹⁷⁶⁶ CAVR was set up, in order to look into the truth behind human rights violations committed in Timor-Leste's independence struggle from 1975 to 1999, and in order to promote reconciliation. 20 Jun.2001, the National Council approved the commission; UNTAET Reg. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 Jul.2001.

¹⁷⁶⁷ The nature of the crime; the amount of criminal acts that the individual committed; and the individual's role in the crime must be determined, before an individual can be accepted in the reconciliation process. UNTAET Reg.2001/10, S.22.1 CAVR may facilitate Community Reconciliation Processes in relation to criminal or non-criminal acts committed within the context of the political conflicts in East Timor between 25 April 1974 and 25 October 1999 considered appropriate by the Commission under S.24. 22.2 "Nothing in the present Regulation shall prejudice the exercise of the exclusive prosecutorial authority of the General Prosecutor and Deputy General Prosecutor for Serious Crimes under Section 14 of UNTAET Regulation No.2000/16 nor the exclusive jurisdiction over serious criminal offences of the Serious Crimes Panel of judges established within the Dili District Court in accordance with Sections 1 and 2 of UNTAET Regulation No. 2000/15." 22.4 "The Commission may undertake a Community Reconciliation Process only in cases where a person has made an admission of responsibility based on a full appreciation of the nature and consequences of such admission and has voluntarily requested to participate in a Community Reconciliation Process." See Reg.2001/25 on the amendment of UNTAET Reg.2000/11, on the organisation of courts in East Timor, and UNTAET Reg.2000/30 on the transitional rules of criminal procedure, Part IV, Community Reconciliation Procedures, at <http://www.easttimor-reconciliation.org/justicesystem.htm>

¹⁷⁶⁸ S.23, Reg.2001/10, S.27.7 The CAVR reconciliation agreement panel shall deliberate upon the act of reconciliation which it considers most appropriate for the Deponent and inform the Deponent of the outcome of their deliberations.

the criminal justice institutions, police protection is necessary, assisting victims and witnesses.¹⁷⁶⁹ The Office of the Prosecutor has to review the individual's statements, concur with the TC on the crime definition and the relevant District Court must review and register the community reconciliation agreements and take action if they are not complied with. Sharing of information between the justice processes is possible, mutually advantageous and essential; in order to register already investigated cases. Reconciliation for offenders of serious crimes, and for offenders not in Timor-Leste, is facilitated by the UNHCR.¹⁷⁷⁰ Those who either want to participate in a community reconciliation process, or who simply want to return, will go through UNHCR-facilitated "Go & See" visits, and it has been decided that nobody attending such an official visit will be arrested, during the visit.¹⁷⁷¹ Although amnesty is used as a carrot in the fulfilment of truth and reconciliation, Timor-Leste indicates an honest attempt to fulfill such aims.

Although the dual justice processes of Timor-Leste may cooperate, where, for example, evidence established in CAVR hearings has been referred to by the Special Panels, with regard to testimonies held, and although the amnesty granting capacity may, as yet, not threaten the scope of the Special Court, there did not appear to be any pre-planned, conscious institutional commitment to assimilate the processes, or the institutions.¹⁷⁷² Instead, Timor-Leste may be an example of the initial stage of assimilated justice. It is possible to identify an institutional commitment that is, to some extent internalised, inclusive without fully including the victims, collaborative rather than competitive, and progressive in terms of realising the shortcomings of the processes. The need for both criminal and restorative justice aims has been recognised and, because of the amnesty process, specific cooperation between the processes has had to be worked out.¹⁷⁷³ While not representing an accidental shift towards *quasi*-assimilated justice, Timor-Leste rather represents a justice model that

The act of reconciliation may include: (a) community service, (b) reparation; (c) public apology; and/or (d) other act of contrition, <http://www.un.org/peace/ctimor/untaetR/Reg10e.pdf><http://www.un.org/peace/ctimor/untaetR/Reg10e.pdf>
¹⁷⁶⁹ UNTAET Reg.2001/10.

¹⁷⁷⁰ In August 2003 the Deputy Attorney-General of the Dili Special Court granted some 150 former anti-independence militias immunity to be able to go home temporarily, on a reconciliation move, 26 Aug.2003, www.jsmp.minihub.org; Belo Ximenes, 28 May 2004, www.jsmp.org

¹⁷⁷¹ If there is no indictment or arrest warrant already issued. However, there is no exemption from arrest in the future. UNHCR must arrange the visit and UNHCR must announce the visits to the UN and the government. Memo 7 Dec.2001, from the Transitional Administrator, on UNTAET's position on reconciliation meetings at or near the border. ¹⁷⁷² www.jsmp.minihub.org 12 Apr.2004, E.Timor Justice Update, 23 Mar.-2 Apr.2004; Justice Update 8-22 Mar. 2004.

¹⁷⁷³ However, the existing collaboration between the processes may represent an unintentional, yet necessary form of *quasi*-assimilation, due to the approved amnesty. The collective community may have been given certain means to both legal and social truth, collective reparations and reconciliation, through the TC and the Special Court. Although some offenders have been tried, and also put through the reconciliation mechanisms, the overall failure with the justice process does not indicate successful fulfilment of the fundamental aim of just-desert punishment, mainly due to the lack of cooperation of Indonesia, however the individual offender-focus of the TC assists the legal truth, and can involve shaming. Deterrence may also be limited in its fulfilment, with the inaction in Indonesia, and the TC amnesty process. Individual reparation is the least fulfilled fundamental aim, and the TC does not appear to focus on the individual victim, but rather on the individual offender.

recognises the need for all of the fundamental aims, to some extent under the control of the criminal justice system. The truth discovery process does not appear to compete with the prosecutorial process and, in terms of truth and reconciliation they have allowed and supported community participation. The supported amnesty, seen as a carrot to satisfy the need to engage the actors in a dialogue, may assist the dialogue between the actors, as a basic requirement for any truth discovery process, which, in a state like Timor-Leste, cannot rely on a developed legal system. However, the truth discovery process must be equally supported by offenders, victims and, where there is still a general demand for further justice, preferably the international community. The disequilibrium of Timor-Leste's main focus on the offender, both in the truth discovery process as well as in the prosecutorial process, does not legitimately recognise the victims. There is thus no objective to balance the involvement of the actors.

Since the indictment of Indonesian General Wiranto in 2003, a leader in the 1999 violence, Indonesia continues to refuse to hand over suspects to the Special Court and the Special Panels continue delaying the issuing of an arrest warrant for the former defence minister.¹⁷⁷⁴ These, and continued failure by the *ad hoc* Jakarta court are alarming¹⁷⁷⁵ and it is perhaps no surprise that a coalition of local NGOs, churches, victim groups etc. have formed a National Alliance for an International Tribunal.¹⁷⁷⁶ The courts are struggling to speedily indict and prosecute, putting the fundamental aims of legal truth, just-desert punishment and deterrence at risk. The recently proposed shared TC between the two nations, with amnesty granting power, is likely to be another Indonesian means of impunity. Before the UN's role can be fully taken over by Timor-Leste, internal and external security issues must be solved and it is thus important that the improving relations between Timor-Leste and Indonesia are further fleshed out.¹⁷⁷⁷ Throughout 2004, national dialogues on justice were held in Dili, attended by judicial staff and the general public in order to

¹⁷⁷⁴ General Wiranto is a leading candidate for the presidential elections; Donnan, 2004.

¹⁷⁷⁵ The *ad hoc* Human Rights Tribunal Law was passed in 2000, following international pressure on Indonesia to take action. Indonesian prosecutors have continued releasing top officials charged with crimes against humanity. 5 Jun.2003 a top general was released, the court saying it had not been proved that he was guilty of committing crimes against humanity, 6 Jun.2003, www.jsmp.minihub.org/; <http://www.theage.com.au/articles/2003/06/05/1054700335049.html>

¹⁷⁷⁶ *Crying Without Tears - In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations*, International Center for Transitional Justice, in Barber, supra, 16 Mar.2004 www.smp.minihub.org

¹⁷⁷⁷ SCRes.1410, 2002 stressed the importance of cooperation between the 2 countries and, with UNMISSET, to bring offenders to justice. See the UN Secretary-General 29 Apr.2004, #11-13 and UN *End of mandate report of the Secretary-General on the UN Mission of Support in East Timor*, 2005, #3. Most of the refugees who remained in camps in West Timor were relocated from camps. Most former refugees decided to remain in West Timor, however there are yet many unresolved cases of displaced children. In the phasing out period, UNMISSET should assist East Timor with public administration and the justice system, especially in the area of serious crimes, law enforcement and security. In order to achieve justice, and provide criminal justice, East Timor must extend its system outside of the Dili District. Justice Update 1-7 Mar.2004 www.jsmp.minihub.org. Amongst other things, local access to justice is a problem, and the lack of capacity of court actors is urgent. Training has been offered by different NGOs, but even refused. Funding is also necessary. Today the Ministry of Justice, Decree No.03/2003, provides financial administration.

discuss problems that threaten Timor-Leste's process to truth, justice and reconciliation.¹⁷⁷⁸ Still, proposals for an international court, to take over from the Indonesian *ad hoc* human rights tribunal, are continuously rejected. Indonesia's permanent representative to the UN, Rezlan Ishar Jenie, and Timor-Leste's Foreign Minister Ramos Horta mean that an ICT would undermine the relations between the two countries.¹⁷⁷⁹ Horta objects to the need for an ICT, saying that Indonesia has taken honest and big steps towards bringing justice to those responsible for violence in Timor-Leste. He has also called for more time for the two countries to be able to reconcile, the latest effort being the shared TC.¹⁷⁸⁰ In May 2004, as Timor-Leste celebrated its 2nd anniversary of independence, the parliament tried to pass a controversial amnesty and pardon law, justified for reasons of national reconciliation.¹⁷⁸¹ The Preamble to the Amnesty Bill underlines the importance to forgive without forgetting, and article 1 grants amnesty to less serious, criminal offences committed before 31 March 2004.¹⁷⁸² However, the limitation on granting amnesty to certain non-violent crimes is deceitful, as article 3 pardons with regard to other crimes. Although the intention behind the law may not be to apply impunity, but perhaps to assist the courts, the courts must determine the crimes and the victims and it is uncertain whether the proposed amnesty would actually recognise existing CAVR and special crimes practices.¹⁷⁸³ One interesting ingredient in the proposed amnesty law is that amnesty is conditional on victim compensation, again relying on courts to determine this.¹⁷⁸⁴

¹⁷⁷⁸ Justice Update 1-7 Mar.2004, www.jsmp.minihub.org

¹⁷⁷⁹ 1 Sep.2004 www.jsmp.minihub.org

¹⁷⁸⁰ 15 Jun.2003, www.jsmp.minihub.org. The agreement was signed in Jakarta 9 Mar.2005, see UN *End of mandate report of the Secretary-General on the UN Mission of Support in East Timor*, 2005, #7.

¹⁷⁸¹ The President urged the Parliament to grant him with a special power to grant amnesty for those already indicted and serving prison terms, as another step towards reconciliation. Also attempted in 2001, and 2003. 2nd anniversary 20 May, 2004, see proposed law 24/I/2 Law on Amnesty and Other Clemency Measures, in Report on the Amnesty and Pardon Law, 5 May 2004 www.jsmp.minihub.org; www.draft%20Amnesty%20Law%202004%20_e_.pdf.

¹⁷⁸² Proposed law 24/I/2 Law on Amnesty and Other Clemency Measures is without a commencement date for the period from which acts can be amnestied. Art.1 "a) criminal offences carrying an imprisonment penalty up to 5 years insofar as they have not been committed in an organised manner, or with violence or under threat against people; b) minor violations of the highway code, offences related to tax and customs, or other offences only carrying a fine penalty; c) any other violations punishable with a fine penalty, even where such offences may alternatively carry an imprisonment sentence." Art.6(1) states that an amnesty made under art.1 cancels any criminal proceedings relating to the act for which amnesty is granted, and any criminal records relating to the offence for which amnesty is granted are erased. Following art.7 the Public Prosecutor has discretionary power to decide whether to apply for amnesty or pardon. See Report on the Amnesty and Pardon Law, 5 May 2004 www.jsmp.minihub.org; www.draft%20Amnesty%20Law%202004%20_e_.pdf.

¹⁷⁸³ In accordance with art.1, the provisions of the Indonesian Penal Code applies. See below, arts.3, 6.

¹⁷⁸⁴ Proposed law 24/I/2 Law on Amnesty and Other Clemency Measures, in Report on the Amnesty and Pardon Law, 5 May 2004 www.jsmp.minihub.org; www.draft%20Amnesty%20Law%202004%20_e_.pdf. Art.2 "1. Amnesty enacted following the previous article of this law is to be granted on the condition that the aggrieved party has been compensated and, where the aggrieved party is the State, that payment of appropriate fiscal and customs taxes has been made. 2. Whenever the aggrieved party is unknown or cannot be found, the judge may consider that the condition referred to under item 1 above has been met for the purposes of this law. 3. If at the time of granting amnesty, the exact amount of compensation has not yet been established, the judge, following inquiries as s/he has deemed necessary, shall establish such amount equitably through an unappealable award. 4. Failure to meet the condition referred to under item 1 above within the 90 days immediately following notification that may be served to the accused for such purposes shall

However, as this is different to the amnesty granted by CAVR, where no compensation is required, some clarification is required.¹⁷⁸⁵ The most important provision for Timor-Leste's justice process is article 3, which suggests that most of those who have already served a third to a half of their sentences will be pardoned.¹⁷⁸⁶ The proposed pardon would in effect pre-empt any serious judicial follow-up on that report.¹⁷⁸⁷ Not only does this provision interfere with CAVR reconciliation procedures, with the repercussion that the community may feel deprived of their decisions,¹⁷⁸⁸ but the proposed pardon also extends to those guilty of serious crimes.¹⁷⁸⁹ The progressive commitment to improve justice and optimize assimilated justice may actually disappear. For a great international and domestic effort to create truth, justice and reconciliation, in the fight against impunity, to then be threatened by further amnesty is contemptible and should be forbidden. "It is bitterly ironic to mark East Timor's second anniversary of nationhood by undermining justice for the most serious crimes that accompanied the country's independence...Reconciliation has a place, but there can't be reconciliation without judicial accountability for violations of basic international human rights."¹⁷⁹⁰

7.4. SIERRA LEONE

Sierra Leone is another example of a state in transition that has a violent past of committed international crimes, with child soldiers and many amputee victims. Unfortunately, the domestic search for peace began with a blanket amnesty, thus immediately restricting efforts to establish truth, justice and reconciliation. The Lomé Peace Accord, signed in May 1999, by the Sierra Leone government and the Revolutionary United Front, granted a blanket amnesty for crimes committed

render amnesty inapplicable." As the courts are not meant to try the person applying for amnesty, the compensation cannot directly relate to guilt, and the judges must evaluate the compensation based on the victim. The proposed Amnesty Law does not specify how.

¹⁷⁸⁵ Art.32(2) UNTAET Reg.2000/10. The victim right to seek compensation is set out in art.6, Id.

¹⁷⁸⁶ Proposed law 24/I/2 Law on Amnesty and Other Clemency Measures, in Report on the Amnesty and Pardon Law, 5 May 2004 www.jsmp.minihub.org; www.draft%20Amnesty%20Law%202004%20_e_.pdf. Art.3 "1. With regard to any type of criminal offence, minor offence or contravention committed on 31 March 2004 or before, pardon shall be granted for the following: a) fine penalties even where such penalties replace another form of penalty payment; b) prison sentences enforced as actual punishment not exceeding one year; c) half of the penalty or 18 months whenever the imprisonment sentence has been enforced as actual punishment not exceeding 10 years, whichever is more favourable to the convict; d) one-third of the sentence whenever imprisonment has been enforced as actual punishment exceeding 10 years. 2. Pardon referred to under item 1 above shall apply to penalties established by decisions to be orally given or which have already been orally given and is made in relation to shall centre on the single sentence in case of cumulative punishment."

¹⁷⁸⁷ 5 Jun.2004 www.jsmp.minihub.org

¹⁷⁸⁸ As the punishments agreed on by the community may be changed. Art.7 allows for appeals on amnesty. See proposed law 24/I/2 Law on Amnesty and Other Clemency Measures, in Report on the Amnesty and Pardon Law, 5 May 2004 www.jsmp.minihub.org; www.draft%20Amnesty%20Law%202004%20_e_.pdf.

¹⁷⁸⁹ See *Prosecutor v. Furundzija* ICTY, 1998, #155; *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, *Prosecutor v. Kallon and Kamara*, SCSL, 2004; UN Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, 2004.

¹⁷⁹⁰ Charmain Mohamed, the East Timor researcher for Human Rights Watch, 8 May 2004 www.jsmp.minihub.org

during the conflict.¹⁷⁹¹ The Accord also provided for the establishment of a TC, which was enacted early 2000, by the President and the Parliament.¹⁷⁹² The peace agreement also requested the creation of a neutral peacekeeping force, with the assistance of the UN and in October 1999, the Security Council established the UN Mission in Sierra Leone (UNAMSIL), in order to assist the agreement.¹⁷⁹³ Peace was not reached, as the rebels continued fighting with the help of neighbouring countries such as Liberia,¹⁷⁹⁴ already an ally of the RUF.¹⁷⁹⁵

In 2000, the same year as the TC was established by the government, the President also requested UN assistance in establishing a criminal tribunal for Sierra Leone.¹⁷⁹⁶ The prosecutorial process was thus recognised to be as important as the truth discovery process. In August 2000, the Security Council passed Resolution 1315, confirming “that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,” and mandating that the Secretary-General to negotiate an agreement with the government of Sierra Leone for the establishment of an independent Special Court.¹⁷⁹⁷ At the time, the development of Timor-Leste’s hybrid court was widely discussed, and probably influenced the prosecutorial process in Sierra Leone. In 2001, the UN and the Sierra Leone government began negotiations over an internationalised domestic court, to be situated in Sierra Leone, in order to avoid further impunity and to prosecute those guilty of international crimes.¹⁷⁹⁸ In the same year, Sierra Leone was called the world’s worst humanitarian crisis. A UN commission of experts released a report, in January 2001, on the Sierra Leone diamond trade fuelling the war and accused President Charles Taylor, of Liberia, of supporting RUF attacks, in exchange for diamond concessions.¹⁷⁹⁹ Violence officially ended in January 2002, after more than ten years of violence.

¹⁷⁹¹ Since the beginning of 1991, war crimes and crimes against humanity have been committed, by various sides in the power struggle of Sierra Leone.

¹⁷⁹² The Lomé Peace Accord, 7 Jul.1999, remained vague on the content of the TC and its mandate, allowing opportunity and flexibility, even with the general amnesty granted. The Peace Agreement granted “absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.” art. IX. Art. XXVI of the Accord stated that a TC would be created, in operation within 90 days from the signing the Accord, submitting its report one year later; UNDoc. S/1999/777; Hayner, 1999.

¹⁷⁹³ Six thousand peacekeeping troops were initially sent. UNDoc.S/1999/777, at www.reliefweb.int/w/rwb.nsf/0/0c11616617eaa86185256b80007b826f?OpenDocument

¹⁷⁹⁴ UNAMSIL maintained its presence and 10 Nov.2000 the Abaju cease-fire, signed in Nigeria, re-committed the parties to the provisions of Lomé; see generally on Sierra Leone’s past, Human Rights Watch, Jul.1998 and Jun.1999.

¹⁷⁹⁵ Revolutionary United Front, the government’s armed opposition, emerged in 1991.

¹⁷⁹⁶ UN Letter from the President of Sierra Leone to Secretary-General, Annex S/2000/786, at <http://www.womenwarpeace.org/issues/justice/docs/res1315.pdf>

¹⁷⁹⁷ UNDoc.S/RES/1315/2000; UN Press Release 14 Aug.2000.

¹⁷⁹⁸ 16 Jan.2002 the Statute of the SCSL was agreed upon, at <http://www.sc-sl.org/scsl-statute.html>; Human Rights Watch, 2004, p.10.

¹⁷⁹⁹ Thompson, 2002, <http://www.humanrightsinitiative.org/publications/Sierra%20Leone%20Report.pdf>

Thus, the peace agreement asked for the establishment of a truth discovery process, after which Sierra Leone and the international community agreed to also begin a prosecutorial process. This section, on Sierra Leone, first looks at the truth discovery process and second, at the prosecutorial process. The last part of the section ends with viewing the relationship between the criminal and the restorative justice processes.

7.4.1. TRUTH COMMISSION

In April 2003, Sierra Leone's victims began to present their testimonies in public hearings, part of their internationalised, yet domestic truth discovery process.¹⁸⁰⁰ The Lomé Peace Accord, of July 1999, had requested a TC with a short lifespan, which was to submit a report one year later.¹⁸⁰¹ The TC was set up independently from the government, ratified by the President and the Parliament in early 2000,¹⁸⁰² but only issued its report in October 2004.¹⁸⁰³ The TC mandate reached back to the civil war of March 1991 and stretched to the signing of the Lomé Peace Accord, in July 1999.¹⁸⁰⁴ The specific mandate was to create an impartial historical record, of human rights and international humanitarian law violations, related to the armed conflict in Sierra Leone; address impunity, provide a forum for offenders and victims, respond to the needs of victims, promote reconciliation and prevent repetition.¹⁸⁰⁵ The mandate was thus quite broad, allowing a macro-truth approach to report on the past.

The TC consisted of three international and four local staff members, appointed full time, and, following the SA TRC criteria and recommendations, they were impartial professional members, supported by the Sierra Leonean government.¹⁸⁰⁶ In March 2002, one member of staff set

¹⁸⁰⁰ In fact, former SA TRC commissioners have assisted Sierra Leone (and East Timor) in their truth processes; Sierra Leone Truth and Reconciliation Commission Act 2000, <http://www.usip.org/library/pa/sl/>; www.sierra-leone.org/trc.html

¹⁸⁰¹ Supra, UNDoc.S/1999/777, Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed in Lomé, 7 Jul.1999; art.26, Lomé Peace Agreement Act, 13 Jul.1999. The Lomé Peace Accord was vague on the content of the TC and its mandate, allowing opportunity and flexibility, even with the general amnesty granted by the Sierra Leone government and the Revolutionary United Front, for the crimes committed during the conflict. The proposed national TC was internationally supported and enacted early 2000 by the President and the Parliament; New York Times 7 Aug.1999; Hayner, 1999; The Truth and Reconciliation Commission Act, see www.sierra-leone.org/trc.html; UNDoc.S/2000/915, at www.un.org/Depts/dpko/missions/unamsil/spcourt.htm

¹⁸⁰² Act of Parliament 10 Feb.2000; Sierra Leone Truth and Reconciliation Commission Act 2000, <http://www.usip.org/library/pa/sl/>; UNDoc.S/1999/777; www.sierra-leone.org/trc.html

¹⁸⁰³ A 1,500-page document with a 3,500-page annex, 23 Oct.2004, at www.justicetribune.com/index_uk.htm; http://www.unicef.org/infobycountry/sierraleone_23937.html; UN Publication of Report of Sierra Leone Truth and Reconciliation Commission, 2004.

¹⁸⁰⁴ Supra, TC Act, 2000.

¹⁸⁰⁵ Id., S.6, TC Act, 2000.

¹⁸⁰⁶ See ch.6 for more on the SA TRC. S.3, Truth and Reconciliation Commission Act, 2000, Sierra Leone Gazette, Vol.CXXXI, No.9, 10 Feb.2000. Staff shall be appointed by the President. The Chairman and Deputy Chairman

up the interim secretariat, which grew to 14 staff, including international advisers.¹⁸⁰⁷ The TC was not able to begin its work until late 2002, when statement taking began. Public hearings had to wait until April 2003.¹⁸⁰⁸ The hearings, of victims and of offenders, could be held in public with additional testimonies taken by individual statements, similar to the SA TRC, with the help of local traditional and religious leaders.¹⁸⁰⁹ However, the TC was without the SA TRC *quasi*-judicial power to grant amnesty (not necessary after general amnesty) and had a hybrid court as its judicial counterpart. The mandate empowered the TC to use a micro-approach to its truth discovery, in order to collect and request any information; visit any place without prior notice; interview anyone it deemed necessary and, similar to the SA TRC, it was able to call upon anyone to attend a hearing and to demand that statements be given under oath with subpoena power.¹⁸¹⁰ Failure to respond to the TC's request included police assistance, fines or a referral to the courts.¹⁸¹¹ The public hearings included individual; thematic; event-specific; and institutional focused hearings, with "special attention to the subject of sexual abuse and to the experiences of children within the armed conflict".¹⁸¹² Thematic hearings were held, in order to describe and explain the past in relation to a number of identified themes, allowing the TC to address patterns of abuse and broader social analysis regarding the context. The specific event hearings added microanalysis of specific cases, establishing whether particular events served a catalytic role in the violations. Examples such as coups and extra judicial executions could also offer insight into the patterns of violations, role of key offenders (individuals and institutions) and victim suffering. The institutional hearings could identify whether there were specific institutions (*e.g.* media or military) that required particular inspection for their role in the violations. The individual hearings could, besides serving the victims with an official healing and telling forum, give individual narratives for analysis of factual truth,

were appointed by the President upon recommendations from the UNHCHR. In order to ensure transparency, the four national commissioners were coordinated by the UN Secretary-General's Special Representative, and the UNHCHR coordinated the appointment of the three international commissioners.

¹⁸⁰⁷ <http://www.sierra-leone.org/trcbriefing072402.html>

¹⁸⁰⁸ Extensive preparations dealt with recruitment in the period of Nov.2002-Jan.2003. The public hearings began 14 Apr.2003. 15 Dec.2003 <http://www.africafocus.org>

¹⁸⁰⁹ S.7-8 TC Act, 2000; 7.5 "Decisions of the Commission shall, as far as possible, be taken by consensus and in the absence of consensus, by the majority vote of members of the Commission and the Chairman shall cast the deciding vote where there is a tie"; 7.6. "During the course of its operations, the Commission may provide information or recommendations to or regarding the Special Fund for War Victims provided for in Article XXIV of the Lomé Peace Agreement, or otherwise assist the Fund in any manner the Commission considers appropriate but the Commission shall not exercise any control over the operations or disbursements of that Fund."

¹⁸¹⁰ *Id.* S.8. See Wierda, Hayner & van Zyl, 2002. The Commission may gather its information in a number of ways, laid out in section 7 of the TC Act. It can undertake its own investigations and research into key events; hold public and closed hearings; take individual statements; and permit persons to provide information to the Commission on a confidential basis, S.7(3). Generally, TCs conduct most truth discovery through private individual statement taking.

¹⁸¹¹ *Id.* S.9.2.

¹⁸¹² S.2.b, TC Act, 2000, Sierra Leone Gazette, Vol.I, CXXXI, No.9, 10 Feb.2000, at www.sierra-leone.org/documents.html

applicable to specific cases (micro truth) and add to the broader truth.¹⁸¹³ The hearings and the truth discovery in general were thus seen as instrumental, where the fundamental aim of truth could fulfil both individual and collective notions. Truth was also treated as instrumental to the other fundamental aim, with possible shaming and deterring values; victim-focused healing and collective reconciliation. The truth discovery process thus attempted overall retrospective accountability and prospective reconciliation, as the TC was not set up to complement the prosecutorial process. The TC was not obliged to disclose the information received,¹⁸¹⁴ although its individual focus, on individual accountability, could have benefited from such cooperation.¹⁸¹⁵ The hearings added to the larger picture that the final truth report was able to deliver and they assisted in the identification of necessary reform.¹⁸¹⁶ In the broad, inclusive final report, findings and recommendations were made, concerning the identified roles played in the conflict, by governments, groups and individuals.¹⁸¹⁷ The historic comments in the final report, on the lead up to the civil war, discuss impunity and corruption on behalf of the state, listing details of all the parties found accountable for the massive atrocities. The battle for the diamond supply was held to fuel the conflict, but the cause of the conflict was a violent turn in the quest for equality, due to bad governance.¹⁸¹⁸ The report issued a warning to the government to stop corruption and asked for legislation of equality for future reconciliation.¹⁸¹⁹

¹⁸¹³ Closed hearings were available with other protective measures. This was essential due to the amount of children and women victims from e.g. gang rapes, seen as common practice in the past and with approx. 60000 ex-combatants being reintegrated into the community and lack of effective and visible justice system, revenge was a risk.

¹⁸¹⁴ Section 7.3, TC Act 2000.

¹⁸¹⁵ Id. S.20, not allowing collective statements. Evidence relating to an individual was collected during hearings, written statements and interviews, where the individual could respond to the allegation. After careful deliberation, following months of research and investigation, TC members concluded their research before the commissioners, in workshops where the findings were debated. The standard of proof used by the TC did not relate to criminal courts proving, beyond a reasonable doubt, innocence or guilt, but the TC decided, on a balance of probabilities responsibility. The TC's main focus was to build a total picture of the conflict and, according to the TC final report, although specific cases were investigated, they were so investigated to indicate, in a demonstrative manner, the nature and course of the conflict. Still, certain individuals were named, such as military leaders, who were held responsible. ##3, ##170, SL.TRC.V2.2.Findings.pdf, at http://www.nuigalway.ie/human_rights/publications.html

¹⁸¹⁶ See e.g. OCHA Sierra Leone, IRIN 15 Jul.2002, at www.reliefweb.int/appeals/2003/files/sle03.pdf. The final report gives evidence of a thorough collection and investigation of a large amount of evidence and information, from public and closed hearings; interviews; investigations and research, #3-10, SL.TRC.V2.2.Findings.pdf

¹⁸¹⁷ Id. pp.13; SC.TRC.V2.3.Recommendations.pdf

¹⁸¹⁸ See final report overview, findings and recommendations, at http://www.nuigalway.ie/human_rights/publications.html. Illegal diamond trading, supported by the ignorance of the international market, could finance the war and its guns. Based on a quest for justice and separation from past inequalities rebel forces entered a brutal war, where women and children became tools for recruitment. The TC disagreed with the SCSL and its Prosecutor David Crane who asserts that the actual cause of the conflict was such a diamond control battle.

¹⁸¹⁹ S.15-16 TC Act, 2000; Sierra Leone Truth and Reconciliation Commission calls for reparations, <http://www.africafocus.org> 28 Oct.2004.

After some tribulation, the Sierra Leone TC report was published on 5 October 2004, based on 40,242 witness testimonies.¹⁸²⁰ In line with the particularly brutal involvement of children, the TC issued the first child-friendly truth report, including child representation in its content, in honour of the 10,000 children that were victimised during the 10-year war. Special hearings had been provided, in order to let children tell their narratives.¹⁸²¹ The TC has been applauded for raising awareness and receiving a number of statements, nationwide, enabling the victims to speak out and have their suffering acknowledged.¹⁸²² However, and perhaps mainly due to the slow start and lack of prosecutions by the Special Court, people's unhappiness with the lack of criminal justice was identified, when it was suggested that the TC should be extended into something similar to Rwanda's *gacaca*.¹⁸²³ In fact, in the final report, made widely available in November 2004, the TC criticised the SCSL and questioned cooperation between courts and truth commissions, in situations where peace agreements with amnesty clauses exist. The SCSL was basically accused of overriding the amnesty, which, according to the TC, undermined the entire peace process.¹⁸²⁴ It is unfortunate that a TC, staffed with international experts, would support the granting of such amnesty, for the international core crimes, and actually view a prosecutorial process, applicable to such crimes, as an opponent.

A lack of faith in the truth discovery process was noticed early on, especially from women. While many want the offenders punished, fear of reprisal and lack of confidence in the justice system has held many people back.¹⁸²⁵ This was a serious problem for the TC, which had to focus

¹⁸²⁰ A 1,500-page document with a 3,500-page annex, 23 Oct.2004, at www.justicetribune.com/index_uk.htm; http://www.unicef.org/infobycountry/sierraleone_23937.html; UN Publication of Report of Sierra Leone Truth and Reconciliation Commission, 2004. At the 15th bi-monthly media briefing on the truth and reconciliation commission, 9 Apr.2003, 1400 statements had been taken, indicating about 3000 victims who suffered more than 4000 violations (out of which more than 1000 were killings and 200 were of rape and other sexual violations). One-third of the deponents were women and 10% of the statements were from children, Chairman Humper, Sierra Leone, www.sierraleone.org/trcbriefing072402.htm; www.sierra-leone.org/trcbriefing090402.html

¹⁸²¹ Id. UN Publication of Report of Sierra Leone Truth and Reconciliation Commission, 2004, at http://www.unicef.org/infobycountry/sierraleone_23937.html

¹⁸²² Id. and see 15 Dec.2003 <http://www.africafocus.org>

¹⁸²³ Africa Focus reported in late 2003 that the TC was recommended transformation into a "People's Court", where civilians would have been able to take cases. Vandy, a local political analyst, explains this suggestion: "The people of this nation have lost trust and faith in the court systems, and much needs to be done to win [their] confidence. Perhaps the TRC will provide that answer." 15 Dec.2003, www.africafocus.org

¹⁸²⁴ Nichols, 5 Jan.2005; The TC found that the Lomé Peace Agreement granted amnesty (Art.IX of the Lomé Agreement applied to all combatants and collaborators) was necessary in the circumstances, and that the UN disclaimer, stating that the amnesty did not apply to certain international crimes, sent a message that the amnesty and thus the Peace Agreement were not to be trusted. It was the TC's view that both the government of Sierra Leone and the RUF committed breaches of the Lomé Peace Agreement, which collapsed in May 2000, and by rejecting the amnesty, both the UN and the local government sent a message that peace agreements with amnesty clauses cannot be trusted. #559-562 SL.TRC.V2.2.Findings.pdf. See final report overview, findings and recommendations, at http://www.nuigalway.ie/human_rights/publications.html

¹⁸²⁵ Jan. 2002 report by Physicians for Human Rights noted that 42% wanted offenders punished and only 35% of the women believed punishment would prevent further sexual violence, and even fewer, 23%, were willing to give their

on sexual offences against women and abuse of children. Certain victims demanded compensation before they would testify before the TC, however Sierra Leone's President managed to receive their cooperation.¹⁸²⁶ Thus, from the beginning of the public hearings it was clear that the population demanded reparations, and recommendations on reparation and deterring measures were included in the final report.¹⁸²⁷ Again, due to the history of Sierra Leone, where children were drugged and taken off to join the militia and become perpetrators of international core crimes and women and children were raped and forced into sexual slavery, the victim focus was on women and children.¹⁸²⁸ It was recommended that the government make reparations, especially to amputees and those who had been sexually violated, and women and children who suffered deprivation, displacement, or worse, between 1991 and 2002.¹⁸²⁹ Collective community reparations and symbolic reparations were also recommended, to foster dignity and means for reconciliation.¹⁸³⁰ In fact, most offenders have been disarmed and reintegrated back into the community, with the assistance of rehabilitation programs and reparation for the victims must now be viewed as essential, in order not to create further inequalities.¹⁸³¹ As many of the victims cannot be successful breadwinners, due to the harm suffered, the compensation programs will be costly, but besides compensation, it is necessary to provide expert healing programs.¹⁸³² The TC Act and the final report requested that the government implement and facilitate the TC recommendations made and establish a follow-up committee to report on the progress of implementation.¹⁸³³ This was thus a broad truth discovery process, including both a micro- as well as a macro-approach, concentrating on specific and general truth. Yet, recognising the amnesty, the fulfilment of the other fundamental

names to either the Special Court or the TC, OCHA Sierra Leone, IRIN, 15 Jul.2002, www.reliefweb.int/appeals/2003/files/sle03.pdf

¹⁸²⁶ Amputee victims (of Aug.2002) demanded that all amputees be given a monthly allowance of a bag of rice; free education; and a one-off reintegration allowance of approx.\$150; www.sierra-leone.org/trcbriefing090402.html; 8th weekly briefing of the Truth and Reconciliation Commission chaired by Schabas, Sep.2002, at www.sierra-leone.org/trcbriefing091102.html

¹⁸²⁷ Rt. Rev. Dr. Joseph Christian Humper, 15 Dec.2003 <http://www.africafocus.org>

¹⁸²⁸ From testimonies in 2002 and 2003, the TC concluded that children were forced to e.g. amputate limbs and cannibalism, and a severe effect of this was that children were rejected by their families because of their past. Most armies were accused of violating women and girls. Full report at http://www.unicef.org/infobycountry/sierraleone_23937.html

¹⁸²⁹ Id. Reparation was recommended in the form of health, housing, pensions, education, skills training and micro-credit assistance. #484, SL.TRC.V2.3.Recommendations.pdf, at http://www.nuigalway.ie/human_rights/publications.html

¹⁸³⁰ In fact, the TC called on Liberia to not only acknowledge its past role in the SL armed conflict but to make symbolic collective reparation to SL, e.g. by installing a commemoration site, #414, Id. SL.TRC.V2.3.Recommendations.pdf

¹⁸³¹ According to Conteh, of UNHCR, 15 Dec.2003 <http://www.africafocus.org>

¹⁸³² S.15.2, TC Act, 2000. In the final recommendations, further discussed under assimilated justice, the TC asks the National Commission for Social action to implement and oversee the reparation program recommended. #483, SL.TRC.V2.3.Recommendations.pdf, at http://www.nuigalway.ie/human_rights/publications.html

¹⁸³³ S.17, TC Act, 2000. This was a novel yet realistic approach, probably adopted due to the many recommendations resulting from truth commissions that are never implemented.

aims was restricted from the start. However, some deterring shame, healing reparation and reconciliation have certainly been fulfilled with the comprehensive truth discovery.

7.4.2. SPECIAL COURT

An internationalised domestic court, with a combination of international and local staff, was seen as necessary in Sierra Leone, a country scared by a long and brutal conflict with impunity.¹⁸³⁴ The needs were great and compelling reasons for prosecution existed, as the atrocities committed since 1991 constituted grave breaches of international humanitarian law.¹⁸³⁵ Restoration of the national legal system is still of major concern but, from the start of the Special Court negotiations, it was seen as a long-term project of at least 10 years¹⁸³⁶ and the primary concern was thus with interim hybrid justice mechanisms: the Special Court for Sierra Leone (SCSL) and the TC.¹⁸³⁷ The non-establishment of another ICT may well be due to the costs it would have incurred and other issues raised by Rwanda during the setting up of the ICTR.¹⁸³⁸ A hybrid internationalised domestic court can guarantee that money and expertise is put directly into the country concerned and that such means do not remain external to the most urgent needs. However, this was not the case with the SCSL, which operated separately to the weak domestic justice system. Had the UN, in the case of Sierra Leone, decided in favour of the establishment of an ICT, it would have been faced with more demands for such a tribunal in, for example, Timor-Leste. Instead, in early 2001, a hybrid

¹⁸³⁴ See supra, the Lomé Peace Accord, 7 Jul.1999; UN Interagency Appeal for Relief and Recovery, Sierra Leone, www.reliefweb.int/appeals/2003/files/sle03.pdf; Thomson, 2002, at http://www.humanrightsinitiative.org/publications/ffm/sierra_leone_report.pdf; Supra Human Rights Watch Reports 1998, 1999, on crimes against humanity committed in Sierra Leone; Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, appending the Statute of the Special Court, signed in Freetown, 16 Jan.2002.

¹⁸³⁵ Following the law of the ICTs, the ICC and the four Geneva Conventions of 12 Aug, 1949 and the 1977 Additional Protocols.

¹⁸³⁶ Or probably more if Rwanda is used as an example. As violence only ended in January 2002, the entire justice process has operated in a state of emergency, where judicial procedures have to a large extent been suspended. Since the rule of law has yet again come into focus, the Sierra Leone judiciary is of concern. According to Thompson's report, by September 2000 a few judges and courts were operational, and the judiciary is short of funds and time, with a great amount of cases that overwhelm the system. Thomson, 2002, p.4, <http://www.humanrightsinitiative.org/publications/Sierra%20Leone%20Report.pdf>

¹⁸³⁷ As the TC was already instituted when the SCSL was proposed, the Registry of the court formulated a Practice Direction, to regulate contact between the TC and detainees held by the court; 9 Sep.2003, amended 4 Oct.2003, see Practice Direction on the procedure following a request by a State, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in the custody of the Special Court for Sierra Leone, at www.sc-sl.org. See also Special Court decisions of 29 Oct. and 28 Nov.2003, also found at www.sc-sl.org; http://www.ictj.org/downloads/SL_TRC_Case_Study_designed.pdf; compared to http://www.ictj.org/downloads/SC_SL_Case_Study_designed.pdf.

¹⁸³⁸ See earlier section and the budgets of the ICTs, at www.un.org/icty/glance/index.htm; www.ictj.org/default.htm

SCSL was decided upon.¹⁸³⁹ It was to be different from the UN-operated ICTs and different from other hybrid models, such as the previously studied Special Court of Timor-Leste.¹⁸⁴⁰ The SCSL is the first hybrid justice model with primacy over domestic courts.

Since the Special Court was not created as a UN body, it relies on voluntary contributions, which has caused lengthy delays and disappointment in Sierra Leone, with an obviously restricted prosecutorial process.¹⁸⁴¹ To secure the life of the Special Court, the UN Secretary-General has had to appeal to UN member states to contribute to the funding of the court, much supported by NGOs and the UN Commission on Human Rights.¹⁸⁴² Funding is one of the essentials for the court to work and, with difficulties encountered in trying to raise the amount needed,¹⁸⁴³ areas such as defence and victim and witness support have suffered and it is doubtful for how much longer the court will be able to operate.¹⁸⁴⁴ It is important to recognise that reduced budgets further restrict the prosecutorial process, which has already limited the number of prosecutions to certain offenders of certain crimes. Further restrictions could seriously undermine the already threatened quality of work.¹⁸⁴⁵

The Trial Chamber has three judges, two of whom are appointed by the UN Secretary-General and one who is appointed by the national government.¹⁸⁴⁶ The Appeals Chamber has five judges, of which two are appointed domestically.¹⁸⁴⁷ The international influence is strong, with a majority of the staff being international, an international Chief Prosecutor, a Registrar and a

¹⁸³⁹ UNDoc.S/2000/915; UNDoc.S/2000/1234; UNDoc.S/2001/40; UNDoc.S/2001/95, at www.un.org/Depts/dpko/missions/unamsil/UnamsilR1.htm; Supra Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2002.

¹⁸⁴⁰ Another hybrid model, staffed by internationals and nationals and located on the territory where the crimes occurred, are Regulation 64 Panels in Kosovo, but they constitute part of the domestic justice system as opposed to the independent institution of the SCSL. The Special Court is thus separate from the national legal system, and with joint administration by the UN and the host nation it applies both national and international law. Human Rights Watch, Sep.2004.

¹⁸⁴¹ UN Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2000.

¹⁸⁴² Mar.2001, E/CN.4/RES/2001/20, appeal for funds.

¹⁸⁴³ International courts are a costly venture. The estimated costs for a 3-year-period was firstly US\$114 million, incl. US\$30 million for the establishment and first year of operations, but later reduced to US\$57million, incl. US\$16.8million for the first year, from 20 contributing states, according to the Office of Legal Affairs, Ass.Press, 29 May 2003; Thompson, supra, 2002, p.31; UN Press Release *Annan Authorizes Tribunal Despite Funding Shortfall*, 4 Jan.2002, at http://www.unwire.org/unwire/20020104/22831_story.asp

¹⁸⁴⁴ UN GARes.A/58/573/Add.1, Special Court for Sierra Leone, 26 Apr.2004; A/RES/58/284, #2.

¹⁸⁴⁵ In Jan.2004, a joinder motion was passed where the indictees would be tried in three groups, excluding Charles Taylor. This is recommendable, especially as there is limited Trial Chambers. *Trial Chamber Joinder Decision: Accused to be Tried in Three Groups*, 27 Jan.2004, at <http://www.sc-sl.org>; See Human Rights Watch Report 2004, p.14, for an examination of delays in hearings, decisions and judgements.

¹⁸⁴⁶ See www.sc-sl.org

¹⁸⁴⁷ Art.2, Special Court Statute, annexed to the agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 Jan.2002, <http://www.sierra-leone.org/specialcourt/Agreement.html>. It must be noted that national appointment does not necessarily mean national judge.

nationally appointed Deputy Prosecutor.¹⁸⁴⁸ Article 11 allows for an additional Trial Chamber however, lack of funds meant that the Second Trial Chamber only began hearing cases in January 2005.¹⁸⁴⁹ A novelty with the SCSL is the Defence Office and a principal defender, which add an important voice to the rights of the accused, and is an important tool in limiting the cost of defence counsel.¹⁸⁵⁰ The rights of the accused, as enshrined in the ICCPR, have been incorporated in the SCSL Statute and Rules.¹⁸⁵¹ A Victim and Witness Protection Unit provides victim support, counselling, medical assistance etc., according to resources.¹⁸⁵² Important for all prosecutorial processes is the setting up of a domestic witness and victim protection unit, as pre- and post-trial protection and support.¹⁸⁵³ According to interviews held, by Human Rights Watch in 2004, such progress is underway in Sierra Leone.¹⁸⁵⁴ While the location of the SCSL in Freetown facilitates access for victims and witnesses and makes the Special Court easier to get to, it also means further security threats and protection needs, which is why the UNAMSIL's remit has been extended.¹⁸⁵⁵ An essential element lacking in the case of the SCSL is the right to reparation. This is unfortunate for the victims that come before the Special Court and means that special efforts must be made, in order for the national justice system to implement such provisions. This is especially important, as the national courts must deal with all but the small number of SCSL indicted offenders. As one of the reasons for creating an internationalised prosecutorial process is to provide a struggling

¹⁸⁴⁸ According to the Agreement between the UN and Sierra Leone, the SCSL has a Management Committee, in order to assist the Secretary-General in obtaining funding and provide advice on non-judicial aspects, e.g. efficiency. See Terms of Reference for the Management Committee for the SCSL, 8 Aug.2000; UN 13th Report of the Secretary-General on the UN Mission in Sierra Leone, 2002. It is time to select a new Prosecutor after the Prosecutor David Crane announced that he will step down from his position 15 July, after three years with the SCSL. 8 Mar.2005, <http://www.sc-sl.org/Press/pressrelease-011705.pdf>

¹⁸⁴⁹ The SCSL has had to work with a minimum of staff and legal officers supporting the Chambers, because of the small budget, and the fact that trials did not commence until Jun.2004. Until then the SCSL only had two legal officers, and since trials began, another two were added. As of Jul.2004, see www.sc-sl.org; The Second Trial Chamber began hearing the case *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* 17 Jan.2005. The three alleged former leaders of the Armed Forces Revolutionary Council (AFRC) are charged with 18 counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law. This is the 3rd and last scheduled trial, underway 7 Mar.2005, facing 3 foreign judges, after 2 years in detention. See <http://www.sc-sl.org/Press/pressrelease-011705.pdf>; www.justicetribune.com/article_uk.php?action=view&id=2953&start=0&sort=date%20desc&search=sierra%20leone&jid=0&langue=

¹⁸⁵⁰ Learning from the ICTs, where coordination of defense issues and high cost has been an issue, the Defense Office has also worked to inform the local population about the court and fair trial issues. Rule 45, SCSL Rules, the defense office provides initial legal advice by duty counsel, legal aid assistance, etc. Investigators provided for the OTP include international and national staff, while the defense teams have one local investigator.

¹⁸⁵¹ Arts.16-17, Rules 33-46, respectively. Inhouse psychological counseling is provided and the unit also seeks to provide protection and relocation needs. See Human Rights Watch report, 2004, p.30.

¹⁸⁵² Rule 34 SCSL Rules of Procedure and Evidence; a Witness Management Unit within the OTP also supports the dealing with victims and witnesses. See more, UN 21st Report of the Secretary-General on the UN Mission in Sierra Leone, S/2004/228, at <http://www.un.org/Depts/dpko/missions/unamsil/UnamsilR.htm>

¹⁸⁵³ As it is important for other, more domestic hybrid courts, which are meant to remain, however under domestic rule, and for domestic courts.

¹⁸⁵⁴ Supra, Human Rights Watch Report, 2004, p.31.

¹⁸⁵⁵ UNSC S/RES/1537, 2004; Supra, UN 21st Report, S/2004/228.

domestic criminal justice system with precedents, it is indeed a serious failure and restriction to have excluded reparation.¹⁸⁵⁶ This is especially so because the SCSL is very restricted in its fulfilment of criminal justice aims and, because it was set up separate to the domestic justice system, there is no intrinsic link to assist the domestic justice process.

The SCSL only holds temporal jurisdiction, with a prosecutorial discretion to prosecute those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law, committed in the territory of Sierra Leone since 30 November 1996.¹⁸⁵⁷ This does not mean that the jurisdiction is limited to leaders, however it has limited the scope of prosecutions since the SCSL began trials, in June 2004. This is the perhaps necessary limitation to jurisdiction that Timor-Leste lacks, concerning responsibility. The court has so far indicted eleven individuals,¹⁸⁵⁸ and although the SCSL has made some fundamental arrests, charging the accused with gender-based crimes and child recruitment, the indictments reflect a narrow interpretation of the mandate, focusing on the architects and the top-level commanders.¹⁸⁵⁹ Unfortunately the prosecutorial process has been further restricted, with its inability to prosecute some of the “most wanted”, which, as a result, has led to reduced support for the process. Charles Taylor is still in Nigeria,¹⁸⁶⁰ mid-level commanders with responsibility have not been indicted, while individuals who fought with the Civil Defence Force have been indicted and the court is not expected to issue more than a couple more indictments.¹⁸⁶¹

Further restrictions to the prosecutorial process of the SCSL are the time reference, excluding the many victims who suffered between 1991 and 1996 from the prosecutorial process. These victims can oppose the process and its fight against impunity because of it, with serious

¹⁸⁵⁶ Amnesty International, 24 Feb.2005; 1 Mar.2005.

¹⁸⁵⁷ Art.6, Special Court Statute, individual criminal accountability and capacity provisions follow the ICTs except in relation to the national law crimes, where individual criminal accountability is determined according to national law, art.14, Special Court. See art.1, Special Court compared to common art.1 of the ICTs that can prosecute ‘those who bear responsibility’.

¹⁸⁵⁸ 11 indicted by 25 Apr.2005, at <http://www.sc-sl.org/about.html>.

¹⁸⁵⁹ Amnesty International 24 Feb.2005.

¹⁸⁶⁰ Former Liberian President Charles Taylor has been indicted by the SCSL on 17 counts of crimes against humanity and other serious violations of international humanitarian law, but Nigeria, who gave Taylor asylum in Aug.2003 refuses to hand him over to the court, and it is important for justice and credibility that international pressure is put on Nigeria. Of course, as the SCSL lacks UN Chapter VII powers that oblige governments to cooperate with the court, the court depends on the cooperation of member states with its requests. SCRes.1478 requests states to cooperate with the SCSL.

¹⁸⁶¹ E.g. Kamara, a senior commander of both the anti-government militia West Side Boys and the Armed Forces Revolutionary Council has been indicted. “The people of Sierra Leone can rest easier knowing that this man will face the Special Court,” Deputy Prosecutor Desmond de Silva said. Supra, Human Rights Watch Report, 2004; www.sierra-leone.org/specialcourt0900.html; www.crisisweb.org/home/index.xfm?id=1803&l=1; Generally people fighting for the General Defence Force are viewed, by the local population, as peace fighters, however this has not stopped the OTP from indicting accused of all sides. Amnesty International, 24 Feb.2005.

repercussions for the overall situation.¹⁸⁶² As hostilities had not ceased when the Special Court's Statute was first drafted, the temporal jurisdiction of the Special Court was left open-ended.¹⁸⁶³ However, while future conflict may, hypothetically, be included, the conflict of the past is restricted to the last five years.¹⁸⁶⁴ The restricted jurisdiction is due to concerns not to overburden the court and the period in focus would include the most serious crimes, committed by the different sides and regions represented in the conflict.¹⁸⁶⁵ Had, however, the Statute included the beginning of the conflict, it would have allowed the prosecutor a wider focus on those who bear the greatest responsibility and it would also have allowed the recognition of more victims. The prosecutorial process could also gain public support and confidence in the rule of law if it were able to demonstrate how international law establishes just-desert punishment, independently of some arbitrary date but based on the beginning of the conflict. This could also have promoted better cooperation between the court and the TC, which had temporal jurisdiction dating from the beginning of the conflict.¹⁸⁶⁶

The Special Court has primacy of jurisdiction and covers crimes against humanity and war crimes, as well as some crimes under Sierra Leonean law, committed since 30 November 1996.¹⁸⁶⁷ However, a blanket amnesty was granted and, according to Amnesty International reports on Sierra Leone, since July 1999, human rights abuses continue to be committed, proving that impunity only feeds impunity.¹⁸⁶⁸ "The international community must firstly condemn the amnesty and secondly aid in rebuilding the domestic criminal justice system, or we otherwise risk viewing a restorative justice process as a substitute for prosecutions."¹⁸⁶⁹ The UN and the international community officially condoned the blanket amnesty, declaring it inapplicable to the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.¹⁸⁷⁰ However, the SCSL acknowledges that the blanket amnesty applies to some

¹⁸⁶² Not to overburden the court, jurisdiction begins from 30 Nov.1996 and is open-ended, although the conflict began 23 Mar.1991, UNDoc.S/RES/2000/1315, at <http://www.un.org/Depts/dpko/missions/unamsil/UnamsilR.htm>

¹⁸⁶³ Like the ICTY, which also has open-ended temporal jurisdiction because of the ongoing conflict at the time of its creation.

¹⁸⁶⁴ Signifying the first comprehensive peace agreement between the Government of Sierra Leone and the RUF, the Abidjan Peace Agreement.

¹⁸⁶⁵ However, 20 Aug.2001 Sierra Leone requested the UN to extend the temporal jurisdiction to cover the conflict from March 1991, which is when the conflict started.

¹⁸⁶⁶ Fritz & Smith, 2001.

¹⁸⁶⁷ The jurisdiction is concurrent with national courts and the national government has agreed that the granted amnesties will not bar prosecution, art.8(2) Special Court Statute.

¹⁸⁶⁸ AI reports on Sierra Leone: AFR 51/13/99; POL 10/01/00; AFR 51/43/00; AFR 51/35/00; AFR 51/69/00; POL 10/01/01; AFR 51/007/01, all at http://www.amnestyusa.org/countries/sierra_leone/reports.do; <http://www.globalissues.org/Geopolitics/Africa/SierraLeone.asp>

¹⁸⁶⁹ UN report, *Situation of human rights in Sierra Leone Commission on human rights*, E/CN.4/RES/2001/20, at

¹⁸⁷⁰ The amnesty was granted in 1999, by the Sierra Leone government and the Revolutionary United Front, for the crimes committed during the conflict. UNDoc.S/RES/1270, 1999; the Lomé Accord stated that a TC would be created,

domestic law offences, but it is not meant to stand in the way of prosecuting offenders of the international core crimes.¹⁸⁷¹ In March 2004, the SCSL refused to recognize the applicability of the amnesty and concluded that it did not prevent international courts from prosecuting the international core crimes.¹⁸⁷²

The crime definitions resemble the ICC and the ICTs' Statutes, but they were not directly implemented, as in Timor-Leste. Crimes against humanity are broad in definition,¹⁸⁷³ the list of war crimes is not exhaustive¹⁸⁷⁴ and mixed jurisdiction is incorporated.¹⁸⁷⁵ Thus, like the ICTs, the Special Court's subject-matter jurisdiction covers international core crimes, considered to have the status of customary international law. But, tailoring the subject matter to fit the local conflict,¹⁸⁷⁶ attacks against the civilian population; against individuals not partaking in the hostilities; against peacekeeping personnel; and the enlisting of child soldiers under the age of fifteen were seen as especially relevant crimes to Sierra Leone.¹⁸⁷⁷ Thus, the SCSL has included recruitment of child soldiers and forced marriage under the protection of international law.¹⁸⁷⁸ Had a direct transfer from the ICC taken place, as in the case of Timor-Leste for example, the judges could have characterised the conflict according to the facts of individual cases, rather than according to the Special Court

in operation within 90 days from the signing the Accord, submitting its report one year later; UNDoc.S/1999/777, see <http://www.un.org/Depts/dpko/missions/unamsil/UnamsilR.htm> Hayner, 1999.

¹⁸⁷¹ This means that the Special Court may try cases of international humanitarian law violations committed since 30 Nov.1996, but only hear violations of Sierra Leone law since 7 Jul.1999. This does not create public confidence in, or support of the prosecutorial process. Scharf, 2000, at www.asil.org/insight53.htm.

¹⁸⁷² Art.10 SCSL Statute: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution." <http://www.scs-sl.org/scsl-statute.html>; Amnesty International, 24 Feb.2005; 1 Mar.2005.

¹⁸⁷³ Art.2 Special Court, "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence" also constitute crimes against humanity.

¹⁸⁷⁴ Art.3 Special Court mirrors art.4 of the ICTR. Sierra Leone joined the common art.3 and Add. Prot. II in October 1986; UNDoc.S/2000/915.

¹⁸⁷⁵ Still, even without a direct implementation of the ICC Statute, and allowing mixed jurisdiction, according to art.5 domestic crimes, the court was referred to as applying 'white man's justice'. The inconsistency between the SCSL and the domestic courts are similar to Rwanda. The international courts' maximum penalty imposed is a period of imprisonment, and the domestic courts continue to pass death sentences. The Sierra Leone government should follow the example of the SCSL, as well as one of the key recommendations of the TC and abolish the death penalty. See more, Amnesty International, Feb.2005.

¹⁸⁷⁶ E.g. the crime of genocide has not been including.

¹⁸⁷⁷ Child recruitment was held to constitute a war crime 31 May 2004, Decision on Preliminary Motion based on lack of jurisdiction, Appeals Chamber. Sierra Leone has been known for its attacks against peacekeepers and its usage of child soldiers Art. 4 Special Court; Conv. on the Safety of UN and Associated Personnel, 1994, at <http://www.un.org/millennium/law/xviii-15.htm>; Art.8(2)(b)(iii) ICC.

¹⁸⁷⁸ Sensitive to the application of domestic law are issues re. child soldiers and juvenile justice. The TC included children's testimonies in its truth investigation, and it reported from the children's aspect, with regard to reconciliation, the TRC Act, 2000, www.sierra-leone.org/trc.html; UNDoc.S/2000/915. Juvenile justice focuses on those most responsible between the age of fifteen and eighteen. The UN SC recommended that the TC would deal with juveniles, SCRes.1315; see art.4 1977 Protocol II (add. to the four Geneva Conventions of 12 Aug.1949). Arts.7, 15 of the Special Court allow for a special chamber and correctional services for juvenile offenders, see below. National crimes, secured under national law, are sexual offences against young girls and property crimes.

Statute. Also, the SCSL would not have been able to prosecute individuals under the age of 18.¹⁸⁷⁹ The UN Secretary-General justified the decision to create a Special Court of mixed jurisdiction, on the basis that certain crimes or aspects of crimes committed during the conflict were better regulated by Sierra Leone law, than by international law.¹⁸⁸⁰ However, the elements of the domestic crimes raise evidentiary and restricting difficulties. For example, prosecution of domestic crimes demands reliance on largely unavailable Sierra Leone jurisprudence and, in order to ensure consistency in application, the Special Court needs to have access to Sierra Leone domestic court decisions, but publication of Sierra Leone court decisions ceased in the 1970s.

Unfortunately, the limited jurisdiction and the issued amnesty risk prolonging impunity in Sierra Leone. Although the amnesty is not recognised by the Special Court, continued impunity will exist within the domestic criminal justice system, where the amnesty is recognised.¹⁸⁸¹ Although certain domestic courts are reported to be working, they are short of staff and access to justice is limited.¹⁸⁸² The urgent need to solve the problems of the justice system is further highlighted by the many detainees in Sierra Leone, whom have neither been charged, nor tried.¹⁸⁸³ According to Thompson's report on the domestic legal system in 2002,¹⁸⁸⁴ the courts stopped operating in 1995 and today the government is investing in Justices of Peace, who act as magistrates.¹⁸⁸⁵ The UN's Interagency Appeal for Sierra Leone, together with UNDP, SCSL and UNAMSIL is funding basic reform of the judiciary, which includes infrastructure, procurement of equipment and important

¹⁸⁷⁹ See ICC Statute, 1998, www.icc-cpi.int; art.7 SCSL Statute: "Jurisdiction over persons of 15 years of age. 1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child. 2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies." At <http://www.scs-l.org/scsl-statute.html>

¹⁸⁸⁰ The crimes under Sierra Leone law may not require the level of proof that international crimes do, e.g. of the existence of an armed conflict or a widespread or systematic attack, but the provisions including domestic law are not without problems. Art.5 enables the Special Court to prosecute persons for offences relating to the abuse of girls under the domestic prevention of Cruelty to Children Act, 1926, and offences relating to the wanton destruction of property under the Malicious Damage Act, 1861.

¹⁸⁸¹ Only a few cases are heard by the local justice system, and the majority do not relate to the serious human rights crimes, mainly because of the recognised amnesty; customary domestic law inconsistent with international law; and a lack of professionals and general infrastructure.

¹⁸⁸² Most local courts apply customary law and include discriminatory law against women, illegal detentions, and excessively high fines for minor offences. Amnesty International 2001, at <http://web.amnesty.org/library/index/engaf510072001?open&of=eng-385>; Human Rights Watch, 2004, p.21

¹⁸⁸³ Sierra Leone is greatly violating art.15 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment that states that no detainee shall be denied access to counsel for more than a matter of days; Linton, 2001.

¹⁸⁸⁴ Thompson, 2002, p.4, 10, at <http://www.humanrightsinitiative.org/publications/Sierra%20Leone%20Report.pdf>

¹⁸⁸⁵ *Id.*, p.11.

judicial training.¹⁸⁸⁶ The SCSL's outreach program attempts to increase the population's knowledge of and respect for the court's work and the rule of law, which is important to end a culture of impunity.¹⁸⁸⁷ Of great importance are the human rights of children and women and the usage of the human rights instruments, to which Sierra Leone is a party. The SCSL organised a National Victims Commemoration Conference on Truth, Justice and Reconciliation, on 1 and 2 March 2005, allowing the local communities to assess the success of the SCSL and to determine what else could be done in the fight against impunity.¹⁸⁸⁸ From the point of view of domestic legal reform, Sierra Leone's reform appears to be in an advantaged situation compared to, for example, Rwanda, which did not have an internationalised court operating within the country and thus did not obtain the enhancement, through *e.g.* employment of local justices and the court house, which the SCSL will, at least, leave behind. As a minimum expectation, it is hoped that domestic courts will at least be able to prosecute those mid-level offenders that the Special Court has not even indicted, perhaps with the help of the local staff presently employed by the SCSL.

7.4.3. ASSIMILATED JUSTICE

Sierra Leone is an interesting example of a case where a great deal of expertise and financial support has been put into both an internationalised domestic truth discovery process and an internationalised prosecutorial process. The TC was created in accordance with the amnesty granted at the time of the peace accord and, when the peace fell through, the prosecutorial process was proposed. There was thus no intentional commitment to work towards assimilated justice, however the creation of institutional processes (based on domestic requests to the international community) was neither accidental. Sierra Leone rather exemplifies an initial move towards assimilating the familiar notions of the criminal and restorative justice aims, however with two separate justice processes.¹⁸⁸⁹ Different to the previous examples, Sierra Leone lacks reflexive institutional commitment; however there may be signs of an objective to fulfil the fundamental aims and to balance the involvement of the actors.

¹⁸⁸⁶ In 2003 approx. \$90m was appealed for by the UN, see *Interagency Appeal for Relief and Recovery, Sierra Leone 2003*, 19 Nov.2002, p.50, at <http://www.reliefweb.int/appeals/2003/files/sle03.pdf>. The Security Council has decided to extend the UNAMSIL to June 2005.

¹⁸⁸⁷ *E.g.* Summaries of court proceedings are broadcasted through local media. See *Prosecutor for the Special Court Begins Holding 'Town Hall' Meetings*, 27 Sep.2002, at <http://www.sc-sl.org/>; ICTJ, 2003, at www.ictj.org/downloads/Legacy/Report.pdf

¹⁸⁸⁸ Amnesty International, Feb.2005

¹⁸⁸⁹ The potential assimilation will be further discussed in chapter eight, together with Rwanda, and other examples of potential assimilated justice.

The UN Security Council decided to establish the SCSL, in order to try the most serious offenders and crimes.¹⁸⁹⁰ “It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.”¹⁸⁹¹ Recognising the issue of restricted prosecutorial processes, in the case of both the Special Court and domestic courts and the amnesty granted and recognised with regard to domestic crimes, the inclusion of domestic legislation may have further limited the prosecutorial process. With the creation of the Special Court, a specific rationale was created for the TC, in connection with the first five years of the conflict that are not covered by the SCSL jurisdiction and because of the granted amnesty that, at least to some extent, paralysed domestic courts. The TC recognised the amnesty and did not recommend prosecutions, but rather saw the court as a threat to its truth discovery process.¹⁸⁹² Thus, where there is not collaborative commitment, any other subjective commitment, inclusive or progressive, to optimize justice is in danger. In turn, such subjective problems harm the potential objective to fulfil the aims and involve the actors, as institutional competition may lead to further practical problems and restricted justice.¹⁸⁹³

The TC, which could compel people to testify, in order to aid its understanding and reporting on the causes, nature and extent of the abuses, brought its own expert forensic investigation teams to Sierra Leone, who mapped mass graves, assessed the need for further

¹⁸⁹⁰ Due to further fighting and the break of the 1999 peace agreement, the Sierra Leone government asked the UN for assistance and to establish a special court, in a letter of June 2000, UNDoc.S/2000/786. In Aug. 2000 the UN Security Council requested the Secretary-General to negotiate an agreement, and in Oct. 2000 a report was handed over for the establishment of the Special Court, UN/RES/1315/2000, UNDoc.S/2000/915, at <http://www.un.org/Depts/dpko/missions/unamsil/spcourt.htm>.

¹⁸⁹¹ S/2000/915, at <http://library.law.smu.edu/resguide/ReptUNSecGSierraLCt.pdf>

¹⁸⁹² Primary Findings #553. “The Commission finds that the amnesty clause in the Lomé Peace Agreement was well intentioned and meant to secure peace. The Commission finds that in repudiating the amnesty clause in the Lomé Peace Agreement, both the United Nations and the Government of Sierra Leone have sent an unfortunate message to combatants in future wars that they cannot trust peace agreements that contain amnesty clauses.” #561. “The Commission finds that the handwritten disclaimer made by the United Nations to the Lomé Peace Agreement stating that the amnesty provisions shall not apply to certain international crimes may have sent a message to combatants and leaders of armed factions that the amnesty provided by the Lomé Peace Agreement was not a secure amnesty, see www.SL.TRC.V2.2.findings.pdf

¹⁸⁹³ Sierra Leone has illustrated how institutional competition delayed investigations; restricted the aim of truth; deterrence; and potentially reconciliation. Rather than collaborating, a micro-approach was thus taken twice, with the effect of losing sight of the victims.

investigations, and advised on forensic evidence.¹⁸⁹⁴ Although the experts advised collaboration with the Special Court and a joint investigation mandate, it is strange that this was not already thought of, as the TC had not begun its work when the SCSL Statute was being decided upon.¹⁸⁹⁵ At the same time, this indicates that the TC was set up as a completely separate restorative justice process to the prosecutorial process. Indeed this was borne out by Professor Schabas, who confirmed in 2002 that the TC was totally independent from any other body and that the TC was not a first instance court which would send those appearing on to the Special Court.¹⁸⁹⁶ The different but yet interrelated mandates of the two institutions were further acknowledged by the UN Secretary-General. "Care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions."¹⁸⁹⁷ With no mandated relationship, studies were conducted in this regard and,¹⁸⁹⁸ in 2003, a Practice Direction was intended to govern access to information and detainees.¹⁸⁹⁹ The SCSL held that the presumption of innocence and fair trial rights would be violated, were the court to hand detainees over to the TC and that it would be possible for the TC to request information via a written affidavit and a follow-up interview.¹⁹⁰⁰ According to the TC, the rules authorised a Special Court judge to approve whether the TC could interview a detainee. This was said to disrespect the TC mandate, but prioritise the prosecutorial process by denying the detainees the right to truth and undermining the TC's guarantee of confidentiality.¹⁹⁰¹ Although the SCSL was willing to assist the TC with information, the TC

¹⁸⁹⁴ E.g. 17 Jun.2002 experts from Argentinean Forensic Anthropology Team, see Id., OCHA IRIN, Sierra Leone, 21 Jun.2002.

¹⁸⁹⁵ Id., 21 Jun.2002; OCHA Sierra Leone, IRIN 15 Jul. 2002, www.reliefweb.int/appeals/2003/files/sle03.pdf UNDoc. S/2000/915; The SCSL was designed in 2001, UNDoc.S/2001/40; UNDoc. S/2001/95. Extensive TC preparations led to public hearings beginning 14 Apr.2003, see 15 Dec.2003 <http://www.africafocus.org>

¹⁸⁹⁶ Professor William Schabas, 11 Sep.2002, <http://www.sierra-leone.org/trcbriefing091102.html>

¹⁸⁹⁷ UN Sec-Gen. letter to Security Council, 12 Jan.2001, UNDoc.S/2001/228, cited in Wierda, Hayner, van Zyl, Jun.2002, p.2, www.ictj.org

¹⁸⁹⁸ E.g. The Post-conflict Reintegration Initiative for Development and Empowerment, at www.ictj.org/africa/sierra.asp. However, in 2002, the Prosecutor of the SCSL decided not to ask the TC for any information, and the two organisations worked separately for approx. 1 year. In May 2003, the TC asked for detainees from the SCSL to be heard by the TC. When the OTP decided to indict individuals from every faction involved in the war, Mr Norman, the leader of the pro-government Civil Defense Forces (CDF), and former defense minister and somewhat a hero to the population, was indicted. When the TC requested Mr Norman, who was in SCSL detention, to give public testimony in one of the TC hearings, the SCSL, fearing that this could lead to self-incrimination and political uproar, refused the TC this opportunity. www.sc-sl.org, Norman Case, 2003, SLSC, at www.sc-sl.org; http://www.ictj.org/downloads/SL_TRC_Case_Study_designed.pdf

¹⁸⁹⁹ See *Practice Direction on the procedure following a request by a State, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in the custody of the Special Court for Sierra Leone*, at www.sc-sl.org, 9 Sep.2003, amended 4 Oct.2003.

¹⁹⁰⁰ www.sc-sl.org, Norman Case, SCSL, 2003.

¹⁹⁰¹ See S.7(3) TRC Act, 2002; see also SL.TRC.V2.2.Findings.pdf ##569; Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, appending the Statute of the Special Court, 2002. (The Special Court Agreement Act 2002) S.21(2): "Notwithstanding any other law, every natural

refused the court's requests to tape record and monitor TC meetings with detainees. Unfortunately, the relationship between the SCSL and the TC was not great.¹⁹⁰² The two institutions competed for funds and although the SCSL appear to have supported the combination of truth and justice, with the common aim of reconciliation, the TC supported the granted amnesty and thus naturally saw the court as a threat to reconciliation. It is obvious that neither Sierra Leone nor the international community took a decision to create a joint prosecutorial and restorative justice process. Still, the combination of a TC and a court is an important realisation of the assimilated justice aims.

Kick-off was difficult for both interim institutions, much due to lack of funding, with barely a tenth of the first year's budget allocated.¹⁹⁰³ This highlights the need to secure initial funding, as the most important truth investigations cannot begin without readily staff, hence endangering the fundamental aim of truth,¹⁹⁰⁴ which was indeed part of the justice processes. Still, as no proper *modus operandi* was worked out between the TC and the SCSL, the specific issue of truth investigation, of great importance to both institutions, was not shared, which might have lessened expenditure. With reference to the TC, it was empowered to examine and investigate past violations, issue summons and sub-poenas and, in the final report, contribute to a broad social truth, as well as to more specific micro-truth, applicable to individual cases. The final findings are based on conclusions arrived at from the factual truth found, relating both to some of the narrative truths (as understood by individual participants, victims and witnesses), and to the social truth (that is, the truth generally accepted by a large part of the population).¹⁹⁰⁵ However, some of the conclusions oppose the different narratives and accepted popular truths, in an attempt to contribute to a new social truth of the Sierra Leone conflict.¹⁹⁰⁶ The SCSL mainly focused on forensic truth,¹⁹⁰⁷ relating to the individual case before it, in order to establish individual criminal accountability. But courts also examine general patterns of crimes, required in order to establish what specific crime has been committed and specific elements of it, however only in relation to one case.

person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court."

¹⁹⁰² There was however some common ground between the SCSL and the TC, where a few of the TC final findings were corroborated in SCSL trials. *E.g.* In the final report, the TC concluded that the CDF was responsible for 6% of the war crimes, including most of the cannibalism, corroborated in Nov.2004 trials. See generally Nichols, 2005; and the TRC final report, SL.TRC.V2.2.Findings.pdf

¹⁹⁰³ The TC was short of \$9.9m by the time the commissioners were appointed, www.sierra-leone.org/trcbriefing082802.html

¹⁹⁰⁴ *E.g.* hard evidence can be destroyed and memories deteriorate.

¹⁹⁰⁵ See SL.TRC.V2.2.Findings.pdf, at http://www.nuigalway.ie/human_rights/publications.html

¹⁹⁰⁶ *Id.*, Primary Findings, #12-38.

¹⁹⁰⁷ Included in this are corroborated testimonies, see ch.6.

The TC did not find the aims of truth, justice and reconciliation necessarily compatible and found that the prosecutorial process had a negative effect on its truth investigations.¹⁹⁰⁸ Since the TC was not enabled to issue immunity to those appearing before it, such individuals could be subpoenaed to appear before the Special Court, without being able to invoke the *non bis in idem* rule.¹⁹⁰⁹ This can, of course, affect the willingness of people to testify openly before the TC and thus it is imperative to determine the issues concerning individuals appearing before TCs; discussions by TCs with court-indicted persons; and the giving of incriminating evidence before the TC. These issues are further discussed in chapter eight. It suffices to say here that these issues were to some extent discussed in 2002, by the International Centre for Transitional Justice,¹⁹¹⁰ and further developed by the TC's own recommendations.¹⁹¹¹ Particularly relevant, to the TC, were the rights of detainees and of prisoners that were asked to be heard by the TC. The TC recommended that future criminal courts allow for immunity clauses, for testimony given to a TC.¹⁹¹² The view sustained here is that truth discovery processes should focus on macro-truth, that is, the creation of an impartial historical record of the human rights abuses and its causes. Victims would probably still come forward to tell their narratives and those offenders that choose not to could still be heard by the courts. The court-established innocence or guilt could then be used and interpreted by the TC, in its macro-analysis. The TC would thus still be able to provide a healing forum, particularly for the victims and a social truth focus. "Experience suggests that truth commissions are more effective when they are able to examine larger tendencies and patterns. Holistic analysis allows the comprehensive historical analysis of the periods of violence, thus identifying structural causes,

¹⁹⁰⁸ Id. Findings, #557. "The Commission finds that the decision by the Special Court for Sierra Leone to deny its detainees the right to appear before the Commission and the nation, in an open and transparent manner, denied the right of Sierra Leoneans to see the process of truth and reconciliation done in relation to the detainees. #558. The Commission holds that the right to the truth is inalienable. This right should be upheld in terms of national and international law. It is the reaching of the wider truth through broad-based participation that permits a nation to examine itself honestly and to take effective measures to prevent a repetition of the past." This, and the recognition of the amnesty, allows one to conclude that the truth discovery process did not share the objective to fulfil all of the fundamental aims of assimilated justice.

¹⁹⁰⁹ I.e. a person cannot be tried twice for the same offence.

¹⁹¹⁰ Wierda, Hayner, van Zyl, Jun.2002, pp.8, www.ictj.org

¹⁹¹¹ The TC final report was filled with comments on the collaboration between a court and a truth commission, to a large extent criticising the SCSL, and highlighting the sensitive issue of sharing information. SL.TRC.V2.3.Recommendations.pdf, at http://www.nuigalway.ie/human_rights/publications.html

¹⁹¹² #475-6, SL.TRC.V2.3.Recommendations.pdf; The TC did not find the 2003 Practice Directions from the SCSL to consider the spirit and purpose behind the TC mandate, but authorised a Special Court judge to decide whether the TC could interview a detainee. The SCSL did thus not recognise the TRC Act and right laid down in its mandate, e.g. sections 3, (the right to hear testimony in confidence), 7(3), (conduct interviews in private) 8(1)© (hold records confidential) of the TRC Act, 2000. The Practice Direction held that TC interviews be monitored and that recordings of confidential interviews be made and lodged with the Registry, ##4(b), 4(c) and 7, in Practice Direction on the procedure following a request by a State, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in the custody of the Special Court for Sierra Leone, at www.sc-sl.org, 9 Sep.2003, amended 4 Oct.2003.

political responsibilities and contributing to prosecutions.”¹⁹¹³ Forensic evidence is of great importance to the legal truth, but perhaps not, to the same extent, to the establishment of a broad inclusive truth of the historical past.¹⁹¹⁴ The TC fulfilled other aims, but the recognition of amnesty, in combination with the selected trials of the SCSL, only mean that the fulfilment of the fundamental aims of just-desert punishment and deterrence have only been attempted, however importantly so. The SCSL, which was never set up with the objective of trying a large number of offenders, must now emphasise the importance of the rule of law and domestic prosecutions. Offender rights, together with the Defence Office of the court, can ensure that the accused are treated according to international standards.¹⁹¹⁵ Also, a certain amount of denunciation has been directed at those individuals who, because of their established responsibility, were named in the final TC report, with the additional benefit of working as a deterrent.¹⁹¹⁶

The fundamental aim of reparation was excluded from the SCSL, where the court has only had the power to order the return of property and other assets acquired by criminal conduct, to the owner or the government.¹⁹¹⁷ The Victim and Witness Protection Unit, together with Victims Management in the OTP, should ensure that those appearing before the court are treated with care.¹⁹¹⁸ The TC recommended reparation program detailed different elements of individual and collective material and symbolic reparation and suggested that financial and material assets should be recovered from those found responsible.¹⁹¹⁹ Any such recovered means should be made available to the War Victims Fund and used for financing the recommended reparations program.¹⁹²⁰ Still, the SCSL missed a great opportunity to include the right to reparation in its Statute, which could have been combined with the recommendations made by the TC.

Mirroring the objective to fulfil the fundamental aims, reconciliation has not been a foreign aim to the SCSL, whose victim commemoration and general awareness agenda, together with domestic legal reform, assist the transition towards justice and reconciliation. The TC recognised “that reconciliation is a long-term process that must occur at the national, community, and individual level. The Commission places no preconditions on the realisation of reconciliation. Reconciliation is an ongoing process that must be nurtured and promoted.”¹⁹²¹ The TC provided

¹⁹¹³ González, ICTJ, 2004, p.19, at www.indo.trc.comment.pdf

¹⁹¹⁴ See ahead, ch.6, legal truth; ch.7, social truth; ch.8, assimilated justice.

¹⁹¹⁵ Supra, SCSL Rule 34.

¹⁹¹⁶ ##106, SL.TRC.V2.2.Findings.pdf, at http://www.nuigalway.ie/human_rights/publications.html

¹⁹¹⁷ Art.19, SCSL Statute.

¹⁹¹⁸ Supra, SCSL Rule 45; Amnesty International, 24 Feb.2005; 1 Mar.2005.

¹⁹¹⁹ Id. ##429; ##482; a direct individual compensation program was not recommended, however detailed pension and health programs were, ##485.

¹⁹²⁰ Proposed by the Lomé Peace Agreement, #430, SL.TRC.V2.3.Recommendations.pdf

¹⁹²¹ Id., #515.

victims and others with a forum that promoted healing and mediation opportunities, involving the affected actors in a dialogue.¹⁹²² Truth acknowledgment by the TC was supported by the weekly press briefings, on UNAMSIL radio, which, together with the Special Court activities assisted general awareness and individual as well as collective reconciliation.¹⁹²³ Besides the reconciliatory effects of the justice processes, the TC recommended that the government should, for example, encourage an overall apology, a national peace day and the continuation of nationwide reconciliation programs.¹⁹²⁴

In conclusion, although Sierra Leone models two separate institutions, representing restorative and criminal justice, the fundamental aims are, in some measure, fulfilled.¹⁹²⁵ Yet, the restrictions, with regard to the TC are linked to the prioritised focus on investigating and writing a truth report, rather than supplying a broad inclusive truth discovery process. With regard to the prosecutorial process, the restrictions are severe and include the inoperative domestic courts, at least with regard to serious crimes and the limited focus and reach of the separate Special Court. Such restrictions do not make the prosecutorial process legitimate in the eyes of the victims or the general community. Unfortunately, the lack of institutional commitment to collaborate has stood in the way for assimilated justice to improve such restrictions.

7.5. RESTRICTED TRUTH, JUSTICE & RECONCILIATION

When pointing the fundamental aims towards the international core crimes and the prosecutorial process; towards the truth discovery process and towards the *quasi*-assimilated justice models, restrictions to the justice processes have been noticed. In order to enable conscious assimilated justice, with reflexive institutional commitment in combination with objective achievement of the fundamental aims and balanced involvement of the actors, legitimate restrictions to the processes must be recognised. This part briefly looks at such prosecutorial and truth

¹⁹²² However, the TC found that, because of fear that information given may be turned over to the SCSL, particularly offenders stayed away from the opportunity to mediate with victims. #568, SL.TRC.V2.2.Findings.pdf

¹⁹²³ UNAMSIL Public information Section, Freetown Aug.22, 2002, at www.iss.co.za/Pubs/Monographs/No80/Chap4.html

¹⁹²⁴ SL.TRC.V2.3.Recommendations.pdf, #518, #522, at http://www.nuigalway.ie/human_rights/publications.html

¹⁹²⁵ The collective community has been recognised through the general and collective focus of the fundamental aims of truth, deterrence and reconciliation, contributed to mainly by the TC, but also by the SCSL. Collective reparation, through elements of prevention, guarantees for non-repetition, respect for the rule of law, and justice mechanisms has been contributed to by the SCSL. To what extent the different elements of TC recommended collective and individual reparation will be applied by the Sierra Leone government is yet to be seen, however rehabilitation programs for the actors exist. The aim of just-desert punishment is restrictedly applied by the limited prosecutorial process, assisted by named individuals declared responsible by the final TC report. However, due to the recognised granted amnesty, it is doubtful whether any such named individuals will be tried by domestic courts.

discovery restrictions.¹⁹²⁶ A second part looks at how *quasi*-assimilated justice can improve such legitimately restricted justice.

The introduced *quasi*-assimilated justice models represent a combination of restricted prosecutorial processes and restricted restorative justice institutions, as applied by countries faced with the international core crimes and non-reconciled communities. The basic ingredients of the justice processes have been identified to include truth discovery and acknowledgment; justice, by means of just-desert punishment and possibly shame and deterrence; some recognition of the right to reparation; and the creation of different means of reconciliation. *Quasi*-assimilated justice basically represents truth, criminal justice¹⁹²⁷ and reconciliation where the fundamental aim of reparation is tentatively part of such *quasi*-assimilated justice. Where the overall objective is to respond adequately to the domestic situation, it recognises the contextual dimension of local particularities and where the law applied and the expertise given have been internationally influenced, a certain amount of realisation of the universal dimension exists. Yet, both the institutional commitment to assimilated justice and the objective achievement of the fundamental aims and of balanced involvement of the actors are flawed, further discussed in the next part. Firstly, the legitimate restrictions to any justice process must be recognised, in order to be able to see beyond such restrictions and improve *quasi*-assimilated justice.

The examples have indicated some recognition of the fundamental aims and the analysis from chapters five and six, where the prosecutorial process potential of fulfilling the aims of just-desert punishment and deterrence have been combined with restorative mechanisms potential of fulfilling the aims of truth and reconciliation.¹⁹²⁸ The fundamental aims of truth and reconciliation have hence been combined with the (criminal) justice process, indicating respect for these aims, *per se*, as well as awareness of the significance of ownership of the whole justice process. Yet, the *quasi*-assimilated justices have had to deal with restricted legal truth, prosecutions and deterrence. Individual reparation has been recognised in theory, but only symbolic collective reparation is visible in practice, often through means implemented for other ends.¹⁹²⁹ Amnesties have been involved in restricting the prosecutorial process, and may have restricted a broader aspect of

¹⁹²⁶ As already discussed, even in cases of perfectly applied international criminal justice applicable to the international core crimes, whether, internationally or domestically applied, the international criminal and restorative justice systems focus on different dimensions, universalism versus particularities. Restorative justice aims of social justice, truth, reparation and reconciliation can at the most be secondary aims of criminal justice, and vice versa individually focused criminal justice aims cannot be the direct focus of restorative justice, at least not unless further mechanisms are added to both processes.

¹⁹²⁷ *I.e.* criminal justice (just-desert punishment and deterrence).

¹⁹²⁸ Rwanda has however not instituted any particular mechanisms for the fundamental aim of truth.

¹⁹²⁹ For example, through truth investigations, debates and healing reconciliation.

restorative truth and reconciliation. At the same time, an amnesty process similar to that of Timor-Leste may have eased the overwhelming effort required by the prosecutorial process.

Besides integrating impunity threats discussed in chapter two, as well as internal shortcomings of the criminal and restorative justice systems, found in chapters four, five and six, many of the international core crimes are committed in periods of non-democratic regimes and in states in transition, where various limiting factors restrict the justice process. Attitudes such as “letting sleeping dogs lie” can take advantage of weaknesses of criminal justice and restorative justice, such as difficulties to apply and execute state responsibilities to prosecute the offenders, or fulfil TC recommendations, with the result of *de facto* restricted justice. Non-action impunity, where states simply avoid or chose not to investigate and prosecute; illegal immunity protection; and a variety of other means that, for non-genuine reasons try to do away with responsibilities that arise from having international core crimes committed, are attitudes that threaten and restrict justice. Such arbitrary restrictions to justice are illegitimate.¹⁹³⁰ However, the view put forward here is that there are cases of restricted justice that are not necessarily arbitrary, but that must be seen as acceptable or even necessary, considering the circumstances of each case. Cases looked at, *e.g.* the SA TRC and the *quasi*-assimilated models of Rwanda and Timor-Leste may represent restricted, yet legitimate justice. Yet, in terms of assimilated justice and South Africa, the universal dimension is lacking, not only because of the limited amount of prosecutions, but also because there does not appear to be an internalised commitment to criminal justice. In fact, South Africa does not recognise individual justice, whereby impunity on the individual level exists, which is why South Africa is rather representative of one side of the assimilated justice equilibrium, that of collective, local particularism.

In a perfectly just world, those responsible for perpetrating the international core crimes would be prosecuted, even if after some time, with a change in government perhaps or through international intervention of an *ad hoc* or permanent character.¹⁹³¹ Unfortunately it is not a perfect world, but justice is often compromised. Out of the choices facing a new regime; ignoring the past and granting blanket amnesty; punishing all the crimes; or establishing the truth and selectively prosecuting certain crimes and offenders in a move towards reconciliation, the first is clearly unacceptable while the second is practically impossible.¹⁹³² The third option perhaps represents the

¹⁹³⁰ See ch.2.

¹⁹³¹ The point of human rights law is to oblige states to protect the rights of the individual and collective citizens, and where a state does not prosecute those who commit human rights crime, the state has failed as a government. Albon, M. *Project on Justice in Times of Transition: Report of the Project's Inaugural Meeting*, in Kritz, 1995.

¹⁹³² *E.g.* Sierra Leone issued amnesty, stopping domestic investigations, prosecutions and convictions, whereby the internationalised domestic court was set up; Rwanda attempted prosecuting and punishing all offender, slowly realising its impossibility.

fact that there are occasions when restricted justice will be legitimate.¹⁹³³ The inherent limitations to the two justice systems looked at must be recognised, where the focus of the prosecutorial process remains on the individuals that are able to participate in the process. Similarly, it is recognised that the truth discovery process may struggle with an individual focus and it may only have a symbolic effect on healing. Hybrid models that try to face practical problems, often incurred by the extent of harm caused by the international core crimes, are also recognised for their effort to optimize justice. Local particularities may increase the difficulties of doing justice, as may universalism, where a certain amount of tension will be expected, where justice is thus ultimately never perfect, demanding a progressive commitment.

Today, the ICC may act when member states refuse to act according to their obligations, especially necessary where the principle of universal jurisdiction cannot be relied upon as a strict customary law obligation for states to prosecute or extradite. In relation to the international core crimes and the ICC, article 17 of the ICC Statute clarifies what legitimately restricted justice the ICC will recognise, in accordance with the principle of complementarity.¹⁹³⁴ Much responsibility is put on the prosecutor of the ICC, together with the investigation mechanisms at hand; and on the Pre-Trial Chamber to ascertain whether or not the domestic state is in fact acting responsibly, with *genuine* attempts to prosecute.¹⁹³⁵ Much authority and liberty remain with the domestic states, as a logic result of the principle of complementarity. The ICC Statute can still guide and, to some extent, control conformity with the international procedures and, where domestic states act inaccurately and illegitimately restrict justice, the principle of complementarity of the ICC could cede the

¹⁹³³ Limited prosecutions may be a number of model cases of *e.g.* the most severe cases with high ranking officials; Limited prosecutions have taken place in *e.g.* East Timor and internationally, at the *ad hoc* ICTs and in Rwanda. See generally Kritz, 1995.

¹⁹³⁴ Article 17 reads: "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State is unwilling or unable genuinely* to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has *already been tried* for conduct which is the subject of complaint, and a trial by the court is not permitted under article 20, paragraph 3; (d) The case is *not of sufficient gravity* to justify action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exists, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for *the purpose of shielding the person concerned from criminal responsibility* for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an *unjustified delay* in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are *not being conducted independently or impartially*, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." Italics added.

¹⁹³⁵ Arts.18, 53, ICC. See behind, ch.5.

domestic jurisdiction to the ICC.¹⁹³⁶ However, chapter five and the examples of this chapter have established that, in reference to the fundamental aims and the recognition of the actors, the prosecutorial process is generally restricted to try a limited amount of offenders, whether through the ICC, a domestic process, or a hybrid model.¹⁹³⁷ Chapter five also identified that the prosecutorial process can add certainty and legal authority to the individual focus of the aims of truth, just-desert punishment, deterrence and reparation. But, broad accounts of the truth are not accomplished, important symbolic aspects of reparation are not referred to by the prosecutorial process, and the aim of reconciliation can only be assisted as a secondary aim, through the fulfilment of the more specific justice aims. When the domestic criminal justice system is weak, as is the case when hybrid internationalised courts or ICTs are proposed, the restrictions may be amplified at the international level, yet hybrid attempts at restricting the practical problems of the prosecutorial process must be recognised for this purpose.

While international law can be interpreted to generally prohibit amnesty in connection to the international core crimes,¹⁹³⁸ practice has proven that such restrictions exist, and that certain amnesties may even be legitimately recognised, especially where honest efforts have been made to do justice.¹⁹³⁹ South Africa may be an example of such legitimately restricted justice, where political offences closely related to the apartheid regime were amnestied, without excluding the

¹⁹³⁶ ICC art.17. However, see art.20 protecting the accused of being tried a second time; Llewelyn, 2001.

¹⁹³⁷ In relation to the international core crimes, it is restricted to try e.g. heads of state and other powerful people, see behind, ICTR; SCSL; Special Dili Court.

¹⁹³⁸ Arts.53, 64, Vienna Conv. on the Law of Treaties 1969; Vienna Conv. on the Law of Treaties between States and International Organizations or between International Organizations, 1986, at <http://www.un.org/law/ilc/texts/treaties.htm>;

<http://www.oas.org/legal/english/docs/Vienna%20Conv.%20Treaties%20InternOrg.htm>; see behind, ch.2. Amnesty can easily amount to impunity and where there is no thorough truth investigation or acknowledgment, the individual actors and the collective community are not given any means to accept the past and reconcile.

¹⁹³⁹ A restorative justice process that grants amnesty may hope for a new beginning, 'a reconciled state', by closing the door on the past. An amnesty-granting-process comprising the fundamental aim of truth in its individual as well as collective form, (hence involving investigations, hearings and testimonies of the individual), but lacking consequences for offenders and deterrents for the future may result in the victims taking justice in their own hands, they may mistrust the new government, and find that the policies or even the personnel of the old regime continue. This does nothing but slow down a sincere move towards reconciliation. If amnesty is mandated, it requires serious precautions, as the legitimacy of both the legal and the restorative systems is dependent on it. The restorative justice process needs to, if at all, grant amnesties that are, at least, supported by the community, offenders and most importantly victims to claim legitimacy, and later, success. Criminal justice cannot claim legitimacy if it recognises arbitrary amnesties in relation to crimes prohibiting amnesties. See Zalaquette, J. *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in Kritz, 1995, pp.11; Benomar, J. *Justice After Transitions*, in Kritz, 1995, pp.198. A restorative justice process that grants amnesty may hope for a new beginning, 'a reconciled state', by closing the door on the past. An amnesty-granting-process comprising the fundamental aim of truth in its individual as well as collective form, (hence involving investigations, hearings and testimonies of the individual), but lacking consequences for offenders and deterrents for the future may result in the victims taking justice in their own hands, they may mistrust the new government, and find that the policies or even the personnel of the old regime continue. This does nothing but slow down a sincere move towards reconciliation.

applicability of the prosecutorial process with regard to non-associated crimes.¹⁹⁴⁰ In South Africa's transition towards accountability and democracy, a prosecutorial justice process did not seem possible, there was no international court available and apartheid had infected the entire nation and its institutions, risking the continuity of the past within the courts of law.¹⁹⁴¹ Instead, a collective approach to justice was chosen, with the objective to absorb the entire nation in a move toward reconciliation.¹⁹⁴² While inter-dependant, two sides of the TRC arose; granting offenders amnesty, which was constitutionally authorised; and attempting to hold the offenders accountable to the victims, by demanding confession in return for amnesty.¹⁹⁴³ The slight influence of individual accountability, where the truth had to be fully disclosed and then published, cannot be ignored, similar to Timor-Leste's amnesty process, however nor can the fact that only a few offenders asked for amnesty, were subpoenaed, publicly named and heard.¹⁹⁴⁴ Individualised amnesties can thus retain some accountability of the actual violations, and involve offender and victim's narratives through testimonies and hearings; however such a focus may hinder a macro-approach to truth.¹⁹⁴⁵

In addition to prosecutorial process limitations, the factors established to play an important role in shaping a successful truth discovery process, in chapter six, can also be precarious factors, able to restrict the process and, thus, the fulfilment of fundamental aims and the potential actor

¹⁹⁴⁰ And East Timor may be another example. Based on great legislative research, the SA TRC was created through national legislation, as a legal institution, parallel to the criminal justice system, as a *quasi*-judicial institution, with administrative legal powers to hear cases, name offenders and grant amnesty. Different from all other TCs, most set up by presidential action, with no legislative debate, e.g. Argentina, Chile, Haiti, Sri Lanka, Chad and Uganda. El Salvador and Guatemala were set up through their peace accords, with UN involvement. The TRC had to decide whether a particular offence was associated with an applicable political objective based on whether the offence was advised, planned, directed, ordered, or committed within SA between the specific dates, by or on behalf of either a publicly known political organisation, liberation movement, state agency or member of the security forces, an in light of the specific criteria set forth in S.20(3)(f)(ii) Promotion of National Unity and Reconciliation Act of 1995. The criteria included an examination of the motive, context, gravity, and objective of the offence, whether the offence was committed under direct order or approval, and whether the offence was committed for either personal gain or out of personal malice, ill-will or spite directed against the victims. See behind, ch.6; Sparks, 1995.

¹⁹⁴¹ See behind, ch.6.

¹⁹⁴² The goal of reconciliation in SA was all along emphasised in its national collective context, hoping to avoid the victims' dilemma of individual reconciliation with the offender(s), with the obvious inclusion of Archbishop Desmond Tutu's religion as a basis for the collectiveness. The concept of justice was interpreted in a broad sense, formulated to meet the local particularities of restorative justice, with limited retribution in the shape of public exposure and shame to be faced by the offenders, whose names and crimes were acknowledged. Maharaj, 1997.

¹⁹⁴³ "The Act seeks to address this massive problem by encouraging survivors, and the dependants of the tortured and the wounded, the maimed and the dead, to unburden their grief publicly, to receive the recognition that they were wronged and, crucially, to help them discover what did in truth happen to their loved ones, where and under what circumstances it happened, and who was responsible...With (the amnesty) incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order." Justice Mohamed of the constitutional court in *AZAPO v. President of the Republic of SA* case, 1996, at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/S-CCT17-96>

¹⁹⁴⁴ In this way South Africa did not only avoid prosecutions, but also avoided general amnesty, see behind, ch.6 and the final SA TRC report.

¹⁹⁴⁵ The little focus that was put on systematic accountability and the collective community, in the SA TRC, through a look at specific sectors and institutions, allowed for some community recognition.

inclusion.¹⁹⁴⁶ The fundamental aims of truth, deterrence and reconciliation appear more applicable to the truth discovery process than the other aims, especially in their collective, general form; although a certain amount of legal truth may be fulfilled, depending on the TC mandate. Public denouncement and shaming are ambiguous means, whereby the aims of just-desert punishment and specific deterrence cannot be primary aims of the process. While reparation may be a direct aim of a truth discovery process, it lacks any means of providing or guaranteeing anything but symbolic reparation. Besides rather inherent restrictions to the truth discovery process,¹⁹⁴⁷ the process can easily be victim to external restrictions, practical problems.¹⁹⁴⁸ The legitimacy and the success of a TC depend on many factors, the main ones being independence from political influence and public credibility, dependent on the commissioners and the specific mandate.¹⁹⁴⁹ The staff has to represent neutral professionalism, while at the same time being able to represent and understand different communities,¹⁹⁵⁰ as the work, with people of different cross-cultural perspectives, demand particular practitioner knowledge.¹⁹⁵¹ To secure proper staff, the initial problem is to secure funding, which must not only cover the running of the TC, but, in order for the truth discovery process to be completed, support mechanisms and recommendations have to be fulfilled, whereby it is suitable to calculate what the country will reasonable be able and willing to spend. In cases where the collective community may not be wary of international influence, such funding and professional support should be invited to add expertise, security and authority, without hindering community representation.¹⁹⁵² Any external influence is thus dependent on community support, from which legitimacy stems. The externally influenced TC of Sierra Leone did not secure funding before beginning its process to investigate and report on the causes, nature and extent of the human rights

¹⁹⁴⁶ See more Truth Commission Organisation and International Centre for Transitional Justice (ICTJ), workshop 2-4 Dec.2003, at www.TruthCommission.org; Hamber, 1997; Waldman, 1993.

¹⁹⁴⁷ Similar to the inherent limitations to the prosecutorial process, due to the dimensional focus, discussed in ch.4, where *e.g.* criminal justice is not primarily concerned with a broader social truth; and restorative justice is not primarily concerned with the individual offender.

¹⁹⁴⁸ Again similar to how the prosecutorial process is liable to external restrictions, where *e.g.* a domestic state is not able to provide professionalism or recognise and apply rules of international law.

¹⁹⁴⁹ A truth discovery process that is not able to represent the community, offenders, and victims, by including them in the truth discovery process, but also through the commissioners of the TC, may lack the necessary link to the local particularities, necessary for moral legitimacy and social justice. The suitability of the commissioners can be reflected in investigation and analytical approaches. The mandate is determined by the TC goals, *e.g.* acknowledging truth; investigating and resolving specific cases; offering victims a forum to tell their story in a healing and reparative milieu; reparation program; recommendations of judicial, military, police and other state mechanisms aiming at deterrence; identifying offenders for possible prosecution, removal from security forces, or other sanctions; and encouraging reconciliation. See generally, Sarkin, 1995, 1996, 1997.

¹⁹⁵⁰ Some form of community nomination of commissioners, representing a broad spectrum of disciplines can assist such selections. SA's selection committee invited nominations from the public; universities were invited to propose commissioners in Guatemala. Barton, 1999, pp.111 argues that it is the empowerment of all the affected actors that is the crucial feature of restorative justice, without which the process will fail, at www.voma.org/docs/barton_emp&re.pdf

¹⁹⁵¹ Umbreit & Coate, 2000, at <http://sww.che.umn.edu/rjp/Resources/Documents/umbcoa98.pdf>

¹⁹⁵² Mixed national and international staff was found in both Guatemala and Haiti; El Salvador was purely international.

violations.¹⁹⁵³ This mandate was broad in reference, and could have allowed a macro-styled analytical process, in order to create an impartial historic record of violations related to the conflict, in order to address impunity; to respond to the needs of the victims; to promote healing and reconciliation; and to deter. However, the TC restricted itself by including demanding micro-truth investigations and a focus on certain individuals, which further restricted its short life span.

The more general a focus, concerning the events and period to investigate, can create a more collective process, rather than an individual and thus restricted micro-truth discovery process. Individual cases and micro-truth investigations imply more specific undertakings and limitations to hearings etc; where unsuccessfully achieved results are more obvious.¹⁹⁵⁴ Of course the combination of both macro- and micro-case analysis, by one and the same institution, as was the case in Sierra Leone, further confine time and resources.¹⁹⁵⁵ Besides this, micro-truth investigations of individual criminal accountability may, as it requires offender focus, affect the general collective sentiment of ownership, *i.e.* the truth discovery process may not truthfully fulfil collective, public truth acknowledgment, reparations, or reconciliation. This may be a collective sentiment (especially where the process is not linked to the prosecutorial process) as specific case-studies restrict the possibility of acknowledging a collective truth, at the expense of acknowledged individual accountability that does not lead to prosecution. Micro-approaches furthermore limit victim participation, similar to the prosecutorial process, and, by not providing a forum for truth telling, the healing, reparative, and reconciling encouragement may be restricted, or even lost. Moral legitimacy, and actor satisfaction, is hence at risk when a truth discovery process considers embracing too many perspectives, and, as chapter six identified, truth discovery fulfilment of the justice aims of just-desert punishment and deterrence are unconvincing.¹⁹⁵⁶ Public hearings add to the valuable inclusiveness, collectiveness and broadness of the truth discovered and acknowledged, with healing and reconciling effects, and inclusive public truth discovery should be invited for such reasons.¹⁹⁵⁷ Although macro-truth investigations are preferred,¹⁹⁵⁸ such a process may well be

¹⁹⁵³ The macro-approach could investigate the context surrounding the violations, for example, whether or not the human rights violations were the result of deliberate planning, policy or authorization by any government, group or individual.

¹⁹⁵⁴ An unaccomplished hearing of a specific offender or a specific case will, as in the case of Sierra Leone, see behind, be noticed to a different extent than where macro-truth investigations struggle to hear offenders.

¹⁹⁵⁵ *E.g.* forensic and legal experts will be necessary for quality case studies.

¹⁹⁵⁶ Any possible punitive and deterring effects of shaming denouncement must be recognised, but it is too tentative a justification, see behind, ch.6.

¹⁹⁵⁷ Any shaming effect is yet a secondary effect to the important inclusive quality of the actual truth discovery process. The SA TRC highlighted the potential of such hearings as legitimising the process. By not allowing truth to be denied, hearings were held to heal and reconcile. This is of course dependent on the actual security conditions, available resources and time, which restricted the Sierra Leone process. If there is a threat to victims testifying publicly, victim and witness protection programs will be necessary and these are costly to run and thus further restrict the truth process, similar to criminal justice, where only individual cases are dealt with.

restricted to conclusions based on a few model testimonies and public hearings, unless the mandate recognises the value in reporting on the truth discovered, without attempting to shape the truth to fit another objective, e.g. reconciliation.¹⁹⁵⁹ Establishing a realistic focus in the initial stage of the restorative process is consequently important. Other precarious factors, previously mentioned, which have to be nursed with the sensitivity they deserve, in order to secure moral legitimacy and not restrict the justice process, all seem to be linked to the actual truth discovery and the government acting upon the TC recommendations. Each case has to be looked at and recognised, and not dealt with as an exception to the rule, or the process may run the risk of excluding, or perhaps deliberately avoiding certain violations and actors. In a process so needy of community and state support,¹⁹⁶⁰ this would restrict the process to the extent whereby it can no longer claim legitimacy. This risk is not only present at the initial phase of the process, but may endure and even increase during the process, if the promises and goals set at the beginning are not viewed by the actors as being satisfied.¹⁹⁶¹

In order not to put restorative aims at such risk, or lose sight of the moral legitimacy acquired through actor support, assimilated justice can attach legal legitimacy and authority to the restorative aims and mechanisms, whereby the prosecutorial process may assist actor satisfaction. While legal legitimacy is mainly contingent on processing just-desert punishment,¹⁹⁶² moral legitimacy is uncertain from the beginning of the process, until the objectives set out in the mandate have been reached.¹⁹⁶³ The application of restricted justice should, according to Van Zyl, oblige the state to list the reasons for non-prosecution, which, in turn, should be evaluated by a court with convincing evidence.¹⁹⁶⁴ There is no reason why restrictions to the truth discovery process could not undergo the same public scrutiny, where, for example, South Africa's government would have to

¹⁹⁵⁸ That is, investigation of broader systematic patterns of the violations. The Guatemalan TC had the overall objective to clarify the causes and consequences of the past, at <http://shr.aaas.org/guatemala/ceh/report/english/intro.html>; The Truth Commission Organisation has determined some factors, see <http://www.truthcommission.org/factor.php?fid=2&mode=m&lang=en>

¹⁹⁵⁹ Resources must also be allocated.

¹⁹⁶⁰ The community needs to recognise the process and its outcomes, in order to reach participation and fulfilment of fundamental aims; and the state needs to support the process politically and financially, with public acknowledgment of the recommendations, in order to increase the support for the process, and its success.

¹⁹⁶¹ Where the TC ends its work with recommendations, such as a reparation policy for the victims that requires the implementation of a government policy, and the recommendations are not implemented, the legitimacy and success of the entire process is at risk.

¹⁹⁶² For prosecutorial processes the main dependence is prosecuting and investigating the individual offender according to just desert principles, as the primary goals of criminal justice. Only as secondary goals, and hence not absolutely legitimising, are reparative and reconciling aims.

¹⁹⁶³ Restorative justice models are open-ended, without the fixed rule of law, determined professionals, institutions or resources to rely on, whereby it is difficult to find a just system that can determine what harm deserves restoration and what reparation would most efficiently be applied.

¹⁹⁶⁴ Van Zyl, P. *Justice without punishment: guaranteeing human rights in transitional societies*, in Villa-Vicencio & Verwoerd, 2000, pp.42.

identify legitimate reasons for not implementing the recommended reparation policy. Non-inherent restrictions, such as externally restricting the prosecutorial process by granting certain amnesties, similar to Timor-Leste, must be approved by the public, in order for the justice process to be legitimate.¹⁹⁶⁵ However, necessitating a judicial assessment may not be domestically feasible in situations where the legal system cannot be relied upon.

International law was not created with the intention to impose impossible duties on states.¹⁹⁶⁶ Serious threat to the country or its people, limited resources and more urgent humanitarian needs may justify a delay in the justice process.¹⁹⁶⁷ International criminal justice and the prosecutorial process are tools in the “claim to universalism”, *i.e.* a vehicle for the application of universal values, which must be able to recognise local particularities. While the prosecutorial process can supply a framework of such universal principles (universalism) *e.g.* through the ICC Statute, the incorporation of this universalism takes place within different local contexts (particularities). When, for example, the former regime retains some power, the prosecutorial process may be at risk, with *e.g.* bias judgements imposed, and this must be recognised.¹⁹⁶⁸ In relation to South Africa, it was held that it “has neither the resources nor the skills to reverse fully massive wrongs of the past...the resources of the state have to be deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person who has directly and indirectly been burdened with the heritage of the shame and the pain of our racist past.”¹⁹⁶⁹ In cases of a restricted prosecutorial process, for example, assimilated justice can add the lacking victim and community focus of the aims of truth and reconciliation.¹⁹⁷⁰ Similar to how the prosecutorial process risks an application of universal values, without sensitivity to the local particularities,¹⁹⁷¹ the truth discovery

¹⁹⁶⁵ Zalaquett argues that an amnesty policy can be legitimate if it is the will of the people, Aspen institute, 1989, p.34.

¹⁹⁶⁶ Orentlicher, 1991. *Jus cogens* are non-derogable norms however, in cases where the state has itself not contributed to the restricting factor, of *e.g.* necessity or *force majeure* and a real threat exists, derogation of duties should be done on a case-by-case basis. See *e.g.* UN Draft Articles on Responsibility of States for Internationally Wrongful Acts, at 43, 2001, at <http://www.un.org/law/ilc/sessions/53/53sess.htm>; *supra*, art.53 of the Vienna Conv. on the Law of the Treaties, 1967, 1986.

¹⁹⁶⁷ However, it must be noted that *force majeure* and security threats are temporary problems in the sense that they may allow the state to not prosecute during a certain period only. Investigations must be carried out and the truth should be established with reparations made available to the victims as best as the state can. See *ibid.*, ch.3.

¹⁹⁶⁸ The enforcement of the law must be seriously undertaken, but where real financial difficulties or insecurity affecting the quality of trial, where basic rights of *e.g.* the UDHR cannot be guaranteed; limited model prosecutions may be allowed.

¹⁹⁶⁹ This was held in upholding the constitutionality of S.20(7) in the *AZAPO case*, South Africa, 1996, #8.

¹⁹⁷⁰ If the restrictions have limited the accountability process to such an extent that responsibility is yet widely unknown, a flexible assimilated justice model must then provide a focus on offender accountability through truth investigations.

¹⁹⁷¹ Where the process may not be able to recognise collective victims or offenders.

process may apply too local a perspective, with solutions to the collective, to the detriment of the individual.¹⁹⁷² Assimilated justice must therefore remain flexible, recognising multi-level governance, sensitive to the tension between universalism and particularism.¹⁹⁷³

7.5.1. QUASI-ASSIMILATED TRUTH, JUSTICE AND RECONCILIATION

Recognising the existence of legitimately restricted justice, where the fundamental aims are only partially fulfilled, assimilated justice can assist such fulfilment. However, in order to do so, assimilated justice requires internal institutional commitment, as well as an overall objective to do so. What appears to be lacking *quasi*-assimilated justice, besides a complete institutional commitment that is reflexive on all levels, is the objective to fulfil the fundamental aims and involve the actors. The *quasi*-assimilated institutions are therefore analysed in this part, in relation to reflexive and objective indicators, further differentiating between an actual genuine paradigm commitment towards fully assimilated justice; and an initial commitment phase. A concise indication of the beneficial effects that even *quasi*-assimilated justice can bring to restricted justice processes is also included, further particularized in the next chapter.

Basically, what differentiates *quasi*-assimilated justice from fully assimilated justice is both a reflexive commitment, within the institutions, to contribute to assimilated justice; and an overall objective to fulfil the assimilated justice ingredients, that is, fulfilment of the fundamental aims and of balanced involvement of the actors. The reflexive character echoes the subjective particularism of each context, where an internalised commitment is required, in order for assimilated justice to be institutionally applied. This may not be a problem in Rwanda, where the process is domestically owned, however it is important for the domestic actors of Timor-Leste and Sierra Leone to integrate the international influence. Although the prosecutorial process that the international community supports emphasises domestic justice,¹⁹⁷⁴ the international community set up the SCSL as a separate entity to the, basically inexistent, domestic criminal justice system.¹⁹⁷⁵ The internationalised court was furthermore separate to the TC, without collaboration, indicating a lack of collaborative and

¹⁹⁷² A state may well be trying to confront its past, but perhaps not according to international standards, ignoring the rights and needs of the actors without legitimate reasons, restricting or ignoring prosecutions and granting amnesty.

¹⁹⁷³ *I.e.* with an inclusive and collaborative commitment, that is also progressive, with the overall assimilated justice objective to fulfil the fundamental aims and involve the actors.

¹⁹⁷⁴ *E.g.* current efforts to institutionalise an internationalised prosecutorial process in Cambodia; the ICC Statute rests on the principle of complementarity.

¹⁹⁷⁵ And the ICC does not mention a link to domestic restorative justice processes, or the involvement of domestic judicial staff. The ICTR was also set up separate to the domestic courts and staff, and maybe the main reason why the internationalised special court of Dili, East Timor was not set up separate from other courts, similar to Sierra Leone, is because the new country lacked all such infrastructure.

inclusive commitment, as well as a lack of a conscious objective. Without an inclusive commitment, the assimilated justice objective is lost, as there can be no complete fulfilment of the fundamental aims or a balanced involvement of the actors without it. It is therefore vital that the institutions cooperate in finding an optimal equilibrium between the fundamental aims, whereby an inclusive commitment may be found. The examples are interpreted to represent no yet fully assimilated justice; models that recognise, to different extent, the need for criminal justice, truth, and reconciliation, with a focus on the individual offender, on the victim, and recognition of the local community. Yet, realising the shortcomings, mainly of institutional collaboration and victim focus, assimilated justice has not been the primary objective in any of the examples. Optimal equilibrium requires a reflexive commitment, sensitive to local particularities and to universal standards. The application of international law and achievement of legitimate justice is not only of international concern,¹⁹⁷⁶ but, in essence, as the fundamental aims also represent particularism, fulfilment of legitimate truth, justice and reconciliation for the international core crimes should be the concern of all.¹⁹⁷⁷ Although international law and the international community emphasise criminal justice aims, the prosecutorial process does not have to be international. If it is, it must support the domestic criminal justice system, and any national particularities.¹⁹⁷⁸ The holistic approach of fully assimilated justice necessitates such recognition and collaboration between international and domestic universal and local particular demands and institutions. Still, it does not appear necessary to share the same institution, in order to fulfil the fundamental aims and recognise the actors. What is important is that the institutions cohere, rather than conflict, through the reflexive commitment discussed; and together share the objective to fulfil the fundamental aims and allowing actor participation.¹⁹⁷⁹ Criticising Sierra Leone, for example, a weak domestic legal system, limited by declared and recognised amnesty; a prosecutorial process restricted to those most responsible for perpetrating the most serious crimes; and a truth investigating and reporting commission have all existed, at the same time, yet detached. Without a joint effort, the institutions end up competing for the actors and for the fulfilment of the aims, which they actually share.

¹⁹⁷⁶ International law applicable to the international core crimes implies universal values without differentiating between international and domestic processes.

¹⁹⁷⁷ Universal jurisdiction aims at protecting the fundamental human rights that the international core crimes violate.

¹⁹⁷⁸ *E.g.* demands for further (collective) truth and reconciliation that could, if ignored, make the process illegitimate.

¹⁹⁷⁹ *E.g.* if micro-truth investigations are of importance to the restorative process, perhaps necessary in order to assist a very restricted prosecutorial process, then the information can be received from the prosecutorial process, which investigates and determines the individual truth, applicable to the individual case. Rather than institutionalising dual offender focused processes, one direction can *e.g.* remain focused on the victims. If the prosecutorial process is limited in application, it could recognise and collaborate with potential shaming and denouncing mechanisms of the restorative process. See ahead, ch.8.

The reflexive commitment must inherently also be progressive; looking for the best solution to the local particularities; the universal dimension must acknowledge universal standards and the emerging genus of hybrid models that attempt to solve practical problems of restricted justice.¹⁹⁸⁰ A different amount of such progressive commitment can be found in the models looked at, where Rwanda may constantly challenge the justice process, in the attempt to improve it. The progressive commitment to optimize the justice process in Timor-Leste is dependent on freedom from Indonesian influence and further amnesties; and Sierra Leone must now integrate the justice processes in the domestic culture, in order to progress. The reflexive commitment and assimilated justice objective are the indicators assisting the assessment of assimilated justice, as both are mutually indispensable, and overlap to a similar extent; the objective dimension can furthermore analyse the level of assimilation. The more developed the conciliation of the aims and the involvement of the key actors, the greater the indication of progression towards fully assimilated justice.

Rwanda's introduced of the traditional, yet novel, *gacaca* institution, combined with the domestic prosecutorial process and the separate prosecutorial process of the ICTR, emphasises the fundamental aims of justice and reconciliation, with an inherent offender focus, as well as a collective community focus.¹⁹⁸¹ The restrictions to the prosecutorial process relate the amount of offenders that can be justly prosecuted, mainly dependent on improvements to the criminal justice system. The reflexive commitment appears internalised and collaborative, however only inclusive to some extent. Once Rwanda had adopted the reconciliatory *gacaca* system, the primary focus on the offenders of the most serious crimes has remained with the prosecutorial process, which should lessen unjust prosecutions. The victims and the communities have been given the opportunity to participate in the *gacaca* justice process, as have less serious offenders, as well as offenders that indicated remorse. Such offenders are exposed to the local and public *gacaca* truth investigations, debates and judgements, operating under the larger criminal justice umbrella.¹⁹⁸² This *quasi*-assimilated justice does thus not only provide offender focus, based on fulfilment of the criminal justice aims. It also assists victims and communities, through a more social process, able to include the aim of reconciliation. The fundamental aim of truth is perhaps still restricted to truth

¹⁹⁸⁰ This is referred to in the case analysis that follows, where flexibility is required in the context-transcending theories and practices.

¹⁹⁸¹ Morris and Scharf, 1998, pp.691, found the ICTR to be the international community's best option responding to Rwanda's genocide, rather than supporting the granting of amnesty, similar to Sierra Leone or the setting up of a TC; or even preferred to assist national proceedings. They did not contemplate combining the international court with other options.

¹⁹⁸² Rwanda chose not to create a separate truth discovery process and by assimilating the restorative *gacaca* process with the criminal justice system, the criminal justice aims are not dependent on the success of such aims in the truth discovery process, e.g. by only subjecting the offenders to public denouncement.

investigations of individual cases, although the restorative hearings, which are public and local, should assist collective truth discovery and acknowledgement. Both the individual and the collective notions of the aim of reconciliation have been given means through such hearings, in combination with the commission working towards reconciliation. Yet, it has to be recognised that the restorative aims of collective truth and reconciliation are perhaps secondary to the criminal justice aims of individual truth, just-desert punishment and deterrence,¹⁹⁸³ in Rwanda. Still, these aims would have been further restricted, had Rwanda not recognised the importance of local truth discovery, as a healing mechanism. The difficult fulfilment of the aim of deterrence may be supported by the *gacaca* process, similar to how public hearings may automatically shame the offenders and Rwandese Tutsi and Hutu live interdependent lives again, showing signs of successful reintegration. The Rwandan approach, which seems to recognise the importance of a domestic truth discovery and reconciliation process, as well as the impossibility of the criminal courts holding all offenders criminally accountable, appears to have been embraced by Timor-Leste and Sierra Leone.¹⁹⁸⁴ The right to individual reparation appears recognised, but Rwanda has not yet distributed any compensation. Collective symbolic reparation has been made, under which the collective community and the offender have been recognised to a larger extent than the victim, in the Rwandan justice process.¹⁹⁸⁵ On the whole, Rwanda's *quasi*-assimilated truth, justice and reconciliation model may well be legitimately restricted, mainly because the nation has avoided externally imposed restrictions, such as amnesties. Furthermore, the necessary internal objective to fulfil the fundamental aims and involve the actors, in combination with reflexive institutional commitment, can be found, however not fully developed. Nonetheless, the possible restorative benefits of the *gacaca* hearings depend upon community support, for its success and legitimacy; and although general fear and shame amongst the Hutu population may complicate the process,¹⁹⁸⁶ it may be anticipated sentiments. The very local feature of the truth discovery increases the importance of collective local concurrence with the process. Still, the progressive nature of the justice process must realise that promises to make reparations have to be fulfilled and perhaps

¹⁹⁸³ The recognised problem with deterrence is that its fulfilment is vague, in terms of both specific and general. Rwanda's priority of the prosecutorial process should, in general criminal justice terms, work as a deterrent, creating respect for the rule of law and the justice process.

¹⁹⁸⁴ Although those countries have used different models in response to the local particularities. Remarkably, Rwanda has had to realise this, even with the assistance of the limited prosecutions at the ICTR, again reminding us of the restricting problems inherent to transitional justices and the international core crimes.

¹⁹⁸⁵ The victim may be able to actively participate in *gacaca* hearings, whereby it can be concluded that the Rwandan process allows for victim participation. Furthermore, the collective community is largely made up of collective victims.

¹⁹⁸⁶ Where, e.g. those accused or otherwise called by the local elders to be heard may flee the local community, the Rwandan police and criminal justice system must collaborate, similar to how the SA TRC had subpoena power, in order to keep the population and the local districts calm and orderly.

public acknowledgement of a broad truth that identifies the causes of the genocide would still be beneficial.

Timor-Leste's transition to accountability and democracy is similarly divided in focus, with the prosecutorial process, equipped to deal with the international core crimes, provided mainly for perpetrators of serious crimes (in order not to impose further restrictions on an already delicately new process). A reflexive, internalised institutional commitment to collaborate and to be inclusive is thus visible. The inherent restrictions to the prosecutorial process appear widely recognised and accepted and it is important to realise that the same limitations apply to the hybrid court, where other practical problems exist, mainly due to domestic weaknesses.¹⁹⁸⁷ The domestic truth discovery process is open and able to deal with lower-level offenders, through Rwandan-typed local community hearings. Timor-Leste has implemented a chance for the offenders that are dealt with by the prosecutorial process to participate in the local community truth discovery and reconciliation process,¹⁹⁸⁸ with the result that the processes are, to some extent, operationally assimilated, yet restricted in terms of quality.¹⁹⁸⁹ The possibility to have already declared offenders of serious crimes participating in the truth discovery process continues the general view of TC practice, in opposition to the SA TRC, that amnesty is not indispensable, in order to achieve actor participation. The criminal justice aims are thus not only dealt with by the prosecutorial process, although the authoritative voice stems from the will to prosecute, with possible effects of deterring shame based on the truth discovery process, especially if the offender meets with his victims. Similar to Rwanda, Timor-Leste's truth discovery process, through the voice of the local community, can publicly hear and denounce the offenders, but Timor-Leste's reconciliation process has amnesty granting power, in the case of perpetrators of less serious crimes. The individually granted amnesty can be issued, in the return for offender's confession, truth, remorse and community services, in this way necessitating cooperation between the criminal and restorative processes, as well as necessitating collective support. Since the local community makes up the foundation of the amnesty-granting process, it appears to have been legitimately recognised. The possibility to grant individual amnesty thus means that just-desert punishment and deterrence are mainly restricted to the prosecutorial process and serious crimes. A collective macro-truth discovery may have been the result of the TC's final report, yet unknown, but the dominant fulfilment of the aim of truth has been individually applicable, in both the prosecutorial process and in the truth discovery of individual amnesty. The

¹⁹⁸⁷ The inexisting domestic legal system makes it difficult to find professionals and other substantial.

¹⁹⁸⁸ This may be very beneficial, and should be operational in Rwanda, whereby the criminal courts allow *gacaca* participation.

¹⁹⁸⁹ The prosecutorial process has struggled with professional staff, although international assistance was provided and the ICC Statute incorporated. The operational assimilation is also restricted, and mainly concerned with sharing information for the individual amnesty process of the TC.

fundamental aim of reconciliation may be the most restricted aim, in relation to the granting of amnesty, which, in turn, can restrict the entire justice process. However, as long as amnesties are individually granted and investigated in the local community, the collective community can raise a loud voice, concurring or objecting, whereby moral legitimacy may be safe. The official truth discovery process, with its report may assist collective symbolic reparation, as well as individual and collective reconciliation, yet, with the plan to set up another TC, together with Indonesia, it is doubtful what beneficial effect the truth discovery process and report have had.¹⁹⁹⁰ The initial phase of an objective to fulfil the aims and involve the actors may exist in Timor-Leste, however, the mutual indispensability of the reflexive and the objective commitment means that where, *e.g.*, the institutional commitment is not properly inclusive, and the objective may generally not focus on the victims and the aim of reparation. Overall, Timor-Leste emphasises truth, criminal justice, and reconciliation, with the offender particularly in focus, yet involving the local community and collective victims in the participatory local hearings. The restorative process does not however appear to focus on the victim, yet the new legislation has recognised the right to reparation, similar to the ICC Statute. Restrictions are obvious and the legitimacy of the Timorese progressive justice process depends on the near future progress and collaboration with Indonesia.

Sierra Leone is the least assimilated of the examples looked at, yet with the best potential, with international assistance in setting up a prosecutorial process and a truth discovery process, at essentially the same time. Sierra Leone's internationalised domestic prosecutorial process appears more similar to the ICTR than to Timor-Leste's hybrid court, as it was set up separate from the domestic criminal justice system¹⁹⁹¹ and basically without recognition of the already present TC. The objective achievement of some of the fundamental aims and of involving the actors may exist, however flawed, but in Sierra Leone there is no reflexive commitment. This commitment must be institutionally internalised and, as the TC has come to an end, progressive commitment must now rely on the domestic officials. The granted amnesty caused a rift between the SCSL and the TC and,¹⁹⁹² unfortunately potential collaboration between the two institutions was lost, with the result of further restricting already restricted justice processes. The focus of the prosecutorial process is

¹⁹⁹⁰ Had the truth discovery process, in combination with the prosecutorial process not been hindered by the extent it has been, due to Indonesia's unwillingness to cooperate, there should be no need for another TC.

¹⁹⁹¹ However without UN Charter Chapter VII power. Although the domestic prosecutorial process was restricted, due to the blanket amnesty, the SCSL could have been set up as part of the domestic criminal justice system.

¹⁹⁹² The fact that the Sierra Leone government decided against prosecution and granted a blanket amnesty for the rebels has found some support, in the belief that it was the only way to achieve a ceasefire. See Rieff, 1999, p.39. However, the ceasefire did not last, and the decision to prosecute crimes against humanity, war crimes and other serious violations of both international and Sierra Leonean laws was widely supported, however not by the TC. See Crossette, 2000, p.16.

unnecessarily restricted and,¹⁹⁹³ with the short life of the TC, potential joint investigation and sharing of information should have been possible, especially with financial limitations to the processes. Instead, the restorative process saw the prosecutorial process as an obstruction to justice, choosing to double the micro-approach to truth investigations, rather than complementing the prosecutorial process with a macro-approach to collective truth. A crucial factor then that must be decided upon from the beginning of the justice process is the issue of amnesty.¹⁹⁹⁴ It may be possible and important to distinguish between individually granted amnesties resulting from a truth discovery process such as South Africa's or perhaps Timor-Leste's¹⁹⁹⁵ and such blanket amnesties where truth investigation and accountability are excluded, as in Sierra Leone.¹⁹⁹⁶ Sierra Leone's amnesty dangerously surrenders domestic criminal justice, and not only punishment (and it is therefore unfortunate that an internationalised TC recognises such an amnesty), whereas Timor-Leste's process surrenders criminal punishment, while still establishing truth, accountability and public awareness. In some ways the South African and Timorese amnesty-granting committees were *quasi*-judicial institutions, where offender, crime and guilt were established, based on micro-truth investigations emphasising their individual focus.¹⁹⁹⁷ Timor-Leste's process is also dependent on community support, where it receives its legitimacy, which the Sierra Leone amnesty was not dependent on. Whereas the general amnesty intended the entire justice process to be waived, literally seeking to hide the past, the in-depth truth investigations and published report of the TC emphasised responsibility. Still, the truth discovery process did not supply a widely inclusive or participatory process and individual and collective reconciliation appear largely unsupported. Deterring shame may be an effect of the published report, yet the aim of deterrence is another largely unfulfilled aim, since general amnesty is domestically recognised and the prosecutorial process is significantly restricted. With an incapacitated domestic criminal justice system, and a truth discovery process that does not provide an official public forum for hearings, truth telling and potential public denouncement, the SCSL should have increased its focus, perhaps to the most

¹⁹⁹³ SCSL focus is on those most responsible, with the result that the court's symbolic authority only identifies a few model cases.

¹⁹⁹⁴ One hopes that in the future the granting of amnesty will not be a major aim or characteristic of a TRC, as international law does prohibit the granting of amnesty for gross violations of human rights. Scharf, 1996; Bassiouni, 1996; Joyner, 1996; Orentlicher, 1991.

¹⁹⁹⁵ An example of what Günther calls amnesty by waived punishment (resembling pardon), in Christodoulidis, 2001, p.4. See behind, ch.2. The SA TRC's Amnesty Committee was staffed by lawyers and many judges, and its findings (which had immediate legal effect) were subject to judicial review and approval by the South African Constitutional Court. The amnesty waived punishment and with problematic and questionable reasons and justifications for punishment *per se*, revoking punishment in this manner may not be more harmful than inflicting punishment, if necessity for punishment cannot be justly established. See ahead, ch.7.

¹⁹⁹⁶ Referring to Günther's waived legal proceedings, Id. p.4.

¹⁹⁹⁷ Timor-Leste does furthermore not issue amnesties for offenders of special crimes and the district courts assist the TC's determination of crime and offender registration.

serious crimes. The aim of just-desert punishment is thus restricted, perhaps not in quality with regard to the few actual prosecutions, but the process has struggled to prosecute the few offenders indicted, consequently restricting the importance of criminal justice aims and respect for the rule of law.¹⁹⁹⁸ Important recommendations for individual and collective reparations were made by the TC report, and rehabilitating and psychological healing centres have been provided, and offenders have been reintegrated with the government's support. However, no direct victim compensation was recommended.¹⁹⁹⁹ Another restriction to the SCSL is the exclusion of the right to reparation, in its mandate, and as the prosecutorial process only hears a few victims, in relation to the few cases before it, the result is that the individual offender and victim focus is extremely restricted. The SCSL has publicly supported reconciliation through its outreach program, and reintegration of the different military groups may be signs of reconciliation. Sierra Leone does thus represent restricted criminal and restricted restorative justice, perhaps to the extent where the internationalised processes are without moral legitimacy. Still, the recognition, by the international community, by the parties to the Lomé peace agreement and by Sierra Leone that both truth discovery and prosecutions are necessary, with the result of having such processes operating domestically, must be interpreted as a step towards the acceptance of a new paradigm, of assimilated justice.

Having recognised the inherent restrictions to the prosecutorial process, to the truth discovery process and to *quasi*-assimilated justice as well as the existence of a progressive commitment to both universalism and particularism, it is interesting to note that even not yet fully assimilated justice can assist such optimizing.

Truth is the main common factor in both prosecutorial and restorative systems; however, legal micro-analysis of the truth has become apparent in both processes. Yet, while such an approach is intrinsic to the prosecutorial process, the truth discovery process can provide equilibrium by focusing on macro-truth, perhaps building healing and social truths onto the forensic and narrative truths of the prosecutorial process. The fundamental aim of truth was given attention by both the criminal and the restorative justice processes of Timor-Leste and Sierra Leone. In legal justice, applicable to the cases heard by the Special Courts, individual micro-truth is necessary. The TC of Sierra Leone also decided to investigate and report on truth relative to individual accountability and such truth was also applicable to the specific cases that came before Timor-Leste's CAVR, in order to identify the specific crime committed. The TCs of both these countries also reported on the larger, social aspects of the truth, in relation to the past atrocities. In Rwanda,

¹⁹⁹⁸ East Timor's prosecutorial process has been restricted mainly due to Indonesian cooperation problems and where the already very restricted mandate of the SCSL is further restricted, its impact is uncertain.

¹⁹⁹⁹ It is still unknown to what extent, if at all, any reparations have been made.

individual truth is applicable to the courts and to the *gacaca* tribunals and there may not be any report on the wider aspects of the truth surrounding the genocide in Rwanda. This amounts to a critical aspect of Rwanda's justice process. Still, the reconciliatory *gacaca* process, combined with healing camps, may provide the local community with at least some truth, which would benefit from an overall examination and publication.²⁰⁰⁰ Perhaps the actual reporting of the truth is less important than the process of truth discovery and *gacaca* can provide such fora. Scharf has ascribed four primary purposes to TCs: establishing an historic record; obtaining justice for the victims; facilitating national reconciliation and deterring future violations,²⁰⁰¹ to which perhaps three attributes can be ascribed to the *gacaca* hearings. Although the potential dual focus of the fundamental aim of truth is assisted by having restorative and prosecutorial processes, equilibrium will be best achieved by allowing the most suitable justice dimension to fulfil at least one focus. If TCs are equipped to investigate micro-truth, it is doubtful whether their potential broad inclusive nature can be sustained or whether such a process will become restricted to certain individuals and cases, similar to prosecutorial processes. Just as a restorative process may complicate collaboration with a prosecutorial process if they compete, rather than participate, in fulfilling the different focuses of the fundamental aims, a prosecutorial process should not attempt a historical record.²⁰⁰²

Regarding the fundamental (criminal) justice aims, attention to the rule of law, criminal justice and restoration of the judiciary find support in the international community and domestic states today. The overall focus of the rule of law programs appears to be on the fundamental aims of criminal justice - legal truth, just-desert punishment and deterrence - through either reform of the criminal justice system and application of international norms relevant to the international core crimes, or the institution of a separate international(ised) special court.²⁰⁰³ Since former Yugoslavia and Rwanda, a more domestic approach has been visible in the examples of this chapter, often with

²⁰⁰⁰ The focus on criminal justice in Rwanda has paid little attention to truth acknowledgement and it does not appear to be an aim of the reconciliation commission. Prunier finds the lack of unaddressed questions in Rwanda to why it happened to be an important factor for a TC. Despite the public nature of the genocide and general knowledge of the actual genocide, there is no generally accepted truth as to why it happened, something a TC could assist with. See Prunier, 1997, p.327. It may of course be that, because of the public violence, the Rwandans do not ask for the truth to be made public.

²⁰⁰¹ Scharf, 1997, p.379.

²⁰⁰² Ch.6-7 look further into truth in the different processes. Minow believes that TCs may be more effective than courts at establishing a historical record of what happened during the violent period, as TCs may respond to the general community by offering meetings with other survivors. Minow, 1998, p.57.

²⁰⁰³ Or, in the rare case of Timor-Leste, the creation of an entire legal system. Obviously the restoration of legal justice involves more the specific legal training and setting up of a judiciary, such as sometimes necessary military and security forces and missions set up to assist general administration, policing, etc. In countries of serious human rights violations military justice and law-enforcement have often played an important role, and it may be especially important to assist the country in transition to reverse this through training. See more on peacekeeping efforts in Plunkett, 1998, pp.61-80.

an (at least initial) international influence.²⁰⁰⁴ Whether providing a purely domestic legal system with assistance or establishing internationalised domestic courts, challenges lie in the important combination of the implementation of international standards in a domestic system, such as due process rights of the actors and respect for domestic particularities.²⁰⁰⁵ The countries looked at all found themselves in a state of transition and in serious need of international funding and expertise.²⁰⁰⁶ The engagement of local, perhaps traditional, systems in international efforts is not obvious, which complicates the relationship between the criminal and restorative justice processes and institutions.²⁰⁰⁷ Rwanda was not allowed to host, co-staff, or generally be involved in shaping

²⁰⁰⁴ Only two *ad hoc* ICTs have been established and now the ICC, which is complementary to domestic criminal justice. Other examples are internationalised domestic efforts in former Yugoslavia and Cambodia. In Nov.1998, the US Institute of Peace and Bosnia-Croat-and Serb representatives discussed a joint TC. With the presence of the ICTY, and the focus of local courts establishing criminal accountability, and in respect of international law, it was held that no amnesty would be granted. This was followed by a Sarajevo conference in 2000, with more than one hundred citizens representing different societal groups, who formed the National Coordinating Committee for Establishment of the Truth and Reconciliation, at www.usip.org/pubs/PW/298/truth.htm; Washington Report, June 2000, p.26, 28. Due to growing concern to the international community and the ICTY, a meeting was held in Sarajevo, in May 2001, with representatives from the ICTY, having commented on the draft law of Bosnia-Herzegovina concerning the establishment of a TC, at www.un.org/icty/pressreal/p591-e.htm. The decision to create a Special War Crimes Court (31 Jul.2001) was supported by the international community, avoiding the inclusion of dealing with offenders of the international core crimes in the overloaded domestic legal system. The IBA is also involved in training staff. See RFE/RL Balkan Report, Vol.7, 21 Nov.2003, UNMIK Reg.No.1999/5 and Reg.2001/8 on the establishment of the Kosovo Judicial and Prosecutorial Council, all at <http://www.pict-pecti.org/courts/hybrid.html>.

In June 1997, after nearly twenty years of impunity, Cambodia asked the UN to assist in the handling of the Khmer Rouge, UNSCres.1997/49. Deliberations and political stalemate delayed the setting up of a genocide tribunal to try former leaders of the Khmer Rouge. A UN expert-group published a report in 1999, recommending an ICT. In 2003, the UN and the Cambodian government agreed to establish the Extraordinary Chambers, composed of Cambodian and international prosecutors and judges, mandated to investigate and try the senior leaders and those most responsible for crimes under Khmer Rouge rule (similar to the SCSL focus on those most responsible). A novelty in an otherwise similarly internationalised domestic court to Sierra Leone, is the majority of domestic judges. This is a challenge, firstly and similar to Rwanda, where domestic lawyers have been victims and witnesses of the genocide; legal training and judicial independence are rare; some of the most responsible, e.g. former head of state, are very old; and, also applicable in reference to Sierra Leone, it is important that the Extraordinary Chambers will not be a one-off, *ad hoc* tribunal, but rather the beginning of respect for the rule of law, accountability and reform of the domestic legal system. Following Joinet's Impunity report, 1997, the Stephen's Commission for Cambodia proposed the setting-up of a TC to complement the international prosecutions in Cambodia, A/53/850; S/1999/231, 16 Mar.1999, at www.un.org/News/dh/infocus/cambodia/corell-brief.htm. See e.g. Becker, 21 Nov.2002; Goldston, 2 Aug.2004, at www.soros.org/initiatives/osji; Linton, 2004; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, at www.derechos.org/human-rights/seasia/doc.krlaw.html; www.crimesofwar.org/cambodia_print.html; Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea; and Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (adopted by the UN GA 13 May 2003) at http://www.pict-pecti.org/courts/cambodia_basic_doc.html

²⁰⁰⁵ When creating an internationalised domestic court, one of the dangers is to know exactly what amount of local staff to employ, honoring the domestic justice process, while not endangering impartiality. This has been one of the main difficulties for the UN concerning an internationalised domestic court in Cambodia. See generally http://www.crimesofwar.org/cambodia_print.html; www.derechos.org/human-rights/seasia/doc.krlaw.html

²⁰⁰⁶ The assistance included, besides urgent humanitarian aid, writing of the new law, employing and training judicial staff and material assistance to rebuild the institutional infrastructure. See e.g. UN Human Rights Field Operation in Rwanda, 1996; UN Basic Principles on the Independence of Judiciaries, 1985.

²⁰⁰⁷ Although the institutional set up differs, the important aspect of making allowance for local particularities may have been ignored. E.g. the international community, in Sierra Leone, may have been able to create a relationship between

the ICTR, nor did the international community's involvement assist in the setting up of a restorative truth investigation and it did not assist in the recognition of the traditional *gacaca*. Domestic staff in the special courts of Timor-Leste and Sierra Leone may have assisted understanding of the local situation, yet the SCSL was set up independent of the domestic system. International law, applicable to the international core crimes, is general rather than particular,²⁰⁰⁸ but each domestic situation has its particularities, its particular truth and its particular reconciliation problems, as well as its own traditional solutions. Universalism is thus subject to local particularities. And, where entire communities have been victimised, the prosecutorial process touches on aspects that can be beneficially absorbed by whatever other processes, or mechanisms that the domestic country traditionally practices. For example, in Rwanda a major challenge was to overturn ethnic division and violent resolve and to move towards reconciliatory public debate, something Rwanda itself has recognised and attempts to implement, through public policies and traditional *gacaca* hearings.²⁰⁰⁹

The need to modify previous justice mechanisms and philosophy according to universal standards and the prosecutorial process is not particular to Rwanda however, but to states shattered from having suffered international core crimes.²⁰¹⁰ Of course there are limitations to what the international community can do. With limited time and resources, the most urgent needs must remain in focus and understanding the practical limitations to the application of international legal standards (universalism) is an important step. It is of course also less demanding to apply expert advice, international norms and institutions that have been applied elsewhere (despite different circumstances) than to correctly understand the local legal culture and adapt the prosecutorial process accordingly. This should not however be excluded, but perhaps left to or worked out with the local authorities.²⁰¹¹ It is as important to recognise, in terms of international core crimes and applicable law, that international law has not developed into universally acceptable principles without reason and, in order to know what restrictions to such universal norms are legitimate, the local particularities must be considered and honest attempts at doing justice and fulfilling international obligations must be made. It is under these circumstances that assimilated justice is proposed, especially in states that are willing yet not necessarily able to change, as is the case in the

the institutions; the TC may have been differently set up, with the court in mind; combined with important reconciliation efforts. Knowledge of the general community's hope for prosecutions may not have limited the focus of the SCSL, and the general amnesty through UNMISSET and UNTAET, may have been able to improve the combination of the domestically supported TC, with certain amnesty granting powers, and the special courts

²⁰⁰⁸ Sharing general characteristics, universally applicable, with a general duty to prosecute, see ch.5.

²⁰⁰⁹ Kumar, 1997, p.76. However it is unknown to what extent the Tutsi dominated government actually applies the rule of law impartially. Sierra Leone struggles more with unfair governance and inequalities than ethnic divisions, and East Timor must assert its own identity, establish justice, which involves Indonesian responsibility, while amending relations with the neighbouring country.

²⁰¹⁰ Leaving behind a great amount of both offenders and victims.

²⁰¹¹ See Pankhurst, 1999, for a discussion on conceptualising justice and reconciliation.

countries studied.²⁰¹² In order to provide an alternative discourse, assimilated justice must therefore remain reflexively and progressively committed to both particularism and universalism. Universal norms are often restrictively applied, as the last three chapters have identified; in reality, in many societies, there can never be complete retribution or indeed reparation. Instead of reducing the importance of universal values, applied through the prosecutorial process, assimilated justice strengthens it, by recognising the importance of the local particularities, which aims add the other part of the equilibrium.

Whereas justice, generally linked to the legal system, has the objective to make right the wrong, by focusing on the offender through truth and just-desert punishment, there may be too many offenders to be able to prosecute and punish all. Collective responsibility may exist - the violent acts were simply not seen as abnormal²⁰¹³ - and perhaps no clear distinction between the majority of offenders and victims can be made. The prosecutorial process may benefit from the punitive and deterrent effects *gacaca* and CAVR hearings can have²⁰¹⁴ on the offender and the general community.²⁰¹⁵ Minow promotes the use of TCs as mechanisms for furthering shame following mass atrocity, with punitive benefits, as well as a way of creating a new community, deterring and reconciling.²⁰¹⁶ However, generally the local population can distinguish between those most responsible and other offenders. This correlates to the general prosecutorial process focus on prosecuting the leaders or those most responsible and emphasises the importance of the symbolic function of the prosecutorial process, as a deterrent and as an end to impunity. Still, it is debatable whether any significant deterring effect can be found, in relation to offenders of the international core crimes. Not only is it difficult to perceive of the offenders as reasonable persons, but where a majority of the nation joins the criminal behaviour, deterrence becomes highly elusive.

²⁰¹² Of course assimilated justice is also proposed for states that are willing as well as able to provide truth, justice and reconciliation. Concerning states that are unwilling to prosecute, punish, provide truth and move towards reconciliation it is hoped that the ICC will be able to initiate the justice process, which must then return to the domestic situation, hopefully with a model of assimilated justice. This is further discussed and exemplified in ch.8.

²⁰¹³ Nino, citing Kant, refers to the atrociousness of the international crimes as “radical evil”, where widespread, persistent and organised opinions lead to collective behavior, so radical that normal moral judgement is inapt. Nino, 1996, p.vii. Scharf argues that TCs may investigate structural and societal causes, which can highlight collective responsibility, 1997, p.379.

²⁰¹⁴ In Rwanda, as in Timor-Leste, thousands of local returnees, willing to reintegrate, create as many opportunities to share information, through public and private debate, over what actually happened. The telling of stories may automatically trigger offender shame, understanding and acknowledgment, of the crime; and public debate can systematically shame and deter.

²⁰¹⁵ Braithwaite discusses reintegrative shaming in situations of what Nino calls radical evil, see Id. Braithwaite means that where collective responsibility, widespread radical evil exists, traditional punishment, which presumes human beings to be rational actors, who weigh the benefits of the criminal act against the probability and costs of punishment, may not be the most suitable response. In such societies, it is not only the offenders, but the entire local community who may be deterred, if a strong relationship exists. See Braithwaite, 1989, p.81, 131.

²⁰¹⁶ See Minow, 1998, p.87, 133.

Still, the symbolic and declaratory powers of the prosecutorial process must not be forgotten.²⁰¹⁷ Even very limited prosecutions, of a few individuals, constitute an important societal landmark that invites to constructive conversations in the community, of what is wrong.²⁰¹⁸ It has been supported throughout the thesis that the initiation of a prosecutorial process authoritatively denies impunity and declares accountability and, as Neier argues, this is valuable even though it may only concern a few offenders and, indeed, victims.²⁰¹⁹ Furthermore, a restricted prosecutorial process will still be able to ensure respect for truth, just-desert punishment, deterrence and victim and offender rights, as the process only focuses on a few cases.²⁰²⁰ The brief look at the *quasi*-assimilated justices has identified how a weak justice system may struggle to provide qualitative evidence, prosecution and defence. There are those who argue for a delay in prosecutions, or even cancellation of the prosecutorial process, on the basis that the adversarial nature of trials may slow down reconciliation and badly practised legal justice may further violate basic human rights.²⁰²¹ Such arguments, in support of the abandonment of prosecutorial processes, are dismissed for reasons of respect for the general obligation to prosecute offenders of international core crimes. Rather, the power and the limitations of the prosecutorial process must be realistically acknowledged when being applied by an international court or by a state suffering the effects of the international core crimes and hence assimilated with other means.

The fundamental aim of reparation is present in all of the systems looked at (for example in constructed memorial sites and organised healing programs), however individual victim recognition is equally lacking in all. Justice, generally linked to the legal system, with the objective to make right the wrong, is essential to the fundamental aim of reparation, which may otherwise end up as an unfulfilled TC recommendation. By providing access to justice and legal recognition of a right to reparation, the victim may seek reparation, but neither the Rwandan, nor the Timorese courts have

²⁰¹⁷ See, e.g. Schabas, 1997, p.516, supporting the declaratory value of criminal law as the most important contribution to the struggle against impunity. The society declares that this kind of behavior is wrong, and as it is made publicly, it belongs to the collective memory of the society.

²⁰¹⁸ Osiel distinguishes between a limited amount of trials, e.g. the ICTR, which is logistically feasible, but limits the societal deliberations; and an overload of trials, e.g. Rwandan domestic trials, which is unfeasible, and actually limits the societal deliberations even further, as most offenders are simply not tried. Osiel, 1997, pp.36-47.

²⁰¹⁹ Neier, 1998, p.220.

²⁰²⁰ The Rwandan plea bargaining system may be one way of limiting, and perhaps improving the prosecutorial focus. The Organic Law allows individuals to confess (scrutinised by the courts), give an apology to victims and, in exchange, receive reduced sentences, arts. 6, 9, 15, 16 of the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, Law No. 08/96, Aug.30, 1996.

²⁰²¹ See e.g. Du Toit, p.36, Mendez, p.2, both in Zalaquett et al., 1997. While the rule of law may have been weak in Rwanda, and the funds few, in order to provide proper infrastructure, it is not believed that another couple of years of preparation could have prepared any country to swiftly try such an amount of offenders. And, indeed, had Rwanda waited, more offenders would have fled the country unless amnesty had been granted, which, in the end, was generally opposed in Rwanda.

been able to guarantee compensation, even though a victim trust fund is provided in Timor-Leste, and both countries allow individuals to file damage claims. The ICTR provision that recognises the right to reparation to be pursuable in Rwandan courts is ineffective; no assistance has been given to set up a victim's fund and it is unfortunate that the international community worsened, rather than improved the situation, in the case of the SCSL.²⁰²² Reparation is also part of restorative justice, where, for example, the TC of Sierra Leone has made important recommendations for collective and individual material and symbolic reparation.²⁰²³ Recovered means, perhaps through the assistance of the court, should be made available to the War Victims Fund, set up to finance the recommended reparations program.²⁰²⁴ The reality in most societies, similar to the previous examples, is that there can never be complete reparation. Besides financial limitations, it is necessary to recognise that no reparation can restore or completely compensate for what has been lost. It is similarly important to emphasise all means of reparation, such as health centres and pension funds, with a specific focus on the individual and collective victims.

Reconciliation attempts have also been visible in the previous examples, with only one example of an internationally influenced restorative process, in Sierra Leone. Rwanda and Timor-Leste chose different mechanisms to assist the reconciliation process, providing for truth discovery; discussion; outreach programs; and reporting. Linton uses an uncomplicated definition of reconciliation, based on her research in Cambodia; "Reconciliation involves the process of learning how to co-exist and work together with people one does not like or is not liked by and coming to terms with personal negativity about one's experiences, whether one be victim or perpetrator. Reconciliation as a process may be simply about assisting people and through that, wider society, to get things back into perspective so that all may lead as normal lives as possible."²⁰²⁵ A state in transition that has struggled for independence or democracy may be sensitive to domination and it is important that the international community assists the domestic system and the concept of national ownership by, for example, promoting local participation and responsibility for the reconciliation process. The prosecution of locally committed crimes of international character can be assisted by the involvement of international legal experts,²⁰²⁶ as long as it does not undermine the important

²⁰²² The SCSL, lacking reparation provisions, provides the few victims that appear before the court with protection, as does Timor-Leste. If at all, Rwanda's struggling domestic courts and the *gacaca* tribunals can only provide the victims with moral support, although the police are meant to be involved and protect local hearings.

²⁰²³ Reparation was *e.g.* recommended in the form of health, housing, pensions, education, skills training and micro-credit assistance.

²⁰²⁴ Proposed by the Lomé Peace Agreement, #430, *supra*, SL.TRC.V2.3.Recommendations.pdf

²⁰²⁵ Linton, 2004, p.15.

²⁰²⁶ *E.g.* judges and prosecutors.

domestic experience.²⁰²⁷ However, specific reconciliation mechanisms may be sensitive to domestic ownership, as they involve a process of sharing, understanding and accepting different parts of the community. Where local traditional practices or TCs, are domestically staffed and supported, the prosecutorial process may not be as sensitive to international involvement, thus balancing international and domestic demands for universalism and local particularities. Yet, both with regard to safeguarding the fundamental aims and the actors, it is important to acknowledge, understand and perhaps preserve any existing culture of justice. Cambodia, having negotiated with the UN for nearly a decade, has been assisted with judicial reform and restoration of the rule of law, without any involvement of the popular Buddhist culture of justice.²⁰²⁸ Cambodian Buddhism teaches that people have to face the consequences of their actions, but it also speaks of compassionate rehabilitation of offenders.²⁰²⁹ The potential for recognising and involving such existing customs, without violating international standards, may provide a good combination of the prosecutorial and the truth discovery processes and the international/domestic relationship. Merely incorporating international norms and standards, without linking them to recognised local concepts of justice,²⁰³⁰ may only further international dependence, as the local population may otherwise find it difficult to identify with the aims of the process. As truth and reconciliation depend on local participation, one method of involving the population in the justice process is to allow as many means as possible for the fundamental aims of truth and reconciliation. Although justice done is justice done, in the sense of the prosecutorial process, hence, to some extent without ownership, this may only be partly true for states in transition. If the international community can only assist the domestic state with limited prosecutions of the most serious crimes,²⁰³¹ the domestic state must, in the end, claim ownership of the entire justice system in order to end impunity and create respect for and confidence in the rule of law and the existing justice process.²⁰³² The context transcending theory of assimilated justice must thus contain both a contextual dimension, which looks to the best solution for the particular society; as well as a universal dimension, which acknowledges universal standards and efforts to face practical problems through, *e.g.*, embryonic assimilated justice thinking.

²⁰²⁷ The previously looked at domestic states were all strangers to fundamental human rights; had insufficient resources (funding, expertise and infrastructure) and could thus not secure investigations, detention, or prosecution. Such situations may necessitate an international majority in staff and control over administration, especially where the domestic state may not, initially, be able to supply the system with anything, as in the case of Timor-Leste.

²⁰²⁸ Through the indepth work of Linton, it is made apparent how the Cambodian Buddhist culture evaluates truth and accountability, in order to avoid revenge. Linton, 2004, p.145.

²⁰²⁹ *Id.* p.23.

²⁰³⁰ *E.g.* initially combining an internationalised prosecutorial process and domestic traditional restorative mechanisms.

²⁰³¹ Whether by means of internationalised domestic trials or completely international through the ICC or an ICT.

²⁰³² It is therefore important to not only be aware of the weaknesses of *e.g.* the Rwandan domestic justice system (that may indeed violate offender rights), but to also support and assist the effort to fight impunity through different modes of justice and not grant amnesty.

7.6. CONCLUSION

Chapter seven has introduced and discussed the models of Rwanda, Timor-Leste and Sierra Leone, which all combine different justice processes, representing criminal, as well as restorative and not yet fully assimilated justice. The critical outlook has identified why these models represent *quasi*-assimilated truth, (criminal) justice, and reconciliation, in different ways.

Although with serious imperfections in the recognition of offender rights in its prosecutorial process, continued in its newly instated restorative yet justice-driven truth discovery process, Rwanda indicates a genuine commitment to fight impunity. The intentional choice to provide the overloaded criminal courts with traditional justice and reconciliation mechanisms is no accidental shift, where more actor involvement invites truth discovery, prosecution, punishment, deterrence and reconciliation. Rather, it represents a reflexive, yet not fully inclusive commitment. The combination of *gacaca* and domestic courts does not qualify as a complete paradigm shift towards assimilated justice, mainly because there does not appear to be any objective protection of broader truth accounts. Also, victim involvement and direct reparation are (yet) to be given effect.

Timor-Leste, a new state, had to be assisted with many aspects of governance, amongst which the initial internationalised criminal justice system, which was to become part of the domestic system, showing evidence of an internalised commitment to universalism. The prosecutorial process was widely supported; however limited success has been had, mainly due to Indonesia's refusal to cooperate, but also because of operational difficulties and an immediate overload of detainees. Domestic efforts also led to the creation of a truth discovery process, in order to assist the prosecutorial process, to invite returnees, and to engage the community, in a more inclusive justice process of particularism. However, with a focus on the offender's confession, in return for amnesty, the overall justice process lacks victim focus. The judicial system has, however, made provisions for reparation, similar to the ICC. The involvement of the general community in the reconciliation process, in combination with the district courts, means that the processes function under the criminal justice umbrella, representing *quasi*-assimilated justice, similar to Rwanda, with a collaborative commitment. The main differences between Timor-Leste and Rwanda concern the lack of an ICT, which could have tried Indonesian high-ranking officials, unless the hybrid court had been given such powers for a limited time, while under international supervision. In combination with domestic efforts to face the practical problems, this could have lessened the restrictions to the prosecutorial process even more. Another difference is the reconciliation process

of Timor-Leste that replaced Rwanda's plea bargaining principles and *gacaca* with individual amnesty and community service, able to invite all offenders to participate.

Restrictions on prosecutorial processes and domestic needs for truth and reconciliation appear to have been initially considered by the international community in the model presented by Sierra Leone. Time and funding are not continuously available, perhaps a reason why the TC and the SCSL restricted their operations to short, but intense truth investigations and a strict focus of the court on those most responsible. However, the use of time and finances could have been improved through institutional collaborative commitment, sharing of information and an effort to internalise (domesticate) both the hybrid prosecutorial process, as well as the TC. Instead, the aim of prosecuting those most responsible has proved difficult. As a consequence, the potential declaratory strength of prosecutions and a renewed respect for the rule of law may fail. The universal dimension is important not to ignore and, where the national system is not ready or able to apply such principles, the hybrid internationalised domestic court should be integrated into the domestic system in order to set an example. This is perhaps most important in situations similar to that in Sierra Leone, where a general amnesty has been declared and partly recognised, disabling the domestic courts. It is also important where the truth discovery process is internationalised and lacks a longer, domestic and inclusive reconciliation process. Yet, even with a TC at hand, the need for a prosecutorial process was recognised, whereby the fundamental aims of truth and reconciliation were intentionally complemented by fundamental criminal justice aims. If the in-depth reparation recommendations, of the TC, are applied, in combination with already supplied rehabilitation and reintegration mechanisms, the individual actors will have been, at least partly, recognised.

Due to international and national pressure, the importance of prosecutions, truth and reconciliation have been recognised to different extents, indicating a progressive commitment to both particularism and universalism. A lesson learnt from the prosecutorial processes considered, is that, in situations where international core crimes have been committed, the process is restricted to the serious crimes and the more responsible offenders.²⁰³³ If the domestic legal system is not fundamentally improved, through an internalised commitment, as well as assisted by other justice mechanisms, the fundamental aims of legal justice (essentially individual truth, just-desert punishment and deterrence, but also to some extent reparation)²⁰³⁴ may remain unnecessarily

²⁰³³ Prosecution of all offenders of international core crimes will not be possible, no matter whether by international or national courts. Rwanda exemplifies an initial effort to prosecute all, through domestic and international prosecutions. Yet today restricted justice is apparent, within the ICT as well as the domestic system's early releases and referrals to *gacaca*. In the cases of Sierra Leone and Cambodia, however also, indirectly, in Timor-Leste and Rwanda, the focus is on the most serious offenders.

²⁰³⁴ The right to reparation requires the victim access to justice and the right to see compensation through the courts. See ch.3.

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restricted. Such improvement cannot only focus on the criminal courts, as no courts or states can afford to prosecute such a magnitude of offenders or indeed make individual reparation to all the victims. From the examples looked at, it appears that criminal justice systems concerned with international crimes, and hence international law, need assimilation with domestic, restorative justice mechanisms, in order to be able to associate with and improve the past, as well as lessen restrictions to the justice process.²⁰³⁵

A reflexive commitment to assimilate the main mechanisms that deal with the international core crimes also requires the objective achievement of the aims and the involvement of the actors. These mechanisms are believed to be truth discovery processes, (e.g. TCs that assist a domestic reconciling process) applied by states in transition where the legal system is often not accredited or trusted; and prosecutorial processes (international, internationalised, or domestic courts, of transitional states).²⁰³⁶ The fundamental aims can then be applied in equilibrium. With the ICC operational, the future may hold fewer occasions of those most responsible not being prosecuted because of unwilling domestic courts; it may also provide further examples of *quasi*-assimilated prosecutorial and restorative processes.²⁰³⁷ With regard to this not (yet) fully assimilated justice, universal recognition of a local context-transcending theory and practice about assimilated justice exists. The UN Secretary-General recently recommended setting up a dual mechanism in Burundi, proving reflexive and objective commitment. With international and internalised commitment to depart from the Sierra Leone model, a combination of processes is discussed, which requires reflexive, collaborative and inclusive commitment.²⁰³⁸ No specifics have yet been determined, but the shared aims of the dual mechanisms are to establish crimes and accountability, by creating a non-judicial truth commission and a special chamber, within the national courts, where the processes would collaborate and share information.²⁰³⁹

Assimilated justice is not a model that can be imposed, nor may it assist or improve the overall justice system in situations where, although international core crimes have been committed,

²⁰³⁵ The aims of truth and reconciliation are fundamental to this local ownership; and furthermore necessary for the validity and acceptance of the applicable international law.

²⁰³⁶ On the few occasions that a domestic state prosecutes a foreign case of universal jurisdiction concerning gross human rights violations, international law is applied.

²⁰³⁷ E.g. avoiding East Timor's inability to prosecute those responsible in Indonesia. Further guidelines may be available, based on future ICC proceedings, perhaps in collaboration with the domestic state in question.

²⁰³⁸ UN Secretary-General report, 11 Mar.2005, in Cruvellier, 2005, at http://www.justicetribune.com/article_uk.php?action=view&id=3001&start=0&sort=date%20desc&search=sierra%20leone&jid=&langue=UK

²⁰³⁹ Id. The TC may be mixed, with a majority of international staff, to ensure impartiality and credibility. The special chamber may also be mixed, with a majority of international staff.

the domestic justice system is intact, widely supported and respects applicable international law.²⁰⁴⁰ Assimilation of international criminal and restorative justice can however entail authority, through the law and a closer connection (moral legitimacy) to the actual actors and their perceptions of justice and reconciliation, through local truth discovery. International law exists in order to uphold certain fundamental standards of universalism and, in states of transition, the application of international law and the doing of justice may have the potential of remaining procedurally flexible. This is so because neither transitional justices, nor international law rely on steadfast procedural norms, at least not to the same extent as stable domestic legal systems do.²⁰⁴¹ Applied in a transitional, thus flexible system, it may remain adaptable to conceptual changes, such as assimilating certain restorative justice aims with the prosecutorial process.²⁰⁴² Fully assimilated justice is also necessary to avoid unnecessarily restricted justice, where a reflexive commitment can limit the restricted justice, by adding mechanisms that fulfil fundamental aims that, in turn, safeguard the actors. Because of recent development in international justice, such as the internationalised domestic courts and internationally supported truth discovery processes, national ownership of the justice process is possible. Still, international involvement and support can not only lend expertise and capacity building to the vulnerable state, but also authority and credibility. If it is not seen suitable to implement an internationalised domestic court, but rather opt for an ICT or the ICC, national sovereignty can still be assisted through the local truth discovery process.²⁰⁴³ In assimilating restorative justice aims with the prosecutorial process, the justice process will gain from the domestic social truth and reconciling notions,²⁰⁴⁴ which can assist and support investigations and the important aftermath of prosecutions.²⁰⁴⁵

Universal jurisdiction, as important a phenomenon as it is, must be understood with respect for local particularities, institutional deficits, lack of political will, as instances of restricted

²⁰⁴⁰ This is generally not the case where international crimes have been committed, as such crimes leave entire nation devastated.

²⁰⁴¹ Classic criminal justice systems may, for a variety of reasons not suitably discussed here, be little in touch with social conflict resolutions actively involving the actors in the decision-making. Classic criminal justice is representative of a rather rigid offender-focused prosecutorial process, where e.g. rules of procedure and evidence may leave out significant parts of the truth that could aid reconciliation.

²⁰⁴² Whether through domestic or internationalised courts. Restorative justice may offer a more socially inclined system, able to use mediation and negotiation to reach a decision, without steadfast procedural norms, and hence more flexible in its application. Yet, mandates with specific time references can mean that important historic factors have to be ignored. Similarly, many truth commissions are only equipped to investigate certain crimes.

²⁰⁴³ If the matter is in the hands of the ICC, national sovereignty should not be at risk as the ICC is complementary to national criminal justice.

²⁰⁴⁴ Less costly to construct rather than improve the domestic criminal justice system to the extent where it is immediately able to deal with international crimes.

²⁰⁴⁵ E.g. Victim reparation, healing and reconciliation efforts can assist the prosecutorial process before, during and after proceedings.

justice.²⁰⁴⁶ The narrow individual focus of the prosecutorial process has highlighted the capacity and weakness of criminal justice and universalism; the necessity of multi-level governance; the importance of states in applying and thus contributing to the development of international law; cooperation with other states and international institutions in fulfilling the obligations and, most importantly; being the primary actors to act upon these crimes.²⁰⁴⁷ *De facto* international justice must accept legitimately restricted justice.²⁰⁴⁸ Consciously assimilating the two dimensions can bring advantageous multi-level governance, equilibrium between the aims and the actors and legitimacy, particularly to lessen restricted justice. Criminal justice universalism can liaise with local particularities, ensuring both an individual as well as collective approach, able to respect universal as well as local values, with both legal as well as moral legitimacy.²⁰⁴⁹ A balance between the prosecutorial process and its individual focus on universal criminal justice aims and restorative truth discovery that can apply a participatory truth with a collective focus on restorative aim, can escape both the application of local particularities, ignorant of universal principles and aims, as well as escaping universally applied principles that lack a local and collective focus.²⁰⁵⁰ Internationally, the ICC, or an internationalised domestic court, may become the external face of general universalism (in terms of protecting fundamental human rights through principles that should be

²⁰⁴⁶ While there may be an objective of international criminal justice to facilitate local particularities such as reconciliation, international criminal justice is mainly crisis management focused and not preemptive. Although important substantive international criminal law development could to some extent be argued to play a preventive role. E.g. criminalised acts such as conspiracy and incitement have a more preventive focus, although necessitating some evident act to support the 'criminalised thinking conduct', see further e.g. the crime of genocide, ICC charter; Genocide Conv. 1949.

²⁰⁴⁷ The ICC is grounded on the principle of complementarity, and international law remains reliant on state cooperation. See generally, Cassese, 2003, p.315 "There is not yet any general obligation for States to refrain from enacting amnesty laws for these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless, if the courts of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such courts would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States"; Ratner, 1998; Delmas-Marty & Cassese, 2002.

²⁰⁴⁸ For an overview of UN Programme Network Institute's restorative justice and criminal justice reform research, see Tkachuk, 2002, at www.Heumi.fi/uploads.hl5y98fikdy.pdf; Liebman, 2001, at www.restorativejustice.org/rj3/Full-text/Uganda

²⁰⁴⁹ Besides the necessary restriction to the prosecutorial process, in terms of international core crimes prosecutions and reparations, the local particularities may further limit the amount of e.g. prosecutions. See behind, ch.4.7, discussing the different dimensions of criminal and restorative justice. The human rights system is yet another important dimension, where, in assimilated justice, the different systems should, of course, all be used to fill the gaps where no perfect justice system exists. Even if the prosecutorial process was not subjected to any restrictions, emphasis is always on the individual offender, and, geared with all the optimal functions, diversity is a necessity. The human rights body greatly aid this diversity with its rights-based focus. Although not further integrated in this thesis, human rights mechanisms would bring valuable justice mechanisms to assimilated justice.

²⁰⁵⁰ This calls for multi-level governance, using the systems different dimensions as counterbalance, i.e. assimilating criminal justice aims with restorative justice aims, allocating space for local particularities to play a role, to an extent restricting criminal justice in a legitimate way. A state may well be trying to confront its past, but perhaps not fully according to international standards but with some restrictions, for example in form of limited prosecutions and granted amnesty. *De facto* international justice trends tend to accept certain forms of restricted justice, e.g. in the form of the South African individually granted amnesties that are unlikely to be discredited by an international court.

universally applied), but because these crimes are the result of local particularities, as well as subject to such particularities,²⁰⁵¹ they do not have universal application.²⁰⁵² While collectivism and local particularities may endanger the rights of the individual and universal values; criminal justice individualism lacks the beneficial macro-level position, where, *e.g.* certain collective attitudes cannot be taken into account.²⁰⁵³ Because of shortcomings and restrictions to justice, particularly in states in transition, assimilated justice must be represented by a franchise model, sensitive to legitimate restrictions.²⁰⁵⁴

CHAPTER 8: CONCLUDING RECOMMENDATIONS FOR FULLY ASSIMILATED JUSTICE

8.1. INTRODUCTION

A conclusion of each component to assimilated justice is included in this final chapter's recommendations for fully assimilated justice. Concluding recommendations are found in the next section, which develops the comprehensive reflexive commitment and the objective achievement required by fully assimilated; representative of the progressive and flexible assimilated justice paradigm. Identification of the potential of assimilated justice to focus on both the past and the future is further acknowledged. The chapter ends with some final remarks.

The thesis did not set out to provide a model of assimilated justice, but rather to provide conceptual foundation for assimilated justice. The nature of assimilated justice achievement and

²⁰⁵¹ With regard to the justice process chosen for similar local reasons.

²⁰⁵² Particular solutions of the local particularities and its collective community must be taken into consideration.

²⁰⁵³ The solution may be to rely on the domestic criminal justice system and an international or internationally influenced special court, in combination with a truth discovery process that leaves the most serious offenders to be tried by a court. This example, where a domestic truth discovery process is assimilated with a prosecutorial process, could entail prosecution, public acknowledgement of the truth, financial reparations of the individual victims, (at the same time supporting individual reconciliation) and longterm collective reconciliation. If restorative justice is single-handedly chosen as the suitable justice process, denunciatory mechanisms of shaming, in combination with victim-acknowledged apologies, and confessed accountability, on behalf of the offender, can possibly deter future crime and symbolically repair the community, and work towards collective reconciliation. On the other hand, if criminal justice would be the opted solution, the individual offender could be punished and perhaps individually deterred and rehabilitated. The general community would perhaps also be deterred and supported, by the prosecutorial process, to find collective reconciliation. There are obvious deficiencies in the last two examples, where some of the fundamental aims and some of the actors are uncared for. Restorative justice appears to lack a specific and individual focus, with regard to all the fundamental aims, specifically the offender-focused aims of just-desert punishment and deterrence. Criminal justice appears to lack the collective focus, with regard to all of the fundamental aims, specifically the aims of truth, reparation and reconciliation.

²⁰⁵⁴ Of course assimilated justice is also proposed for states that are willing as well as able to provide truth, justice and reconciliation. Concerning states that are unwilling to prosecute, punish, provide truth and move towards reconciliation it is hoped that the ICC will be able to initiate the justice process, which must then return to the domestic situation, hopefully with a model of assimilated justice. Bronkhorst, 1995.

commitment does not require and is not suited to specifying a model. Rather, the character of fully assimilated justice invites a comprehensive balanced internalised, collaborative and inclusive commitment of existing institutions, which is progressive and shares a collective optimization of the objective achievement of fulfilling the fundamental aims and involving the actors.

Political and social resistance exists, as do structural weaknesses and other practical problems, linked to weak or cautious states, whereby illegitimate impunity threats must be recognised and differentiated from legitimately restricted justice. Chapter two began such differentiation, which was continued in the assessment of the fulfilment of the fundamental aims in the prosecutorial process and in the truth discovery process, of chapters five and six. The remedy proposed to improve such restrictions, of inherent character to each justice dimension and due to practical problems faced when international core crimes have been committed, is a two-fold objective, found in chapters three and four. Assimilated justice can complement such restrictions (rather than relying on one of the two justice systems) with a balanced involvement of all the affected actors, with specific emphasis on the victims, all of which have been identified as having a legitimate right to such involvement. The involvement of the actors to some extent implements achievement of the fundamental aims, which make up the second part of the assimilated justice objective. At the same time, the objective to fulfil the aims overlaps with the actor inclusion, whereby the two are mutually indispensable. The fulfilment of the fundamental aims is also beneficial to the extent where the individual and the collective elements are linked to such focus on the actors. Impunity on the individual level exists where the prosecutorial process is illegitimately restricted. Individual impunity also exists where illegitimate restrictions to truth and reparation limit the fulfilment of those aims. Legitimately restricted justice is improved with the additional focus on other aims than, for example, just-desert punishment, which also adds focus on the victim and the community, in order to fight impunity. Where fully assimilated justice objective and commitment exist, all the actors and all the aims are to some extent focused on. The assimilated justice objective cannot be fully achieved in either the prosecutorial or the truth discovery process, but present day thinking indicate a shift towards at least *quasi*-assimilated justice with a combination of reflexive assimilated justice commitment and objective, which already improves the dimensional gap between universalism and particularism. The inherent dimensional focus, described in chapter four, and furthered in chapters five and six are not necessarily contradictory, but can be assimilated, as further identified in chapter seven. *Quasi*-assimilated justice does not (yet) represent a cohesive commitment within the institutions and constituencies to contribute to assimilated justice. It must be an internalised commitment, within the institutions, by the domestic officials, required to make these institutions work and in order to recognise restricted justice. The commitment must

furthermore be inclusive, referring to all the affected actors and it must also be collaborative. If the institutions are not committed to a relationship, optimal equilibrium between the fundamental aims and the dimensions cannot be guaranteed. Optimal equilibrium requires a reflexive commitment, which is progressive and flexible, in order to be sensitive to local particularities and to universalism. At the same time, comprehensive commitment requires objective achievement of fulfilling the fundamental aims and involving the actors, not least because the experience of such achievement can reinforce and further develop the necessary commitment. Equally, objective achievement is not enough in itself, as this can be merely the serendipitous result of a combination of international and domestic pressures. Without the comprehensive commitment, including internalisation, the objective achievement of assimilated justice may be contingent and static.

Assimilated justice can thus reflect both a moral legitimate claim, gained from the objective achievement to fulfil the overlapping fundamental aims and involve the actors in equilibrium; and an empirical claim, with a necessary institutional framework of internalised, inclusive, collaborative commitment that must remain progressive and flexible. At the same time as there may be tension between a transition towards reconciliation and democracy and a justice process of criminal accountability, they depend on each other.²⁰⁵⁵ A past, a present and a future outlook and perspective can exist, as long as the state and its justice process are able to fulfil the fundamental aims. Assimilated justice is thus able to supply a focus on both the past and the future; on accountability and justice and on reconciliation and democracy.

8.2. A FLEXIBLE MODEL OF FULLY ASSIMILATED JUSTICE

A reflexive commitment with objective achievement of the fundamental aims and of balanced involvement of the actors is possible and necessary. The evidence of assimilated justice thinking in recent transitions, affected by international core crimes, demonstrates the necessity to fulfil fundamental aims that represent both universalism and particularism. This is necessary in order to improve inherent restrictions to both prosecutorial and truth discovery processes. Furthermore, practical problems, often faced by states in transition, by weak justice systems and by international institutions, must be assisted to the extent possible. The ICC may well be able to provide prosecutorial justice in most situations where illegitimate restrictions to the universal dimension exist, yet, without assimilated justice objective achievement and reflexive commitment, the ICC is not set up to internalise the process domestically, collaborate with other institutions, or

²⁰⁵⁵ "Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary", Niebuhr, 1944, at <http://www.religion-online.org/showchapter.asp?title=446&C=347>

include a collective and local focus. The SA TRC, to some extent representative of the other dimension of assimilated justice, may well exemplify legitimate truth discovery, although with limited victim focus. Yet, without assimilated justice objective achievement and reflexive commitment, a similarly set up TC will collaborate with the universal dimension, whereby there is no internalisation of such principles. Developing context-transcending theory and practice, looking at the best solution for the particular society combined with and recognised by the universal dimension can lessen practical problems. Assimilated justice is also necessary in order to involve the actors, without which the justice process in non-stable democracies cannot claim legitimate representation of the collective. Assimilated justice proposes a conceptual and practical framework of truth, justice and reconciliation, providing local and social restoration of the rule of law, building on the existing restrictions to the prosecutorial process and the truth discovery process, by assimilation of the two. Assimilated justice concentrates on achieving balance between the aims and the actors, represented at different extent in the criminal justice and the restorative justice paradigms. Assimilated justice thus aims at finding equilibrium, by accommodating local particularities with universal principles, rather than either ignoring or imposing the latter. "Justice is at once philosophical and political, public and intensely private, universal in its existence and yet highly individualized and culturally shaped in its expression."²⁰⁵⁶ Assimilated justice requires a different *modus operandi* of the institutional actors, internationally and domestically, where awareness of local particularities and universal principles is required through internalised, collaborative and inclusive commitment to justice and to reconciliation. Such reflexive commitment also involves objectively achieved fulfilment of the fundamental aims and inclusion of the actors.

8.2.1. INTERNALISED COMMITMENT

There is room for improvement with regard to shifting the operational burden to domestic institutions and officials. Only institutionalising a prosecutorial process that is representative of universalism on the domestic arena will not suffice without connecting the fulfilment of the justice aims with the local particularities, as identified in chapter seven. When the justice process is completely international or internationalised with some domestic staff, the process will most probably have a temporary feel to it, whether the process is held in the country in question or elsewhere. In order to reinstate a stable legal system and respect for the rule of law, necessary for permanent justice and democracy, ownership of the justice process is important, where there is thus

²⁰⁵⁶ Mani, 2002, p.186.

responsibility to internalise it, that is, with objective achievement. While international processes may, under the circumstances, be necessary, domestic states cannot ignore their responsibility to protect universal values and standards. States must instead make honest attempts at applying the prosecutorial process. The guidelines and ideals that international imposition can assist the domestic officials and the actors with are important, yet not enough. The ICC is an essential institution for the prosecutorial process and universalism, founded on the value of assisting the internalised domestic commitment to the universal dimension of the rule of law and the fundamental justice aims. With the recognition of offender and, more importantly, victim rights to access justice, to participate and to be repaired, the actors may demand domestic re-negotiation of social inequalities. The domestic state is not only invited to supply a just prosecutorial process, but it is actually required to do so, or else the justice processes may not be socially supported, thus lacking moral legitimacy and long-term effects. Fully assimilated justice involves an initial internalised commitment to the assimilated justice objective achievement of fulfilling the fundamental aims and thus also involving the actors. Where such a commitment is initially lacking, as it were in Sierra Leone, international influence may be of assistance, but, recalling the final recommendations of the TC of Sierra Leone, local sensitisation is then required, in order to fill the gap between the universal and particular dimensions.²⁰⁵⁷ While the prosecutorial process may not be overly sensitive to foreign personnel, post-conflict institutions of a restorative and collective character are particular to the local circumstances, which the staff must not only be susceptible to, but a fine balance between the two dimensions must be maintained. This balance is assisted by the assimilated justice objective achievement, through the fulfilment of the overlapping fundamental aims and thus realized actor involvement. However, when assimilated justice is not complete, where *e.g.* an initial internalized commitment is lacking, it is recommended that the international community and domestic states primarily focus on the domestic justice system. Instead of, or in addition to establishing internationalised hybrid institutions, international know-how should be seconded to the domestic systems. If an international institution is seen as necessary, it should be set up, similar to the ICC, based on the principle of complementarity, thus with the internalized commitment to making the justice process domestic, while recognising the local particularities.

8.2.1.A. PERMANENT INTERNATIONAL TRUTH COMMISSION

²⁰⁵⁷ ##477, SL.TRC.V2.3.Recommendations.pdf, at http://www.nuigalway.ie/human_rights/publications.html

In relation to the internalised commitment of assimilated justice, a permanent international truth commission (ITC) or commission of inquiry was proposed at an international conference in 1996, in response to international core crimes and restorative justice demands.²⁰⁵⁸ The proposed institution appears similar to a TC, with a mandate to investigate the crimes of the ICC jurisdiction, issue a final report with recommendations on reparation and non-criminal penalties and named offenders.²⁰⁵⁹ It would function as an addition to the ICC and to domestic prosecutions, as it would be able to bring cases to the attention of the courts, yet its draft mandate does not provide provisions relating to any internalisation of its process or to institutional collaboration. In relation to progressive assimilated justice conceptualisation, as a developing body of flexible assimilated comprehension of the universal and the contextual dimensions, the proposed ITC relates to certain of those aspects. However, this thesis does not support the institutionalisation of an ITC treaty, mainly for the reason of the contextual dimension, which, together with the internalised commitment of assimilated justice, emphasise shifting the operational burden to domestic institutions of the primary actors. The contextual dimension of particularism and the internalised and inclusive commitment of assimilated justice require more than awareness of the local particularities. Ownership of the process is required, if not immediately then at least as part of the progressive flexible commitment. Without ownership there will be no fully inclusive commitment, delaying internalisation and full recognition and involvement of the actors, perhaps more detrimental to restorative justice than to an initial international prosecutorial process.²⁰⁶⁰ Assimilated justice would not gain from the ITC being added to the universal dimension, nor would the local justice situation or, more importantly, the actors be further enriched. Furthermore, the important symbolic effect of a domestic state initiating such a process in response to its responsibility can be lost.

The proposal by Scharf focuses on the truth, where the investigation and reporting could possibly work as a forerunner to the ICC and domestic prosecutions, which could highlight responsibility and support prosecutions.²⁰⁶¹ Other advantages to an ITC include secured funding; professional staff of greater neutrality, which would be less vulnerable to local practical problems that could restrict the process, and, because of its permanent character, investigations could begin immediately. Yet, there can be no local truth discovery *process*, inclusive of the collective victims or the local community, besides referring to such testimonies in the investigations. The aim of

²⁰⁵⁸ Scharf, 1997, pp.375. See appendix 6, Draft Statute for a Permanent International Commission of Inquiry.

²⁰⁵⁹ See appendix 6, Part 3, arts.17-18.

²⁰⁶⁰ Thus the ITC would face similar problems to those of the ICC and the ICTs, where the larger amount of actors is not in reach. However, this could be more damaging to a truth discovery process, which legitimacy relies on local collective actor support.

²⁰⁶¹ Amnesty is thus omitted, *supra*, p.394.

deterrence and any punitive fulfilment of an ITC would have little collective and local impact, compared to an internalised domestic justice process, even though the naming of offenders may well involve shaming.²⁰⁶² One way of making sure that institutions of the two dimensions can collaborate is to not grant amnesty. “While the deterrent value of prosecutions of international crimes may be subject to debate, the granting of amnesty has been shown empirically to foment future abuses.”²⁰⁶³ Excuses for offenders of the international core crimes are not sought, but judgements that can be sustained and even if the ITC’s findings and recommendations are not welcomed by the government in question, the established truth, recognition of victims and identified offenders can certainly fulfil some of the fundamental aims. Granting amnesties further violates fundamental actor rights.²⁰⁶⁴ “While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”²⁰⁶⁵

In terms of the aim of reparation, the proposed permanent ITC suggests a reparation scheme where reparation requests should primarily go through national courts with the help of the ITC’s findings.²⁰⁶⁶ Otherwise, the ITC should be responsible for a victim fund, paid for by the state in whose territory the violations occurred and by foreign governments.²⁰⁶⁷ There are no further guarantees that ITC recommendations will be fulfilled and without an open forum in the state in question, the ITC cannot claim to provide any more symbolic reparation or healing mechanism than

²⁰⁶² The proposed ITC would be authorised to not only use deterring mechanisms such as naming offenders and publishing the truth, but also to recommend non-criminal sanctions, which the member states would be under an obligation to carry out. Appendix 6, art.22.

²⁰⁶³ Scharf, 1997, p.398; UNHRCCom. concludes that the granting of amnesties has led to more human rights abuses, UNDoc.E/CN.4/1990/13. Impunity arguments go further and mean that the long-term development towards legitimate justice is gravely endangered and not only slowed down by granted amnesties. Neier, 1998.

²⁰⁶⁴ E.g. the right to justice and the right to reparation.

²⁰⁶⁵ Supra, UN Secretary-General on SCSL, 2000, at <http://www.sc-sl.org/scsl-agreement.html>. Still, offenders of individually granted amnesties are not likely to come before the ICC. “Trials would probably have contributed far less than did the amnesty process towards revealing the truth about what had happened to many victims and their loved ones.” SA TRC Final Report, Vol.1, p.121. The Geneva Conv. Protocol II promotes certain amnesties but they do not refer to individual criminal responsibility for serious violations of fundamental human rights, see Protocol II relating to the protection of victims of international armed conflicts, Additional to the Geneva Conv, art.6(5); Geneva Conv.IV, art.146 actually necessitate punishment and ICRC comments that the article refers to amnesty for domestic law offences and *not* for more serious war crimes, see Bassiouni, 1996, p.218. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) was justified on the basis of these extraordinary atrocious crimes. Individually granted amnesties will always fail some offenders who are then available for prosecution, and not all will apply. The amnesties of South Africa have only been granted regarding acts associated with political objectives of the state. The ICC statute’s silence on the topic could only be interpreted as a main rejection of amnesties, and, see earlier chapter, there are few paths for an amnesty-granted-offender to take to avoid prosecution concerning the ICC crimes.

²⁰⁶⁶ With the findings of an ITC it may be easier for victims to bring cases in foreign courts or to receive compensation by the government as a duty of the state. See appendix 6, Draft Statute of ITC, art.21.

²⁰⁶⁷ Id. Also, and lastly, in cases of UN Charter Chapter VII, frozen assets should be made available.

the ICC.²⁰⁶⁸ It is not only a question of providing reparation to the injured actors. It is also of fundamental importance for the aim of reconciliation to involve the victims and the local community.²⁰⁶⁹ Collectively discovering the truth of a national past is primarily a national venture, where it is important that the entire community feels involved rather than imposed by the international community. Neither collective truth nor national reconciliation can be fulfilled without the domestically internalised link and the *ad hoc* truth investigation and reporting is limited to a 12-month-period, during which it would be difficult, if at all attempted, for the ITC to establish domestic internalisation and inclusion. Yet, of course the ITC can have beneficial influence on the justice process, and a process of both court and truth commission is possible without any severe loss or distraction of either process, especially where the TC is set up without amnesty or immunity provisions. Still, although the permanent ITC was proposed in addition to the prosecutorial process, there is no reference to a collaborative commitment,²⁰⁷⁰ although its objective to fulfil the aims of truth, deterrence and reparation would not conflict but rather complement the prosecutorial process. The model could rather, with the assistance of assimilated justice thinking, assist domestic states in shaping the mandate of a similar, yet local process.

Different alternative hybrid models will probably continue to be suggested and institutionalised, with the goal to fight impunity and lessen restricted justice and practical problems. All such efforts must be recognised in the spirit of progressive assimilated justice commitment and objective to optimize the application of the aims and the actors. However, fully assimilated justice would require, as this section has highlighted, an internalised commitment of the institutions (*e.g.* an ITC and the ICC or any other prosecutorial process) to shift the operational burden to the domestic arena (in order to truly reflect and assimilate with a restorative, collective dimension of particularism). Furthermore, assimilated justice involves an inclusive commitment to involve all the actors in a legitimate justice process (in order to fight impunity and reflect internalisation as well as universalism), where the institutional framework must be set up in a collaborative fashion, collectively optimizing the achievement of the fundamental aims (in order to assist the mutually indispensable relationship between the aims and the actors, which combines the dual justice dimensions, in the fight against impunity). Yet, such subjective reflexive institutional commitment to assimilated justice is part of the progressive and objective achievement to fulfil truth, just-desert

²⁰⁶⁸ To invite everyone involved or to ensure that the process and result reach everyone does not become easier on the international arena. Still, with the help of media and international character, an international institution may have a wider audience.

²⁰⁶⁹ While international involvement may aid the setting up of such commissions with additional funding and maybe as a response to the public where the violating regime is still in power, Nelson Mandela refused such international input in the SA TRC.

²⁰⁷⁰ Nor is there any reference to internalized or inclusive commitment.

punishment, deterrence, reparation and reconciliation, through a balanced involvement of the actors. Assimilated justice is subsequently flexible.

8.2.2. COLLABORATIVE COMMITMENT

There is a need for the different institutions and process mechanisms to work together, with collaborative thinking in terms of the collective optimization of the fundamental aims. Timor-Leste recognised the inherent restrictions to the prosecutorial process and the practical problems facing the justice process and thus opted for a community-based process that could further the aims of truth and reconciliation, yet tying it to the criminal justice system. Although no such commitment existed between the Special Court and the Truth Commission for Sierra Leone, where the objective achievement to fulfil the fundamental aims and achieve a balanced involvement of the actors were rather held by both institutions. As both processes had to face inherent restrictions and practical problems, the more social and flexible truth discovery process should have realised its incapacity to compete with the more rigid and inherently offender-focused prosecutorial process.²⁰⁷¹ As only a limited number of victims can take part in the Special Court proceedings, the truth discovery process, in collaboration with the prosecutorial process, could have focused on the victims and supplied them and the collective community with a forum. This collective collaborative mode of thinking would solve the problem of encouraging offender participation, similar to how the TC of Guatemala, which did not issue amnesty in return for full disclosure, rather related the process to the victims.²⁰⁷² In relation to fully assimilated justice, the lacking internalized commitment in Sierra Leone could have been promoted by a collaborative commitment, where a balanced involvement of the actors and fulfilment of the aims would have satisfied the shared goals. This would avoid one institution or process to function at the expense of another.²⁰⁷³ The prosecutorial process can contribute to the re-establishment of the rule of law, through the promotion of individual accountability and fulfilment of the fundamental justice aims. The truth discovery process can fulfill

²⁰⁷¹ See Wierda, Hayner & van Zyl, 2002, at www.ictj.org/TRC.SpecialCourt.pdf

²⁰⁷² Yet, in terms of the actors, and foremost the offenders, collaborative commitment would perhaps not invite many offenders to publicly contribute to the truth, as the truth given may be incriminating. However, the truth discovery does not have to focus, but only involve and invite the offenders, as assimilated justice requires a balanced involvement of the actors, where the victims remain those most neglected. Reflexive in commitment and flexible in character, assimilated justice should not be initiated with confidential hearings that can then not be shared between the institutions. See *Id.* Part IV, Wierda, Hayner & van Zyl's discussion on the SCSL and the TC of Sierra Leone, 2002, at www.ictj.org/TRC.SpecialCourt.pdf, identifying how balancing requests can be worked out.

²⁰⁷³ These goals include a broad truth account of the past, individual criminal accountability, deterrence of future violence, acknowledgement of the victims and reconciliation with respect for the rule of law.

an equally important role, recommending social and political reform, as well as contributing to it, through its fulfilment of truth, deterrence, reparation and reconciliation.²⁰⁷⁴

It is important to realize that before institutional mandate-sharing issues are solved, that is the reflexive and subjective institutional commitment; assimilated justice must be the intention, with grounding policies, which will then solve pragmatic issues. If such assimilated justice intention exists, potentially with an internalized commitment, *quasi*-assimilated justice may rectify non-collective optimization, however demanding such a commitment on behalf of all those involved. In Sierra Leone, for example, the prosecutorial process has a very narrow focus, leaving a large amount of both offenders and victims to the truth discovery process. Truth investigations could be shared, although the truth investigations may not be made public from the start, due to a need for secret indictments. However, entrusting another institution with evidence should not harm the justice process, as long as the institutions share the assimilated justice intention (with objective achievement) and they are committed to collaboration, rather than competition. The truth discovery process will thus not gain from interfering or publishing individual legal truth that can become important in the few prosecutions. It is neither reasonable to think that a truth report will be investigated, written and published before a significant number of those indicted are arrested, but if this is the case, the fundamental aspect is that the institutions are part of one and the same assimilated justice process, where communication is essential. On the issue of evidence and truth investigation, scarcity of documentary evidence is often a problem in many situations where international core crimes have been committed.²⁰⁷⁵ This means that even the prosecutorial process may have to begin with a broad account of the truth of the conflict, thus to a large extent applying a macro-approach to truth discovery, mapping organizational structures and causes to the past violence.²⁰⁷⁶ Truth investigation could collaborate in such situations and, where the mandate of both or of the prosecutorial process is narrow in focus,²⁰⁷⁷ a comprehensive focus gives ample potential for the process to assimilate with a macro-truth discovery process.²⁰⁷⁸ In fact, fully assimilated

²⁰⁷⁴ In 2001, Judge Jorda of the ICTY recognised that, in situations of mass crime, the prosecutorial process faces practical problems that further restrict the number of prosecutions, whereby a TC for Bosnia would have been a complementary addition to the ICTY. See UN, President of the ICTY presentation to the UN GA, 2001, <http://www.ictj.org/ENGLISH/colloquium04/bohlander/Bohlander.doc>. The combination of a TC has received a lot of public attention, especially because of the influence of international experts, and while it is not a new idea to join domestic justices with the criminal justice system, as a non-competing effort, it is the overall commitment and objective of assimilated justice that can balance the dimensional claims.

²⁰⁷⁵ Adding yet another reason to collaboration, in addition to already limited resources.

²⁰⁷⁶ In fact, the ICTs and the SCSL have identified how even internationalised courts cannot be too rigid in their truth investigations, as they are faced with a limited amount of evidence. See UN Report of the Planning Mission on the Establishment of the SCSL, 2002, ##39, 55; Wierda, Hayner & van Zyl, 2002, at www.ictj.org/TRC.SpecialCourt.pdf

²⁰⁷⁷ E.g. the SCSL is mandated only to prosecute those with the greatest responsibility.

²⁰⁷⁸ Indeed, where a narrowly defined TC mandate may only hear certain individuals in relation to individually granted amnesty, the truth discovery process has added further restrictions to the justice process and the prosecutorial process

justice would not face the problem of information sharing; the conceptual objective achievement and the reflexive commitment purports collective optimization.²⁰⁷⁹

Still, where the justice process may be initiated with a collective understanding and desire to have both a prosecutorial and a truth discovery process independent of one another, collaborative commitment and objective achievement are not made impossible. Research and suggestions made in relation to information sharing of the two institutions of Sierra Leone indicate some such collaboration, based on conditions where the court must make detailed requests for information to the TC.²⁰⁸⁰ However, without a collaborative commitment that seeks to optimize the objective achievement to fulfil the fundamental aims and involve the actors, it cannot be guaranteed that honest efforts are made to grant specific requests or share critical information.²⁰⁸¹ With regard to the other fundamental aims, which to some extent rely on the fulfilment of truth, it is not as difficult to perceive of joint efforts to deter, repair and reconcile. Different institutions and processes will fulfil a certain amount of the aims symbolically, yet deterring, reconciling and collectively repairing mechanisms will gain from collaborative commitment.²⁰⁸² In the collective optimization of fulfilling the aims, the reflexive commitment must recognise where the aims are best fulfilled. In relation to just-desert punishment and reparation, it has been recognised that such aims require a judicial, authoritative process.²⁰⁸³

The collaborative conflict in the Sierra Leone model restricts the justice processes, even to an extent where they are no longer legitimate, due to the fact that justice process does not attempt to

lacks the potential to involve a macro-approach. The reflexive and progressive commitment with the overall assimilated justice objective to fulfil the aims and involve the actors will then only be assimilated to the extent where the TC can broaden its actor involvement. The truth discovery process could be part of the initial truth discovery phase, providing macro-truth to the local community and to the prosecutorial process, which can be continued as a participatory process, once the court has started its more specific micro-truth investigations. The truth discovery process could also assist the court in the collecting of case-applicable evidence; however this would not complement the prosecutorial process to the same extent. Art.15(2) of the SCSL Statute, the Prosecutor will “have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations.” See UN Report of the Planning Mission on the Establishment of the SCSL, 2002, #39.

²⁰⁷⁹ *I.e.* the different truths would be investigated, identified and distributed, where legal truth and evidence that would be admissible in court would be seen as optimal to the aim of prosecution, while many private facts and individual narratives could be made part of a truth report, and further discussed in an open forum.

²⁰⁸⁰ Wierda, Hayner & van Zyl, 2002, pp.13, at www.ictj.org/TRC.SpecialCourt.pdf. Investigation is not shared, and the Trial Chamber shall act as a neutral party to any request for information, which should only be done during trial. Double amount of time and effort has thus already been spent on dual investigations. The TC should furthermore be allowed to grant offenders, who make a statement, immunity, whereby such information cannot be disclosed to the court, as evidence against the person who made the statement. It is doubtful why offender-involvement should be that an important aspect to the TC, for it to require immunity protection. This would then compare to the SA TRC amnesty.

²⁰⁸¹ Which will furthermore be difficult, as information yet unknown cannot be requested in a detailed fashion.

²⁰⁸² Collectively indicating the joint efforts of the justice process to create deterring mechanisms, collective reparation and a joint effort to reconcile and rebuild democracy and the rule of law should be beneficial to the actors.

²⁰⁸³ Shaming and public denouncement mechanisms do not fulfil principles of just desert, and reparation cannot only rely on TC recommendations.

limit the restrictions, but rather emphasize them, adding practical problems.²⁰⁸⁴ Furthermore, linked to the potential loss of trust and legitimacy is the damage it does to the actors and especially to the victims, through a lack of objective achievement, *i.e.* non-fulfilment of the fundamental aims. Assimilated justice rectification of such situations would ask whether the truth discovery process²⁰⁸⁵ could not simply allow the prosecutorial process to investigate and fulfill the aim of just-desert punishment. Legal, individual criminal accountability would then be justly ascertained, even if only in a limited amount of cases and the restorative process could focus on restoration.

Generally, where there is no fully assimilated justice and a TC has been set up in a similar fashion to the SA TRC, for example, the truth discovery side of the justice process could integrate and collaborate with such commitment, with a prosecutorial process that focuses on those who are not granted amnesty.²⁰⁸⁶ This ensures a restricted prosecutorial process, adding to the vague infliction of shame, while also creating an incentive to fulfil the aim of truth. In line with the ICTs and the hybrid Special Courts, the prosecutorial process should at least focus on the leaders and instigators, etc. of the crimes, which, besides fulfilling the fundamental justice aims, also demonstrates legal authority.²⁰⁸⁷ Where a prosecutorial process is primarily instituted,²⁰⁸⁸ there is nevertheless room for a restorative justice process, to help broaden the truth and allow more space for the victims and community with a collective focus. Of course, similar to how some promote and prioritise the prosecutorial process, to the detriment of restorative aims; prioritising the truth discovery process works to the detriment of criminal justice aims, which is why the objective achievement of assimilated justice must be a balanced approach. Neither process, nor institution or

²⁰⁸⁴ *Supra*, the powers of the two institutions were specified in the legislation implementing the SCSL in Sierra Leone's domestic law, where the Special Court Agreement Act, 2002, S.21(2) states that "Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court." At the same time, the TRC Act provided the TC with the power to gather information in confidence, pursuant to S.7(3), thus obviously competing.

²⁰⁸⁵ Referred to as such in the situation where there is no or very little collaborative commitment (as it could otherwise be referred to as the fully assimilated justice process).

²⁰⁸⁶ *E.g.* those who fail to give full disclosure, and against whom there is evidence of involvement in the specific crimes. Where a TC is in place, the criminal justice system may further individual criminal accountability and individual rights and avoid collective responsibility. If amnesties are part of the process, there should be individuals who do not qualify for amnesty and who should then be dealt with directly by the courts. If amnesties are not part of the TC, the commission may serve as a victim and collective community forum, besides providing a broad truth account and symbolic reparations and means of reconciliation.

²⁰⁸⁷ In *quasi*-assimilated justice, the prosecutorial process could still qualify in terms of assimilated justice, if trials take place after the TC, as long as this is part of an institutional commitment with the assimilated justice objective to strive towards fundamental aim fulfilment, and involvement of the actors. Unless such objective commitment exists, the problem may be similar to that of South Africa, where hardly any trials have been held. The SA TRC was of course not set up with an assimilated justice commitment. "Through eventual "exemplary" prosecutions, especially of the most culpable perpetrators and the leaders responsible for planning or supervising their abuses, together with the publication of a comprehensive truth commission report, authorities can educate the population about what the law is, deter future violations, and ensure a sense of justice for the victims." Scharf, 1997, p.400.

²⁰⁸⁸ Similar to *e.g.* East Timor or Rwanda.

dimension should be overstated, as failure or severe restrictions can lose the social trust, support and legitimacy.²⁰⁸⁹

8.2.3. INCLUSIVE COMMITMENT

Greater emphasis upon the victim is realizable with fully assimilated justice. An inclusive commitment must refer to and be shared by all of the actors, especially by those most neglected - the victims. Mani speaks of reparative justice in response to the actors, whom Mani refers collectively to as survivors.²⁰⁹⁰ As earlier discussed, there is a danger in treating the offender, the victim and the collective community as survivors, although they may all be exactly that. Victimized communities and victims could perceive such 'reparative justice for the survivors' as either overlooking the victim-hood, or as treating rather than punishing the offenders. Although reparation may be the least fulfilled aim, it is important that it is victim-focused and thus not survivor-focused, in order to involve the actual victims. Instead of referring to assimilated justice as reparative, it should be restorative, without excluding the justice aims of truth, just-desert punishment and deterrence. Rwanda has not been able to apply a prosecutorial system similar to ICC standards however, in combination with its *gacaca*, it can be seen as a system with an objective achievement of truth, justice and reconciliation. However, to refer to it as reparative, without including victim-focused reparation, seems ignorant of the victims.²⁰⁹¹ Chapter three identified rights to access justice, to participation and to reparation; these rights can provide the missing piece to equilibrium between focus on the offender and the victim. Since the offender is in focus in the fulfilment of truth (at least micro-legal truth), just-desert punishment, deterrence (at least specific deterrence) and reconciliation (which must involve an individual perspective of the offender), it is essential to achieve the fulfilment of reparation, which requires a victim focus. In turn, this requires an inclusive commitment of the institutions and the actors to emphasise victim-recognition. Otherwise, optimal objective achievement of actor-involvement will not be attainable, with the result that the aim of reparation has not been fulfilled.

With regard to criminal justice, it is not strange, from a theoretical perspective that no specific space was assigned to the victim.²⁰⁹² Where the state assumes the role of the violated victim, through the exercise of punishment, it should also provide the victims with reparations and

²⁰⁸⁹ E.g. similar to how the SCSL can easily be perceived of as a failure due to its limited focus and success.

²⁰⁹⁰ Mani, 2002, pp.173. Reparative justice seeks to redress the legal and moral injustice suffered by the victim.

²⁰⁹¹ See Cragg (Ed.), 1992, pp.172.

²⁰⁹² In accordance with criminal justice, and its primary aim of just-desert punishment, the primary focus of criminal law is on the offender, and the primary aim is to hold the offender justly accountable, for the harm done, and to deter future crimes.

the general community with collective reparation and reconciliation mechanisms.²⁰⁹³ This makes the victim-incorporation of the ICC vital,²⁰⁹⁴ yet in need of inclusive commitment of assimilated justice for domestically attainable symbolic and collective elements. While criminal jurisdiction has been replicated at the international level, it is more difficult to replace domestic social institutions,²⁰⁹⁵ which is why the prosecutorial process is not the optimal place to make collective and symbolic reparation. Social and local sensitivity needs an inclusive commitment to victim participation, in order to understand the victims' perspective, local justice and materially attainable reparations.²⁰⁹⁶ Including the victim in the prosecutorial process individualises the victim in a way that the truth discovery process cannot, by ways of legal authority.²⁰⁹⁷ The prosecutorial process is, besides being able to individually acknowledge the victim through a right to participate, also able to issue reparation orders.²⁰⁹⁸ Where there are insufficient means available from the offender, confession, apology and remorse can, through assimilated justice, assist the victim. The large scale of violations and the amount of victims affected by the international core crimes do however not allow for very wide measures, but limits reparation and participation. While prosecutions are believed to have the possible effect of deterrence and, to some extent, symbolic reparation, it is acknowledged that it is practically impossible for all victims to bring complaints. It is also acknowledged that reparative actions, even with the ICC victim fund, will be few and narrow in scope.²⁰⁹⁹ Yet, the important aspect of inclusive commitment is fundamental to the dignity of the victims and, whereas a TC cannot guarantee real reparation, the prosecutorial process can, for

²⁰⁹³ It is a victim's right to oblige the state to hold the offender accountable, to address and to repair the harm caused to the victim, see Bassiouni Principles, 2000, E-CN_4-RES-2005-35, annexed.

²⁰⁹⁴ Legitimising the victim at the international level, it must be acknowledged that the predominant aim of criminal law is to hold the offender accountable through just desert.

²⁰⁹⁵ Stable justice systems often deal with the offender, the victim, and the general community with means of e.g. mediation-programs.

²⁰⁹⁶ Reparation in the form of satisfaction e.g. is better realized by the state.

²⁰⁹⁷ The inclusion of the victim can take into account many victim perspectives, with the assistance of criminology. Criminological tools are often not centred on the criminal law, but try to replace the criminal law tools used in order to, e.g. repair the victim. Historic practices and theories on the role of the victim; general justice, equality, restitution and participation rights; victim protection; and a general demand for balance between the amounts accorded to offender rights all have an integral part. Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, in Fattah, 1992. For victims' rights arguments based on restoration, see Cassell, 1994; for victims' rights' arguments based on healing and reconciliation reasons, see Kilpatrick & Otto, 1984; for victims' rights' arguments based on a right to protection, see McDonald, 1976, Aynes, 1984; for victims' rights' arguments based on historic and justice arguments, see Eikenberry, 1984, Gittler, 1984, Hudson, 1984, Kelly, 1984, Polito, 1990. In a truth discovery process the victim tends to be classified or referred to as part of a group or the community, see Beloof, 1999; Roach, 1999; Sebba, L. *The Individualisation of the Victim: From Positivism to Post-modernism*, in Crawford & Goodey, 2000; Sebba, 2000.

²⁰⁹⁸ Reparations do not stand in the way of accountability, but can actually extend it, by means of ordered reparation.

²⁰⁹⁹ Taking this into account, together with other factors that restrict justice, threaten justice, or present cases of impunity, it is important to be able to look at resolutions of a restorative and reconciling nature; different means of reparation, such as rehabilitation and satisfaction, as well as collective means of symbolic reparation and means of healing and reconciliation.

example, add certainty to the restricted, yet ordered reparation.²¹⁰⁰ Assimilated justice advantages can, in relation to restricted justice, look at solutions of a symbolic and collectively healing nature. Through the justice process and reparation made and supported by the state, the victims' interest to have dignity restored is facilitated by the state accepting its responsibility. Still, practical problems restricting victim inclusion are important to take into consideration, where the collaborative and internalised commitment can assist inclusion by adding the restorative focus. For example, where Rwanda must advertise the symbolic means of reparation made and created, *e.g.* by the implementation of *gacaca*.²¹⁰¹ Such inclusive practices further include the local community, whom the prosecutorial process is unable to reach directly.

As seen in the SA TRC, restorative justice is not necessarily victim-driven, but it can be victim-inclusive.²¹⁰² By victim inclusion the truth, when revealed, is broader in investigation and application. However, the intrinsic aims of restorative justice, *i.e.* truth, reparation and reconciliation, can still lack individuality, where the victim-focus appears within the collective community focus. A victim-driven process would be possible in assimilated justice, since the objective is to optimize fulfilment of the fundamental aims and involve the actors (where the prosecutorial part must inherently fulfil the offender focus). Such a process would provide continuous support until the rights of the victims have been fulfilled, to the extent possible.²¹⁰³ What may help a victim-driven process is the established inclusive truth, which comprises narratives told by all the actors and thus also represents an inclusive process. Such inclusiveness, also recognising the importance of the other actors, will assist fulfilment of all the fundamental aims

²¹⁰⁰ It is practically impossible for all victims to bring individual complaints, and reparation, even with the ICC victim fund, will be narrow in scope.

²¹⁰¹ An International Claims Commission was suggested in 2000, in relation to the ICTs, see *supra* UN President Jorda, 2000. The UN has set up compensation commissions, however not directly linked to criminal justice; see UN 1991, when the Security Council established the UN Compensation Commission to hear claims for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations as a result of [Iraq's] unlawful invasion and occupation of Kuwait". While the Commission's capacity is broader than a court's, being able to review all claims and not just those that fall under the crimes committed by the accused, the funding of this particular commission is solely the sale of Iraq's oil, a rare source of income. The claims can be brought by individuals through states, and directly by states and international organizations.

²¹⁰² To set a time limit to the TRC focus and efforts is a sign of restorative justice not being victim-driven. TRC final report, Vol.5, Ch.8, p.14.

²¹⁰³ The character would perhaps still be *ad hoc*, yet there as long as the victims would require representation, in a sense moving away from transitional justice and implementing restorative norms in the permanent system of assimilated justice. Reparations, especially symbolic and administrative reparations must continue to be available to the victims. While financial reparations may be granted immediately as a stepping-stone towards quality life, the psychological needs of the victim may only appear with time and it is important that the victim is publicly allowed to heal in his own time, with access to memorials and counselling. For the truth to be collectively accepted it may also be important for the government to show continuous interest in the acceptance, as a sign of reconciliation, by keeping files and investigations open. In cases where the truth will never be fully known, continuous efforts on behalf of the government to investigate and provide reparations and healing programs for the community and the individual are all symbolic healing mechanisms.

and their potential dual focus.²¹⁰⁴ Inclusive truth gives insight to the victim's views; anger, protests against amnesty and refusal to accept reparations can thus be avoided and legitimacy of the justice process can be achieved.

Assimilated justice inclusiveness will not only assist shortcomings of the prosecutorial process' victim-focus. Guarantees, rather than recommendations that reparation and, indeed, prosecution will follow will symbolically help the victim and, of course, national reconciliation. An inclusive assimilated justice process will allow focus on both the individuals and the community, vital for all the aims. Besides institutional inclusive commitment, the actors of the general community must be so committed, whereby the inclusive process can succeed in its invitation to communication and mediation. Those who appear before the *gacaca* or the local process of Timor-Leste appear to have accepted such inclusion. In order for the ideology of assimilated justice to be reflected in the process, where the aims can be put into practice, it is important for the universal dimension to be rights-based, while the dimension of particularism must reflect empirical facts concerning the victims' needs.²¹⁰⁵ Inclusive commitment in fully assimilated justice guarantees institutional collaboration through a process that includes the actors, wherein the actors may be able to indicate what collective and symbolic reparation should be given priority. Yet, the SA TRC mirrors the fact that not even the truth discovery process is able to publicly hear all the victims.²¹⁰⁶ Victim-statements play an important role in truth investigations, where other type of evidence is often lacking and such investigation require a great amount of local knowledge, as it involves a selective process.²¹⁰⁷ Truth discovery can be healing, as Guatemala's TC recognised in its exclusion of using amnesty as a carrot to get offenders to participate and, where micro-truth investigations are not necessary, the restorative process can invite more victims to tell their truth, as a valuable healing exercise. The main advantage of the truth discovery process, which must be absorbed in assimilated

²¹⁰⁴ Just desert will be based on a truth that includes the victim perspective; general deterrence may be more sensitive to the local particularities; and reconciliation, which begins with the individual process of forgiveness and rehabilitation, should gain from victim-inclusion.

²¹⁰⁵ In e.g. Argentina, justice through truth and prosecution were demanded before reparations would be accepted. See www.TruthCommissions.org; The Guatemalan truth report, in discussing collective reparation, recommended that, as the international core crimes have a collective responsibility connotation, the reparatory measures should also be implemented in a collective way through e.g. territorially based projects that promote healing and reconciliation. Thus, in addition to addressing direct victim reparation, other actions should benefit the entire population, without distinction between the actors. See *Memory of Silence*, 1999, at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html>. Collective responsibility connotation suggests state sponsored crimes; all sides of the conflict were involved holding some responsibility; all of which are often, at least to some extent, included. See, on victims, criminology, criminal justice and restorative justice, Zedner, 1994, pp.1207.

²¹⁰⁶ The findings by the Amnesty Committee were mainly based on victim-statements and only a very small percentage, around 10%, testified publicly. Final Report of SA TRC, Vol.1, p.439.

²¹⁰⁷ Statement taking, with all its hitches, moral and technical, may not be the right but only way known to collect information, and it is a challenging task for courts and truth commissions alike. The SA TRC started a pro-selective process in certain areas, mainly through local organisations. Final Report SA TRC, Vol.1, p.141. The participation supported by local external bodies increased the amount of statements by nearly 50%.

justice, is the feasibility to include the victims directly and allowing them a place to be heard, in combination with prosecutorial process asserted reparation.

Reparation and victim focused-justice is not only important in terms of victim rights. In order to re-establish social trust and support of the legal system, the state must fulfil the victim's and the community's needs.²¹⁰⁸ Restorative justice mechanisms, when viewed by the local community as legitimate, can, through its collective social and restorative focus further social respect.²¹⁰⁹ The truth discovery process can also acquire moral legitimacy through its inclusive character, if the victim's narrative is involved in truth acknowledgment.²¹¹⁰ Further legitimacy and inclusiveness is realized through the beneficial effects of involving the victim in the justice process, especially in terms of fundamental aim fulfilment.²¹¹¹ Neither the prosecutorial process, nor the truth discovery process is able to single-handedly supply such an inclusive focus that can fulfil the right to access justice,²¹¹² the right to truth,²¹¹³ and the right to reparation.²¹¹⁴

²¹⁰⁸ It may be argued that procedural criminal law does not need to provide the victim with a role, in its prosecutorial process, in order to legitimise the process and the fundamental aim of just-desert punishment. Preventive criminal law does not need an actual victim, in order to provide answers to general social threats, but, if existing victims are not taken into account, in the shaping of the law, criminal law may well develop into an inhumane technique, not capable of answering to social problems. This would prevent an appropriate, and effective, balance of truth, just-desert punishment, deterrence, reparation, and reconciliation. Such imbalanced application of the fundamental aims would subsequently involve the parties in a similarly imbalanced manner.

²¹⁰⁹ In combination with criminal justice (and its individual focus, ability to reinforce individual, personal rights and respect), restorative justice supplements that legitimacy with important, locally sensitive, moral legitimacy.

²¹¹⁰ Assimilated justice thus supplies both legal and moral legitimacy, through which inclusive individual and collective victim focus can be supplied. Rather than only focusing on either individual criminal justice, which responds to the individual restoration of justice, and rights (especially individual, personal rights), or social restorative justice, which may act in response to the moral need of restoring civil dignity and rights (especially those of a collective nature), assimilated justice may be able to provide both. An apartheid regime, or, for example, slavery, torture, and other human rights crimes, will do more than just create physical harm. The international core crimes degrade, and humiliate individuals, and communities, to the extent that the victims lose their dignity and respect, not only in the eyes of others, but also in a personal loss of identity. Through public truth acknowledgment, recognition of the victims' dignity and rights can be attached to the justice process, in combination with the necessary legal recognition of the crime, harm done, and rights affected, through criminal justice. See Honneth, 1995.

²¹¹¹ The inclusive actor character adds narrative truth to the overall truth, and reconciliation without inclusive actor support will not reconcile anything. Remembering Argentina's Mothers of the Plaza de Mayo and Brazil's Commission for the Family Members of the Persons Killed or Disappeared for Political Reasons, who all refused compensation because it was viewed as bought silence in the absence of truth and justice, we may have to accept that truth is the prerequisite for justice in its entirety. However, the other aims also gain from such inclusiveness. Cuya, 1999, at www.derechos.org/koaga/iii/1/cuya.html; TCs Digital Collection, at www.usip.org/library/truth.html

²¹¹² A right to justice mainly involves the prosecutorial process right to participation, information and a possibility to start proceedings, but also involves a right to see justice done, through responsible institutions, with a correlating duty to investigate, prosecute, punish, and move towards reconciliation and stable democratic institutions. This involves the fulfilment of the fundamental aim of legal truth, just-desert punishment, deterrence and reparation. Although the extent of the rights and obligations can be discussed, one can conclude, as Méndez does (and according to the framework laid down in ch.3 and in the Bassiouni Principles, annexed) that there are certain rights of victims with correlating duties of states. See Méndez, 1997 and 2001. He sees these rights as independent elements, not as a menu of alternatives, but they deserve to be treated as integral parts of a justice process.

²¹¹³ Truth involves participation, truth acknowledgement and publication; with a correlating duty to disclose the truth, through a legal judgement and through a truth discovery process. This involves the aim of truth, legal and social; which also partially fulfil the other fundamental aims, all reliant upon truth.

The objective maintained throughout the thesis is to improve justice, by complementing rather than competing with the prosecutorial process, in order to widen the actor involvement in the fight against impunity.²¹¹⁵ The inclusive commitment of assimilated justice thus also involves the individual offender, whose rights can be summarised in the comprehensive right to a public and fair hearing.²¹¹⁶ Although the prosecutorial process is, theoretically, able to provide such rights, which is why international involvement and imposition of the universal dimension is often important, transitional justices often face added restrictions to what the international prosecutorial process may do. Where a legitimate restorative process brings further actor inclusion, involving the offenders, some offender rights will be restricted, as the *quasi*-assimilated justice models indicated, which is why the universal dimension must constantly progress in an internalised, collaborative *and* inclusive fashion. This also relates to the collective community, where the collective nature of the aims can be realized.²¹¹⁷

What is important is that the state makes truthful attempts at fulfilling its obligations, in relation to the actor inclusion and thus also to the rights and interests of the actors and the

²¹¹⁴ Which involves material and symbolic individual and collective elements of reparation; and a duty to make such reparations, on behalf of the offender (through the prosecutorial process), on behalf of the state and other contributing actors. An assimilated justice process generates legitimacy through the fundamental aims, and truth, just-desert punishment, deterrence, reparation and reconciliation can be fulfilled through the application of listed rights and duties.

²¹¹⁵ While the needs of the offender may be responded to differently, depending on the justice process, offender rights refer to the competences of the prosecutorial process. It is thus not believed that restorative justice mechanisms should process individual offender rights. However, restorative justice means of 'dealing' with the offenders are recognised, through *e.g.* shaming. Collective responsibility is not applicable in criminal justice, whereas collective notions can be discussed and reported on by the restorative side of assimilated justice, in order to assist reconciliation and a transition towards democracy.

²¹¹⁶ Including the right not to be subject to arbitrary arrest, detention, search or seizure; right to information; adequate time for and right to defence; right to a presumption of innocence; to be tried without undue delay; to be present at trial; and a right to appeal; with a duty to provide just institutions. This involves the fulfilment of the aims of truth, just-desert punishment and deterrence. Based on ch.3; UN Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, 1992, at <http://www.uncjin.org/Standards/UNRules.pdf>; 10th UN Congress on Offender Rights, 1999, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; ICC Statute, 1998.

²¹¹⁷ Broad social truth, general deterrence, collective symbolic reparation and reconciliation can more effectively be fulfilled with the assistance of mechanisms with a collective and local focus. In the case of violated collective rights, the penalties must be of an essentially reparative nature, according to the UN Guissé report, 1997, #39. The reason for this is, as discussed earlier, the incapacity to compensate all those who have suffered harm caused by international crimes, individually. The needs to know the truth, be guaranteed non-repetition, and be given means towards reconciliation are vital for community and national development, and means towards such needs are broadly incorporated into the right to satisfaction. "On a collective basis, symbolic measures intended to provide moral reparation, such as formal public recognition by the State of its responsibility, or official declarations aimed at restoring victims' dignity, commemorative ceremonies, naming of public thoroughfares or the erection of monuments, help to discharge the duty of remembrance. In France, for example, it took more than 50 years for the Head of State formally to acknowledge, in 1996, the responsibility of the French State for the crimes against human rights committed by the Vichy regime between 1940 and 1944. Mention can be made of similar statements by President Cardoso concerning violations committed under the military dictatorship in Brazil, and more especially of the initiative of the Spanish Government, which recently conferred the status of ex-servicemen on the anti-Fascists and International Brigade members who fought on the Republican side during the Spanish civil war." #42, Joinet, 1997; Princip.25, Bassiouni principles. The right to truth is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume, in order to deter and reconcile. Joinet, 1997; Princip.12, 25 Bassiouni principles.

fundamental aims.²¹¹⁸ The inclusive commitment of fully assimilated justice is thus twofold; it is inclusive in terms of the actors and the aims; it is also inclusive in terms of the individual legal process and of the collective restorative process. Such inclusive commitment relies on institutional reflexive commitment to inclusive objective achievement and process; as well as on the commitment of the constituencies.

8.3. PROGRESSIVE COMMITMENT

Fully assimilated justice must be thought of as a developing body of knowledge which needs to be constantly adjusted to the demands of new situations, without losing sight of universal principles. Assimilated justice thus represents a progressive thought-process, as well as a flexible institutional establishment. The progressive commitment, containing the internalised, collaborative and inclusive commitment, can absorb the objective achievement of fulfilling the aims and of involving the actors, in a flexible approach. The local contextual dimension informs the universal dimension of the particular needs and practical problems, which will assist the model of the assimilated justice response. The universal dimension does then not risk being exclusively universal in application, with a narrow focus able to fulfil the fundamental justice aims. Assimilation with local justice solutions ensures that the dimension of particularism is not insignificant.²¹¹⁹ Assisting such progressiveness, one can think of different institutional devices that can lend support, as containers not just of universal principles, but also of institutional commitment to take this body of knowledge and values forward in a progressive manner.

Prospective needs must be recognised in the retrospective response to the crimes and assimilated justice offers such a conception - including the affected actors and the various individual and collective claims to truth, justice, and reconciliation - as a response to international core crime injustices. The reflexive commitment understands the different responses necessary, in order to satisfy the actors, the local particularities and universal standards. This progressive commitment has assimilated both the contextual and the universal dimension, in a flexible progressive assimilated justice. Assimilated justice does thus not represent a uniform model of justice, but rather endeavours a flexible franchise model, sensitive to local particularities, mainly through the inclusion of the actors.

²¹¹⁸ To find equilibrium between these criminal and restorative aims, the local actors, and the international community must take into account and respect the local context, and global circumstances (the dual dimensions). It cannot be overstated that national authorities hold primary responsibility concerning this (internalised commitment), and it is only when they fail their duties that the international community should act.

²¹¹⁹ Drumble, 2000, p.1318.

The development of the ICC indicates a less imposing prosecutorial process than the dominance over domestic justice that the primacy of the ICTs characterises.²¹²⁰ The hybrid courts, *quasi*-assimilated justice and the international recognition of the SA TRC also indicate less dominant prioritisation of one justice process and also a less decontextualized understanding of the rule of law application and its effects on local communities.²¹²¹ The ICC's identification of the victim and the last decade's development on victim rights to justice and reparation add to this contextualised mode of thinking, even though the victim and the aim of reparation appear to still be a weak link. Such thinking also correlates to legitimately restricted justice,²¹²² where the universal dimension involves reflexive commitment and recognition of efforts to limit practical problems. In terms of respecting international law and the developing duties to prosecute and make reparation, it is important that restricted justice is assessed, based on grounds similar to those laid down in article 17 of the ICC Statute.²¹²³ Due process rights may be difficult to guarantee in any state in transition,²¹²⁴ but, in the example of Rwanda, the domestic efforts to limit practical problems and inherent restrictions to the international and national prosecutorial process should still be commended. Again, it is not believed that the ICC will become a domineering institution, under which circumstances it could suppress national justice efforts. The court was not set up with such intentions and, as its resources are limited and dependent on member states, the ICC must consider justice in a collective perspective, where its effect on domestic efforts must be analysed.²¹²⁵ Rather, the ICC will assist internalized commitment to shift the operational burden to domestic

²¹²⁰ Although the ICC has the last voice on the matter of whether or not the domestic state has made genuine attempts at prosecuting, according to art.17, ICC Statute and can therefore assume jurisdiction. However, rather than doubting the intentions of the ICC, it was not set up as an overpowering institution, and where domestic efforts are being made, e.g. in South Africa or Rwanda, it would appear that the ICC will be able to turn its focus on more urgent situations.

²¹²¹ Without saying that there has been assimilated justice commitment in all these examples, the institutions are all different, but they have a common characteristic that represents at least some domestic sensitization.

²¹²² Orentlicher, 1991, p.2598, recognises the need for the universal dimension and the recognition of international law and prosecutions, but also recognising instances of legitimate prosecutorial discretion.

²¹²³ Art.17 lists unwillingness; inability to genuinely carry out investigation or prosecution as reasons to act. Where the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute; the accused has already been tried for the conduct; or it is not of sufficient gravity to justify further action, the ICC shall not act. Art.17(2) lists grounds for establishing unwillingness, where regard to the principles of due process must be taken. If proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility, impunity exists and the ICC shall act. An unjustified delay in the proceedings which in the circumstances is inconsistent with intent to bring the accused to justice will also necessitate ICC action, as will non-independent partial proceedings. 17(3) declares inability assessable based on considerations to whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

²¹²⁴ Due process rights are listed in the ICCPR, art.14, 1966.

²¹²⁵ In fact, the author is presently collaborating with the ICC's investigation team currently present in Uganda, in order to assist such collaboration.

institutions.²¹²⁶ The ICC can be a participant to assimilated justice commitment and objective, although it will of course not be part of the initial internalised commitment. Yet, it can join in the progressive objective achievement to fulfil the fundamental aims and involve the actors, with institutional commitment to collaborate with other institutions.

8.3.1. RETROSPECTIVE JUSTICE AND PROSPECTIVE RECONCILIATION

To conclude the recommended progressive disposition of fully assimilated justice, the advantageous character of assimilated justice can be viewed from its beneficial backward-looking as well as forward-looking aspects, necessary in transitional phases where both universalism and local particularities need to be recognised. As chapter four established, the fundamental aims behold both retrospective as well as prospective perspectives and, when assimilated, both the past and the future can be dealt with, representing progressive flexible assimilated justice.

Reconciliation is fictional if impunity is allowed and accountability is not identified unless all the actors have been properly acknowledged, even though it may be argued that by bringing up the past and holding offenders accountable, the transition towards reconciliation and democracy may be slowed down.²¹²⁷ When no strict global duty to apply the prosecutorial process exists, justice (and accountability) may be sacrificed for quick reconciliation (and democracy).²¹²⁸ A danger of ignoring the individuals, or treating them as means to reconciliation rather than ends in themselves, is made manifest where the actors can declare the justice process illegitimate, if they are not allowed the inclusion they deserve. As a retrospective as well as a prospective focus can be supported by the fundamental aims, through assimilated justice objective and commitment, states in transition do not have to choose between an “either or” model, represented by either criminal justice or restorative justice.

Not only has past practice indicated some acceptance of restricted justice, but acceptance of legitimately restricted justice actually appears essential, as international law is not meant to create impossible demands of domestic states. Similarly, in order to avoid further impunity and guarantee the application of criminal justice principles attached to the international core crimes, to the extent

²¹²⁶ Art.17 may apply unless domestic states attempt a prosecutorial process similar to that of the ICC, which will make the case admissible to the ICC.

²¹²⁷ Supporters of a fast move towards democracy often undermine individual accountability, due to its possible slowing down effects on such a transition, but the value of justice should not be ignored for the sake of short-term expediency. See generally Kritz, 1995.

²¹²⁸ The danger with this is that in the balance of transitional justice, impunity is allowed and preferred to a system of justice and accountability, Joyner, 1998. Even if the criminal accountability process is often restricted, limited model prosecutions are better than none.

possible, declaring all restrictions illegitimate could alert disbelief in criminal justice and feed the idea that the prosecutorial process slows down reconciliation. In order to guarantee the application of the fundamental aims that criminal justice supports, where the accountability and justice prospect includes the actors, both a past- and a future-outlook is required. This is possible through assimilated justice, which aims epitomize a retrospective and a prospective focus meant for peace and order; democracy and accountability. Assimilated justice is also argued to support and invite multi-level governance, of both universal principles (in the domain of criminal justice) and of local particularities (in the domain of restorative justice). This is especially relevant in circumstances of transitional justice and other situations where it appears difficult to supply a justice process taking into account the fundamental aims and actors. Crimes dealt with through prosecutions and other means of criminal justice, aiming at individual criminal accountability, must be applied in the local social and political context, in order for the transitional model to be viewed as transiting towards legitimate justice, democracy and the rule of law. Hybrid courts and other justice mechanisms set up to deal with the past may have the effect of something extraordinary, exceptional and temporary. However, societal trauma may not pass the transitional stages of truth discovery, accountability and reconciliation; unless the next step, that is, permanent justice and democracy, are institutionally projected, which is why assimilated justice must remain flexible and progressive. It is important that the criminal justice system can be involved in such a contextual development. For the justice process to be legitimate in the eyes of the actors, the internalised, collaborative and inclusive progressive commitment of assimilated justice can do away with the provisional and indicate a sincere move towards permanence (democracy built on the rule of law). Objective achievement, that is, actual verifiable fulfilment of the aims and involvement of the actors, must be present. Otherwise, the possible impunity that follows a failure of the justice process to hold the offenders accountable while providing truth, reparation and reconciling mechanisms for the victims and the local community will remain a disabling legacy.

States in transition are often required to start from the beginning, which was the case in Rwanda and, especially, in Timor-Leste, where it was necessary to re-institute the rule of law and justice in order to ascertain accountability for the past, while also reaching forward towards reconciliation and democracy.²¹²⁹ Whether and to what extent the previous regime should be prosecuted, what type of amnesty could be granted, and how much truth can be discovered and acknowledged, are decisions dependent on whether and in what way the previous regime is part of

²¹²⁹ Transitional justice refers to a state's attempts to overcome past atrocities with a focus on moving towards democracy, thus recognising that different models of transitional justice, moulded by the reasons behind the transition (local particularities).

the transition.²¹³⁰ It is true, in many cases, that reconciliation terminology is apparent in states in transition. Some form of TC or at least investigation is often implemented as a means towards a prospective transition to reconciliation.²¹³¹ The transitional context does not only depend on the domestic development towards reconciliation, but also on the universal dimension (including international law and international impositions), with the result of prosecutorial processes alongside TCs. Such development highlights the increasing acceptance of a state responsibility to prosecute offenders of the international core crimes.²¹³² The relationship between just accountability and reconciling democracy thus depends upon the transitional context (*i.e.* the contextualised dimension) and upon the fundamental aim of truth.²¹³³ Truth, justice and reconciliation are thus inter-dependent.²¹³⁴

The relationship between justice and reconciliation (or between accountability and democracy) may become a struggle, especially for one justice system by itself, as a transition from an oppressive past to stable peace requires both the retrospective and the prospective focus, represented by the application of the fundamental aims.²¹³⁵ A prospective move towards peace and democracy could, without a retrospective focus on accountability, justice and order, become nothingness. This, to some extent, grasps the essence of the Rwandan progress. The domestic criminal justice system could not be fully relied upon, due to the local particularities, whereby the retrospective accountability process was restricted. The application of *gacaca* and other reconciling mechanisms (with a prospective focus) assimilated the justice process into a system with a retrospective and a prospective focus. The prosecutorial process and hence criminal justice accountability may, at least partly, depend upon a prior framework of democracy, where it may be

²¹³⁰ Thus, in order to know what restrictions to universalism is feasible, knowledge of the local particularities are necessary. The tighter a grip the past holds on the future, the less criminal and more restorative justice appears to be the choice. For example East Germany and Rwanda's regimes were overthrown, with the result that the opposition could nearly entirely lead the transition and opt for prosecutions. Chile opted for pre-emptive reform and this allowed the old regime to play a major role in the transition, at least until the opposition had gathered enough authority. In South Africa the transition was the result of a compromise with the result that there could be no transition without the support of both sides. See the Justice and Society Program of the Aspen Institute, 1989; Goldstone, 1997; Sarkin, 1996; 1998.

²¹³¹ During the last decades, transitional justice development has taken place, mostly through the birth of democracies out of oppressive governments, *e.g.* in South America, Africa, Asia and Eastern Europe. See generally Zalaquett, 1989; Kritz, 1995.

²¹³² *E.g.* ratification and domestic implementation of the ICC Statute can affect domestic states and the shape their transition will take.

²¹³³ See ch.4; truth is instrumental to the truth applicable to ascertain justice (just-desert punishment, deterrence, and individual reparation), and thus necessary for accountability; truth is also necessary as a healing end in the truth discovery process, and as a means to collective reparation and reconciliation, necessary for stable democracy.

²¹³⁴ "East Timor will be a democratic country. This means real democracy, not a one-party democracy, not a rigged democracy, but a multi-party democracy. Underlying this democracy, and essential to it, will be a judicial system which is independent of government." Gusmao, X. statement made at conference on East Timor, New Zealand 9 Sep.1998, at <http://www.etan.org/et/1998/september/sept8-14/9xpaper.htm>

²¹³⁵ Chapters 4-6 have identified how truth of the past is instrumental to reconciliation and other fundamental aims. The move towards democracy (and reconciliation) needs a focus on the past and the future, which assimilated justice assists, by providing the application of the fundamental aims.

easier to guarantee just and fair principles of justice in a stable democratic legal order. Yet, as the *quasi*-assimilated justice examples have identified, it is not an absolute necessity to have stable democracy in order to operate a prosecutorial process, however restricted.²¹³⁶ Applying the fundamental aims in a legitimate justice process of assimilated justice can significantly support the move towards democratic reconciliation, while at the same time guaranteeing accountable justice. A balanced application of the fundamental aims indicates respect for justice (the rule of law and the legal order) and reconciliation (peace and democracy) for the actors. This is thus also assimilated justice equilibrium, seen from a retro- and pro-spective perspective. Assimilated justice responds in retrospect to previous violations, when it assigns just-desert punishment and it also supports a prospective move towards deterrence of impunity threats, reparation and reconciliation.

The aim of truth is firstly an end in itself, automatically triggering memories of the past and forthcoming healing, vital to the victim and to the community.²¹³⁷ Truth is also a retrospective as well as a prospective means, where truth discovery beholds perceptions of the past, through as much actor inclusion as possible, of which the result may hold future consequences. Truth must be discovered and acknowledged,²¹³⁸ which may cause problems for a new regime in bringing up sensitive issues.²¹³⁹ However, without the truth about the past, there will be no understanding or acknowledgment, no factual basis for accountability and healing processes to begin, no deterrent and no possible means towards reconciliation and a new beginning. More than anything, the prosecutorial process lacks the macro-approach to truth discovery that assimilated justice attaches, by mandating the restorative side of assimilated justice such a collective approach, rather than a micro-approach.²¹⁴⁰ In fact, a micro-approach to truth discovery may confuse and obstruct the

²¹³⁶ Restricted justice is apparent in, e.g. Timor-Leste, unable to directly supply a prosecutorial process that was able to recognise and apply universal norms. The ICC Statute aided the situation in Timor-Leste, through the implementation of the law; and the ICC and international law can provide domestic states with substantive and procedural law and guidelines, which domestic, signatory states of the ICC may feel obliged to apply and follow or else run the risk of losing the jurisdiction to the ICC, under art.53 and the principle of complementarity, art.17.

²¹³⁷ Of course also to the offender, yet the offender's truth may be of more importance to the other actors. Truth includes forensic, narrative, social and healing aspects, according to the SA TRC definitions; thus linked to the rights to see justice done / a duty to investigate, prosecute and punish; to know the truth / a duty to disclose the truth. Méndez, 1997.

²¹³⁸ It must also be investigated when the truth is individually applicable to accountability, in order to ascertain guilt with legal legitimacy.

²¹³⁹ The actual truth finding process is of great importance to the entire justice process, as well as to the legal relevance of an amnesty. If truth is assumed instrumental, and the process will go through the different stages of *quasi*-judicial truth and evidence investigation, then the truth of the past cannot be hidden and responsibility has thus been established. If an amnesty would subsequently be granted, the legal relevance of the amnesty will be much similar to a pardon and pose a lesser threat of impunity.

²¹⁴⁰ Nevertheless, a more legal approach focusing on micro-truth applicable to particular events, cases and individuals appears utilized even by the truth discovery process, rather than a social science approach focusing on macro-truth. It has also emerged that the truth established in restorative justice processes can be viewed and used primarily as a means towards reconciliation. The truth thus runs the risk of being overly evaluated. While micro-truth is certainly important, because of its component of forensic truth, facts, and evidence necessary to determine details, it requires competences such as trained professionals, resources and an incredible amount of time to be able to investigate a great amount of

prosecutorial process, similar to how the two justice institutions of Sierra Leone have competed rather than cooperated.

The more legal justice-inclined fundamental aims are more backward-looking than forward-looking. Just-desert punishment is retrospective in its focus on a past criminal act and intent, necessarily with the offender's past emphasised. Punishment can arguably also have the victim and the victimized community in focus, hence also with the attention on the victimizing past.²¹⁴¹ As a prospective means, punishment may carry future utilitarian goods, e.g. rehabilitation of the offender and victim satisfaction. Just-desert punishment may also be an essential mark for a new beginning, bringing truth and justice to the victims and the community and guilt and just-desert punishment to the offenders.²¹⁴² This should not be interpreted as only supporting prosecutorial processes, but rather as a way of attracting more institutions, of domestic, regional and international character, to prosecute and punish in a coherent manner.²¹⁴³ Criminal justice aims and processes are of great importance, perhaps in the end only because the gruesome nature of the international core crimes deserve, or require, such a response. The fundamental aim of deterrence is retrospective, similar to just-desert punishment, as a more criminal justice-focused aim, in its specific form.²¹⁴⁴ Deterrence is also prospective, both with regard to specific offender as well as general community deterrence, where means of deterrence must be evaluated on past criminal actions, with the objective to deter future acts. Although deterrence is a problematic fundamental aim that does not appear guaranteed in its specific or general form, in either of the two justice processes studied; overall deterrence seems less unattainable in a truth discovery process that is not linked to any imposed sanction. With regard to specific deterrence, however improbable it may be to deter offenders of international core crimes,²¹⁴⁵ possible punitive effects of denouncement are even less convincing. Assimilated justice

cases. Most TCs do not possess these qualities and thus risk the success of the truth discovery process, because, if micro-truth is erroneous, the individuals whose cases have been investigated will feel deceived. In contrast, a mandate requesting a larger historic picture, with causes and patterns of abuse, can be done through macro-truth investigations.

²¹⁴¹ Rwanda requires an apology before a confession and plea bargain and evidences a sophisticated sentencing theory where restorative means are invited. Renunciation of the past may indeed have strong beneficial effects on the actors. Truth can, of course, shame and in that sense punish (although not based on just desert principles), deter and repair.

²¹⁴² Even though a general duty to prosecute and punish offenders of the international core crimes cannot be firmly established, there is sufficient treaty support for the fundamental aim of just-desert punishment to be viewed as a prerequisite for justice. A conference on universal jurisdiction, in 2002, provided that states should supply criminal jurisdiction; prosecute or extradite according to international principles and, while not excluding restorative justice, it was held that simply supplying a restorative justice process concerning the international core crimes would be incorrect. See Ankumah, 2003, at <http://www.campusdenhaag.nl/pagina/101>

²¹⁴³ Art.53 of the ICC Statute supports the view held by, for example, Kofi Annan, where the complementarity of the ICC, and universal jurisdiction, do not necessarily stand in the way of domestic initiatives, "like South Africa's, it is inconceivable that...the court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future." UN Press Release SG/SM/6686, 1998; ICC art.53 allows the Prosecutor of the Court some discretion determining whether to investigate and prosecute.

²¹⁴⁴ Again mainly with the offender in focus.

²¹⁴⁵ Generally due to their strong conviction.

complements the general deterrence that the prosecutorial process may create, with inclusive truth discovery and truth acknowledgment. Even though the fundamental aim of deterrence may often have to be recognised as unfulfilled, the effort to fulfil the aim attaches important consequentialist values to the prosecutorial process. Another recognised weakness, perhaps even more important than that of deterrence, although strongly linked to it, is the fundamental aim of reparation. Victims and communities have a right to guarantees of non-repetition, whereby efforts to fulfil the aim of deterrence will be appreciated; and the long-term effects must not be forgotten, even though they may not be immediately felt by the actors. Unfulfilled promises of reparation must be accepted as more detrimental than no promise and people in need may well interpret TC recommendations as promises rather than suggestions, especially where the victims have been participating in the demand for reparations. The valuable inclusiveness of the truth discovery process, involving individual and collective symbolic reparation, must instead be assimilated with legal authority and a prosecutorial process able to implement the ICC provisions relating to the limited individual reparations. In this way, the legitimacy and success of the entire justice process is not at risk, which can otherwise be the consequence of unfulfilled recommendations. With regard to legal justice and its inherent individual focus, the aim of reparation adds the necessary retrospective victim focus, justly and fairly establishing what means of reparation is necessary. Assessed on past losses, both material and symbolic reparations are prospective means for a repaired future.

Reconciliation, similar to peace and democracy, is a prospective aim and process, for both the individual and the collective actors. Within the fulfilment of reconciliation's different levels, retrospective analysis may exist, through, *e.g.* automatic remembrance, although the achievement is prospective. Externally influenced means of reconciliation, such as collective symbolic reparation, psychological assistance to forgive and/or rehabilitate may also be influenced by the past, thus constantly reminding assimilated justice of the importance of as inclusive and all-embracing a truth discovery as possible. Reintegrative shaming may have assisted the reconciliation process of both Rwanda and Timor-Leste, supported by different means and represented by different communities.²¹⁴⁶ This reminds assimilated justice of the importance of integrating mechanisms sensitive to the local particularities. While truth is the backbone to both these processes, neither country has had a widely acknowledged truth report,²¹⁴⁷ questioning the importance of an actual truth report, rather than questioning the importance of a collectively embraced truth investigation.

²¹⁴⁶ The prosecutorial process, in combination with *gacaca* hearings and reconciliation camps may have assisted the inter-dependent Hutu and Tutsi communities. Timorese accept offenders back into the community, maybe with the assistance of the very limited prosecutions and the amnesty granting truth discovery.

²¹⁴⁷ In fact, South Africa did not widely distribute its large report, but transmitted short truth acknowledgements during and after the process, over the radio. It is yet unknown to what extent the Sierra Leone report will be read and what Timor-Leste decides to do with its report.

Perhaps it is the case that the macro-truth is, to a large extent, already known and the value lies in the participatory process, with public recognition of both the process and its outcome.

The aim of truth is a retrospective aim as well as a prospective means (we can only attempt perceptions of the past, which may hold future consequences); punishment is a retrospective aim and arguably also a prospective means (just desert is evaluated on past criminal action, and may carry future utilitarian goods); deterrence is a retrospective aim as well as a prospective means (means of deterrence must be evaluated on past criminal actions, with prevention of future acts); reparation is a retrospective aim as well as a prospective means (both material and symbolic reparation is assessed on past losses, for a repaired future); and reconciliation is prospective (individually and collectively progressing, although the reconciling process, through means of forgiveness and rehabilitation, may have to put some focus on the past). The importance of a justice process that is able to supply a retrospective and a prospective focus, with the assistance of these fundamental aims, can reward the actors in different ways. Truth, just-desert punishment, deterrence and reparation ascertain accountability and individual rights. Truth, general deterrence, collective and symbolic reparation and reconciliation assist the welfare of the collective, where a macro-approach to truth discovery can highlight social inequalities. Assimilated, both dimensions nurture the legitimacy of the overall justice process.

8.4. CONCLUDING REMARKS

This thesis set out to assemble the concept of assimilated justice, in order to support the fight against impunity. Assimilated justice can improve the practical problems and inherent restrictions that criminal justice faces by allowing an integrated restorative and local justice focus, which can consequently lessen impunity, generally understood as the non-application of the prosecutorial process. However, it has been argued, in line with the objective of assimilated justice, that impunity must represent exclusion of more than the prosecutorial process and comprise non-inclusion of the actors. In the fight against impunity, assimilated justice sets out to hold offenders of the international core crimes individually accountable and to include the victim and the general community in the justice process. Non-impunity thus entails the objective achievement of assimilated justice - establishing the truth, prosecuting and punishing the offender, attempting to deter the offender and other actors, making reparations to the victims and attempting collective community reconciliation.

Legal instruments support inclusive assimilated justice commitment and objective to recognise and involve the offender, the community and, particularly, the victims. Evidence of needs

and rights of the actors and, particularly, of the victims exist, albeit without firm acceptance by states. The 1998 Rome Statute of the ICC and the Bassiouni principles are recent instruments that highlight and legitimise offender, victim and community inclusion.²¹⁴⁸ Based on this development, the fundamental aim of reparation has been internationally recognised. The individual and collective victims have also been defined,²¹⁴⁹ as has the individual offender²¹⁵⁰ and the affected community.²¹⁵¹ These actors and individual as well as collective rights to know the truth, access justice and to be repaired further justify assimilated justice, puts the victim in focus and also gives further support to the application of more victim and community focused fundamental aims.

Actor-inclusion additionally establishes basis for the assimilated justice need of each fundamental aim, as well as recognition of the potential dual focus on the individual and the collective actors, achievable through the assimilated justice objective to achieve fulfilment of each aim and involvement of the actors. The fundamental aim of truth is instrumental to the other fundamental aims, besides being appreciated for its expressive value, whereby truth must be committed to (at the initiation of the justice process), in order to fulfil legal as well as social truth. The fundamental aim of just-desert punishment is justified on just desert principles, so it is mainly an aim of the universal dimension, yet suitably combined with other fundamental aims and values, assimilating retributive and utilitarian theories. Deterrence is included as a fundamental aim separate from just-desert punishment, accommodating the aims of utilitarian as well as restorative justice without interfering with principles of just desert. The aim of deterrence, in relation to the nature of the international core crimes, adds a beneficial individual and collective focus, valuable in principle, however difficult to fulfil. The aim of reparation includes individual as well as collective material and symbolic means, of which material reparation must primarily focus on the victims through the universal dimension. This is also due to practical problems and impunity threats that face truth commission recommendations. The importance of symbolic reparation must be recognised, due to the limitations that exist in terms of material reparation, and symbolic reparation also has the effect of working as a means to, and part of, reconciliation. Through assimilated justice,

²¹⁴⁸ Victim Declaration 1985; Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, 1992; 10th UN Congress on Offender Rights, 1999, at <http://www.uncjin.org/Documents/10thcongress/10cDocumentation/10cdocumentation.html>; ICC Statute, 1998; Bassiouni principles 2000 (incl. van Boven 1997, Joinet 1997) and see generally behind, ch.3.

²¹⁴⁸ A victim is an individual or a collective who has, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights...the victim may also include a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm. Princip.8, Bassiouni principles.

²¹⁵⁰ The offender is a natural person, over the age of 18, who commits, aids and abets, incites and in other ways participates in a crime, and who qualifies for individual criminal accountability. Art.25, ICC.

²¹⁵¹ The community is the local collective that has collectively suffered indirect harm.

individual offender- and state-supported material and symbolic reparations can be combined. Reconciliation is a fundamental aim that inherently focuses on all the actors. As regards offenders, victims and communities affected by international core crimes, society is faced with more than just a few cases that require individual reconciliation (although it has been emphasised that individual reconciliation begins the collective process). The assimilated justice objective to fulfil the fundamental aims is dependant on the reflexive and progressive assimilated justice commitment, without which their possible overlapping potential and individual as well as collective actor focus can be lost. Optimal balance between the actors appears to exist in the assimilated application of the aims, where the aim of truth inherently focuses on all the actors, just-desert punishment focuses mainly on the offender, deterrence mainly on the offender and general community, reparation mainly on the victim and reconciliation firstly on the individual actors and secondly, on the community. Taking criminal justice as well as restorative justice practices into account, the aim of reparation appears to be the most precarious of the aims applied, which reflects the urgent need to include the victim in assimilated justice. Optimal balance between the aims appears possible through the objective to fulfil all the fundamental aims in a progressive justice process, in which different modes of application would be possible, taking into account the local particularities, whilst respecting universal principles. Assimilated justice allows a collective social justice influence, bringing in the community and a collective focus. This assimilation is further supported by the fundamental aim of truth being able to reach its full potential. Legal, individual offender-focused truth becomes functional because just desert depends on it. The individual focus further promotes the involvement of the victim and the aim of reparation. The fundamental aim of deterrence depends furthermore on an individual offender focus. At the same time, expressive truth, with its collective social functions, can be put to good effect through general community involvement. The recognition of general goods arising from the aim of punishment may also promote symbolic collective reparation and lay the foundation for reconciliation. Assimilated justice needs and also supports the dual focus of deterring the international core crimes that must involve more than reassuring the victim and community that the offender will not commit more crimes. The individual focus can also promote healing and reconciliation, which the collective recognition can advance. With the contents of assimilated justice acknowledged in the first four chapters, the remaining part of the thesis continued the support for assimilated justice with a focus on the restrictions of the universal dimension and on the restrictions of the local particularities dimension, further mitigating the need for assimilated justice.

The argument made that assimilated justice is a needed paradigm finds support in the findings in chapters five and six, where neither dimension of justice looked at can single-handed

fulfil the fundamental aims or recognise the actors. The prosecutorial process has proven necessary in the implementation of certain aspects of the fundamental aims, as representative of one side of the equilibrium, that of individual, legal justice. Perhaps more valuable than anything else in the prosecutorial process, is the legal authority attached to the process. Within that process of investigation, trial, sentence and enforcement of sentence, the justice aims of individual legal truth and just-desert punishment appear fulfilled. The value of deterrence (individual and collective), appears recognised, with a certain amount of influence possible in just desert and the actual penalty. The enforcement of sentence does similarly appear guaranteed, to the extent where domestic criminal justice can be relied upon. Furthermore, the international prosecutorial process of the ICC, perhaps a model process of prosecuting offenders of the international core crimes, has included the victim as an actor in the process, with a right to participation, protection and reparation. Whereas broad collective and symbolic reparation, in the form of guarantees against non-repetition, for example, do not belong within the prosecutorial process, individual and collective victim-focused rehabilitation, restitution and compensation can be fulfilled, dependent on the resources of the offender and the international community. The fundamental aim of reconciliation, together with the collective notion of truth and broader features of reparation do not appear to be direct aims of criminal justice or directly fulfilled through the prosecutorial process. The prosecutorial process and the justice focused-aims are demanding aims, requiring timely application of universal principles, reliant on domestic states, often in transition that struggle with the implementation of the prosecutorial process and the proper fulfilment of the fundamental aims. Inherent restrictions and practical problems invite international standards (e.g. to prosecute or extradite the offenders of the most atrocious crimes) to be assimilated with other justice means. With the IMT, the importance of individual subjects and an international forum were highlighted, further developed by the ICC, especially in terms of the victim. Of course state sovereignty, consent and cooperation are still vital for international law and international institutions, but the ICC will play a major role invoking principles of universalism, in situations where the involvement of criminal jurisdiction is required, but not acted upon domestically.

The truth discovery process finds further assimilated justice support, although assimilated justice does not criticize criminal justice *per se*, nor does it oppose restorative justice *per se*. However, in communities where respect for the rule of law, democracy and the local community are not stable, the threat of impunity is intense, with practical problems that can further restrict the application of the prosecutorial process and the truth discovery process. Represented by different TC models and processes, much due to different local particularities, truth discovery processes are flexible by nature, essential in order to represent the local particularism (a key word to the truth

discovery process) and thus also to the local justice dimension of assimilated justice. If it would lose touch with the actual actors affected by the past, it could never claim to include or fulfil the fundamental aims of truth or reconciliation and it could not claim moral legitimacy. The truth discovery process must be factually true (according to forensic truth) and true to integrity (according to narrative truth), through *e.g.* allowing actor inclusion, or else there can be no talk of healing and social truth. Without lessening the importance of the collective notions of healing and social truths, it appears that factual and narrative truths initiate such truths. The fulfilment of the fundamental aim of truth depends on the overall objective of the TC, and the fundamental aims of just-desert punishment and deterrence are difficult to fulfil where no punitive sanctions are implemented. Also, potential effects of shaming cannot be guaranteed. Whereas the collective notion of reconciliation may be built on truth that is representative of the entire nation, victim narratives should be recognised and explained, through which a collective notion of responsibility and suffering may appear. Hearings should be public and the report should be made widely available, as these essentials lay the foundation for public support, moral legitimacy and social justice. Running the risk of being influenced by the past, the setting up of the TC must be carefully planned, where problematic limitations concern the period to investigate, staff and amnesties. The SA TRC represented restorative justice flexibility, in style and process, by individually granted amnesty mechanisms. However, generally, TCs have not had the power to grant such amnesty and a macro-focused truth investigation of systematic patterns is preferred, in assimilated justice combinations with the individual focus of the prosecutorial process. In line with the overall objective to fight impunity, a “no amnesty approach” must be the preferred approach, although *quasi*-judicial elements may converge with legal legitimacy, making such an approach the second best option.

Hopeful signs of a positive attitude towards applying assimilated justice have been noted, in chapter seven (although cautiously so), identifying *quasi*-assimilated justice models of criminal and restorative justice processes, however not yet of fully assimilated justice. Inherent restrictions to the international and domestic prosecutorial process were further identified. In combination with practical problems of transitional states and the amount of offenders and victims involved in and affected by the international core crimes, further justice is necessary, where a commitment to internalise the universal dimension, in collaboration with local justice is visible in Rwanda and Timor-Leste. The plea bargaining system of Rwanda and the individual amnesty process of Timor-Leste must be recognised as legitimately restricting the prosecutorial process and actually assisting overloaded criminal justice systems with alternative justice processes. The *quasi*-assimilations share the commitment to internalise universal principles in domestic procedure, to collaborate, to include

the actors (albeit with less focus on the victims), and the overall objective involves the fulfilment of truth, justice and reconciliation. Unfortunately, the international community did not intend such commitment for Sierra Leone's dual justice processes, although restrictions to the prosecutorial process and a domestic need for truth and reconciliation appear initially considered. Where general amnesties are granted offenders of the international core crimes, it is important that the international community, representative of universal principles, does not recognise such practice, but instead provides truth discovery and prosecutions with an internalised commitment. Due to international and national pressure, the importance of prosecutions, truth and reconciliation have been recognised, yet to different extent. This indicates a progressive commitment to both particularism and universalism. If the domestic legal system is not fundamentally improved, through an internalised commitment, as well as assisted by other justice mechanisms, the fundamental aims of legal justice (essentially individual truth, just-desert punishment and deterrence, but also to some extent reparation) may remain unnecessarily restricted. Such improvement can not only focus on the criminal courts, as no courts or states can afford to prosecute such a magnitude of offenders or indeed make individual reparation to all the victims. From the examples looked at, it appears that international justice, concerned with the actors involved in and affected by the international core crimes, needs assimilation with domestic, restorative justice mechanisms, in order to be able to associate with and improve the past, as well as lessen restrictions to the justice process.

Fully assimilated justice, compared to restricted criminal, restorative and *quasi*-assimilated justice, recognises both the inherent restrictions of both dimensions and the practical problems that states in transition and the international justice system face, when concerned with justice for the actors of the international core crimes. Such recognition reflects a reflexive and progressive commitment and objective achievement of fulfilling the fundamental aims and involving the actors. Assimilated justice is thus a flexible concept, involving universal principles of legal justice, assimilated with a local context-transcending understanding. Assimilated justice is also a legitimate justice paradigm, which entails legal legitimacy and authority through the law and socially established moral legitimacy through a closer connection to the actual actors. There is thus no *one* model of assimilated justice, where its objective and reflexive commitment character does not suite rigid institutionalisation, but rather flexibility, which shares collective optimization of the objective achievement. Applied in transitional circumstances, assimilated justice represents a flexible system of fundamental aim and actor application, remaining adaptable to conceptual changes, assimilating certain restorative justice aims with the prosecutorial process. The complementarity principle of the ICC, internationalised hybrid courts and internationally supported truth discovery processes make a context-transcending concept and ownership possible, in combination with international support,

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authority and credibility. International law and universal principles must be understood with respect for local particularities, institutional deficits and lack of political will, as instances of restricted justice. The narrow individual focus of the prosecutorial process highlights the capacity and weakness of criminal justice and universalism; the necessity of multi-level governance; the importance of internalising application of and contribution to international law; collaborative cooperation with states and institutions and, most importantly; actor inclusion. A balance between the prosecutorial process (its individual focus on universal criminal justice aims) and local truth discovery (that can apply a participatory truth with a collective focus on reparation and reconciliation) can escape application of local particularities that are ignorant of universal principles and aims. It can also escape universally applied principles that lack a local and collective focus. Internationally, the ICC or a hybrid court may become the external face of universalism, in terms of protecting fundamental human rights through principles that should be universally applied, but, because these crimes are the result of local particularities, as well as subject to such particularities, local application is necessary. While collectivism and local particularities may endanger the rights of the individual and universal principles; individualism lacks the beneficial macro-level position, where, *e.g.* certain collective attitudes cannot be taken into account. Because of shortcomings and restrictions to any justice process, particularly in states in transition, assimilated justice must be represented by a franchise model, sensitive to legitimate restrictions. Assimilated justice can thus provide a retrospective and individual focus on justice, through the legal order, accountability and respect for the rule of law. Assimilated justice can also provide a prospective and collective focus on stable democracy, through justice, reconciliation and peace.

CHAPTER 9: BIBLIOGRAPHY

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- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec.1984, T.S.Vol.862, GARes.39/46, Supp.(No.51)
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968, T.S.Vol.754, ILM, 1969
- Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec.1948, GARes.260, T.S.Vol.277, 1948
- Convention on the Safety of UN and Associated Personnel, 9 Dec.1994, 31 I.L.M. 482, 1995
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, signed 26 Nov.1987, E.T.S.No.126, 27 ILM I 152, 1988
- European Convention on the Compensation of Victims of Violent Crimes, E.T.S.No.116, 1983
- European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, E.T.S.No.82, 1974
- European Convention on the Protection of Human Rights and Fundamental Freedoms, signed 4 Nov.1950, E.T.S.No.5, 1950
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 Aug.1949, 75 T.S.Vol.31
- Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted 12 Aug.1949, 75 T.S.Vol.85
- Geneva Convention Relative to the Treatment of Prisoners of War, adopted 12 Aug.1949, 75 T.S.Vol.135
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted 12 Aug.1949, 75 T.S.287
- Hague Convention Respecting the laws and customs of War, No.IV 18 Oct.1907 T.S. 2269
- Inter-American Convention on the Forced Disappearances of Persons, 33 ILM 1429, 1994
- Intern-American Convention to Prevent and Punish Torture, O.A.S.T.S.No.671985
- The UN Congress on the Prevention of Crime and the Treatment of Offenders issued ECOSOC declarations in e.g. 1971, 1980, regarding Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, ECOSOC, 1984
- International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 Dec.1965, 660 T.S.195
- International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 Nov.1973, GARes.3068 (XXVIII), T.S.Vol.1500
- International Covenant on Civil and Political Rights, adopted 16 Dec.1966, GA Res.220A (XXI), T.S.Vol.999

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- International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec.1966, GA Res.2200A (XXI), T.S.Vol.993
- Optional Protocol to the ICCPR, adopted 16 Dec.1966, 999 T.S.171; Second Optional Protocol to the ICCPR, adopted 15 Dec.1989, GARes.44/128
- Protocol I Additional to the Geneva Conventions of Aug.12, 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 Jun.1977, UN.Doc.A132/144
- Protocol II Additional to the Geneva Conventions of Aug.12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 Jun.1977, UN.Doc.A132/144 annex II
- Statute of the International Court of Justice, Jun.1945, T.S.Vol.1316
- Statute of the International Criminal Court, May, 1998, T.S.Vol.2187
- Statute of the International Criminal Tribunal for former Yugoslavia, UN.Doc.S/RES/827, 1993, ILM, 1993
- Statute of the International Criminal Tribunal for Rwanda, UN.Doc.S/RES/955, 1994
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GARes.40/34, 1985
- UN Declaration on the Protection of All Persons from Enforced Disappearances, GARes.47/133, 1992
- UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human rights and Fundamental Freedoms, GARes.53/144, 1998
- Universal Declaration of Human Rights, adopted 10 Dec.1948, GARes.217A (III), UN.Doc.A/810, pp.71, 1948
- Vienna Conv. on Consular Relations and optional protocols, 1963, T.S. Nos.8638-8640, vol.596
- Vienna Convention on Diplomatic Relations, 18 Apr.1961, T.S.500
- Vienna Convention on the Law of Treaties, adopted 23 May 1969, T.S.331, UN.Doc.A/CONF.39/26

ASSIMILATED JUSTICE APPENDIX

1. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT APPENDIX¹

PART 2. CRIMES WITHIN THE JURISDICTION OF THE COURT

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

1. For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;

¹ Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no

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active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar

nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

2. RETRIBUTIVE JUSTICE V. RESTORATIVE JUSTICE APPENDIX ²

Old paradigm of retributive justice

1. Crime defined as violation of state.
2. Focus on establishing blame based on guilt, on the past.
3. Adversarial relationship and process are normative.
4. Imposition of pain to punish and deter/prevent future crime.
5. Justice defined by intent and process: right rules.
6. Interpersonal, conflictual nature of crime repressed; conflict seen as individual v. the state.
7. One social injury replaced by another.
8. Community on the sideline, represented abstractly by state.
9. Encouragement of competitive, individualistic values.
10. Action directed from state to offender: victim ignored, offender passive.
11. Offender accountability defined as taking punishment.
12. Offence defined in purely legal terms, devoid of moral, social, economic, political dimensions.
13. Debt owed to state and society in the abstract.
14. Response focused on offender's past behaviour.

New paradigm of restorative justice

1. Crime defined as violation of one person by another
2. Focus on problem solving, on liabilities/obligations, on the future.
3. Dialogue and negotiation are normative.
4. Restitution as a means of restoring both actors; goal of reconciliation/restoration.
5. Justice defined as right relationships: judged by outcome.
6. Crime recognised as interpersonal conflict, value of conflict recognised.
7. Focus on repair of social injury.
8. Community as facilitator in restorative process.
9. Encouragement of mutuality.
10. Victim and offender's roles recognised in problem/solution: victim rights/needs recognised, offender encouraged to take responsibility.
11. Offender accountability defines as understanding impact of action, and helping to decide how to make things right.
12. Offence understood in whole context; moral, social, economic, political.
13. Debt/liability to victim recognised.
14. Response focused on harmful consequences of offender's behaviour.

² Zehr's distinction chart, in Umbreit, M.S., *Victim meets offender: The impact of restorative justice and mediation*, Criminal Justice Press, 1994.

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| <p>15. Stigma of crime irremovable.</p> <p>16. No encouragement for repentance and forgiveness.</p> <p>17. Dependence on proxy by professionals.</p> | <p>15. Stigma of crime removable through restorative action.</p> <p>16. Possibilities for repentance and forgiveness.</p> <p>17. Direct involvement by participants.</p> |
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3. ICC VICTIM REPARATION³

ICC STATUTE			
TYPE OF AID	OPENING OF FILE	PRE-TRIAL	DURING TRIAL
Information	R.16 R.92 R.92.6 R.49 5.50.1 R.50.5 R.92.2 R.92.3 & Art.61		R.131
Protection Art.43(6) R.17 R.18 R.19	ART.54(1)B ART.54(1)F R.16	ART.57(3)E	ART.64(6)E ART.68(1) ART.68(4) R.67 R.71, 72 R.87, 88
Participation	ART.53(1)C ART.15(3) R.50.3 R.50.4	ART.19(3) R.59 R.59.3 R.119.3	ART.65(4) ART.68(3) R.89 R.90 R.91 R.93
Reparations	ART.57(3)E		ART.75 ART.79 ART.82(4) R.95 R.97 R.98 R.221

³ Chart based on the Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

4. BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW APPENDIX⁴

Human Rights Resolution 2005/35

The Commission on Human Rights,

Recalling the report of the independent expert appointed by the Commission, M. Cherif Bassiouni, and, in particular, the draft of the “basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” annexed to his report (E/CN.4/2000/62), and the note by the secretariat (E/CN.4/2002/70),

Recalling all its previous resolutions on the matter, particularly resolution 2004/34 of 19 April 2004,

Thanking the independent experts, M. Cherif Bassiouni and Theo van Boven, for their most valuable contributions to the finalization of the draft basic principles and guidelines,

Welcoming with appreciation the report of Alejandro Salinas, Chairperson-Rapporteur of the third consultative meeting on the “basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” (E/CN.4/2005/59), and in particular his assessment that the mandate provided in resolution 2004/34 - to finalize the draft basic principles and guidelines - has been fulfilled as the document reflects three rounds of consultative meetings and some fifteen years of work on the text,

1. *Adopts* the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law annexed to the present resolution;

2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of Government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;

3. *Recommends* the following draft resolution to the Economic and Social Council for adoption:
“*The Economic and Social Council,*

“*Taking note* of Commission on Human Rights resolution 2005/35 of 19 April 2005, in which the Commission adopted the text of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,

“1. *Expresses its appreciation* to the Commission for the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;

“2. *Adopts* the Basic Principles and Guidelines as contained in the annex to Commission resolution 2005/35;

“3. *Recommends* to the General Assembly that it adopt the Basic Principles and Guidelines.”

⁴ Human Rights Resolution 2005/35 Adopted by a recorded vote of 40 votes to none, with 13 abstentions. See chap. XI, E/CN.4/2005/L.10/Add.11

56th meeting
19 April 2005

[Adopted by a recorded vote of 40 votes to none,
with 13 abstentions. See chap. XI, E/CN.4/2005/L.10/Add.11]

**BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY
AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS
LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW**

Preamble

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 14, the Convention on the Rights of the Child at article 39, and of international humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907), article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), and articles 68 and 75 of the Rome Statute of the International Criminal Court,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples' Rights at article 7, the American Convention on Human Rights at article 25, and the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 13,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Noting that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation" and requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Affirming that the Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Principles and Guidelines do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under

international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

Noting further that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines.

I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND IMPLEMENT INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

- (a) Treaties to which a State is a party;
- (b) Customary international law;
- (c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

- (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
- (c) Making available adequate, effective, prompt, and appropriate remedies, including reparation, as defined below; and
- (d) Ensuring that their domestic law provides at least the same level of protection for victims as required by their international obligations.

II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

III. GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. STATUTES OF LIMITATIONS

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

8. For purposes of this document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. TREATMENT OF VICTIMS

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. VICTIMS' RIGHT TO REMEDIES

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered; and
- (c) Access to relevant information concerning violations and reparation mechanisms.

VIII. ACCESS TO JUSTICE

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
- (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
- (c) Provide proper assistance to victims seeking access to justice;
- (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. REPARATION FOR HARM SUFFERED

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed

to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. Rehabilitation should include medical and psychological care as well as legal and social services.

22. Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

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

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

X. ACCESS TO RELEVANT INFORMATION CONCERNING VIOLATIONS AND REPARATION MECHANISMS

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. NON-DISCRIMINATION

25. The application and interpretation of these Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or ground, without exception.

XII. NON-DEROGATION

26. Nothing in these Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international

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human rights law and international humanitarian law. It is further understood that these Principles and Guidelines are without prejudice to special rules of international law.

XIII. RIGHTS OF OTHERS

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

5. TRUTH COMMISSIONS IN THE 1990S APPENDIX

Country	Year	Commission	Result
Bangladesh	1971	War crimes	30,000 charges followed by blanket amnesty
Uganda	1974	Disappearances	Report published 1986, no individual cases
Bolivia	1982	Disappearances	No report
Israel	1982	Specific killings	Report
Argentina	1983	Disappearances	<i>Nunca más</i> report, analysis of repression
Guinea	1985	Inquiry	No report or trials
Uruguay	1985	Disappearances	Report published, no individual cases
Zimbabwe	1985	Inquiry	Confidential report
Philippines	1986	Presidential committee	No report published
Chile	1990, 1992	Truth, reconciliation	Report published, individual cases, reparation
Nepal	1990	Inquiry	Report published in 1994, with little publicity.
Chad	1991	Habré crimes	Report published on individual cases
Czech Republic	1991	Lustration laws	Individual cases heard
Sri Lanka	1991, 1994	Inquiry	No report published
Germany	1992, 1995	Inquiry into left wing	Purges, trials, compensation
Poland	1992	Inquiry	Secret list discredited
Bulgaria	1992	Inquiry into left wing	No report, trials void and records closed
Romania	1992	Inquiry	2 reports published
Albania	1992	Specific killings	Mass-graves discovered, victims identified, trial
El Salvador	1992	Ad hoc on military	Confidential report
Brazil	1992	Human rights council	Military police found guilty
Mexico	1992	Nat. human rights com.	Reported disappearances
Nicaragua	1992	Tripartite commission	Report published
Togo	1992	Nat. human rights com.	Government found guilty of 1991 killings
Niger	1992	Nat. human rights com.	Some corruption cases reported
Ethiopia	1992	Special public prosecutor	Perpetrators charged in 1995
Sudan	1992	Inquiry	Report not yet published
Thailand	1992	Killings and Disappearances	Non-public report, trials and compensation
El Salvador	1993	Armed groups	Perpetrators named in confidential report

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Zimbabwe	1993	Human rights commission	Failed
Ghana	1993-94	Com. on human rights	Failed investigation
Burundi	1993	UN Inquiry Genocide	Report, Recommendations
Honduras	1993, 1994	Disappearances	Perpetrators named, later prosecuted
Paraguay	1993	Inquiry	Files opened, trials held
Malawi	1994	Inquiry	In progress
Sri Lanka	1994	Disappearances	Reports published, with some follow-up
Haiti	1994	Truth commission	Report issued
Burundi	1995	Truth commission	Report published, followed by mass killings
South Africa	1995	Truth and reconciliation	Report published, individual amnesty granted
Guatemala	1995	Elucidation	Published report on human rights violations
Indonesia	1998	TC	Proposed
Ecuador	1996	Truth and justice	Aborted
Malawi	1999	Human rights com.	Investigating
Nigeria	1999	Inquiry	Report not made public
Somalia	2000	TC	Proposed
South Korea	2000	Inquiry	Investigating
Ivory Coast	2000	Mediation commission	Report on crimes committed
Peru	2000	TC	Charges brought
East Timor	2000	Truth and Reconciliation	In progress
Sierra Leone	2000	TC	Report published
Sri Lanka	2001	TC	Report to the president Apr.2002
Burundi	2001	TC	Yet again proposed
Lebanon	2001	Disappearances	Operative
Panama	2001	Inquiry	Documented military regime
Yugoslavia	2001	TC	In progress
Afghanistan	2002	TC	In progress

6. DRAFT STATUTE FOR A PERMANENT INTERNATIONAL COMMISSION OF INQUIRY⁵

The States parties to this Statute,

Recognizing the need in the aftermath of international and internal conflicts for an impartial, fair, and authoritative record of grave human rights crimes and serious violations of international humanitarian law;

Desiring to establish a permanent international mechanism for achieving such a record as situations arise;

Emphasizing that such a mechanism is intended to be complementary to national and international prosecutions, not a substitute for them;

Have agreed as follows:

⁵ Scharf, M. *The Case for a Permanent International Truth Commission*, Paper presented to Justice in Cataclysm, An International Conference, Duke University and the Office of the Prosecutor of the ICTs, 20-21 Jul. 1996, in 7 *Duke Journal of Comparative & International Law*, 1997, pp.375.

PART 1. ESTABLISHMENT OF THE COMMISSION OF INQUIRY

Article 1

The Commission

There is established an International Commission of Inquiry ("the Commission"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

Article 2

Relationship of the Commission to the United Nations

The Chairperson of the Commission, with the approval of the States parties to this Statute, may conclude an agreement establishing an appropriate relationship between the Commission and the United Nations.

Article 3

Seat of the Commission

1. The seat of the Commission shall be established at _____.
2. The Chairperson, with the approval of the States parties to this Statute, may conclude an agreement with the host State establishing the relationship between that State and the Commission.
3. The Commission may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.

Article 4

Status and Legal Capacity

1. The Commission is a permanent institution open to States parties to this Statute in accordance with this Statute. It shall act when required to consider a case submitted to it.
2. The Commission shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

PART 2. COMPOSITION AND ADMINISTRATION OF THE COMMISSION

Article 5

Composition of the Commission

1. The Commission shall consist of five members, including a Chairperson and a Vice Chairperson as provided in article 8.
2. The States parties to this Statute may temporarily or permanently increase the number of Commissioners by two-thirds vote if warranted by the Commission's workload.
3. The Commission shall appoint an administrative staff commensurate with its workload, including lawyers, analysts, interpreters, secretaries, security personnel, and investigators.

Article 6

Election of Commissioners

1. Each State party may nominate for election not more than two persons, of different nationality, who are willing to serve as may be required on the Commission.
2. The Commissioners shall be elected by an absolute majority vote of the States parties by secret ballot.
3. No two Commissioners may be nationals of the same State.

4. Commissioners hold office for a term of five years and, subject to paragraphs 5 and 6 of this Article, are not eligible for re-election. A Commissioner shall, however, continue in office in order to complete the investigation of any situation which has commenced before the expiration of his/her term.

5. At the first election, one Commissioner chosen by lot shall serve for a term of one year and be eligible for re-election; two Commissioners chosen by lot shall serve for a term of three years and are eligible for re-election; and the remainder shall serve for a term of five years.

6. In the event of a vacancy, a replacement Commissioner shall be elected in accordance with article 6 to fill the remainder of the predecessor's term, and shall be eligible for re-election.

Article 7

Officers of the Commission

1. The Chairperson and the Vice-Chairperson shall be elected by an absolute majority of the Commissioners. They shall hold office until the end of their terms as Commissioners.

2. The Vice-Chairperson may act in place of the Chairperson as appropriate.

3. The Chairperson shall be responsible for:

(a) preparing the Commission's annual budget and supplemental budgets for the investigation of each situation referred to it, to be approved by the States parties to this Statute or the United Nations in accordance with article 12 of the Statute;

(b) hiring and firing of the Commission's staff;

(c) the due administration of the Commission; and

(d) the other functions conferred on it by this Statute.

Article 8

Independence of the Commissioners

1. In performing their functions, the Commissioners shall be independent.

2. Commissioners shall not engage in any activity or hold any official position which is likely to interfere with their functions as a Commissioner or to affect confidence in their independence.

3. Any question as to the application of paragraph 2 shall be decided by the Chairperson, or by the Vice-Chairperson if it concerns the Chairperson.

Article 9

Excusing and Disqualification of Commissioners

1. For good cause, the Chairperson at the request of a Commissioner may excuse that Commissioner from participating in a particular investigation undertaken by the Commission.

2. Commissioners may not participate in the investigation of any situation in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent, or potential conflict of interest.

3. Any question as to the disqualification of a Commissioner shall be decided by an absolute majority of the members of the Commission.

Article 10

Loss of Office

1. A Commissioner who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.
2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot by a majority of the Commissioners.

Article 11

Privileges and Immunities

1. The Commissioners and the staff of the Commission shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.
2. Counsel, experts and witnesses called before the Commission shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 12

Allowances and Expenses

1. The members of the Commission and its staff shall be paid a salary on an as when actually employed basis in accordance with the schedule annexed to this Statute. [The schedule is not included in this Appendix.]
2. The salaries of the Commissioners and their staff and other expenses of the Commission shall be borne by the parties to this Statute in accordance with the annexed schedule or, in any case referred to the Commission by the Security Council, by the United Nations.
3. The Commission is authorized to accept voluntary contributions from interested States, including funds, materials, and personnel.

Article 13

Working Languages

The working languages of the Commission shall be English and the language of the State which is the subject of an investigation.

Article 14

Rules of the Commission

1. The Commission may by an absolute majority make rules for the functioning of the Commission, the conduct of investigations, and any other matter which is necessary for the implementation of this Statute.
2. The initial Rules of the Commission shall be drafted by the Commissioners within six months of the first elections for the Commission, and be submitted to a conference of States parties for approval. Subsequently, additional Rules or amendments to the Rules shall be transmitted to States parties to this Statute and are considered to be approved unless, within six months after transmission, a majority of the States parties have communicated in writing their objections. A proposed rule will apply provisionally pending the expiration of the six-month period.

PART 3. JURISDICTION OF THE COMMISSION

Article 15

Situations Within the Jurisdiction of the Commission

The Commission has jurisdiction in accordance with this Statute with respect to situations involving the following international crimes:

- (a) the crime of genocide;
- (b) serious violations of the laws and customs applicable in international and internal armed conflict; and

(c) crimes against humanity, including enforced disappearances, extra-legal executions and acts of torture.

Article 16

Preconditions for the Exercise of Jurisdiction

1. The Commission shall exercise its jurisdiction over a situation with respect to a crime mentioned in article 15 if the situation is referred to it by the United Nations Security Council, or a majority vote of States parties to this Statute.
2. In referring a situation, the relevant entity shall designate the dates and geographic location which are to be the subject of the investigation.

PART 4. FUNCTIONS AND POWERS OF THE COMMISSION

Article 17

Functions

1. The Commission shall have the task of undertaking investigations, making determinations, and issuing recommendations, with respect to situations within its jurisdiction in accordance with articles 15 and 16.
2. The Commission's proceedings shall be held in public and open to the media, except as required for the protection of victims and witnesses or confidential information.
3. The Commission shall present its findings and recommendations in a final report in English and the official language of the country in question, which shall:

- (a) be submitted within one year of the conferral of jurisdiction over a situation, unless extraordinary circumstances make a longer period necessary;
- (b) be adopted unanimously if possible, otherwise by a majority of its Members;
- (c) include an analysis of the nature and extent of violations, how they were planned and executed, the fate of individual victims, and on the basis of clear and convincing evidence the names of persons primarily responsible for violations;
- (d) include recommendations as to individual victim compensation;
- (e) include recommendations as to appropriate non-criminal penalties for perpetrators including partial or complete forfeiture of government pensions and temporary or permanent bans from military or public office;
- (f) include recommendations as to steps that will help avoid a repeat of such atrocities in the future; and
- (g) be transmitted to the authorities in the relevant State, the media, as well as to the Secretary-General of the United Nations, who shall take steps to ensure its widespread public dissemination.

4. The Commission may, at its discretion, bring individual cases to the attention of relevant national or international judicial authorities.
5. The Commission will endeavor to conduct its investigations so as not to interfere with ongoing domestic or international criminal investigations and/or prosecutions.

Article 18

Powers

For the purposes of the investigation, the Commission shall have the power to:

- (a) gather, by the means it deems appropriate, any information or evidence it considers relevant to its mandate.
- (b) interview any individuals, groups or members of organizations or institutions.

- (c) hear testimony of victims, witnesses, and other relevant parties.
- (d) employ measures for the protection of victims and witnesses, including such means as
- (i) expunging names and identifying information from the Commission's Report; (ii) giving of testimony through image- and voice-altering devices or closed circuit television; and (iii) assignment of a pseudonym; and
- (e) carry out any other measures or inquiries which it considers useful to the performance of its mandate, including requesting reports, records, and documents from the relevant State authorities or making on-site inspections.

Article 19

Rights of Persons Adversely Affected

A person who in the opinion of the Commission is likely to be adversely affected by the evidence given before the Commission shall receive an opportunity to be heard in person or through a representative and to cross-examine the person giving such evidence.

PART 5. OBLIGATIONS OF STATES

Article 20

Cooperation

1. The States parties undertake to extend the Commission whatever cooperation it requests of them in order to gain access to sources of information available to them.
2. In any case referred to the Commission by the United Nations Security Council, all States are obligated to extend the Commission whatever cooperation it requests of them in order to gain access to sources of information available to them.

Article 21

Victim Compensation

1. The victims of the human rights abuses within the jurisdiction of the Commission are entitled to compensation for loss of life, physical or psychological injury, loss of liberty, loss or damage to property, loss of opportunity, and other injuries proximately caused by the abuses.
2. The Commission shall transmit to the competent authorities of the State(s) concerned its findings that a victim has suffered injury due to the acts of a specific individual or governmental entity.
3. Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.
4. A fund shall be established for the compensation of victims, which will be given resources by the government of the State involved in the violations and by foreign governments, who are urged to allocate _____ percent of their aid to that State for the victim compensation fund.
5. When the assets of responsible authorities have been frozen in accordance with a Security Council Resolution under Chapter VII of the United Nations Charter, States may release such frozen assets to the victim compensation fund. Such frozen assets may also be released pursuant to judicial awards for damages in favor of the victims of abuses against the responsible authorities.

Article 22

Penalties

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1. The State parties undertake to carry out the Commission's recommendations for non-criminal penalties of persons found responsible for violations of the crimes within the Commission's jurisdiction.
2. In any case referred to the Commission by the United Nations Security Council, all States are obligated to carry out the Commission's recommendations for non-criminal penalties of persons found responsible for violations of the crimes within the Commission's jurisdiction.

