

In the pursuit of accountability are there more appropriate mechanisms than prosecutions?

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**IN THE PURSUIT OF ACCOUNTABILITY ARE THERE MORE APPROPRIATE
MECHANISMS THAN PROSECUTIONS?**

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LL.B (Hons)**

**A thesis submitted in partial fulfilment of the requirements of Sheffield Hallam
University for the degree of Master of Laws by Research.**

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Abstract

This thesis focuses on the fundamental tensions that exist between the interests of the post-conflict State and those of the 'international community'. Focus will be on the appropriateness of alternatives to prosecution, specifically, the use of amnesties and truth commissions, and whether such alternatives can satisfy the need for accountability. In international criminal justice, it is often argued the only route to accountability is through formal prosecutions. However, does holding an individual accountable require formal prosecution and punishment? And could accountability be achieved in general terms without prosecution of all possible suspects? I will argue that the extraordinary nature of crimes within international criminal law, coupled with context specific situations, means there can be no one size fits all approach to achieving accountability.

Introduction

This thesis on '[i]n the pursuit of accountability are there more appropriate mechanisms than prosecutions?' principally explores the concept of accountability in an international criminal justice setting. For present purposes, international criminal justice will be defined as legal and other responses to widespread criminality, often encompassing the major international crimes, and often the result of civil war or sustained conflict.

There is somewhat of a conundrum about how a post-conflict society, which is going through a difficult transitional period, can move into a new era of peace. Many scholars argue that accountability through prosecutions holds the answer. However, this notion has become increasingly disputed by proponents of transitional and restorative justice.

Structure of this thesis

This research consists of seven chapters with the first two introducing the concept of accountability (in its many forms and contexts) and identifies recurring themes between the different contexts. Then using the common threads, seeks to apply these to international criminal justice settings. This analysis seeks a clearer understanding of accountability and how it can be achieved through the finding of the truth, seeking justice, and providing recognition.

Using the concepts of truth, justice and recognition the thesis moves on to firstly discuss two alternative mechanisms, amnesties and truth commissions (Chapters 3-

5). The discussion explores to what extent these alternatives can ascertain truth, achieve justice and provide recognition.

Lastly, the thesis focuses on the use of prosecutions and to what extent a trial followed by punishment satisfies the identified key concepts to provide accountability. This will be followed by a critical discussion of the merits of the alternative mechanisms as well as prosecutions (Chapter 6). Overall, this thesis seeks to assert that international criminal justice should not be reliant on prosecutions to provide accountability in a post-conflict society. And that, analytically or conceptually, 'accountability' should not be associated exclusively with personal guilt but should also be thought to be captured by wider restorative processes in post-conflict societies. According to Bovens, 'accountability' is a term used to cover a multitude of 'distinct concepts, such as transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity'.¹

¹ M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* at 449

Chapter One:

The idea of accountability.

The purpose of this chapter is to address the complexity in defining accountability, but will identify the recurring themes within the literature. If someone is to be held accountable, what exactly does this mean? The traditional dictionary definition defines 'accountable' as: '1. required or expected to justify actions or decisions' and '2. explicable; understandable'.²

Mulgan states that 'without mechanisms for demanding explanation, applying judgment and imposing sanctions, institutions that are designed to control will fail to achieve their purpose'.³ Mechanisms designed to control, such as legal regulation or political instructions, can be taken for mechanisms of accountability even when they do not directly involve any routine scrutiny or punitive response.⁴ However, a note of caution from Mulgan, is that no one type of institutional structure can be guaranteed to deliver effective accountability.

Accountability can be thought to encompass general structures whereby individuals are required to give an account for their actions (or inactions) between superiors and subordinates and vice versa. However, no one accountability structure fits all circumstances and a post-conflict environment is a good example of where we need to be flexible, and perhaps even experimental, in our approach (see below).

² "accountable *adj.*" *The Concise Oxford English Dictionary*, Twelfth edition . Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2008. *Oxford Reference Online*. Oxford University Press. Sheffield Hallam University. Last accessed on 25 April 2012 <http://www.oxfordreference.com.lcproxy.shu.ac.uk/views/ENTRY.html?subview=Main&entry=t23.e292>

³ R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000), 78 (3) *Public Administration* at 566.

⁴ *Ibid*

Robert Behn explores the meaning of accountability and highlights the complexity of providing a one size fits all definition.⁵ However, Behn's discussion is predicated on an assumption of public accountability. Accountability is a word widely used in many different contexts and one which Behn describes as an 'elusive concept.'⁶ The literature contains many interpretations of the term 'accountability', but for Rubenstein his focus is on a 'standard model of accountability.'⁷ That model needed here. Identifying a central core meaning of accountability, Behn attempts to define the terms 'accountable' as subject to giving an account *answerable* and capable of being accounted for: *explainable*: and 'accountability' is "the quality or state of being accountable, liable, or responsible.

'Numerous definitions of accountability have been offered by scholars and practitioners of development.'⁸ The basis of their efforts often reverts back to a standardised form of accountability meaning, for example, financial auditing and clear chains of command and responsibility. However, whilst accountability is mentioned in relation to a wide range of areas including political, economic and legal, it is perhaps worth considering at some point why there seems to be a varied understanding of what accountability actually is, and whether it is important to have a standardised model of accountability. This remains beyond the scope of this thesis, but is certainly a topic for further research.

⁵ R.D. Behn, *Rethinking democratic accountability* (2001) Printed by R.R. Donnelley and Sons, Harrisonburg, Virginia at 2

⁶ Ibid

⁷ J. Rubenstein, 'Accountability in an Unequal World' (2007), 69 (3) *The Journal of Politics* p.617.

⁸ A. Ebrahim, 'Accountability in Practice: Mechanisms for NGOs' (2003) 31(5) *World Development* at 813.

A one size fits all approach to what it means and how it can be achieved, even if possible, may not be preferable. Should a standardised definition be provided the challenge at this point is to determine whether that definition answers what, why, where and how accountability is to be achieved.

The literature concerned with exploring the meaning of accountability is focused on it in a broad sense. One such author, Koppell discusses five broad aspects of accountability, which include 'transparency, liability, controllability, responsibility and responsiveness'.⁹ However, to focus on accountability which incorporates other somewhat complicated concepts, provides little clarity as to what is meant by accountability. Whilst it is acknowledged above that the concept of accountability proves elusive, it may be possible to have a more focused understanding of accountability by following Bovens' discussion on conceptual and evaluative approaches.¹⁰

Conceptual

What does accountability mean? Accountability can mean different things in different circumstances: public and private, institutional and governmental, local and (inter)national. It is essentially an obligation on an actor to explain and to justify his or her conduct to a forum. An actor can either be an individual or an organisation. The forum is responsible for the drawing out the explanation from the actor and then

⁹ J. Koppell, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"' (2005) 65(1) *Public Administrative Review* at 94, in M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* at 450.

¹⁰ M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* at 447.

passing judgement. The forum can be an individual, often a superior, an institution or a court.¹¹

Account-giving consists of three facets. In the first instance the actor is under an obligation to explain their conduct, which includes the provisions of explanations and justifications. This requires more than the mere provision of information and may also require justification of specific acts or omissions. Secondly, it must be possible for the forum to question the actor about their conduct. Lastly, the forum must have the capacity to pass judgement, which could include a sanction and public condemnation.¹²

Evaluative

Bovens discusses the three evaluative perspectives of accountability which are democratic, constitutional, and a learning perspective.¹³ In essence, Bovens' evaluative perspective means individuals have to give an account for their actions to 'the people', government or another forum which has no political (or punitive) powers but requires accountability as part of its institutional feedback processes and memory.

Bovens' discussion of accountability has a narrow and well-defined understanding of accountability and places it in a sociological setting. For Bovens, accountability is 'the obligation to explain and justify conduct'.¹⁴ In which happens in a forum where

¹¹ Ibid at 450

¹² Ibid at 451

¹³ Ibid at 462

¹⁴ Ibid at 450

questions can be asked to fully understand the conduct or omission with the possibility of repercussions for the account giver.

Accountability *holders* and *holdees*

Behn asserts that accountability has 'accountability holders and accountability holdees.'¹⁵ Accountability holders are those which hold an individual or institution accountable for their actions or inaction. Whereas accountability 'holdees' are those being held to account for their actions or inaction by providing answers and explanations.

Accountability and responsibility

Accountability is often more than the attribution of responsibility, it involves associating responsibility with penalties. Mulgan also explores the complex nature of what is meant by accountability and discusses the close association of accountability with responsibility.¹⁶ Whereas Behn's assumption concerned public accountability, Mulgan focuses on private accountability and the role, responsibilities and expectations of accountability on an individual. In this context, where the focus is placed on an individual, 'accountability is concerned with the constraining of power'.¹⁷

External (vertical) accountability

The account is given to some other person or body outside the person or body being held accountable; it involves social interaction and exchange, in that one side, that

¹⁵ R.D. Behn, *Rethinking democratic accountability*, (2001) Printed by R.R. Donnelley and Sons, Harrisonburg, Virginia at 1.

¹⁶ R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000) 78 (3) *Public Administration* at 557.

¹⁷ R. Mulgan, *Holding power to account. Accountability in modern democracies* (2004) London, Palgrave MacMillan.

calling for the account, seeks answers and rectification while the other side, that being held accountable, responds and accepts sanctions; it implies *rights of authority*, in that those calling for an account are asserting rights of superior authority over those who are accountable, including the rights to demand answers and to impose sanctions.

The inclusion of sanctions in the core of accountability is contestable on the grounds that it may appear to go beyond the notion of 'giving an account'. On the other hand, 'calling to account', appears incomplete without a process of rectification.

Internal (horizontal) accountability

Internal accountability is variously described as 'professional'.¹⁸ Accountability in this sense goes across or within an institution rather than to a higher authority, and as such, might be associated with self-regulation: giving an account to one's peers rather than to an external or higher authority.¹⁹

Responsibility

Mulgan observes that '...'accountability' now commonly refers to the sense of individual responsibility...'²⁰ In fact accountability and responsibility are interlinked, so much so, that the terms seem interchangeable. Originally, however, '...'accountability' was usually seen as part of 'responsibility' (the external aspect), the position is now often reversed with 'responsibility' taken to be a part of 'accountability' (the internal aspect).²¹

¹⁸ R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000) 78 (3) *Public Administration* at 556.

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

A middle ground between the two seems to have emerged. 'Accountability' can then denote one set of responsibility/accountability issues, those concerned with the 'external' functions of scrutiny, such as calling to account, requiring justifications and imposing sanctions. This fits with the core senses of accountability, whilst 'responsibility' is left to cover the 'internal' functions of personal culpability, morality and professional ethics.²² This distinction allows 'accountability' to stand on its own, no longer under the wing of 'responsibility', and thus recognises its contemporary meaning, while still confining it to its original, and still most widely accepted, sense.

As an overview of Mulgan's discussion, external accountability seeks to investigate and assess actions taken (or not taken) by agents or subordinates and to impose sanctions. The extent to which individual agents or subordinates can fairly be held accountable for particular actions, particularly when it comes to the matter of sanctions, depends on whether they can be said to have been genuinely involved, in deciding those actions. Thus, external accountability and blame inevitably raise issues of individual choice and personal responsibility.²³

Control

As well as a discussion on responsibility and its relationship with accountability, Mulgan also asserts further extensions of accountability. The first of these being control and to what extent accountability can be a method of imposing control. Mulgan argues that the core sense of accountability is clearly grounded in the general purpose of making agents or subordinates are called to account and, if

²² Ibid

²³ M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* at 561.

necessary, penalised as means of bringing them under control. An example provided by Mulgan is that of public organisations and how in a democracy, it is because the people wish to control the actions of public officials that they make these officials answer, explain and accept sanctions.

'Control' in the broadest sense of making public agencies do what the public and their representatives want, accountability and control are intimately linked because accountability is a vital mechanism of control.²⁴ The challenge is creating an institutional framework, which embeds a control framework and allows for subordinates to hold 'superiors' accountable. This control framework feeds into compliance.

A further extension of accountability is responsiveness, which like control, refers to the aim of making governments accord with the preferences of the people. This involves the ability to anticipate needs, for example, it could possibly be an agency providing services to members of the public. O'Loughlin discusses the need to develop measures of accountability which include the extent to which officials anticipate the wishes of their superiors, thereby drawing attention to the importance of anticipated reactions by officials as part of the effect of scrutiny mechanisms.²⁵ That is, the effectiveness of accountability mechanisms is to be observed not simply in the occasions when officials are actually brought to account. Mulgan argues that

²⁴ R. Mulgan, R. 'Accountability: An Ever-Expanding Concept' (2000), 78 (3) *Public Administration* at 563.

²⁵ M.G. O'Loughlin, 'What is bureaucratic accountability and how can we measure it?' (1990) 22 *Administration and Society* at 283, in R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000) 78 (3) *Public Administration* at 567.

more importantly in securing compliance is the ever present threat of being called to account.²⁶

The final extension of accountability as discussed by Mulgan is dialogue, which can be present in amnesty arrangements to be discussed later (Chapter 3). 'Accountability is seen to be a dialectical activity, requiring officials to answer, explain and justify, while those holding them to account engage in questioning, assessing and criticizing'.²⁷ Further support for Mulgan's position comes from March and Olsen who place explanation and justification at the core of accountability, which should be pursued to provide a contested account.²⁸

Narrative

Accountability has been defined as 'a liability to reveal, to explain, and to justify what one does; how one discharges responsibilities, financial or other, whose several origins may be political, constitutional, hierarchical or contractual.'²⁹ In fact the provision of a narrative fits in with Mulgan's 'final extension of 'accountability''³⁰ in which he discusses the importance of creating a dialogue.

Scott also focuses on the providing of a narrative and the importance this has on accountability. Asserting that the term 'accountability' can be broken down into a series of questions: specifically, '..'who is accountable?'; 'to whom?'; and 'for

²⁶ R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000) 78 (3) *Public Administration* at 567.

²⁷ *Ibid* at 569

²⁸ J.G. March and J.P. Olsen, *Democratic governance* (1995) New York: Free Press, Chapter 5, in R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000) 78 (3) *Public Administration* at 569.

²⁹ E.L. Normanton, 'Public Accountability and Audit: A Reconnaissance' in Smith and Hague, *op. cit.*, n.1, 311, in C. Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* at 40.

³⁰ R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000) 78 (3) *Public Administration* at 569.

what?'...'³¹ And through the creation of a dialogue it becomes clear who is being called to account, who they are accounting to, and why.

The 'who' part could be a politician, a director of a company, an institution or an individual. The 'accounting to' part, which Bovens calls the 'forum', could be a court, government, shareholder or 'the people'. The 'why' part could be required due to poor performance, the breaching of responsibility in some way or acting in a way which goes against society's norms.

Separating the 'to whom' and 'for what?' we find three broad classes within each category. Thus accountability may be rendered to a higher authority ('upwards accountability'), to a broadly parallel institution ('horizontal accountability') or to lower level institutions and groups (such as consumers) ('downward accountability').

Whilst Ebrahim's Article focuses on the work of Non-Governmental Organisations and the complex nature of accountability, he describes documents used to provide a narrative such as reports and evaluations, as well as participation, as mechanisms of accountability.³² Furthermore, Ebrahim distinguishes between the mechanisms as either a tool or process.³³

Accountability tools refer to devices or techniques, which are often applied over a limited period of time and can be documented, for example, the creation and submission of financial statements, ledgers or reports to a forum. This links with the

³¹ C.Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* at 41.

³² A. Ebrahim, 'Accountability In Practice: Mechanisms for NGOs' (2003) 31(5) *World Development* at 815.

³³ Ibid

discussion on control by Mulgan and the importance of creating a mechanism for accountability.³⁴

On the other hand, process mechanisms such as participation and self-regulation are generally more broad and multifaceted than tools for achieving accountability. Process mechanisms emphasise a course of action rather than a distinct end result.³⁵ Ebrahim's discussion fits well with Scott's views on the importance of providing an account which feeds into a narrative.³⁶

Macro and Micro

With reference to Mulgan's article in which responsibility aligns with accountability, Nollkaemper discusses responsibility in relation to the state and the individual.³⁷ Nollkaemper jostles with a discussion on macro and micro accountability, which is a dichotomy which is perhaps well-suited to international justice and, more specifically, post-conflict states.

When addressing a breach of international law, Nollkaemper argues that the international community has two options. The first being the pursuit of individual responsibility and the second being that of state responsibility.³⁸ This introduces the concept of macro and micro accountability.

³⁴ R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000) 78 (3) *Public Administration* at 566.

³⁵ A. Ebrahim, 'Accountability In Practice: Mechanisms for NGOs', (2003) 31(5) *World Development* at 815.

³⁶ Ibid

³⁷ A. Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 (3) *The International and Comparative Law Quarterly* at 615-640.

³⁸ Ibid at 639

Sanction/punishment

Whilst acknowledging that accountability encroaches upon a plethora of areas including, health, education, government, commerce, Rubenstein identifies what she calls ‘...the “standard model” of accountability...’,³⁹ which involves holding another actor accountable and entails sanctioning that actor if it fails its obligations without a justification or excuse.

Rubenstein explores the relationship of ‘power’ with accountability. In a world filled with inequality Rubenstein argues that it is unlikely this “standard model” can really be achieved in a situation where the less powerful is trying to hold an individual or institution to account which is in a stronger and more powerful position. Such power imbalances result in the failure to provide what Rubenstein describes as standard accountability, so whilst in an ideal world the purest form of accountability is preferable, inequalities throughout the world means compromises must be made. This ‘standard model’ of accountability is the *ideal* and one which is extremely difficult to achieve, especially when it involves a more powerful actor. Therefore compromises are made as to what can realistically be achieved.

According to Behn, some commentators have a clear understanding of what accountability means: it means punishment.⁴⁰ This punishment can be a fine, prison sentence, the loss of one’s job, all of which are subject to the requirements of due process. In fact:

³⁹ J. Rubenstein, ‘Accountability in an Unequal World’ (2007) 69 (3) *The Journal of Politics* at 616.

⁴⁰ R.D. Behn, *Rethinking democratic accountability* (2001) Printed by R.R, Donnelley and Sons, Harrisonburg, Virginia at 3, see footnote 14 and 15.

‘...the punishment can also be the public humiliation of being grilled by a hostile legislator, of being sued by an aggressive lawyer, of being subpoenaed by an unctuous prosecutor, or of being defamed by an investigatory journalist – none of which requires much due process. When people find themselves in a position where they are being held to account, there are a variety of ways to hold them accountable to punish them.’⁴¹

Grant and Keohane claim accountability is concerned with ‘...’standards, information, and sanction’...’⁴² Interestingly not all commentators make reference to the need for a sanction or punishment. Whilst some commentators are indignant that sanction is a natural facet of accountability, others similar in their views to Behn⁴³, like Bovens⁴⁴ and Mulgan⁴⁵ question whether this actually entails punishment. Sanctioning is broader than the imposing of a fine or prison sentence, and in fact, mere judgment by a forum (without necessitating the need for punishment), the process of reporting and being questioned fits in with the sanction element of accountability. The sanctioning is an important part of accountability, but should not be confined to mean only a fine or imprisonment.

⁴¹ R.D. Behn, *Rethinking democratic accountability* (2001) Printed by R.R. Donnelley and Sons, Harrisonburg, Virginia at 3.

⁴² R.W. Grant and R.O. Keohane, ‘Accountability and Abuse of Power in World Politics’ (2005) 99(1) *American Political Science Review* 29-44, in J. Rubenstein, ‘Accountability in an Unequal World,’ (2007), 69 (3) *The Journal of Politics* at 618.

⁴³ R.D. Behn, *Rethinking democratic accountability* (2001) Printed by R.R. Donnelley and Sons, Harrisonburg, Virginia at 3

⁴⁴ M. Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13(4) *European Law Journal* at 451.

⁴⁵ R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (2003) Pelgrave in M. Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13(4) *European Law Journal* at 451.

On the whole there is no predisposition towards punishment within the main discourse around accountability, but the recurring focus is on providing a narrative.⁴⁶ An explanation for conduct or omissions, thereby explaining and being answerable.

What can be identified when discussing accountability is the dilemma of dealing 'with multiple and sometimes competing accountability demands'.⁴⁷ This often leads to some form of compromise, for example a report or statement which provides an account with reasons why someone has made an error, but where there is no call for a sanction, thereby working within the basic understanding of accountability of being able to explain and answer.

Summary

On the whole, the literature seems primarily concerned with providing a narrative, but Rubenstein raises, somewhat vehemently, the importance placed on sanctioning and punishing in order to hold someone or some institution accountable.

Revisiting Behn, he observed that the varied definitions of 'accountability' in their rawest forms ignore the concept of punishment.⁴⁸ Instead, they emphasise the responsibility to answer, to explain, and to justify specific actions (or inactions), in part by keeping records of important activities. This seems a stark contrast to some

⁴⁶ C. Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* 38-60.

⁴⁷ A. Ebrahim, A. 'Accountability In Practice: Mechanisms for NGOs' (2003) 31(5) *World Development* at 814.

⁴⁸ R.D. Behn, *Rethinking democratic accountability* (2001) Printed by R.R. Donnelley and Sons, Harrisonburg, Virginia at 4.

international lawyers and scholars who associate holding an individual or institution accountable with the sanctioning and punishment through fines or imprisonment.⁴⁹

According to Moore and Gates 'the terms of accountability are always changing'.⁵⁰ What Mulgan refers to as a 'chameleon-like term'.⁵¹ Lacking clarity and consensus as to the definition of accountability has resulted in the term being broad and open to manipulation to suit the many contexts in which accountability is sought. However, there are a number of key themes which appear within the literature. These include:

Public and Private divide

It is clear 'accountability' has both a public and private dimensions; governments, institutions and individuals. Generally when someone or something is 'answering to someone or something' it is to the state, government, people, international community (externally, vertically), or, peers, friends, people within the institution or community (internally, horizontally).

Narratives

Accountability involves keeping records of events, which in turn provides a useful narrative, an account of events.⁵² The providing of documentation, which Scott discusses the keeping of records of events and providing reports explaining what

⁴⁹ R.D. Behn, *Rethinking democratic accountability* (2001) Printed by R.R. Donnelley and Sons, Harrisonburg, Virginia at 4.

⁵⁰ Moore and Gates in R.D. Behn, *Rethinking democratic accountability* (2001) Printed by R.R. Donnelley and Sons, Harrisonburg, Virginia at 4.

⁵¹ R. Mulgan, 'Accountability: An Ever-Expanding Concept' (2000) 78 (3) *Public Administration* at 555.

⁵² C. Scott, 'Accountability in the Regulatory State' (2000) *Journal of Law and Society* 27(1) at 40.

has happened, helps add a control aspect to accountability through the provision of a narrative.⁵³

Macro and micro

Whilst acknowledging that Rubenstein muddies the water by emphasising the role of sanctions and the complexity of power imbalances in the pursuit of both macro and micro accountability, it is clear that sanctions do not have to be in the form of fines and imprisonment. Sanctions can take many different forms depending on the context in which they are imposed.

In acknowledging the common themes within the literature on accountability it remains clear that the term remains equivocal rather than univocal. The following chapter will discuss accountability and its' presence within international criminal justice and considers who is subject to explain their conduct or omission, to whom and why. The challenge for any accountability mechanism is how it can possibly deal with competing accountability demands which become even more complex in a post-conflict state.

⁵³Ibid

The previous chapter discussed the many contexts in which the term accountability is used. Accountability becomes ever more complicated in an international criminal justice setting since it is contentious in how this can be provided given the background of conflicts, which may be longstanding animosities, and the interest that the international community takes in restorative justice. This thesis will discuss the concept of accountability in the context of post-conflict societies. Concluding with a clear statement of what accountability is, and how (best) it is achieved when responding to atrocity.

'Accountability for the most serious crimes is a condition for stability and development.'⁵⁴ Out of the international community following the Nuremberg and Tokyo trials borne the idea of, and increased emphasis on, individual accountability. Chapter 1 addressed the issue of what accountability is, but this discussion is more focused on how it is achieved.

'Accountability measures that achieve justice range from the prosecution of all potential violators to the establishment of the truth.'⁵⁵ With this in mind, this thesis will focus on amnesties, truth commissions and formal criminal prosecutions to establish the extent to which accountability can be achieved within each mechanism. The ascertainment of the truth, to seeking of the justice and providing redress are the essential ingredients of dealing with wrong-doing in a post-conflict society.⁵⁶

⁵⁴ International Federation for Human Rights, ICC Review Conference: Renewing Commitment to Accountability May (2010) at 19 last accessed 13/11/12 via: <http://www.fidh.org/IMG/pdf/KampalaCPI543a.pdf>

⁵⁵ M.C. Bassiouni 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59(4) *Law and Contemporary Problems* at 19.

⁵⁶ Ibid

It is also the case that accountability can be achieved through lustration, truth seeking and reparations.⁵⁷ In fact one of the main issues when addressing accountability is separating what people - and by people I mean victims and the wider society - want to achieve and how this should be done. Another aspect concerns the international community and how these ideas of accountability fit with its' own understanding. Reparations, for example, can be through apologies, restitution, compensation, rehabilitation, satisfaction and guarantees that history will not repeat itself.

International criminal justice systems are set up in post-conflict situations, or sometimes even during an on-going conflict. They are often established in respect of States in transition where domestic criminal justice may be inadequate due to a variety of factors, which include mass scale atrocities committed in the course of conflict, the collapse of the domestic legal infrastructure, and/or its inability to conduct trials in a fair and open process. When a conflict is still fresh, the domestic legal system is often unwilling or unable to address past atrocities.⁵⁸ This thesis will discuss whether perpetrators can be held accountable and whether a formal prosecution is required.

A post-conflict society is often in a place of heightened political disorder tasked with addressing unhealed wounds. The complexity of such a situation causes conflict between possible short-term and long-term goals. Short-term goals revolve around the cessation of hostility and establishing a forum for addressing the conflict. Long-

⁵⁷ Ibid

⁵⁸ Ibid

term goals encompass continued peace and reconciliation within the affected State along with regional stability and good constitutional and international order.

'The key route to accountability has historically been through individualised criminal responsibility'.⁵⁹ Thereby using criminal trials to provide accountability and in a time of heightened awareness on the importance of accountability and the need to end impunity, Robinson states that many view 'prosecution is of the highest importance'⁶⁰ in providing accountability.⁶¹ However, such commentators seek to address human rights abuses using the criminal law. The unique and complex nature of dealing with atrocity requires a pluralised approach. This means, instead of always reverting to law and the use of criminal trials, alternative methods should be used where appropriate. Responses to atrocity in a post-conflict society to move beyond the dominance of the criminal law as a one size fits all approach and should be context specific. Boraine states '[i]t would be regrettable if the only approach to gross human rights violations comes in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights.'⁶² In fact, supporters of the International Criminal Court (ICC) and individual accountability have suggested that there should be some scope for the ICC to defer to alternatives, such as truth commission initiatives, where such initiatives are legitimate and necessary

⁵⁹ L. Mallinder and K. McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies' (2011) 6(1) *Contemporary Social Science* at 110.

⁶⁰ D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14(3) *European Journal of International Law* at 481

⁶¹ Ibid at 481-505

⁶² A. Boraine, *A Country Unmasked: South Africa's Truth and Reconciliation Commission* (2000), in D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,' (2003) 14(3) *European Journal of International Law*

mechanisms for a transition from repression or violence to a stable democracy.⁶³ Issues are raised surrounding what is meant by *legitimate* and how such initiatives could be implemented.

The issue is if, and how, 'legitimate' can be distinguished from Boraine's 'no blatant disregard to fundamental human rights'. Legitimate is concerned with the legal, moral and political dimensions which provide a mechanism with legitimacy. On the other hand, that might not be easily distinguishable from an amnesty that, while domestically and internationally contentious, does not appear to represent a 'blatant disregard for human rights'.

Drumbl discusses the establishment of a norm in how the international community seeks to provide accountability for international crimes.⁶⁴ This norm is what Drumbl calls the 'reflex response of international criminal trials'.⁶⁵ In this legal context, criminal trials fit within this norm as the best forum to address this level of wrongdoing. Accountability determinations proceed through adversarial, third party adjudication conducted in judicialised settings by putatively neutral judges where the individual is constructed as the central figure. This in turn leads to a number of select guilty individuals being blamed for systemic levels of violence. When it comes to sanction and sentencing the creativity of the response is limited by the criminal law, specifically, to imprisonment. Thereby the perpetrator of crimes such as

⁶³ D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14(3) *European Journal of International Law* at 482.

⁶⁴ M. Drumbl, *Atrocity, punishment, and international criminal law*, (2007) Cambridge University Press at 205 -209

⁶⁵ Ibid

genocide being treated no differently than a perpetrator of armed robbery in those countries which adhere to such sentencing models domestically.

Henham's research focuses on punishment and sentencing in international trials and has stated that often the sentences imposed do not reflect the gravity of the crime.⁶⁶ Moreover, it would be impossible for the gravity of such heinous crimes to be fully reflected in penal policy.

A major concern for Drumbl is that the preference for criminalisation has prompted scepticism toward alternative mechanisms in the quest for justice.⁶⁷ Drumbl calls for reform and the expansion of the meaning of justice, and in turn, international criminal justice to be pluralised to move beyond the law. Accountability in this somewhat rigid legal framework may have a shared value, but pluralism suggests that the process of accountability could very well take different forms in different places. Drumbl firmly believes there is no one size fits all solution and there should not be either because of the complexity of issues and demands placed on a post-conflict society.⁶⁸

In his article, Cleary refers to the general definition of accountability and discusses how the term can be divided into someone being *answerable* for their conduct and being able to *explain* their actions. Cleary makes a bold, but true statement in that 'we are all accountable.'⁶⁹

⁶⁶ R. Henham, 'Some Issues for Sentencing in the International Criminal Court (2003) 52 *International and Comparative Law Quarterly* 81-114.

⁶⁷ M. Drumbl, *M. Atrocity, punishment, and international criminal law*, (2007) Cambridge University Press at 209.

⁶⁸ Ibid

⁶⁹ E.J. Cleary, 'Accountability,' (2002) 59 *Bench & Bar of Minnesota* at 6.

The shift towards individual accountability in international criminal justice can be traced back to the Nuremberg and Tokyo Trials following the Second World War. 'Never again', were the words uttered, would this happen, whilst the trials sought to hold the most senior perpetrators accountable. The trials provided a model which combined adversarial trial with inquisitorial pre-trial submissions. An adapted version of this model was used as a template for the Ad Hoc Tribunals in the Former Yugoslavia and Rwanda. The merit of the model is forensic engagement with evidence in order to provide a fair trial; the downside is the length of trials and a seeming detachment from restorative practices, which is the viewpoint of many commentators including Drumbl,⁷⁰ Mallinder and McEvoy.⁷¹

Whilst '...there is an increasing recognition of accountability as a norm in international law'⁷² the international community generally relies upon five alternative ways of responding to atrocity. Firstly, the international community may do nothing, perhaps on political grounds, which is surely the antithesis of providing accountability. Second, grant amnesty, which according to Scharf can provide a short-term answer to settling conflicts and a mechanism the international community can utilise or allow a state to use for the cessation of hostility facilitating the transition to democracy.⁷³ An example provided by Scharf is the mass murder of civilians by military leaders in Haiti. The military leaders were persuaded to step down from

⁷⁰ Drumbl, M. *Atrocity, punishment, and international criminal law*, (2007) Cambridge University Press.

⁷¹ Mallinder, L. and McEvoy, K. 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies', (2011) 6(1) *Contemporary Social Science* 107-128.

⁷² M.C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability,' (1996) 59(4) *Law and Contemporary Problems* at 19.

⁷³ Scharf, M.P, 'Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide' (1999) 52(2) *Journal of International Affairs* at 624.

power to allow a democratically elected government take office, which was facilitated by the United Nations and was the 'only valid framework for the solution of the crisis in Haiti'.⁷⁴ Scharf also observed, '[i]n the short run, the amnesty achieved more for the restoration of human rights in Haiti than what would have resulted by insisting on punishment and risking political instability',⁷⁵ thereby illustrating the potential usefulness of amnesties.

Third, the international community may seek to establish a truth commission (also called a truth and reconciliation commission, as in South Africa. Fourth, the international community may assist domestic prosecutions, through funding or help with resources. Fifth, to pursue the investigation and prosecution of alleged perpetrators within an international arena.⁷⁶ Often the decision rests on the political motivations at the time. Scharf provides an example and states that 'Cold War politics'⁷⁷ were to blame for the lack of engagement in Cambodia, at the time, and immediately following the conflict where it is estimated 'two million people were butchered.'⁷⁸ Whilst Scharf criticises the international community's lack of immediacy in their responses to atrocity and cites Cambodia's killing fields as an example.⁷⁹

The varied responses from the international community highlight the multi-faceted dimension of accountability. Mendez states accountability '...has legal, ethical, and

⁷⁴ *Statement of the President of the Security Council*, U.N. Doc. S/INF/49 (New York: United Nations, November 1994), in Scharf, M.P., 'Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide' (1999) 52(2) *Journal of International Affairs* at 624.

⁷⁵ M.P. Scharf, 'Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide,' (1999) 52(2) *Journal of International Affairs* at 624.

⁷⁶ *Ibid* at 622

⁷⁷ *Ibid* at 621

⁷⁸ *Ibid*

⁷⁹ *Ibid*

political dimensions, and it is imperative to recognize and tackle all three.’⁸⁰ Moreover, Mendez asserts much of the discussion takes place in the context of transitional justice, but should also be seen to provide a solution to conflict. ‘Ending conflict situations presents political challenges to accountability issues that are not present in transitions to democracy.’⁸¹

Expectations and the tension with reality

Rather poignantly, Bassiouni states that ‘no single formula can apply to all types of conflicts nor can it achieve all desired outcomes.’⁸² Suggesting a variety of mechanisms should be used to provide accountability depending on the context in which it is being sought. Bassiouni is also stating a cautionary tale of what such mechanisms can realistically achieve. It may not be possible to achieve the standard model of accountability.

Accountability has a number of dimensions, specifically, legal, ethical and political.⁸³ Additionally, States are under an obligation to hold perpetrators to account for the sake of victims and the wider society.⁸⁴ This seemingly stems from the human rights movement that has created two positions: *legalistic* and *moralistic* positions. There is a tendency for international criminal justice to take a legalistic view under the auspices that it touches upon both the ethical and political dimensions and by doing so adopts a *top down* approach when dealing with atrocity.⁸⁵ Doak observes that

⁸⁰ J.E. Méndez, ‘Accountability for Past Abuses’ (1997) 19 *Human Rights Quarterly* at 256.

⁸¹ *Ibid* at 257

⁸² M.C. Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability,’ (1996) 59(4) *Law and Contemporary Problems* at 23.

⁸³ J.E. Méndez, ‘Accountability for Past Abuses,’ (1997) 19 (2) *Human Rights Quarterly* at 256.

⁸⁴ *Ibid*

⁸⁵ *Ibid* at 257.

international justice focuses predominantly on retribution, which means it falls short in achieving restorative elements.⁸⁶

States have a number of choices available: either the state adopts a punitive stance and pursues formal criminal trials or decides to adopt less punitive means, for example, a truth commission. However, such mechanisms are not mutually exclusive.⁸⁷

Truth

‘Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process’.⁸⁸

There is an increasing amount of commentary within the international fora around the importance of truth and the role it plays in the aftermath of atrocity and its significance in providing accountability. Victims, their loved ones and the wider society are entitled to the ‘truth’ and an increased emphasis on truth-telling as a means of providing a historical record and the addressing of past wrongdoing. This emphasis perhaps originates from the increasing credence provided to transitional justice. It seems ‘truth’ can provide reconciliation and enable a state to start a new chapter by providing answers and moving on. Indeed, any mechanism for

⁸⁶ J. Doak, ‘The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions’, (2011) 11 *International Criminal Law Review* 263-298.

⁸⁷ J.E. Méndez, ‘Accountability for Past Abuses,’ (1997) 19 (2) *Human Rights Quarterly* at 255-282.

⁸⁸ UN Doc. S/RES/827, 25 May 1993, Record on Debate of Resolution 827, published in V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, A Documentary History and Analysis*, (1995) (Volume 2 Transnational Publishers 185 (Ms Albright, United States of America)).

accountability which fails to provide truth should be perhaps considered mere tokenism. Moreover, Zalaquett stated truth is a requirement for legitimacy and provides for the establishment of the facts thereby holding someone to account.⁸⁹

Krauthammer argued that 'truth is always preferable to justice'.⁹⁰ This suggests a compromise may have to be reached, but through the process of ascertaining the truth, it in turn, satisfies elements of justice. It is a precondition of legitimacy that any process of accountability should include truth telling.⁹¹ In fact, a trial without truth telling violates due process equating justice with equal participation, as a party and witness.

'One of the primary means to find closure and overcome trauma and anxiety is through account-making'.⁹² This requires the creation of a narrative concerning the atrocity, which will require all parties engaging in a process of truth telling and leads to the writing of an accurate narrative. This process and provision of a narrative perhaps links the process of truth ascertainment with justice.

'It is sometimes asserted that for victims of crime and serious human rights violations, storytelling – whilst usually a painful process – can be valuable and empowering in the longer term by helping restore a sense of esteem and self-

⁸⁹ J. Zalaquett, *Dealing with the Past: Truth and Reconciliation in South Africa*, 51 Alex Boraine et al. eds., (1994) in J.E. Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* at 268.

⁹⁰ J.E. Méndez, 'Accountability for Past Abuses', (1997) 19 *Human Rights Quarterly* at 268.

⁹¹ J. Zalaquett, *Dealing with the Past: Truth and Reconciliation in South Africa*, 51 Alex Boraine et al. eds., (1994) in J.E. Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* at 268.

⁹² J. Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 *International Criminal Law Review* at 269.

worth'.⁹³ In the short-term this could perhaps re-traumatise victims and/or their families, but is important for the process of reconciliation.

The increased significance of truth commissions within a post-conflict state as a means of addressing past wrongdoing has led to the importance of truth and the role it plays in providing accountability. Truth can achieve accountability and promote justice by imposing moral condemnation and offering specific recommendations for reform. Méndez raised concerns with the arguments articulated by commentators such as Krauthammer, Pastor and Forsythe as he asserts they are proponents of trading justice for truth. Such commentators argue the 'trading' of justice is needed because they confine justice to mean the prosecution and subsequent punishment of perpetrators, but justice in the context of a post-conflict society is much broader than equating wrong-doing to punishment. Indeed, '...the public expects the truth telling to be a step in the direction of accountability, not a poor alternative to it.'⁹⁴ Whilst not requiring punishment it perhaps requires lustration. Lustration is concerned with the removal of politicians who have been complicit in international crimes.⁹⁵ This process can effectively remove corrupt individuals from positions of power and influence as a form of punishment.

Understanding the importance of truth requires an appreciation of the quality of the truth that is to be uncovered. In fact '...what will be the quality of the truth that is established? Will one be forced to make negative comparisons between the

⁹³ J. Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 *International Criminal Law Review* at 270.

⁹⁴ J.E. Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* at 269.

⁹⁵ R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2010) Cambridge University Press at 575.

commission's truth and judicial truth or historical truth?'⁹⁶ Discussion around establishing the truth within a truth commission and a trial will be discussed in later chapters, but as a starting point it is important to recognise that truth commissions provide a forum for the truth to be told and an opportunity for victims, families and witnesses to state their account of events. Whilst there is criticism regarding the full extent of the truth achieved through a trial, Mendez states truth 'established has a "tested" quality that makes it all the more persuasive.'⁹⁷

Teitel's view is that '[i]t is sufficient that a few well-published trials are held at which the "truth" of the past is demonstrated, the victims' voices are heard and the moral principles of the (new) community are affirmed.'⁹⁸ No matter how detailed these limited number of case reports are, they are unlikely to provide a full, and truthful, account. They may help provide a background, but often in trials, defendants will only reveal that which has already been uncovered. A fully truthful account is unlikely where it is likely to worsen the situation for the defendant. It is also unlikely that all the victims of atrocity will have their day in court for practical purposes.

A number of commentators fail to appreciate the complexity of dealing with a post-conflict society and the important role 'truth' plays, but Sooka discusses reconciliation in her article on accountability and argues that in order to reconcile a state the process requires support from members within the affected society, factual

⁹⁶ A. Perreira, 'South Africa's Road to Healing Paved with Problems' in *LEXIS News Library*, CURNWS File (11 April 1996) in M.P. Scharf, 'Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide,' (1999) 52(2) *Journal of International Affairs* at 627.

⁹⁷ J.E. Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* at 278.

⁹⁸ R.G. Teitel, *Transitional Justice* (2000) Oxford University Press at 51-59 in M. Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1-35.

knowledge and an acknowledgement of past wrongdoing.⁹⁹ Therefore demonstrating the significant role 'truth' plays in the process of reconciliation, but also in relation to providing answers and explanations.

Whilst it is acknowledged that truth is an essential part of providing accountability, there is an issue with 'plurality of truths' or whether 'one shared truth' needs to be reached. Any mechanism to provide accountability will include some route to the truth. The issue is determining the best way to establish an accurate, a truthful, account of the conflict. There are inevitably competing narratives generated by conflict, and truth commissions allow them to be heard without necessarily reconciling them. Prosecutions do sometimes attempt to make an authorised narrative but they are instrumental too as truths are necessary for prosecutions. Amnesties have the potential to allow peace, which can be a precondition, certainly for conditional amnesties (Chapter 3), of an open and honest debate which feed into the provision of a narrative.

The only possible truth that would have legitimacy and be acknowledged as accurate is one that is produced with the involvement of all parties. The end result would then reflect a 'collective truth', however, this is subject to the assumption that participants in the process have fully disclosed their involvement and have provided an accurate account. There is also a requirement the 'truth' is obtained through a transparent process, which treats all voices equally.

⁹⁹ Y. Sooka, 'Dealing with the past and transitional justice: building peace through accountability' (2006) 88(862) *International Review of the Red Cross* 311-325.

Justice

'In examining accountability, one confronts a moral imperative for punishment, deterrence, and some form of healing for victims; a legal landscape lacking any comprehensive criminal code and enforcement architecture; and a political environment in which governments and domestic constituencies have sharply differing ideas of both the definition of justice and the costs of administering it to all offenders.'¹⁰⁰

The word 'justice' is a difficult one to define, especially in an international context, with the varied cultures and understandings of what is meant by the term and how it can, and should be, achieved. Is justice achieved through a punitive approach, the arrest, charge, prosecution and conviction of perpetrators? This may provide justice for individual victims and their family, but in a post-conflict society it is also important to provide justice for the wider community.

Clark argues '...justice entails far more than simply retribution'.¹⁰¹ Therefore, justice is something which cannot be satisfied purely through a criminal trial.¹⁰² Slye seeks to determine how justice is achieved. Justice is providing victims with truth, a right to judicial protection and reparations.¹⁰³ Perhaps a restorative amnesty, which is a conditional amnesty sitting within a transitional context would fit within this framework.

¹⁰⁰ S.R. Ratner, J.S. Abrams and J.L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, (2009) 3rd Edition, Oxford University Press at 2.

¹⁰¹ J.N. Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' (2011) 9 *Journal of International Criminal Justice* at 521.

¹⁰² Ibid

¹⁰³ R.C. Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law Association* at 173.

The Peace and justice debate often confines justice as a legalistic concept. However, the literature is increasingly acknowledging that justice is needed before peace can become a reality.¹⁰⁴ For example, Clark states '...the ICTY is essentially an instrument of peace: the criminal prosecution of persons responsible for serious violations of international humanitarian law is regarded as being central to the peace process in the former Yugoslavia'.¹⁰⁵

According to Mendez, it is important for the international community to see justice is done.¹⁰⁶ In fact '[t]he pursuit of justice and accountability fulfils fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts'.¹⁰⁷ This returns to the very heart of justice, what it means, and how it is achieved, thereby focusing on substantive justice (the best outcome) with procedural justice (the best process).

Justice also requires reconciliation as it:

'is critical to the construction and maintenance of peace. Reconciliation in this context does not mean that victims must forgive their wrongdoers, or that

¹⁰⁴ J.N. Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' (2011) 9 *Journal of International Criminal Justice* at 539

¹⁰⁵ G.T. Blewitt, 'The International Criminal Tribunal for the Yugoslavia and Rwanda', in M. Lattimer and P. Sands, (eds), *Justice for Crimes Against Humanity* (2006) Oxford: Hart Publishing 145-160, at 146. in J.N. Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' (2011) 9 *Journal of International Criminal Justice* at 539.

¹⁰⁶ J.E. Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* at 270.

¹⁰⁷ M.C. Bassiouni, 'Justice and Peace: The Importance of Choosing Accountability Over Realpolitik' (2003) 35 *Case Western Reserve Journal of International Law* at 192.

victims and offenders must enjoy friendly relations, but it does require that hostilities be defused and that citizens find a way of peacefully coexisting'.¹⁰⁸

The restoration of democratic processes and the provision of social and political stability is a precondition of accountability. Establishing the rule of law will involve institution building as well as political transformation and establishment of good governance. The term 'governance' is being used as a collective term which focuses on a number of concepts. These include reconciliation and reparation within a state following a period of conflict and the political transition to be undertaken. It is important to note that the risk of atrocity occurring is heightened 'when countries are in upheaval and/or the political conditions are unstable'.¹⁰⁹

The role states themselves play in the process is also important. It also creates dynamics within which accountability plays an important role. States are often aggressors themselves and commit atrocity¹¹⁰ thereby, acting as a catalyst for a culture of impunity. The United Nations has developed four 'rule of law' indicators to assist states recovering from a period of conflict.¹¹¹ The rationale behind the indicators is that the establishment of rule of law is an essential aspect of governance and is required to build an effective criminal justice system.

¹⁰⁸ D. Roche, 'Truth Commission Amnesties and the International Criminal Court' (2005) 45 *British Journal of Criminology* at 573.

¹⁰⁹ C.C. Joyner 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59(4) *Law and Contemporary Problems* at 162.

¹¹⁰ M.C. Bassiouni, 'Justice and Peace: The Importance of Choosing Accountability Over Realpolitik' (2003) 35 *Case Western Reserve Journal of International Law* at 191.

¹¹¹ The United Nation's Four Rule of Law Indicators accessed via: http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf

To facilitate transition following a period of conflict, it requires what Sooka calls, the 'ownership of the process.'¹¹² It falls to the government to implement any mechanism being used to hold perpetrators accountable. It is also important for whichever path to accountability is pursued that civilians participate in order for democracy to prevail.

Ensuring public participation within a democratic process will provide an institution with legitimacy. In fact, the issue of accountability is not only concerned with holding perpetrators accountable, but also the mechanism/institution established to provide accountability.¹¹³

'One must.....take a sober and realistic view of political constraints in proposing accountability measures.'¹¹⁴ However, this does not automatically result in realpolitik and surrender of accountability. In fact, it is possible to argue that the pursuance of truth and justice is not only the right thing to do, but also politically desirable because it goes a long way toward realizing the idea of democracy.

Koskeniemi discusses the expectations of victims and poignantly states that victims 'do not so much expect punishment (though of course that is not insignificant) but rather a recognition of the fact that what they were made to suffer was "wrong", and that their moral grandeur is symbolically affirmed.'¹¹⁵ This does not only satisfy the

¹¹² Y. Sooka, 'Dealing with the past and transitional justice: building peace through accountability' (2006) 88(862) *International Review of the Red Cross* at 314.

¹¹³ Ibid

¹¹⁴ J.E. Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* at 256.

¹¹⁵ M. Koskeniemi, 'Beyond Impunity and Show Trials' (2002) 6(1) *Max Planck Yearbook of International Law* at 11, in C. McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?' (2012) *Journal of International Criminal Justice* at 371.

need to answer and explain for individual conduct, but through this process the victims and wider community are acknowledged.

Recognition

Maintaining the focus on being able to explain conduct and provide answers the final addition to this chapter is recognition. Martineau et al discuss the theories of recognition and based on Taylor's publication state that '...recognition is not just a courtesy we owe people, but 'a vital human need'.¹¹⁶

'The term "recognition" may be said to be comprised of two quite distinct acts: a political act and a legal act'.¹¹⁷ Whilst in his article Kelsen uses his understanding of recognition in relation to states, it also provides a good starting point for the recognition of grave wrongdoing of international crimes.¹¹⁸

Recognition has at least two dimensions which are political and legal. Political nature of recognition is concerned with story-telling and the creation of a narrative as well as recognising an individual's status as a victim who has a right to be heard and participate, even if the victim is not owed a conviction. Legal recognition can be provided through criminal trials and the acknowledgement of crimes and victims by a court. It is also possible to provide legal recognition through the use of alternative mechanisms, which provide opportunities to acknowledge the wrong-doing. As well

¹¹⁶ C. Taylor, *The Politics of recognition*. In *Multiculturalism and the politics of recognition*, ed. A. Gutmann, (1994) at 25-73. Princeton: Princeton University Press, in W. Martineau, N. Meer and S. Thompson, 'Theory and Practice in the Politics of Recognition and Misrecognition' (2012) 18 *Res Publica* 1-9.

¹¹⁷ H. Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35(4) *The American Journal of International Law* at 605.

¹¹⁸ Ibid

as the criminal law, it is also possible to provide redress and recognition through the use of civil courts.

In her Article, McCarthy observes the inherent predisposition of international criminal justice with prosecuting and punishing perpetrators of international crimes and in so doing fails to provide the necessary redress for victims.¹¹⁹ Recognition goes some way to address this issue.

For the purposes of this discussion, recognition in an international criminal justice context can be divided into three distinct sub-categories. These include reparation, participation and stabilisation through the rule of law. Recognition in the context of a post-conflict society is concerned with the re-establishment of people as citizens.

The very nature of the types of conflict that fall within the clutches of international criminal justice means that there will be large numbers of both perpetrators and victims. The broader issue is whether accountability should focus on the perpetrators of crimes, but with the sheer number of individuals to be held accountable, and the devastation caused by the conflict, this seems an insurmountable task.

The importance of reparation also burdens and tests the political might of a new government. As stated 'a well-designed reparations program contributes to justice precisely because reparations constitute a form of recognition...'¹²⁰

¹¹⁹ C. McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?' (2012) 10 *Journal of International Criminal Justice* 351-372.

¹²⁰ P. de Grieff, 'Reparations Efforts in International Perspective: What Compensation Contributes to the achievement of Imperfect Justice,' (unpublished paper) at 34 in Sooka, Y. 'Dealing with the past

'Victims need to have their victimisation acknowledged, the wrongs committed against them decried, and the criminal perpetrators, or at least their leaders, punished, and compensation provided for the survivors'.¹²¹ This acknowledgement may also be associated through the provision of reparations, as Bassiouni states, 'victim compensation is a necessity'.¹²² While acknowledging that compensation does not necessarily have to be monetary, any form of compensation would fall within the recognition subheading. In order for victims to be compensated, victims will need to be acknowledged and thereby recognised by a court or some other entity as being victims of the atrocity.

Recognition encompasses various actors, the State (Government), the wider society, individual victims and of groups on the grounds of ethnicity, race, religion or gender.. However, it is questionable as to the extent to which all three actors can benefit from recognition. Mechanisms designed to provide redress and recognition would perhaps provide a domino effect. Recognition through political participation is extremely important and plays a significant role in the wider restorative process.

The political aspect is hugely important as well as the process of lustration. It is vital for a state to move through a difficult transitional period with a view to restoring its' community and maintaining peace that, for example, the new Government acknowledges past wrongdoing. Again, this may not necessarily be through criminal trials, but through lustration or establishing a process or mechanism to recognise

and transitional justice: building peace through accountability,' (2006) 88(862) *International Review of the Red Cross* at 320.

¹²¹M.C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability,' (1996) 59(4) *Law and Contemporary Problems* at 26.

¹²² *Ibid* at 22

and acknowledge the past. This creates another dimension of recognition, which does rely on the law.

Overall, atrocity has a number of key stakeholders: victims, perpetrators, the state and the international community. Whether a prosecution, truth commission or national amnesty is implemented, or a combination of these to address atrocity, they are tasked with resolving often deep rooted hostility with an abundance of complexity.

Summary

The discussion so far has established that accountability has many dimensions and meanings. In its' rawest form, accountability means to *answer* and *explain*. This chapter has asserted that, in an international criminal justice context, three fundamental requirements need to be satisfied to provide accountability: truth, justice and recognition. In the forthcoming chapters, the discussion will develop these three requirements in the context of amnesties, truth commissions and prosecutions.

Chapter Three: Amnesties: the antithesis of accountability?

The origin and complexity of conflict provides a State with extraordinary challenges in respect of moving forward after a period of sustained conflict. The broader question is whether or not alternatives, such as amnesties can facilitate such periods of transition. Amnesties are inherently political and have been used to both help cease hostility and in post-conflict societies. This chapter explores the political nature of amnesties, but limits itself to the discussion of conditional amnesties (see below), not blanket amnesties.

Amnesty is the promise of suspending criminal and civil justice measures and ignoring certain crimes, for utilitarian purposes. Ergo, on strictly consequentialist and mathematical grounds (i.e. the greatest happiness for the greatest number), amnesties often have strong *moral* justification. This can be contrasted with the other major theory of morality, deontology, which would dictate that there is a *duty* to respond to wrongdoing with a punitive response regardless of its (dis)utility.

An amnesty, like 'amnesia', comes from the Greek word 'amnestia', meaning 'forgetfulness' or 'oblivion'. From a legal perspective, amnesty laws have traditionally been understood as extraordinary legal measures designed to eliminate the record of past crimes by barring criminal prosecutions and/or civil suits for designated persons or crimes.¹²³ In this context, amnesties seem to be the antithesis of accountability. As discussed in Chapter 2, accountability in the dominant legalised context requires prosecution and punishment. Moving beyond

¹²³ Defining Amnesty Laws, Queen's University Website, last accessed 12 November 2012 at: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/DefiningAmnestyLaws/>

this definition it is important to understand amnesties in context to fully appreciate the appropriateness of such a mechanism.

Many commentators argue that amnesty falls short of providing accountability. As will be explored, it is possible for some amnesties, such as conditional amnesties to provide truth, stabilisation and end the cycle of conflict.

Amnesties have long served as a response to atrocity in both conflict ridden and post-conflict states.¹²⁴ Whilst some controversial unconditional amnesties, also referred to as blanket amnesties, which have dominated literature and been fuel for the fire for critiques of amnesty laws.¹²⁵ Unconditional amnesties were often granted automatically and unconditionally to specified groups of offenders. The amnesty would simply require the police and prosecutors to refrain from investigating and prosecuting crimes which fall within the remit of the amnesty.

According to Mallinder and McEvoy, who have undertaken empirical research into the use of amnesties, implementation processes can take many forms.¹²⁶ One form includes the use of national courts who decide whether or not the defendant is eligible for the amnesty. Where the court decides an amnesty should be granted to an individual the case is closed.¹²⁷

There are also conditional amnesties, amnesties for which implementation processes are put in place thereby making the amnesty limited and conditional.

¹²⁴ L. Mallinder and K. McEvoy 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies,' (2011) 6(1) *Contemporary Social Science* at 120

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Ibid

Mallinder and McEvoy state the implementation process for conditional amnesties 'must be established to determine who is eligible for amnesty'.¹²⁸

Advisory bodies report back to the executive following a period of investigations and submit a list of people for whom they recommend that amnesty is granted.¹²⁹ It is then at the discretion of the head of state whether or not to grant amnesty in accordance with the recommendations.

Some amnesty processes provide for the creation of an amnesty commission, which can be government bodies as in Uganda, or can be independent entities as in South Africa. Dependent on their mandates, amnesty commissions can grant or recommend amnesty which can be on the basis of certain individuals or groups, as well as for particular crimes committed within a certain period.¹³⁰

In addition to the issues raised by individual accountability, these processes themselves are also subject to a form of accountability. The decision to grant amnesty must be in accordance with the amnesty law and as a consequence the decision needs to explain the rationale behind granting an amnesty. In fact, it is important the decision makers explain the decision to grant amnesty to adhere to a fair and transparent process. Of course decisions of this nature are subject to scrutiny from victims themselves, support groups, the media and scholars.¹³¹

¹²⁸ Ibid

¹²⁹ J. Sarkin, *Carrots and sticks: The TRC and the South African amnesty process* (2004) Antwerp, Intersentia, in L. Mallinder and K. McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies,' (2011) 6(1) *Contemporary Social Science* at 120.

¹³⁰ L. Mallinder and K. McEvoy 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies' (2011) 6(1) *Contemporary Social Science* at 120.

¹³¹ Ibid at 121

Decisions to grant amnesty have a wider impact on the community as a whole. Individuals granted amnesty may well have difficulty in reintegrating within a society, which will likely contain victims or their families, thereby creating further complications for reconciliation.¹³² As part of its remit, the commission may also play a role in this important reintegration process.¹³³ This also provides victims with the opportunity to challenge decisions made before a court.¹³⁴

The controversy surrounding amnesties has increased with the improved awareness of human rights issues and recognition of international criminal law. In this legal context which equates accountability with prosecution and punishment, amnesties are viewed as allowing impunity. However, the broadening of accountability beyond this legal context and referring back to the broader contexts of accountability, as mentioned in Chapter One, affords certain amnesties with an opportunity to provide accountability. As Bovens has argued, accountability has come to serve as a term which covers various distinct ideas such as 'transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity.'¹³⁵

The determination to hold individuals accountable during what can only be described as a delicate transition from conflict or a dictatorship to a new regime requires a broader interpretation of accountability. Focusing on accountability in a broader

¹³² Ibid

¹³³ Ibid at 120

¹³⁴ Ibid at 121

¹³⁵ M. Bovens, 'Analysing and assessing accountability: a conceptual framework' (2007) 13(4) *European Law Journal* at 449.

sense will allow 'amnesties to play a more constructive role in post-conflict justice and peacemaking'.¹³⁶

'Sometimes [amnesty] may simply be an unavoidable political reality, dictated by the need to bring an end to conflict. To be sure, many amnesties given to tyrants in recent decades are vulnerable to severe criticism. But it is too absolute to rule them out altogether.'¹³⁷

The political nature of amnesties cannot be understated. In fact, Mallinder states '[a]mnesty laws have a long history of being used as political tools to stem violent conflict or facilitate negotiated transitions'.¹³⁸ The political usefulness of amnesties does not necessarily lie within truth and justice, but in the potential stabilisation of a state. As previously discussed, full accountability for atrocity can rarely be achieved.

There have been two important developments in international law that have caused many to question the use of amnesties. Firstly, the international community has recently established that it will hold at least some violators of international law accountable for their actions. This is evidenced by the United Nations' (UN) creation of the international war crimes tribunals, with the sole purpose of prosecuting perpetrators of crimes committed in the former Yugoslavia and Rwanda. Subsequently, the UN has set up a special court in Sierra Leone. More recently, the International Criminal Court (ICC) has been established and designed to prosecute

¹³⁶ L. Mallinder and K. McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies' (2012) 6(1) *Contemporary Social Science* at 109.

¹³⁷ Final Report of the Truth & Reconciliation Commission of Sierra Leone, Vol. 1, ch 1, para 79, L. Mallinder, 'The Role of Amnesties in Conflict Transformation' in *The Effectiveness of International Criminal Justice*, Cedric Ryngaert (ed.), International Law, Volume 3, August, 2009 at p.280.

¹³⁸ Ibid.

crimes under international law.¹³⁹ In light of these developments many world leaders, international lawyers and human rights activists now believe it is not acceptable to allow perpetrators of atrocity to go unpunished. Prosecution and punishment, they argue, is essential to eliminate the notion of impunity and to deter current and future leaders from committing similar crimes.¹⁴⁰ This assumes the use of criminal law is capable of carrying out prosecutions and acts as a deterrent.

Despite the increasing recognition of fundamental human rights and the accompanying demand to bring perpetrators to justice, governments in post-conflict states struggle to determine the best way to deal with past wrongdoing. We have seen the leaders in Peru, Argentina, Chile, Haiti, Sierra Leone and South Africa, to name a few, have passed blanket amnesty laws that protect perpetrators who have committed serious violations of international law from prosecution. The decision to grant amnesty often results from a combination of several considerations. Some countries are ill-equipped to prosecute these criminals, especially when the atrocity occurred on a large scale or a number of years ago. Governments may see an amnesty as necessary to halt the human rights abuses, believing guerrilla groups or entrenched dictators may naturally be reluctant to cease hostilities or relinquish power if they know that they will face prosecution thereafter.¹⁴¹ Governments may also fear that large scale prosecutions would undermine the process of reconciliation, and that the government can better serve the country's immediate needs by focusing on restoring order, rebuilding infrastructure, and implementing democratic reforms.

¹³⁹ Preamble of the Rome Statute 1998

¹⁴⁰ Ibid

¹⁴¹ W.A. Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court of Sierra Leone,' (2004) 11 *U.C. Davis Journal of International Law & Policy* 145, 164.

Thus, the legality of amnesties for perpetrators of crimes under international criminal law is in a state of transition and considerable uncertainty. On one hand, scholars, lawyers, and governmental officials argue that customary international law prohibits amnesties and requires states to seek justice for serious human rights violations.¹⁴² Further, they argue that the international community has an interest in seeking retribution and deterring future human rights violations. Thus, they assert that domestic amnesties do not prevent international tribunals or national courts in other states from asserting jurisdiction over these criminals. On the other hand, the fact that governments continue to offer amnesties suggests that customary international law does not, at least yet, prohibit certain amnesty laws.¹⁴³

Despite the uncertainty over the *de jure* legality of amnesties, many commentators agree that the international community can *de facto* legitimise an amnesty. The UN has participated in amnesty negotiations and has approved such deals after they were concluded.¹⁴⁴ Likewise, the International Criminal Court (ICC) Prosecutor has discretion to not prosecute certain criminals where 'a prosecution is not in the interests of justice'.¹⁴⁵ The need for the international community to reach consensus on the validity of amnesties has become more important in light of the controversial amnesties adopted by several countries.¹⁴⁶ In 2005, both Algeria and Colombia enacted amnesties intended to bring years of civil war to an end. In Algeria, the

¹⁴² D. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' (1991) 100 *Yale Law Journal* 2585-93.

¹⁴³ M.P. Scharf, 'Swapping Amnesties for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1998) 31(1) *Texas International Law Journal* at 36.

¹⁴⁴ *Ibid*

¹⁴⁵ Rome Statute 1998, Section 53(2)(c).

¹⁴⁶ M. Slackman, 'But Bygones Can't Be Bygones If The Pain is Raw' *New York Times* 5th October 2005, at A4.

Charter for Peace and National Reconciliation provides amnesty to all militants not accused of public bombings, mass murder, and rape. The Charter also provides monetary reparations to the victims of the fifteen year civil war. In Columbia, the Justice and Peace Law grants amnesty to paramilitaries and leftist guerrillas who turn themselves in, and provides limited sentences of 5-7 years for those who committed serious crimes under international law. In 2005, the President of Columbia, Alvaro Uribe, visited world leaders in the hope of securing international approval of the deal. However, human rights organizations criticized the law for perpetuating an atmosphere of impunity in Cambodia, and have called upon the ICC to ignore the amnesty and prosecute the leaders of the guerrilla and paramilitary groups.¹⁴⁷

An international duty to prosecute serious crimes under international law could arise from one of two sources of international law: treaty or custom. A state may accept such a duty by becoming a party to a treaty that explicitly requires signatory states to prosecute certain types of crimes. Alternatively, an existing customary norm of international law may create an obligation to prosecute certain crimes, even where a state has never explicitly agreed to such an obligation. Customary international law results from a general and consistent practice of states acting under a sense of legal obligation, or *opinion juris*. A law of customary international law may arise within a short period of time, but the state practice must be widespread and consistent. Specifically, any customary international law should reflect the practice of those states that are involved in the particular activity.¹⁴⁸

¹⁴⁷ A.U. Munoz, 'An ICC investigation is the only hope that there will be justice against those who commit crimes against humanity,' *Columbia War Crimes Probe Urged*, BBC News 29th June 2005. Available at: <http://news.bbc.co.uk/2/hi/americas/4633955.stm>

¹⁴⁸ A. Cassese, *International Criminal Law* (2008) Oxford University Press at 17-20.

The Rome Statute also evidences a lack of consensus regarding the legality of amnesties, as the Statute is vague as to whether the ICC has jurisdiction over persons granted amnesties under domestic law. Domestic amnesties may prevent ICC prosecution in two ways. First, the Security Council may defer the prosecution for twelve months if it determines, pursuant to its Chapter VII powers, that an amnesty (or temporary amnesty) is necessary to maintain and restore international peace and security.¹⁴⁹ After twelve months, the Security Council may renew its deferral if it continues to be in the best interest of international peace and security.¹⁵⁰ Second, the ICC prosecutor may decide not to prosecute a certain crime if the prosecution is:

‘not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime’.¹⁵¹

These two provisions reflect a compromise between those parties who urged complete accountability, and those who desired a more flexible approach to promote stability, peace and reconciliation after periods of internal conflict. Recognising the widespread disagreement as to the validity of domestic amnesties under

¹⁴⁹ Rome Statute 1998, Art. 16 (stating that the Security Council can request the ICC not to prosecute by adopting a resolution).

¹⁵⁰ Ibid

¹⁵¹ Ibid at Article 53.

international law, Philippe Kirsch, the Chairman of the drafting committee, stated that the final version of the Rome Statute was 'creatively ambiguous'.¹⁵²

The UN has often taken the view that domestic amnesties for perpetrators of serious crimes under international law are not legitimate. Specifically, during the establishment of the Special Court of Sierra Leone (SCSL), the then UN Secretary General Kofi Annan reported:

'While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of 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'.¹⁵³

However, the term *consistently* is somewhat misleading in that the UN has openly encouraged countries to grant amnesties on several occasions. The UN in 1994 supported the South African amnesty as it viewed an amnesty as a way to aid transition and provide stabilisation.¹⁵⁴ The amnesty in South Africa required perpetrators to engage in truth-telling and lustration as part of the deal.¹⁵⁵ Moreover, in 1993 the UN in conjunction with the United States (US), helped negotiate a blanket amnesty agreement in order to resolve the internal conflict in Haiti. The UN

¹⁵² M. Scharf, 'From the eXile Files: An Essay on Trading Justice for Peace,' (2006) 63 Wash & Lee Law Review at 367

¹⁵³ Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915 4th October 2000.

¹⁵⁴ L. Mallinder and K. McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies' (2012) 6(1) Contemporary Social Science at 113.

¹⁵⁵ Ibid

and US saw an amnesty as the best and least costly way to persuade the military to relinquish power, and therefore end the human rights abuses that threatened to send thousands of Haitians fleeing to the shores of the US.

There are also numerous instances in which the UN did not help negotiate the terms of the amnesty or indeed, encourage the parties to agree to the deal, but did take action to *de facto* legitimise the amnesty. For example, in 1996 at the conclusion of the amnesty deal in Guatemala, the UN Mission to Guatemala issued a public statement concluding that the proper scope of an amnesty deal lay 'exclusively with the Guatemalan people'.¹⁵⁶

Although the amnesty agreement did not have its desired effect and the fighting resumed, the UN in 1996 did not object to an amnesty clause in Sierra Leone for the rebels involved in the insurgency against the government.¹⁵⁷ In addition, the Sierra Leone Truth Commission pointed out the UN's inconsistent stance towards the amnesty laws in Sierra Leone. 'It is not clear why unconditional amnesty was accepted by the United Nations in November 1996, only to be condemned as unacceptable in July 1999. This inconsistency in United Nations practice seems to underscore the complexity of the problem'.¹⁵⁸ More recently, in 2003, a UN envoy helped negotiate the exile arrangement for Charles Taylor in Nigeria.¹⁵⁹

¹⁵⁶ Ibid

¹⁵⁷ S.C. Res. 1260, UN SCOR 53rd Sess., 4035th mtg., UN Doc. S/Res/1260 (1999)

¹⁵⁸ Ibid at 164.

¹⁵⁹ M. Scharf, 'From the eXile Files: An Essay on Trading Justice for Peace,' (2006) 63 Wash & Lee Law Review at 341.

The UN does not consistently disapprove of amnesties. Instead, it appears to favour accountability over peace only when political costs are low. The UN's inconsistent positions in Haiti and Sierra Leone illustrate this point.

In the Secretary General's 2004 Report to the Security Council on the Rule of Law and Transitional Justice, Kofi Annan urged that the Security Council resolutions and mandates should:

'reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those related to ethnic, gender and sexually based international crimes, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations created or assisted court'.¹⁶⁰

State practice, especially the practice of states most affected by serious crimes under international law, is the strongest indication that there is no customary international law imposing a duty to prosecute perpetrators of such crimes. States have repeatedly granted amnesty from domestic prosecution to perpetrators of serious crimes under international law. Moreover, a number of states have participated in negotiating amnesties, suggesting that even states that are not affected by the crimes do not recognise any law that prohibits affected states from granting amnesty.

¹⁶⁰ The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, S.C. Res. 616, UN SCOR, 59th Session., at 21, UN Doc. S/2004/616 (2004).

To illustrate, governments from every region of the world have decided to grant amnesties to individual perpetrators of international crimes. There is a long history of using amnesties in countries including; Argentina, Chile, Uruguay, El Salvador, Guatemala, Sierra Leone, Haiti, Zimbabwe, South Africa, Afghanistan and Algeria.¹⁶¹ In these instances, amnesties were granted to persons who had committed serious crimes under international law.

The fact that states grant amnesties to perpetrators of serious crimes under international law, and other states participate in these peace negotiations, suggests that many states believe that peace should perhaps be preferable to other objectives. Such state practice remains the strongest indication that there is no customary international law prohibiting amnesties for perpetrators of all serious crimes under international law. It is possible for amnesties, coupled with conditions can be a useful tool for post-conflict societies as well as provide a certain amount of accountability.

In contrast, international courts and tribunals generally disfavour amnesties, stating that states who grant amnesties have violated their international legal obligations. Nevertheless, even international courts have not been able to identify any customary international law with respect to amnesties. In *Prosecutor v Furundzija*, the ICTY had the opportunity to comment on the legality of amnesties, but decided not to stipulate the existence of a rule against amnesties for serious crimes under international law *per se*. Instead the ICTY stated that 'amnesties are generally

¹⁶¹ The Proposed Charter for Peace and National Reconciliation, August 2005, Human Rights Watch, available at <http://hrw.org/background/mena/algeria0905/3.htm>

incompatible with the duty of states to investigate [torture]'.¹⁶² This statement implies that some amnesties may be permissible. Furthermore, the use of the word 'investigate' rather than 'prosecute' may suggest that only amnesties that seek to suppress the truth are incompatible with international law.

The Special Court of Sierra Leone (SCSL) also had to face the issue of amnesties. Specifically, whether the amnesty granted to the Sierra Leone rebels under the Lome Accords prevented the SCSL from prosecuting them under international law. The court first noted that there is 'no general obligation for States to refrain from amnesty laws on these [*jus cogens*] crimes'.¹⁶³ States therefore do not "*breach a customary international rule*" in granting such amnesties.¹⁶⁴ Even though the court concluded that Sierra Leone did not violate international law by granting the amnesty, it decided that the Lome Accords did not prevent SCSL from exercising jurisdiction over the criminals.

These international court decisions do not, however, establish that all amnesties for serious human rights abuses are illegal under international law, or that states have an international obligation to prosecute violations of international law.¹⁶⁵ Indeed, international courts have shown a willingness to allow states to decide how to hold perpetrators accountable, and how to provide appropriate redress for victims.

¹⁶² *Prosecutor v Anto Furundzija*, Judgment Case No., IT-95-17/1-T, para. 155.

¹⁶³ *Prosecutor v Kallon & Kambara*, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72 para. 7 in L. Sadat, 'Exile, Amnesty and International Law' (2006) 81 *Notre Dame Law Review* at 1018.

¹⁶⁴ *Ibid*

¹⁶⁵ *Ibid*

Whilst state practice disproves the argument made by some activists and legal scholars that amnesties for serious violations of international law are illegal *per se*, this is not to say that all types of amnesties are considered legal. This can be illustrated by recent state practice which indicates that blanket amnesties may be illegal. States must provide some form of accountability, even if such accountability does not involve state prosecution, punishment, and incarceration.¹⁶⁶ However, the precise demands of this obligation remain unclear. As illustrated, state practice is too inconsistent to identify the exact obligation. Professor Ronald Slye sums up the current requirements of international law, stating that it 'requires some response to such atrocities'.¹⁶⁷ This response may include creating truth commissions that expose wrongdoing, requiring the criminals to compensate the victims for their injuries, or imposing non-criminal penalties on the persons covered by the amnesty.¹⁶⁸

Recent state practice supports the claim that international law requires some form of accountability. With the exceptions of the blanket amnesties enacted by Chile and Peru, both of which have subsequently been declared illegal, states have combined some mix of justice, truth, reparations in their amnesty laws. In fact, the amnesty in Uruguay, for example, allowed perpetrators of crimes to be held liable in civil courts.¹⁶⁹ The South Africa amnesty legislation required perpetrators seeking amnesty to disclose their crimes and petition the courts for amnesty.¹⁷⁰ Moreover,

¹⁶⁶ R.C. Slye 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* at 201.

¹⁶⁷ Ibid at 191

¹⁶⁸ M.P. Scharf, 'From the eXile files: An essay on trading justice for peace,' (2006) 63 *Washington and Lee Law Review* at 346.

¹⁶⁹ Ibid

¹⁷⁰ L. Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa' (2009) Working Paper No.2 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*,

the Colombian amnesty legislation required that all perpetrators seeking amnesty disclose their crimes, turn over illegally acquired assets, and lay down their weapons.¹⁷¹

There is also evidence that state officials believe that they are under a legal obligation to hold criminals accountable, in some way, for their actions. The South African government, for example, rejected the National Party's proposal for a blanket amnesty. The government declared its intent to abide by international law in drafting the amnesty legislation, thus indicating that a blanket amnesty could violate its international obligations.¹⁷² In 1999, the Argentine government acknowledged that all individuals have a right to truth, and declared that the government 'accepts and guarantees the right to the truth, which involves the exhaustion of all means to obtain information on the whereabouts of disappeared persons'.¹⁷³ Several Argentine courts have also declared the blanket amnesty laws to be inconsistent with international law and in 2003, repealed the Due Obedience and Full Stop Laws.¹⁷⁴

This emerging custom of permitting amnesties while demanding some degree of accountability may strike the optimal balance between the competing interests of justice and peace. Requiring some degree of accountability will help prevent the notion of impunity from developing, while at the same time provide states the flexibility to negotiate peace agreements.

Institute of Criminology and Criminal Justice, Queen's University Belfast last accessed 24/11/12
accessed via:

<http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Fileupload,152146,en.pdf>

¹⁷¹ M.P. Scharf, 'From the eXile files: An essay on trading justice for peace,' (2006) 63 *Washington and Lee Law Review* at 342-347.

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ Ibid at 342

Jurisdiction and admissibility

The theory of universal jurisdiction rests on the notion that certain crimes affect the fundamental interests of the international community as a whole.¹⁷⁵ Crimes against humanity, for instance, as implied by the terminology, affect not only the victims who were tortured or killed, but all of us.¹⁷⁶ Individuals throughout the world have the right to prevent such crimes and seek retribution against perpetrators. Therefore, when courts exercise universal jurisdiction they are acting in the interests of the wider international community.

Recent domestic and international court decisions have reaffirmed the primacy of international law over domestic, and have established that domestic amnesties do not prevent others from prosecuting violations of international law. The SCSL also said that amnesties have no trans-national effect. The Court stated that:

‘where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction’.¹⁷⁷

The Court found that the Sierra Leone amnesty law did not violate international law, but also that it did not deprive the international community of the right to prosecute those persons who had committed serious crimes under international law.

¹⁷⁵ Ibid 368-372.

¹⁷⁶ D. Luban, ‘A Theory of Crimes Against Humanity’, (2004) 29 *Yale Journal of International Law* at 86.

¹⁷⁷ *Prosecutor v Kallon & Kamara*, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case Nos. SCSL-2004016-AR72(e) para. 67 (13th March 2004).

Therefore, in respect of *jus cogens*, an amnesty may not extinguish liability under international law, even if it may provide immunity under domestic law.¹⁷⁸

Although scholars and courts that have confronted the question agree that domestic amnesties do not bar prosecution in other forums, in reality there have been few attempts to prosecute persons covered by domestic amnesties. This is largely due to pragmatic reasons. Prior to 1998, the ICC did not exist, and the cost of creating *ad hoc* tribunals was substantial. Efforts to prosecute individuals in third party countries were futile so long as the perpetrator covered by the amnesty remained in his home country. Moreover, national courts may have been reluctant to prosecute perpetrators covered by domestic amnesties for reasons of international comity.

With the establishment of the ICC and the recent push towards accountability there is greater pressure on states, the UN, and the ICC Prosecutor to bring perpetrators of serious crimes under international law to justice. While preventing human rights atrocities is an important goal, there may still be good reason to respect domestic amnesties and refrain from prosecuting those protected by the amnesty. The referral of the situation in Northern Uganda following the enactment of The Amnesty Act to the ICC creates confusion.

Uganda

As mentioned earlier, amnesties are inherently political. The experience of Uganda means amnesties are no longer the sole concern of individual governments.¹⁷⁹ The

¹⁷⁸ A. Marie-Slaughter, 'Defining the Limits: Universal Jurisdiction and National Courts,' (2004) *Universal Jurisdiction* 171-73.

¹⁷⁹ L. Mallinder, Working Paper No. 1 'Uganda at a Crossroads: Narrowing an amnesty' From *Beyond Lealism: Amnesties, Transition and Conflict Transformation*, March 2009, Insitute of Criminology and

international community has become increasingly disapproving of circumstances where amnesties offer immunity for serious human rights violations and seems fixated with criminal trials as a response to atrocity and method of achieving accountability. This fixation is a result of a number of factors which started with the drive for humanitarian interventions in the 1990s, the establishment of the ICC, a need for regional stability as well the need for Uganda's resources. Whilst amnesties are political tools they are not always opposed for purely non-political reasons; opposition to amnesties might also be partly political both domestically and internationally.

In Uganda, The Amnesty Act 2000 was introduced to end a period of sustained civil war and as a tool to aid a peaceful resolution to the conflict. This legislation received support through the provision of funds and knowledge from various international organisations and donor states. The amnesty in Uganda differs to that of South Africa, which will be discussed later, as it was introduced during on-going conflict and not to aid political transition.

The situation in Uganda became even more interesting in 2003 with the referral by Ugandan President Yoweri Museveni of northern Uganda to the International Criminal Court (ICC). The ICC, exercising its jurisdiction under the referral, issued arrest warrants for individuals which had previously been provided with immunity by The Amnesty Act 2000.

This move has made many commentators and scholars question whether amnesties can play a positive role in resolving on-going conflict situations. A strong opponent of amnesties and their utility is Ricoeur.¹⁸⁰ Ricoeur's main criticism of amnesties is that they fail to provide justice. However, as discussed by Mallinder and McEvoy, amnesties which are implemented through an institution or mechanism have the potential to provide a narrative through the ascertainment of the truth.¹⁸¹ As well as providing institutional recognition and acknowledgement.

The sustained period of conflict in Uganda is a result of a long chequered past, which Mallinder traces back to colonial rule.¹⁸² During this period Uganda was split into North and South, with Northern Ugandan, predominantly home of the Acholi people, chosen to be a 'labour reserve'. Whilst the south, home of the Baganda people, was chosen 'as cash crop and industrial zones'. Under British colonial rule this division was further apparent through the policy to recruit civil servants from the south and soldiers from the north. Over a period of time an underlying tension existed with those situated in the north being seen as the work horses of the country whilst those living in the south benefitted from better education and lived in relative prosperity.

Britain granted Uganda independence in 1962 leaving behind notable tension between the North and South. Indeed, Chatlani argues '[t]his "divide and rule" policy stirred resentment and animosity between the two regions, resulting in a polarized

¹⁸⁰ P. Ricoeur, *Memory, history, forgetting*, (2004) University of Chicago Press, Chicago, in L. Mallinder and K. McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies', (2012) 6(1) *Contemporary Social Science* at 122.

¹⁸¹ L. Mallinder, and K. McEvoy, K. 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies', (2012) 6(1) *Contemporary Social Science* at 122.

¹⁸² *Ibid* at 122

nation ripe for conflict.¹⁸³ Essentially this left Uganda vulnerable to opportunists who would use the tension and increasing animosity for their own political and economic gain. This led to the dictatorial regimes of Milton Obote and Idi Amin under which violence ensued. With the eventual removal from power by rebel groups in 1978, Uganda suffered a period of unstable governments all exploiting the division in the country for their own benefit.

This period of instability within Uganda provided opportunities for numerous guerrilla groups to operate within Uganda. Most notably the National Resistance Army (NRA) led by the current President, Yoweri Museveni, who came to power in 1986 and began a period of 'intensive anti-northern propaganda.'¹⁸⁴ This period of violence, propaganda and heightened hostility culminated in what Mallinder explains as being 'two competing narratives for the origins of the conflict.'¹⁸⁵

Essentially these narratives pertain to those living in northern Uganda being to blame for starting the violence through jealousy. The Acholi could not accept that both political influence and economic might rested in the south. The other narrative tells the story of how the northern Ugandans had eventually comes to terms with

¹⁸³ H. Chatlani, 'Uganda: A Nation in Crisis' (2007) 37 *California Western International Law Journal* at 280-1.

¹⁸⁴ O. Otunnu. 'Causes and Consequences of the War in Acholiland' in Okello Lucima (ed), *Accord: Protracted Conflict, Elusive Peace: Initiatives to end the violence in northern Uganda*, (2002) Conciliation Resources, London. in L. Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) Working Paper No.1 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast accessed via:

<http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload,152141,en.pdf>

¹⁸⁵ L. Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) Working Paper No.1 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast accessed via: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload,152141,en.pdf>

Museveni's victory, but in fact further human rights abuses carried out by Museveni's NRA was the starting point.

During the conflict various crimes were committed including 'rape, abductions, confiscation of livestock, killing of unarmed civilians, and the destruction of granaries, schools, hospitals and bore holes'.¹⁸⁶ Furthermore, government soldiers engaged in mass looting of cattle, which 'was especially painful in the eyes of middle-aged and elderly Acholi'.¹⁸⁷ Crimes committed during a period of conflict are not exclusively limited to the core international crimes of genocide, crimes against humanity, war crimes and crimes of aggression, but also include other, perhaps less serious crimes such as looting of cattle. Such lower level crimes can have a significant impact on the daily lives of members of society.

The on-going conflict within northern Uganda led to the formation of the Lord's Resistance Army (LRA), led by Joseph Kony. The LRA pursued a campaign against the very people they were created to fight on behalf of, which led to smaller militias being formed to combat the on-going violence being committed by the LRA. The conflict breached the borders of some neighbouring countries, in particular, Sudan.

¹⁸⁶ O. Otunnu. 'Causes and Consequences of the War in Acholiland' in Okello Lucima (ed), *Accord: Protracted Conflict, Elusive Peace: Initiatives to end the violence in northern Uganda*, (2002) Conciliation Resources, London. in L. Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) Working Paper No.1 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast accessed via: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Fileupload,152141,en.pdf>

¹⁸⁷ S. Finnström, 'Wars of the Past and War in the Present: The Lord's Resistance Movement/Army in Uganda', (2006) 76 *Africa* at 202-3. in L. Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) Working Paper No.1 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast accessed via: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Fileupload,152141,en.pdf>

Uganda has a history of using amnesties to respond to political crises. In more recent times the Amnesty Act 2000 came into force in January 2000 grants amnesty, which is understood broadly as 'pardon, forgiveness, exemption or discharge from criminal prosecution or any other punishment by the State', to:

'...any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by

- (a) Actual participation in combat;
- (b) Collaborating with the perpetrators of the war or armed rebellion;
- (c) Committing any other crime in the furtherance of the war or armed rebellion; or
- (d) Assisting or aiding the conduct or prosecution of the war or armed rebellion.¹⁸⁸

It further states that individuals who fall within the scope of the amnesty 'shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of war or armed rebellion'.¹⁸⁹ The amnesty only applied to Ugandan nationals. The conflict was widespread, but excluded Sudanese nationals and other foreign nationals involved in the conflict with a start date is the time of President Museveni coming to power.

¹⁸⁸ Amnesty Act 2000, s3(1)

¹⁸⁹ Amnesty Act 2000, s3(2)

The Ugandan amnesty offered blanket amnesty for all crimes committed during the conflict by non-state actors.¹⁹⁰ Some amnesty laws are enacted as part of a wider transitional process, but the Ugandan amnesty was introduced in isolation of any other process. The beneficiaries of the amnesty were the Government's opposition which meant there were no repercussions for Government forces, as they were seen as simply doing their duty. So maybe amnesties make sense of 'superior orders' which are not a defence in international law, but are surely intelligible. Whilst the Government's opposition were recognised through an acknowledgment in the amnesty, no recognition was provided for Government forces.

Another interesting aspect of the Ugandan amnesty process is the establishment of an Amnesty Commission. The role of the Amnesty Commission is to implement amnesty which provides the opportunity to scrutinise decision making as to whether or not an amnesty should be provided, policed and managed. The monitoring not only means individual perpetrators are being held to account for their actions, but the mechanism itself is being held to account for their decision-making to the state, to victims and the wider community. It is also possible for victims to challenge the decision to grant amnesty to a perpetrator. This process provides legitimacy to amnesties and, whilst not prosecutions, have a real impact on criminal justice.

South Africa

The South African Truth and Reconciliation Commission (SATRC) required perpetrators to disclose information relating to their conduct in order to be granted

¹⁹⁰ L. Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) Working Paper No.1 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast at 3 accessed via: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload,152141,en.pdf>

amnesty. South Africa is a prime example on the effectiveness of amnesties which are implemented through a formal mechanism. A truth-recovery facility was attached to the amnesty as well as 'measures to acknowledge victims' suffering and to provide reparations.'¹⁹¹

'That truth, which the victims of repression seek 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 disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire'.¹⁹²

To clarify the discussion so far, where there are amnesties that include some form of accountability, these do not violate international law. In addition, domestic amnesties do not prevent other countries or international tribunals from exercising universal jurisdiction over the persons covered by the amnesty.

¹⁹¹ Ibid

¹⁹² *Azanian Peoples Organisation (AZAPO) and others v the President of the Republic of South Africa and others* 1996 (4) SA 671 (CC), para 17. in. L. Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) Working Paper No.1 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast at 89-90 accessed via: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Fileupload,152141,en.pdf>

Expression of sovereignty

McEvoy and Mallinder have spent a considerable amount of time researching the role of amnesties in international law.¹⁹³ The focus is on national amnesties and addresses the main criticisms surrounding the use of amnesties. Interestingly, they make the assertion that amnesties, and the granting of amnesties, are a sovereign right of a state.

On one level an amnesty maybe seen as a compromise between those involved in a conflict. Another view point raised by McEvoy and Mallinder is '...the granting of amnesties also represents an important expression of state power and sovereignty'.¹⁹⁴ This links back with the idea of control as discussed by Mulgan and discussed in a previous chapter.

Whilst much of the literature concerning amnesties seems to suggest that amnesties for the most serious crimes are illegal and that states should seek to prosecute and punish perpetrators. McAvoy and Mallinder observe that 'no international convention has explicitly prohibited amnesty laws'.¹⁹⁵

Truth

Mulgan's final extension of accountability in providing a dialogue can be present in amnesty arrangements (see Chapter 1). As previously discussed, amnesties have been, and continue to be linked with, a truth recovery process which provides an

¹⁹³ K. McEvoy and L. Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy,' (2012) 39(3) *Journal of Law and Society* 410-40.

¹⁹⁴ Ibid at 414

¹⁹⁵ Ibid at 417

opportunity for a narrative of events. However, questions have arisen with regard to the quality and accuracy of truth through such processes.

Rather poignantly the South African Truth and Reconciliation Commission's (SATRC) report stated '[t]he amnesty process was.....a key to.....eliciting as much truth as possible about past atrocities'.¹⁹⁶ The report goes on to discuss how the truth-ascertainment process worked as a result of engagement with the process and this was only facilitated through the removal of the possibility of punishment.

Justice

Many commentators observe that amnesties are the antithesis of justice, amongst other things. However, McEvoy and Mallinder address this issue and argue that amnesties can actually help achieve justice as well as provide an opportunity for the cessation of hostility. If an amnesty is part of a wider process with certain conditions attached an amnesty can help provide a record of events through the use of testimony from participants to the conflict. A conditional amnesty can also provide stabilisation within a state and facilitate a process of lustration, which provides justice for the wider community.

Scharf argues that under Article 16 of the Rome Statute the International Criminal Court may have to defer to a national amnesty if a United Nations Security Council

¹⁹⁶ South African Truth and Reconciliation Commission Report , vol.6, ch 1, para 25. in L. Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) Working Paper No.1 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast accessed via: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Fileupload.152141.en.pdf>

Resolution is adopted under their Chapter VII powers.¹⁹⁷ Such a resolution could either request that any investigations and/or prosecutions are stopped, or call for the deferral of any prosecution in progress.¹⁹⁸ An example of this is the adoption of Resolution 1593 in Darfur which referred the situation to the ICC, however, Scharf notes that at the same time it prevented the ICC from exercising jurisdiction over foreign military personnel.¹⁹⁹

It has been argued that 'emerging democratic practice has more to lose in a situation where the community is divided than where it is united under the banner of reconciliation and amnesty'.²⁰⁰ This links to the notion that such wrong-doing affects 'the collective', the wider community and only if the community comes back together can there be long-lasting peace and stability.

In light of Article 16 of the ICC Statute, 'The Security Council has the legal authority to require the court to respect an amnesty...if two requirements are met...'²⁰¹ These include where there is a threat to peace and where a resolution is granted to maintaining peace or resolving threatening situations.²⁰²

¹⁹⁷ M.P. Scharf, 'From the eXile files: An essay on trading justice for peace,' (2006) 63 *Washington and Lee Law Review* at 368.

¹⁹⁸ Ibid

¹⁹⁹ Ibid at 369

²⁰⁰ B. Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws*. (2002) Longman, Pearson Education at 19.

²⁰¹ M.P. Scharf, 'From the eXile files: An essay on trading justice for peace,' (2006) 63 *Washington and Lee Law Review* at 369.

²⁰² Ibid

Recognition

Chapter 2 discussed recognition in a broader sense and asserted that as part of this area falls reparation. Reparation goes beyond the need for a legal sanction or monetary awards and includes acknowledgements and apologies. A conditional amnesty provides victims and affected communities with a narrative of events and acknowledgment of the atrocity.

In his text, Chigara makes reference to Hayner who questioned '[c]an a society, writes Hayner, build a democratic future on a foundation of blind, denied, or forgotten history?'²⁰³ As Mallinder and McEvoy highlight in their article, conditional amnesties do not deny past wrong-doing and are part of a wider transitional process.²⁰⁴ Recognition is about re-establishing people as citizens.

Chigara enters into the discourse surrounding the key arguments concerning amnesty.²⁰⁵ One of the concerns Chigara refers to, which is raised when discussing the legitimacy of amnesty is where the prospect of the desired peace and democracy, sought through the implementation of an amnesty, is short lived or fails to occur?²⁰⁶ However, no mechanism provides an ideal outcome, and as will be discussed in later chapters, each mechanism has its' own strengths and weaknesses dependent on the context in which it is being used.

²⁰³ P.B. Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study', (1994) 16(4) *Human Rights Quarterly* at 597, in B. Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws*. (2002) Longman, Pearson Education at 19.

²⁰⁴ Mallinder, L. and McEvoy, K. 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies', (2011) 6(1) *Contemporary Social Science* 107-128.

²⁰⁵ Chigara, B. *Amnesty in International Law: The Legality under International Law of National Amnesty Laws*. (2002) Longman, Pearson Education..

²⁰⁶ Ibid.

Interestingly, in her Working Paper, Mallinder points out that amongst the objectives of the amnesty process in South Africa was the desire to 'advance...reconciliation and reconstruction...' ²⁰⁷ On the whole many commentators agree with Mallinder that South Africa provides an example of the usefulness of amnesties with state transition without the need to disregard all facets of accountability. Indeed, a carefully designed amnesty process coupled with complementary mechanisms can provide accountability. An amnesty can provide recognition through political participation and have proven to be a useful tool when part of a wider restorative process. It is also possible to achieve stabilisation with a state where a conditional amnesty has been implemented, as seen in South Africa.

Amnesty as an alternative to prosecution: a means to an end?

On the one hand, amnesties may seem to be nothing more than a symbolic response to accountability. However, on the other hand, if an amnesty provides for the cessation of conflict then it would be prudent to allow amnesty to remain in the repertoire of mechanisms designed to address past wrong-doing in a post-conflict setting. A broad and general amnesty alone cannot provide the required level of accountability sought by the international community, but a conditional amnesty can provide accountability.

'The South African amnesty process has also been credited as offering an alternative, more restorative form of justice, in which offenders can be held

²⁰⁷ Interim Constitution 1993, Postamble. in L. Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa' (2009) Working Paper No.2 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast last accessed 24/11/12 accessed via: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload,152146.en.pdf>

accountable and victims can be acknowledged.'²⁰⁸ South Africa is certainly a lesson on how effective conditional amnesties can be after a period of conflict.

Summary

The international community is at a crossroads. While states have continued to pass amnesties and negotiate peace deals, many UN officials and international legal scholars have argued that granting amnesties to perpetrators of serious crimes under international law violates international legal norms. These demands for greater accountability have had some effect and states have increasingly incorporated mechanisms into amnesty deals for holding perpetrators of crimes accountable for their actions. An amnesty carefully constructed in a way which obliges perpetrators to participate in an accountability process is a useful and legitimate mechanism.

Conditional amnesties are inherently political tools, which can provide opportunities to provide an account of a conflict, facilitate the process of lustration and acknowledge wrong-doing. It is also commonplace for amnesties to be coupled with a truth commission to facilitate truth-telling and encourage participation. The next chapter will focus on truth commissions in the context of accountability and whether such a mechanism can provide the required level of truth, justice and recognition.

²⁰⁸ L. Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa' (2009) Working Paper No.2 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast last accessed 24/11/12 accessed via: <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload,152146,en.pdf>

'...countries recover from the trauma and wounds of the past, they have had to devise mechanisms not only for handling past human rights violations, but also to ensure that the dignity of victims, survivors and relatives is restored'.²⁰⁹

Following a period of conflict a state is faced with a period of transition. During this period of transition a state is tasked with addressing injustices and creating rule of law and peace and restorative justice is said to provide a mechanism through which this can be achieved. One alternative mechanism to prosecution that sits within restorative justice is a truth commission. Truth commissions are justified on the basis that they not only elicit honesty and openness but 'hold offenders to account' when prosecutions are not a viable option.

Previous chapters have highlighted the importance of accountability and proponents of truth commissions in particular stress the importance of addressing past wrongdoing.²¹⁰ The emphasis in truth commissions is placed on victims and the role they must play in reconciling a state.

Supporters of truth commissions argue that truth-telling, fact finding and providing a narrative of the conflict are enough to satisfy the accountability needs of victims, their families and the wider society. However, as previously mentioned in Chapter 2,

²⁰⁹ N. Kritz, ed., N. Mandela, Foreword: Transitional Justice-How Emerging Democracies Reckon with Former Regimes, vol.1 (Washington DC., United States Institute of Peace Press, 1995.1995) in Review Conference of the Rome Statute, Kampala – Confronting Impunity: The role of Truth commissions in Building Reconciliation and National Unity, (2010) ICC RC/ST/PJ/INF.5.

²¹⁰ N.J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,' (1996) 59(4) *Law and Contemporary Problems* 127-152.

there is increasing recognition around the call for the prosecution of perpetrators both by those most directly affected, but also the international community. On this basis, a state is in a particularly difficult position, particularly following the possible effects of lustration, which is the 'purging of public servants who are thought to be responsible for international crimes,'²¹¹ when a newly formed government is deciding how to address past wrongdoing and reconcile a potentially divided society. The political nature of a period of transition should not be underestimated.

A government may find a number of constraints which would deter it from large scale prosecutions. In particular, Kerner states, prosecutions would exceed any 'conceivable amount of resources in terms of money, personnel, and above all the amount of time needed to deal with each case, not to speak of the quality of handling the matter, and a possible solution or final decision that would meet the needs of all participants, and above all the victims'.²¹²

Truth commissions are commonly used in transitional justice settings and often try to balance the needs of both the victims, offenders and wider community. The objective is to address both the past by holding perpetrators to account and provide a forum for the presentation of testimony that is not subject to judicial scrutiny or procedural constraints while creating the conditions for a peaceful future by

²¹¹ R. Cryer, H. Friman, D. Robinson and E. Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2nd Edition (2010) Cambridge University Press at 575.

²¹² H. Kerner, *Crime Control Developments in Post-Modern Societies and in Societies in Transition: Looking for Possible Common Features between Seemingly Unrelated Discourses and Practices, also with Regard to the Implementation of Restorative Justice*, in E. Van der Spuy, S. Parmentier and A. Dissel, *Restorative Justice – Politics and Prospects* (2007) Juta Publishing at 52.

reconciling all groups in society and to do so in such a way that does not undermine the transition.²¹³

A report given by the then Secretary-General to the Security Council, presented in August 2004, recognises the role of truth commissions in post-conflict justice:

‘Another important mechanism for addressing past human rights abuses is the truth commission. Truth commissions are official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centred approach and conclude their work with a final report of findings of fact and recommendations’.²¹⁴

Truth commissions are bodies that ‘(1) investigate the past, (2)...investigate a pattern of abuses over a period of time, rather than a specific event, (3) ...[are] temporary...completing...[their]...work with the submission of a report, and (4)...are officially sanctioned, authorized or empowered by the State’.²¹⁵ This is somewhat of a contrast to criminal trials which are concerned with individual wrong-doing and emphasise careful inclusion and exclusion of evidence, rather than open, untrammelled and frank narrative.

²¹³ R. Teitel, *Transitional Justice*, (2000) Oxford University Press.

²¹⁴ ‘The Rule of law and transitional justice in post-conflict societies’, UN Doc. S/2004/616, para. 50, in W.A. Schabas, ‘A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court of Sierra Leone’, (2004) 15 *Criminal Law Forum* at 52.

²¹⁵ P. Hayner, *Unspeakable truths: Confronting state terror and atrocity* (2001) New York: Routledge in N. Dimitrijević, ‘Justice Beyond Blame: Moral Justification of (The Idea of) A Truth Commission,’ (2006), 50(3) *The Journal of Conflict Resolution* at 373.

Many commentators question whether truth-telling serves as an effective mechanism in achieving justice and provides the necessary level of accountability required for the most heinous crimes. The rise of restorative justice, as a post-conflict mechanism to restore peace and civility cannot be denied.²¹⁶ However, with particular focus on truth commissions, how realistic is it that a truth commission can reconcile a post-conflict state when sections of a society will only view formal prosecutions as a way of moving forward?

A truth commission has been defined by Teitel as ‘...an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specific period of time’.²¹⁷ Teitel's description of a truth commission fits within the accountability model described in Chapter 2. The truth-ascertaining emerges from the investigations, which can also have an impact on justice, whilst recognition comes in the form of official reports and documentation.

Truth commissions are a common mechanism used in post-conflict situations²¹⁸. In particular, Brahm states ‘..., the truth commission has become a staple of post-conflict peace building efforts.’²¹⁹ Further, he argues this is particularly true in instances involving political transitions rather than instances where one side has been victorious, thereby negating possible claims of victors’ justice.

²¹⁶ Review Conference of the Rome Statute, ‘Confronting Impunity: The role of Truth Commissions in Building Reconciliation and National Unity, (2010) Para.25.

²¹⁷ R. Teitel, R. ‘Transitional Justice Genealogy’, (2003b) 16 *Harvard Human Rights Journal* at 78.

²¹⁸ E. Brahm, ‘Uncovering the Truth: Examining Truth Commission Success and Impact,’ (2007) 8 *International Studies Perspectives* at 16.

²¹⁹ Ibid

The 1990s saw an increase in the number of truth commissions established. The purpose of a truth commission is '...to compile a truthful record of the abuses.'²²⁰ Thereby creating a narrative of the conflict which *may* be cathartic for a post-conflict society.

Hayner states truth commissions acknowledge past wrong doing, respond to victims' needs, further justice and accountability, investigate institutional responsibility and recommend reforms and aims to record the '*greatest possible*' number of crimes, whilst seeking to promote peace and reconciliation.²²¹ In addition, Hayner argues that truth commissions are superior to criminal trials. One of Hayner's concerns of criminal trials is that they tend to individualise conflict which is inherent in the process due to the rise of individual accountability.²²² This is also a concern for Drumbl in that the increasing demand for criminal trials focuses on a mechanism designed to address individual conduct in a context which is much broader and community wide.²²³ Truth commission have the capacity to not only focus on individual perpetrators and victims, but also provide institutional accountability through revealing 'the institutional failings that allowed the crimes to occur'.²²⁴ Truth commissions provide an opportunity to address such failings, which provides broader accountability and a greater opportunity to address past crimes and provide an institutional framework to safeguard against future conflict, thereby helping to provide social stability.

²²⁰ D. Roche, 'Truth Commission Amnesties and the International Criminal Court,' (2005) 45 *British Journal of Criminology* at 565.

²²¹ P. Hayner, *Unspeakable truths: Confronting state terror and atrocity* (2001) New York: Routledge in N. Dimitrijević, 'Justice Beyond Blame: Moral Justification of (The Idea of) A Truth Commission,' (2006), 50(3) *The Journal of Conflict Resolution* at 373.

²²² Ibid

²²³ Ibid

²²⁴ E. Brahm, 'Uncovering the Truth: Examining Truth Commission Success and Impact', (2007) 8 *International Studies Perspectives* at 21.

The absence of a criminal liability features heavily within a truth commission, However, there can be a disclosure relationship between international courts and truth commissions.²²⁵ Therefore, it is not impossible that evidence to truth commissions could become evidence in a prosecution. For example, the truth commission in Argentina in 1983 produced documentation which aided the prosecutions of the military.²²⁶ In fact, the threat of prosecutions can aid truth commissions in their success in obtaining testimony.²²⁷

Brahm acknowledges that truth commissions 'represent some form of accountability for human rights abuses.'²²⁸ Indeed, in his article Brahm jostles with the pros and cons of truth commissions mentioning a body of emerging literature which question the role of amnesties. Again, such critiques come from those commentators which equate accountability with prosecution and punishment, but accountability in such extraordinary circumstances needs to be broader.

Mendeloff in his article²²⁹ discusses peace building initiatives and the increasing rhetoric around the need to hold individuals accountable and how 'some kind of formal accounting of the past is essential to achieve lasting.....peace in war-torn states'. Mendeloff goes further and discusses how formal criminal prosecutions and alternative mechanisms such as truth commissions are amongst the 'repertoire' of

²²⁵ N.J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,' (1996) 59(4) *Law and Contemporary Problems* at 143.

²²⁶ Ibid

²²⁷ Ibid

²²⁸ E. Brahm, 'Uncovering the Truth: Examining Truth Commission Success and Impact', (2007) 8 *International Studies Perspectives* at 21.

²²⁹ D. Mendeloff, 'Truth-Seeking, Truth-Telling and Postconflict Peacebuilding: Curb the Enthusiasm?' (2004) 6(3) *International Studies Review* 355-380.

activities used in the pursuit of peace. This adds further support for Drumbl's argument that international criminal justice should be pluralised as to allow and acknowledge the benefits of alternative mechanisms.

The issue of plurality and a repertoire of mechanisms are important as the issues, needs and wants of a post-conflict society cannot be addressed solely through the utility of criminal trials. In fact, criminal trials can create further tensions, as with the International Criminal Tribunal for Yugoslavia (ICTY), and conflict, thereby impacting on reconciliation. Criminal trials also have a number of other deficiencies which will be discussed in Chapter 5. Assuming there is a one size fits all approach for how post-conflict societies address past wrong-doing ignores the complexity of the issues such a society faces.

Appropriateness of truth commissions

'Any process must seek to restore civic trust by citizens in the institutions of government'.²³⁰ A further function of a truth commission is lustration. The ritual sacrifice of an individual, in which they are publically shamed and will no longer hold public office appeases victims and gets ex-oppressors out of positions of power. Is this a happy alternative to expensive prosecutions?

Recent reports discuss the intention to establish a truth commission to address human rights abuses in Brazil.²³¹ Perhaps such moves to establish a truth

²³⁰ Review Conference of the Rome Statute, Kampala – Confronting Impunity: The role of Truth commissions in Building Reconciliation and National Unity, (2010) ICC RC/ST/PJ/INF.5.

²³¹ The Independent, 'Truth commission to tackle Brazil's dark past', 23rd September 2011 accessed via: <http://www.independent.co.uk/news/world/americas/truth-commission-to-tackle-brazils-dark-past-2359357.html>

commission is an indication of the appropriateness of such mechanisms and raises issues as to the extent to which truth commissions provide for accountability.

Much of the debate on the appropriateness and effectiveness of truth commissions is in relation to the role such truth commissions play in peace building and helping to reconcile and go through a period of transition from a point of conflict to one of peace: solely achieved by providing a forum for truth telling. However, is truth telling really important and is a truth commission more likely to reveal the truth than a formal trial?

Truth

Truth-telling, as discussed in Chapter 2, has become ever more prominent and is deemed an essential component of peace building.²³² Thus, acknowledging that 'truth' plays an important role. 'The claim is that the establishing the 'truth' about the state's past wrongs.....can serve to lay the foundation of the new political order'.²³³ Truth in the context of truth commissions has two distinct facets, which are truths about individual wrong-doing as well as actions and events at an institutional and communal level.

Walker discusses the increasing presence of the 'right to truth' in international documents.²³⁴ This 'right to truth' is suggested to help with reparations to victims and their families and also acknowledges the need to address past abuses and move forward:

²³² D. Mendeloff, 'Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?', (2004) 6(3) *International Studies Review* at 358.

²³³ R. Teitel, *Transitional Justice*, (2000) Oxford University Press, UK at 69.

²³⁴ M.U. Walker, 'Truth Telling As Reparations,' (2010) 41(4) *Metaphilosophy* 0026-1068.

'[t]he creation of a public record of a country's wrongdoing can provide a valuable opportunity to reshape a country's collective memory, by both encouraging private and public reflection on the past and by leaving a permanent record which can be relied upon by generations of future historians'.²³⁵

The creation of a narrative through the truth-ascertaining function of a truth commission can help alleviate suffering, as well as potentially acting as a deterrent. This process establishes a record, one which can subject perpetrators to embarrassment and humiliation which could help act as a deterrent, but also, the record does not shy away from institutional or government wrong-doing.²³⁶

Justice

The increasing popularity of truth commissions has resulted in many to criticise the mechanism, particularly in relation to achieving justice. Increasingly questioning the effectiveness of truth commissions and whether the aims are achievable in reality.

Can truth-telling serves as an effective mechanism in achieving 'justice' and for providing accountability for the most heinous crimes? Much of the discussion around truth commissions takes place in relation to transitional justice, more specifically, restorative justice. The rise of restorative justice as a post-conflict mechanism to restore peace and civility cannot be denied. Within restorative justice

²³⁵ M. Osiel, *Mass Atrocity, Collective Memory, and the Law*. (2000) New Brunswick: Transaction Publishers, in D. Roche, 'Truth Commission Amnesties and the International Criminal Court,' (2005) 45 *British Journal of Criminology* at 569.

²³⁶ D. Roche, 'Truth Commission Amnesties and the International Criminal Court,' (2005) 45 *British Journal of Criminology* at 569.

lie truth commissions which provide for the assertion that '[j]ustice should include truth recovery, recognition, reparations, as well as the restoration of civic trust and the building of social solidarity or cohesion'.²³⁷

As with accountability, the concept of 'justice' is surely dependent on the audience? There is a Western dominant view of how justice can be achieved, but empirical research on the ground suggests that justice may well mean the prosecution and punishment, but other societies view justice from differing perspectives. For example, Northern Uganda and Timor-Leste both have a history of traditional mechanisms with the sole aim to heal the local community after some form of wrong-doing.²³⁸ Some societies such as Uganda have a history of using cleansing ceremonies to address wrong-doing and heal the community, known as *nyono tong gweno*.²³⁹ Which involves an entire local community coming together to acknowledge wrong-doing and try to heal itself.

Recognition

According to Dzur, accountability is achieved through a truth commission by the recognition of past crimes, the taking of responsibility by those responsible and provides a forum for perpetrators to demonstrate regret and show remorse for their actions.²⁴⁰ This is also the view of Sooka who states that recognition is provided by

²³⁷Y. Sooka, 'Dealing with the past and transitional justice: building peace through accountability' (2006) 88(862) *International Review of the Red Cross* at 317.

²³⁸K. McEvoy and L. Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy' (2012) 39(3) *Journal of Law and Society* at 432.

²³⁹L. Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) Working Paper No.1 From *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast accessed via: http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload_152141.en.pdf

²⁴⁰A.W. Dzur, 'Restorative Justice and Civic Accountability for Punishment,' (2003) 36(1) *Northeastern Political Science Association* 3-22.

a forum in which victims can also actively participate in the process and have their say whilst having the wrongdoing acknowledged by the rest of the community. According to Sooka, such a 'public acknowledgement by an official body contributes to their affirmation and healing'.²⁴¹

'To provide recognition involves an acknowledgement of identity (that details who people are and what they have experienced) alongside simultaneous actions to enhance emancipation and respond to what subordinated parties need to gain parity with others.'²⁴²

In this context, a truth commission allows for the acknowledgement of the perpetrator, the victim(s) and any institutional involvement. So whilst helping to establish the involvement of perpetrators truth commissions are also concerned with providing recognition for victims.²⁴³

It has been asserted that '...the principal role of truth commissions is to prime transitional states for deeper, radical change.'²⁴⁴ Deeper in the sense that it allows for institutional accountability. Institutional accountability is provided by truth commissions as they seek to not only address wrong-doing by individuals, but to hold an institution or government accountable for their involvement in the conflict.

²⁴¹ Y. Sooka, 'Dealing with the past and transitional justice: building peace through accountability' (2006) 88(862) *International Review of the Red Cross* at 318.

²⁴² E. Stanley, 'Truth Commissions and the Recognition of State Crime,' (2005) 45 *British Journal of Criminology* at 583.

²⁴³ Ibid at 588.

²⁴⁴ Ibid

A part of recognition is concerned with reconciliation and in the context of a post-conflict society, does not require the forgiveness by victims, or the wider society, to perpetrators, but it does require the peaceful existence within the same community. Not only does reconciliation require truth and some form of acknowledgement, it 'requires that offenders be treated fairly'.²⁴⁵

Issues with providing recognition through truth commissions

However, '...despite such potential, the ability of truth commissions to provide full recognition is hindered by significant operational, social and political factors.'²⁴⁶ This is due to the somewhat labouring process in the truth-ascertaining aspect of a truth commission.

Stanley states 'truth commissions actually tend to inhibit the recognition of state crime.'²⁴⁷ In addition truth commissions have been said to only provide '...partial recognition of crimes, victims and perpetrators; they tend to simplify identities and needs, to fit the political landscape; and they are operationalized in a way that disconnects identity from the remedies required to deal with injustice.'²⁴⁸ In practical terms it can be difficult to collate testimony from victims and the wider community. 'As such, certain victims, such as indigenous or poor populations, or women, can find they are less likely than others to be identified and provided with space for dialogue in the aftermath of state crime.'²⁴⁹ In Timor Leste the 'reconciliation hearings tended to reflect the dominance of men in traditional dispute resolution

²⁴⁵ D. Roche, 'Truth Commission Amnesties and the International Criminal Court,' (2005) 45 *British Journal of Criminology* at 573.

²⁴⁶ E. Stanley, 'Truth Commissions and the Recognition of State Crime,' (2005) 45 *British Journal of Criminology* at 583.

²⁴⁷ Ibid

²⁴⁸ Ibid at.589.

²⁴⁹ Ibid

processes'. In the case of Timor Leste the dominance of men hindered the extent to which women could participate in the process and to have their say, thereby limiting the extent to which women could have their suffering acknowledged.

Heralded as a particular success story, the South Africa Truth and Reconciliation Commission (SATRC), is used as a good example of how a truth and reconciliation commission can help transition despite the fact that the South Africa TRC was deemed 'costly in terms of both money and in the failure to produce retributive justice.'²⁵⁰ Other commentators challenge this success story, particularly with regard to the lack of recognition of victims and their needs.

The SATRC has been accused of making misleading claims about victims being amenable to forgiveness and that they were only interested in symbolic reparation.²⁵¹ In particular, 'the Commission engaged in subtle suppression of victims' feelings that falsely heralded notions of forgiveness and reconciliation over views of retribution or desires for financial reparation'.²⁵²

In which case, the SATRC failed to recognise the true extent of the needs and wants of victims. Victims are central to the functioning of a truth commission and therefore, failing to recognise and address their true needs results in the truth commission being nothing more than symbolic in nature. It also weakens the position of being

²⁵⁰ J.L. Gibson, 'The Contributions of Truth to Reconciliation: Lessons from South Africa,' (2006) 50(3) *The Journal of Conflict Resolution* at 411.

²⁵¹ G. Simpson, *Tell No Lies, Claim No Easy Victories: A Brief Evaluation of South Africa's Truth and Reconciliation Commission*, in D. Posel and G. Simpson, *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, eds. Johannesburg: Witwatersrand University Press, in E. Stanley, 'Truth Commissions and the Recognition of State Crime,' (2005) 45 *British Journal of Criminology* at 592.

²⁵² Ibid

able 'to push for radical change and to inform South African society about the complexity of victimization'.²⁵³

A crucial part of recognition, in this context, is for any recommendations made by a truth commission to be considered and acknowledged by the state. However, it is commonplace for such recommendations to be ignored.²⁵⁴ In such a scenario: where a truth commission fails to properly recognise victims and their needs, and the final recommendations are ignored, it proves to be nothing more than a symbolic exercise. However, truth commissions are an end in themselves and not just a means to an end.

Questions could also be raised over the quality and full extent of the truth than can be uncovered within a process which suppresses the role of the victims. In fact, it has been stated that '...this inability.....to respond to what victims need ensures that the injustices of the past remain open'.²⁵⁵ However, truth commissions have a greater capacity than say, trials, for including more victims in the process and can provide a narrative of events, acknowledgment of wrong-doing and victims, a forum for perpetrators to show remorse and recognition at both an individual and institutional level.

Truth commissions are uniquely placed to expose the complexity of state crime, to revalue the identities of victims and to promote suggestions on how justice can be

²⁵³ E. Stanley, 'Truth Commissions and the Recognition of State Crime,' (2005) 45 *British Journal of Criminology* at 592.

²⁵⁴ Ibid

²⁵⁵ B. Hamber, D. Nageng and G. O'Malley, "Telling it Like it is.....": Understanding the Truth and Reconciliation Commission from the Perspective of Survivors', (2000) 26 *Psychology in Society* 18-42, in E. Stanley, 'Truth Commissions and the Recognition of State Crime,' (2005) 45 *British Journal of Criminology* at 593.

further attained through social, legal and political measures. However, truth commissions have to be approached with a certain degree of caution, as they do not tend to provide full recognition. Some commissions, like in South Africa, present a partial recognition of victims and perpetrators, and they simplify identities and needs to connect with dominant political agenda. This links back to Mulgan's concerns about the power imbalances involved when trying to hold someone, or particularly an institution, accountable. One of the many issues with accountability is concerned with holding someone or an institution, with considerably more power and influence, to account for any part they have played in the conflict. Truth commissions broader focus, one which goes beyond individual wrong-doing helps to address this imbalance.

Despite the concerns raised above, truth commissions have a significant role in helping states go through a period of transition. Properly constructed, a truth commission can offer recognition of state crime, victims, perpetrators and bystanders; commissions often present the first step to justice. Truth commissions are heavily dependent on the way in which they are implemented and responded to by transitional states as well as the international community.

Objectives

How realistic is it that truth commissions can reconcile a post-conflict state when proponents will view formal prosecutions as the only way of moving forward and reconciling? At the very least commentators acknowledge that truth commissions offer some form of accountability even if they do not offer reconciliation.

'Truth commissions should also be expected to take positive steps to attempt to repair victims' harm. Interviews with victims reveal that financial reparation is often less important to them than 'emotional restoration'.²⁵⁶ In order for this restoration to happen and for truth commissions to have legitimacy and provide some form of accountability it is important that those involved with, and affected by the conflict, actively participate in the process. Some concern has been raised with regards to the cooperation of perpetrators, but offering amnesty as an incentive to engage is one option available to tackle this issue. It is important for a truth commission to uncover truth in order to aid the repairing of victims' harm.²⁵⁷

Truth commissions raise the truth versus justice debate. Specifically, the question is whether the establishment of truth can provide justice, and with it, accountability. However, with many vested interests, mainly political, and the notion of victors' justice, history is told by the victors and in turn can have an influence on the establishment of the 'truth'.

In fact, is it the role of truth commissions to achieve justice and satisfy the requirement for both individual and institutional accountability. Truth commissions have a particular function within a post-conflict society, but should they be seen as fulfilling a multitude of roles?

Truth commissions should be devised and driven to pursue peace and promote reconciliation for a post-conflict state. The question this raises is how such a

²⁵⁶ H. Strang, *Repair or Revenge: Victims and Restorative justice*, (2003) Oxford: Oxford University Press, in D. Roche, 'Truth Commission Amnesties and the International Criminal Court,' (2005) 45 *British Journal of Criminology* at 581.

²⁵⁷ D. Roche, 'Truth Commission Amnesties and the International Criminal Court' (2005) 45 *British Journal of Criminology* at 574.

structure could be pursued. The very nature of truth commissions is that they are slow, due to the number of perpetrators and victims, and may cause more resentment and anger in the short term. However, if they are not allowed to function like this then they might be perceived as politicised, in which case they are counter-productive.

One of the main concerns regarding amnesties is the perceived lack of accountability. However, coupling an amnesty with the truth commission has been said to 'assure accountability'.²⁵⁸ Perhaps it is dangerous to think that all truth commissions provide an assurance of achieving accountability. History shows us there is no simple answer for dealing with past wrong-doing in a post-conflict society. Whilst truth commissions have the capacity to achieve many of the needs and wants of such a society, however some commentators argue that the operations of truth commissions are hindered when the final reports are ignored by governments. Although, truth commissions do work if accountability is equated with recognition (even if the recommendations are ignored), but do not work if accountability is equated with the attribution of individual accountability.

A significant contributor to the debate on truth commissions is the experience of South Africa. Gibson has attempted to address the question as to whether or not 'truth' has effectively reconciled the State.²⁵⁹ In addition a criticism of the TRC concerns the decision to individualise victims rather than allow them to stand as an

²⁵⁸ L.J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes,' (2009) 49 *Virginia Journal of International Law* at 916.

²⁵⁹ J.L. Gibson, 'Overcoming Apartheid: Can Truth Reconcile a Divided Nation?' (2006) *Annals of the American Academy of Political and Social Science*, 603, *Law, Society, and Democracy: Comparative Perspectives* 82-110.

entire community.²⁶⁰ However, truth commissions have the ability to provide some form of accountability to more victims, than say criminal trials, due to its' greater capacity to address wrong-doing.

The discussion so far has alluded to truth commissions as a mechanism to achieve accountability. However, there are a number of criticisms of truth commissions relating to the fact truth commissions cannot possible provide redress for all.

Hayner argues truth commissions could be preferable to formal trials.²⁶¹ In particular:

'identify patterns of abuses, discover truth, reveal institutional failings that allowed the crimes to occur, take a broader view of human rights abuses' and 'recommend institutional changes to prevent a recurrence of the crimes, whereas a trial focuses on the details of a specific incident.'

The process provides an important opportunity to establish a historical record whilst having the capacity to reduce the number of lies that can be circulated unchallenged. Truth commissions also seem better suited for atrocity committed on a large scale and provide a forum for remorse, forgiveness and potentially reconciliation.

Brahm acknowledges that 'while prosecution remains desirable....., sometimes, there are practical reasons to forego trials.'²⁶² For instance, perpetrators often

²⁶⁰ M. Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)', (2002) 32 *Diacritics* 33-59.

²⁶¹ ²⁶¹ P. Hayner, *Unspeakable truths: Confronting state terror and atrocity* (2001) New York: Routledge in N. Dimitrijević, 'Justice Beyond Blame: Moral Justification of (The Idea of) A Truth Commission,' (2006), 50(3) *The Journal of Conflict Resolution* at 373.

remain too influential after the transition, the number of crimes committed too large, or the judicial system has either been co-opted or decimated during the recently ended conflict to make trials a feasible possibility.' So whilst there is significant support for formal prosecutions, truth commissions are seen, to some, as a compromise.

There is an acknowledged difficulty in judging the successfulness of truth commissions. A number of other issues have been mentioned about a truth commission has no enforcement powers and avoids 'real' punishment. However, a truth commission can be designed in a way that can aid prosecutions, and lustration is a kind of punishment.

Truth commissions can facilitate closure for victims, by providing a narrative of events which can put an end to lies. They also provide opportunities for perpetrators to explain and answer for their conduct, thereby providing individual accountability, as well as institutional accountability through the added advantage of looking at the conflict from a broader perspective.

In fact, Phelps argues the story telling that takes place may well offer greater justice than efforts to prosecute and punish perpetrators of human rights abuses. While trials may trigger public discussion in certain cases, Phelps agrees with other observers who have argued that trials generally do not promote dialogue and

²⁶² E. Brahm, 'Uncovering the Truth: Examining Truth Commission Success and Impact', (2007) 8 *International Studies Perspectives* at 21.

discussion.²⁶³ Both of which are essential components for achieving accountability in a post-conflict society.

‘Truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms. They can also provide a public platform for victims to address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past’.²⁶⁴

Grodsky states that truth commissions are a type of ‘compromise justice’ and put in place where the international and domestic pressures for criminal justice collide.²⁶⁵ However, it seems Grodsky’s understanding of justice is limited to the legal understanding of justice. One which perhaps only equates justice with the prosecution and subsequent punishment of offenders, thereby viewing truth commissions as failing to provide an adequate response. Interestingly, as mentioned earlier, Hayner argues that the broader benefits of truth commissions in fact make them superior to criminal trials.²⁶⁶

²⁶³ T.G. Phelps, *Shattered Voices: Language, Violence, and the World of Truth Commissions*, (Philadelphia: University of Pennsylvania Press, 2004), at 67 in R. Evans, ‘Seeking Retribution for Human Rights Abuses: The Role of Truth Commissions’ (2005) *Human Rights Review* 127-134.

²⁶⁴ ‘The Rule of law and transitional justice in post-conflict societies’, UN Doc. S/2004/616, para. 50, in W.A. Schabas, ‘A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court of Sierra Leone’, (2004) 15 *Criminal Law Forum* at 53.

²⁶⁵ B. Grodsky, ‘International Prosecutions and Domestic Politics: The Use of Truth Commissions as Compromise Justice in Serbia and Croatia’ (2009) 11 *International Studies Review* at 693.

²⁶⁶ P. Hayner, *Unspeakable truths: Confronting state terror and atrocity* (2001) New York: Routledge in N. Dimitrijević, ‘Justice Beyond Blame: Moral Justification of (The Idea of) A Truth Commission,’ (2006), 50(3) *The Journal of Conflict Resolution* at 373.

Summary

A post-conflict society is faced with a mix of both short-term and long-term goals. To achieve these goals it is imperative for a state to 'focus on reconciliation and nation-building'.²⁶⁷ Truth commissions offer a 'unique contribution' to a post-conflict society in that it provides opportunities for victims' voices to be heard on a much greater scale than a prosecution.²⁶⁸ This also helps produce a narrative through the *account giving* by perpetrators and witnesses, promotes reconciliation through the inclusion of all parties to the conflict, creates opportunities to address state wrong-doing and has the capacity to have a broad impact on a post-conflict state.

²⁶⁷ Review Conference of the Rome Statute, 'Confronting Impunity: The role of Truth Commissions in Building Reconciliation and National Unity', (2010) para.4. accessed via: http://www.icc-cpi.int/en_menus/asp/reviewconference/Pages/review%20conference.aspx

²⁶⁸ Ibid para.5.

The Nuremberg and Tokyo International Military Tribunals were a turning point for the international community. After witnessing some of the worst atrocities in history, the international community would no longer allow perpetrators of the most heinous crimes to go unpunished and individuals would be held individually responsible for their actions. The prosecution of such individuals is a specific and dominant model of accountability. However, a number of issues arise from this model, specifically, the focus on a relative low number of high ranking individuals, the lengthy trials, the substantial amounts of evidence, the lack of attention to domestic models of criminal justice, the burden of proof on the prosecution, publicity, and the fact many international trials are held outside of the relevant state(s), which creates tensions between what happens during the trial and whether or not this resonates on the ground.

The international community is said to have a vested interest in the most serious violations of international criminal law as they affect mankind as a whole and the only way to work towards prevention of their recurrence is to send a clear message to those with political power and/or command responsibility that they will answer for their deeds.²⁶⁹ However, this assumes dictators are rational thinkers and fear what they are doing is wrong and would be called to answer.

Broomhall discusses the 'Nuremberg Principles', which have laid the foundations for international criminal law.²⁷⁰ These 'Principles' were the starting point of '...a new

²⁶⁹ M.C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability,' (1996) 59(4) *Law and Contemporary Problems* at 9.

²⁷⁰ B. Broomhall, *International Justice & The International Criminal Court: Between Sovereignty and the Rule of Law*, (2003) Oxford University Press.

relationship between the individual, the State, and the international community...'.²⁷¹

The main premise is that crimes are committed by human beings, and as such, an individual no matter what their official position can, and will be, held accountable for their actions.

Mendez argues accountability can only be achieved through prosecutions and trials and the restoration of truth and establishing facts should not be at the expense of criminal prosecutions.²⁷² However, a properly conducted criminal trial should function in a way which uncovers truth and provides a factual record of events: inherent within the process. Albeit, not necessarily comprehensive, but relatively extensive.

Much of the literature discussing the rationale behind punishment is concerned with two main themes: specifically, that of retribution and deterrence.²⁷³ Whilst in this legalistic and dominant model of accountability asserts the need to hold an individual accountable/answerable for their crimes with subsequent punishment, a wider question needs to be addressed. In this context, who are the defendants accountable to? It is generally accepted that for such heinous crimes the international community has a vested interest in holding perpetrators accountable and to the wider 'community'. More immediately, perpetrators should be held accountable to their own community, the community in which the wrong-doing has taken place, as in some African states.

²⁷¹ Ibid at 19.

²⁷² J.E. Méndez, 'Accountability for Past Abuses,' (1997) 19 (2) *Human Rights Quarterly* 255-282.

²⁷³ K. McEvoy and L. Mallinder, L. 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy,' (2012) 39(3) *Journal of Law and Society* at 416.

The international community has now accepted that it is important to hold violators of international criminal law accountable for their actions. Many world leaders, international lawyers and human rights activists now believe it is not acceptable to allow perpetrators of atrocious crimes to go unpunished. The establishment of the ICC is a clear indication of this point. Particularly the Preamble which asserts the role of the ICC is to 'end impunity'. Prosecution and punishment, they argue, is essential to eliminate the notion of impunity and to deter current and future leaders from committing similar crimes and necessary to restore and maintain international peace and security.

In her article, Orentlicher discusses the questions over whether or not a new democratic society, which rises from the ashes of a prior regime, could 'survive the destabilising effects of politically charged trials.'²⁷⁴ Orentlicher is referring to an important aspect of the difficult situations faced by states when emerging from conflict are unstable and rife with tension.

Ending hostilities and preventing the commission of future crimes, is a benefit to the international community. Although the international community has an interest in seeking justice and holding perpetrators of crimes accountable, this interest may yield to greater demands of preserving the lives of the innocent hence some 'tolerance' of amnesty. What should be done when the quest for justice and retribution hampers the search for peace?

²⁷⁴ D. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', (1991) 100 *Yale Law Journal* at 2546, in B. Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws*. (2002) Longman, Pearson Education at 18.

What are the arguments for prosecution? Scholars, in particular, have argued that prosecutions are necessary to deter future violations of international criminal law.²⁷⁵ Amnesties, they argue, may send a signal to 'rogue' regimes that they have nothing to lose by committing heinous crimes to further their political agenda. For example, Richard Goldstone, the former Prosecutor of the ICTY, concluded that the international community's failure to prosecute dictators who had committed heinous crimes encouraged the Serbs to carry out their ethnic cleansing campaign with little fear of retribution.²⁷⁶ This notion of impunity presents a cost to the entire international community, not just the state in which the particular crimes occurred.

However, do prosecutions act as a deterrent in reality? In brief, there is no definite way to prove or disprove this theory due to the limited number of prosecutions.²⁷⁷ The deterrence theory rests on three main assumptions; first, criminals are aware of the laws and the possible punishments; second, criminals weigh up the costs and benefits of their actions before committing a crime; and third, the risk of incarceration outweighs the benefits of committing the crime.²⁷⁸ Although, we may assume that individuals who commit human rights atrocities are aware their actions are illegal, the second and third assumptions are more problematic. However, they perhaps view the likelihood of being hauled before an international court as remote.

One type of accountability is served by the prosecutions of perpetrators which directly relates to punishment, but accountability in a broader sense provides for

²⁷⁵ Ibid

²⁷⁶ M.P. Scharf, 'From eXile files: An essay on trading justice for peace,' (2006) 63 *Washington and Lee Law Review* at 349.

²⁷⁷ C. Slobogin, 'Civilization of the Criminal Law,' (2005) 58 *Vanderbilt Law Review* at 141.

²⁷⁸ P.H. Robinson and J.M. Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing its Best,' (2003) 91 *Georgetown Law Journal* at 953.

other mechanisms as discussed in previous chapters. In this context, Akhavan describes the opposing views as those that originate from 'judicial romantics' and 'political realists'.²⁷⁹ One type of accountability is served by prosecution and is related to punishment, but not all types of accountability are achieved in this way. Those proponents of the prosecution and punishment of perpetrators are what Akhavan calls 'judicial romantics'. Whilst those, which accept alternatives also play an important part in providing accountability for atrocity, and moreover, acknowledge the limitations of criminal trials, are called 'political realists'.²⁸⁰

Charles Taylor and the Special Court for Sierra Leone

Another significant point in history was the prosecution of Charles Taylor, the former president of Liberia. The first head of an African state to be brought before an international tribunal and as mentioned by Rodman '...an important step in ending the culture of impunity in which tyrants and rebel leaders believe they will never be held accountable for their crimes.'²⁸¹ The significance of the Charles Taylor trial for the ICC is that it illustrates the issues with enforcement of the law to end impunity via prosecutions and the '...political requirements of negotiating an end to armed conflict', which is also important during a period of transition.

International Criminal Court

One of the main objectives of the International Criminal Court (ICC) is that '*...the most serious crimes of concern to the international community as a whole must not*

²⁷⁹ P. Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism,' (2009) 31(3) *Human Rights Quarterly* 624-654.

²⁸⁰ Ibid

²⁸¹ K.A. Rodman, 'Is Peace in the interests of justice? The case for broad prosecutorial discretion at the International Criminal Court.' (2009) 22(1) *Leiden Journal of International Law* at 99.

go unpunished.'²⁸² This fits with Akhavan's idea of 'judicial romantics' and, as perhaps could be expected, views prosecutions and the attribution guilt and punishment as the main way of addressing wrong-doing.

A first glance the ICC's website provides the impression of action being taken in several states. Whilst the Court is engaged in prosecuting individuals for serious violations of international criminal law, questions arise concerning the effectiveness and efficiency of such prosecutions.

Within the international *fora* the ICC stands as a beacon of accountability. Heralding a stark warning by holding individuals accountable for their crimes by assuming responsibility for investigating and prosecuting violations of international criminal law where states at national level are unable or unwilling.²⁸³

Holtermann²⁸⁴ states that whilst the ICC Preamble signals an importance of prosecuting perpetrators, that within the Statute '...a few articles could be interpreted so as to leave open the possibility of respecting amnesties.'²⁸⁵ In context, Holtermann's discussion focuses on the arguments surrounding restorative justice which include measures such as conditional amnesties granted by Truth Commissions.

²⁸² ICC Statute Preambular para. 4.

²⁸³ Article 17 of the Rome Statute 1998.

²⁸⁴ J.V.H. Holtermann, 'The End of 'the end of impunity'? The International Criminal Court and the Challenge from Truth Commissions,' (2010) 16 *Res Publica* 209-225.

²⁸⁵ *Ibid* at 212

Complementarity of the ICC

There is a trend in international criminal law which favours domestic over international courts, with international justice being deemed appropriate only when a national solution is not possible. This could be due to a number of reasons, but include situations where a state lacks the necessary legal infrastructure and resources to undertake mass criminal trials. This is more recently evidenced by the principle of complementarity of the ICC. Commenting on the importance and significance of the complementarity principle, John Holmes states: '[t]he complementarity regime is one of the cornerstones on which the future of International Criminal Court will be built.....Such a system would reinforce the primary obligation of States to prevent and prosecute genocide, crimes against humanity and war crimes.....'²⁸⁶

In lieu of any definition of complementarity in the ICC Statute our attention is drawn to the 10th Preambular paragraph which states; 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction.' The ICC Statute imposes an obligation on states to prosecute those crimes which fall within the Statute and to hold those responsible to account for their actions. El Zeidy states the reason behind the principle of complementarity is 'to preserve the ICC's power over irresponsible States that refuse to prosecute those who have committed heinous international crimes.'²⁸⁷

²⁸⁶ J.T. Holmes, 'The Principle of Complementarity, in THE MAKING OF THE ROME STATUTE, Supra note 2, at 73-74.

²⁸⁷ M.M. El Zeidy, M.M. 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law,' (2002) 23 *Michigan Journal of International Law* at 869.

The ICC co-exists with national courts and it has the ability to do this because of the principle of complementarity. In contrast the ad hoc Tribunals are based on the principle of primacy. The combatant states are effectively kept at arms' length, because either they are implicated or because they are unable to offer a suitably stable and secure home for the Courts. In essence courts must, by definition, have distance from those they are judging because judicial accountability is blind, impartial and answers to no-one other than the will of the international community as it is expressed in law.

The ICC will take jurisdiction over a matter where national courts are 'unwilling' or 'unable' pursuant to Article 17 of the Statute. However, how easy is it for the ICC to establish whether a state is unwilling or indeed, unable in order for it to be merely complementary? This is partly due to a codification of the customary international law around universal jurisdiction and crimes against humanity. So if the OTP issues an arrest warrant then the obligation is on the state..

Article 53

Article 53 of the Rome Statute provides discretion to the Prosecutor by, theoretically at least, allowing the Prosecutor to abstain from investigating and prosecuting when in 'the interests of justice'. The Rome Statute fails to define the term, which has led many to question whether this has been deliberately omitted to encourage ambiguity and promote creative interpretation by the Prosecutor, which could possibly lead to acceptance of alternatives to prosecutions.²⁸⁸ However, any decision made by the

²⁸⁸ K.A. Rodman, 'Is peace in the interests of justice? The case for broad prosecutorial discretion at the International Criminal Court,' (2009) 22(1) *Leiden Journal of International Law* 99-126.

Prosecutor to postpone an investigation or prosecution, or to decide not to proceed, is reviewable by the Pre-Trial Chamber.²⁸⁹

The ICC Prosecutor exercised his discretion to suspend investigations in Uganda. Although, temporarily allowing a suspension in order to give peace negotiations an opportunity to succeed is not the same as sanctioning immunity and alternatives to prosecutions, such as blanket amnesties.²⁹⁰

Fish argues the most noticeable action taken by the ICC has been in Uganda since the Prosecutor issued the first arrest warrant against a current head of state.²⁹¹ The ICC actively engaged with peace negotiations between the guerrilla fighters known as the Lord Resistance Army (LRA) and the Ugandan government. Once the ICC has indicted alleged perpetrators there is currently no real discretion to suspend the indictments to allow for peace talks.²⁹² This created unease between both sides and undermined the process of negotiation. After all, why would the LRA leaders agree to end the conflict if they were still subject to the ICC's indictment?

The President of Uganda, Yoweri Museveni, after referring the LRA to the ICC decided to do two things for the cessation of hostilities. Firstly, offering amnesty to the LRA and secondly, contacting the ICC to request the indictments were withdrawn. The ICC declined to withdraw the issued indictments.²⁹³

²⁸⁹ Ibid

²⁹⁰ Ibid

²⁹¹ E.S. Fish, 'Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions,' (2010) 119 *The Yale Law Journal* at 1703.

²⁹² Ibid at 1705.

²⁹³ Ibid at 1706.

Finally an agreement between the LRA and the Ugandan government was reached, which involved the LRA leaders being prosecuted in the Ugandan courts with a promise of lenient sentences. The idea was to prevent the ICC from exercising jurisdiction under Article 17. However, after further discourse with the ICC, the Prosecutor for the ICC stated any arrest warrant for the LRA must be executed in spite of the fact measures had already been taken. The question at this point is whether this is a stance based on procedural issues with the Statute in terms of no discretion to recall an indictment or for allowing leniency in sentence; or a clear indication of the ICC fulfilling its mandate of ending impunity? In any event, one of the most senior officials within the LRA, Kony, failed to attend his trial and continued fighting. Commentators within the international field such as Fish question whether the LRA ever had the intention to stop fighting, but used the negotiations as a tactic to delay the execution of the arrest warrants and provide an opportunity for violence.²⁹⁴ If such assertions are true, perhaps the ICC's determination to see the execution of the arrest warrants was the right one.

There is much discourse within the international *fora* regarding peace versus justice. In fact, the International Federation for Human Rights stated '...that victims and affected populations have an inherent right to peace as well as to justice'.²⁹⁵ Moreover, the two are not mutually exclusive and should benefit one another.

²⁹⁴ F. Mugabe, *Uganda: Army Ready To Attack LRA Rebels*, New Vision (Uganda), 15th June 2008, available at <http://allafrica.com/stories/200806160001.html> in E.S. Fish, 'Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions,' (2010) 119 *The Yale Law Journal* at 1707.

²⁹⁵ International Federation for Human Rights, *ICC Review Conference: Renewing Commitment to Accountability*, 25 May 2010, N°543a, last accessed 12/11/2012, available at: <http://www.unhcr.org/refworld/docid/4bfcc04e2.html>

Concerns over formal prosecutions

In spite of the increased determination to prosecute violators of international criminal law, Blattman and Bowman raise a number of concerns with regards to prosecutions in the pursuit of accountability.²⁹⁶ These concerns include the reliance on state co-operation, for example with the enforcement of arrest warrants and preservation of evidence, which highlight the inherently political nature of prosecutions. A further concern is the safety of investigators on the ground in a particular state. A final observation pertains to the delays, procedural challenges that all add to the length of a trial. Whiting argues that '...swift justice is more certain justice'.²⁹⁷ In fact, the ongoing saga during Slobodan Milosevic's trial meant he was able to delay proceedings so significantly that he died before the completion of the trial. Whilst the victims and their families were denied a verdict the trial did mark a new era for international prosecutions. This leads to the question of whether or not accountability was achieved for his victims and the wider community. In Chapter 1, accountability was defined as the explaining and answering for conduct, but the trial of Milosevic provided no real explanation and he was never held to answer for his involvement in the atrocity carried out in the Former Yugoslavia.

Truth

The important role truth plays in a post-conflict society has already been discussed in previous chapters. Truth serves a multitude of purposes which include the ability to promote social healing, promote justice, establish a historical record, to educate

²⁹⁶ R. Blattmann and K. Bowman, 'Achievements and problems of the International Criminal Court: a view from within,' (2008) 6(4) *Journal of International Criminal Justice* 711-730.

²⁹⁷ A. Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered,' (2009) 50 *Harvard International Law Journal* at 323.

and promote democracy. All relevant to a society faced with the need to address past wrong-doing.

Discussing the Eichmann Trial, Koskeniemi states that 'the trial was held to be necessary in order to bring to publicity the full extent of the horrors of the Nazi war against the Jews'.²⁹⁸ However, concerns were raised on the notion of victors' justice as there were no trials for the Allied Parties. Whilst the Eichmann trial opens up many avenues, which are beyond the scope of this discussion, the state was indeed 'willing and able' to prosecute and it did. The trial was an opportunity for many victims to tell their story, so much so that it really ceased to be prosecution at all but ended up more like a truth commission and execution. Everyone within Israel was happy to see Eichmann convicted and executed, but very many people outside Israel were unhappy with the trial becoming a forum for Israel to create a 'founding myth'.²⁹⁹

The Resolutions establishing the ICTY and ICTR do not list the ascertainment of the truth as one of the objectives of these tribunals. Their Statutes also make no reference to the ascertainment of the truth as an objective of international criminal justice. However, surely some aspect of uncovering truth is inherent in the process of a trial. The inclusion of evidence and witness testimony are all inherent within a criminal trial. In fact, criminal trials perhaps allow for a 'tested truth', a truth which is open to challenge from either the prosecutor or defence counsel. The concern with the truth-ascertaining function of a criminal trial is that it perhaps is a constructed

²⁹⁸ M. Koskeniemi, 'Between Impunity and Show Trials,' (2002) 6 *Max Planck Yearbook of United Nations Law* at 3.

²⁹⁹ *Ibid* at 22.

truth, which has been moulded and formed around a legal argument, thereby impacting on the full extent of truth that can be uncovered.

In spite of any explicit reference to the ascertainment of truth within the Resolutions for the ICTY and ICTR, the need for truth has gained prominence amongst lawyers, politicians and scholars. For example, Ms Albright has said 'Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process'³⁰⁰, thereby acknowledging the importance of truth.

In fact, the Rules of Procedure and Evidence for the ICTY and ICTR were subject to amendment and now include a truth-ascertaining function to the Tribunal. Truth is referred to in:

'Rule 90(F)(i) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

(i) Make the interrogation and presentation effective for the ascertainment of the truth...' ³⁰¹

There are a number of controls that are necessary to constrain defendants using the Court for extensive and endless rhetoric and self-justificatory speeches.

The importance of ascertaining the truth was also expressed in *Prosecutor v Akayesu* in which the ICTR made it clear the objective is 'to establish the truth in its

³⁰⁰ UN Doc. S/RES/827, 25 May 1993, Record on Debate on Resolution 827, accessed via: <http://untreaty.un.org/cod/avl/ha/icty/icty.html>

³⁰¹ State the rules of evidence?

judgment,³⁰² Whilst many commentators argue truth ascertained during a trial is a 'contested truth', it leaves others questioning exactly how much truth can be established with the limited capacity of trials to hear testimony from all those involved. It is in fact the adversarial nature of such trials that impedes the truth-ascertaining function and perhaps a move towards an inquisitorial system would help alleviate the influence of lawyer's account-making on the truths being told.

It was not until the establishment of the ICC that an explicit statement has been made in the founding Statute with regards to the ascertainment of truth. Specifically, Article 54(1)(a) of the Rome Statute states the Prosecutor shall '[i]n 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.' In addition, Article 69(3) of the Rome Statute states that '[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth'. The first read of this section implies the ICC is concerned with ascertainment of the truth, one which is not moulded and adjusted to support a legal argument, but one which seeks the full truth. However, as mentioned previously, the adversarial nature of the trial will impact on the evidence presented at court, and therefore, the quality and extent of the truth established.

Whilst the level and extent of the 'truth' which is uncovered by criminal trials is questionable, the Rome Statute and the interpretations of the provisions have left no room for disputing that the truth-ascertaining function is a core objective of the ICC.

³⁰² *Prosecutor v Akayesu*, T. Ch. I. Judgment, ICTR-95-4-T, 2 September 1998, para.131.

The same can be said in respect of the ICTY and ICTR in spite of the silence on the ascertainment of the truth in their Resolutions.

Justice

A further argument in favour of prosecution relates to the issue that some alternatives, such as amnesties, deprive victims of the right to seek justice. Whilst it is accepted that all people have certain fundamental rights, including the right to justice, the right to judicial protection, and the right to a fair remedy.³⁰³ Criminal trials are necessary to honour these fundamental rights as well as to 'give significance to the [victims'] suffering'.³⁰⁴ In addition to upholding these rights, prosecutions may help restore the victims' dignity, serve as a truth finding mechanism, and provide the necessary evidence to permit victims to recover damages in civil courts.

Beyond the rights of the actual victims and their families, this argument asserts, that some alternatives deprive the rest of humanity of the opportunity to seek justice. In both our domestic and international legal systems, it seems to be the notion that crimes do not only affect the aggrieved person, but the entire community. The international community has an interest in prosecuting crimes that offend the norms of all mankind regardless of the specific victims' wishes. On this basis, amnesties and truth commissions, as an alternative to prosecutions, prevent humanity from seeking this level of retribution. The broader question is whether the international community should be focused on retribution, but instead concentrates on

³⁰³ R.C. Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* at 191.

³⁰⁴ M.P. Scharf, 'Swapping Amnesties for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1998) 31(1) *Texas International Law Journal* at 14.

establishing a fuller truth, reconciling a divided state and acknowledging all those affected by the conflict.

It has also been asserted that alternatives may undermine the transition to democracy and to the establishment of the rule of law.³⁰⁵ If criminals from a prior regime are not brought to justice, the prevailing notion of impunity may undermine the establishment of democratic institutions. Likewise, if citizens perceive that criminals are not held accountable for their actions, they are more likely to disregard the law themselves, further undermining the establishment of the rule of law.³⁰⁶ Lawlessness leads to more lawlessness, encourages disrespect for legal institutions, and increases the probability of vigilante justice.³⁰⁷ Finally, the absence of any form of prosecution may fuel fears that a prior regime may come back to power, further undermining attempts to reconcile the country. Prosecuting criminals may reduce the community's fears and provide a sense of stability and security for a new democratic regime. These are arguments made by 'judicial romantics' who fail to acknowledge the limitations of trials. They can be slow and cumbersome, selective in terms of situations, perpetrators and the evidence used during the trials. In fact, such statements concerned with the necessity of criminal trials epitomise the concern by Drumbl regarding the tensions that exist between the unrealistic expectations placed on international criminal law and what it can realistically achieve.

³⁰⁵ D. Orentlicher, 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* at 2542.

³⁰⁶ D.M. Kahan, 'Between Economics and Sociology: The New Path of Deterrence,' (1997) 95 *Michigan Law Review* at 2486.

³⁰⁷ D. Orentlicher, 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* at 2542.

Criminal trials are principally concerned with 'the allocation of guilt and imposition of punishment'.³⁰⁸ The primary concern for trials is the individualisation of guilt and at the very heart of such a mechanism is retribution and through this approach, justice is achieved. Legal commentators have argued that 'justice delayed is justice denied' with the rationale behind this position concerned with the impact of delays on trials.³⁰⁹ However, Whiting has sought to address this position.³¹⁰ Whiting argues there is a widely accepted desire to expedite trials, which many view as justice being done, but discusses on the other hand, '[i]nternational criminal cases that excessively expedited.....can lose credibility and can be perceived as failures, thus undercutting the very goals that they are trying to serve.'³¹¹

The First Annual Report of the ICTY reaffirms the mandate of the Tribunal which is 'to do justice, to deter further crimes and to contribute to the restoration and the maintenance of peace.'³¹² Whilst the ICTR Resolution refers to an additional objective, namely, its contribution to the process of national reconciliation.³¹³ On the other hand, the ICTY Resolution does not explicitly refer to reconciliation as an objective, but a number of judgments have nonetheless referred to such an objective.³¹⁴ For instance, in *Deronjić*, the Chamber held that '[t]ruth and justice should also foster a sense of reconciliation between different ethnic groups within the

³⁰⁸ J. Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions', (2011) 11 *International Criminal Law Review* at 280.

³⁰⁹ A. Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50 *Harvard International Law Journal* at 323.

³¹⁰ Ibid

³¹¹ A. Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered.' (2009) 50 *Harvard International Law Journal* at 323.

³¹² M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999) 2nd Edition, Kluwer Law International (The Hague/London/Boston) at 236.

³¹³ UN Doc. S/RES/955, 8 November 1994.

³¹⁴ UN Doc. S/RES/808, 22 February 1993.

countries.....of the former Yugoslavia'.³¹⁵ In Erdemovic, the Trial Chamber stated that efforts to end impunity 'would contribute to appeasement and give the chance to the people who were solely afflicted to mourn those among them who had been unjustly killed'.³¹⁶ However, criticism particularly focused on the ICTY has been rife with regards to concerns over the selectivity of prosecutions and the use of plea-bargaining.

More recently, the ICC has affirmed the right to justice for victims, which was defined as follows: "victims' interests in the identification prosecution and punishment of those who have victimised them by preventing their impunity. When the right to justice is to be satisfied through criminal proceedings, victims have a central interest in the outcome of such proceedings leading to the identification, prosecution and punishment of those who have victimised them. Accordingly, victims have a personal and core interest in the determination of guilt or innocence of the persons charged."³¹⁷

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³¹⁵ *Prosecutor v. Deronjić*, T. Ch. Judgment on sentence, IT-02-61-T, 30 March 2004, para.133.

³¹⁶ Sentencing Judgment, IT-96-22-T. 29 November 1996, para.65.

³¹⁷ *Prosecutor v. Katanga & Ngudjolo*, P.T. Ch. Public Urgent Decision on the Set Procedural Rights Attached to procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, paras. 39-42, footnote 102.

³¹⁸ UN Doc. S/RES/808, 22 February 1993.

³¹⁹ *Prosecutor v. Deronjić*, T. Ch. Judgment on sentence, IT-02-61-T, 30 March 2004, para.133.

were solely afflicted to mourn those among them who had been unjustly killed'.³²⁰ The ICTY has been plagued by a number of criticisms by lawyers, politicians and scholars. Firstly, the issue of selectivity with regards to the ICTY targeting a particular group. Further criticisms have been raised with regards to the common use of plea-bargaining.

Recognition

Recently the International Criminal Court announced a formal plan to provide victims with reparations. It comes to light after the recent conviction of Thomas Lubanga Dyilo for war crimes.³²¹ The Trust Fund for Victims (TFV) provides a mechanism for distributing money to victims as a way of reparation. According to a recent press release 'The TFV addresses and responds to the physical, psychological, or material needs of the most vulnerable victims'.³²² In addition, these reparations provide a form of recognition for victims, but only to those victims identified by the ICC. It also assumes that monetary reparations are a way of helping to reconcile those most directly affected, but what about the wider community and those victims not identified? This leads to selective accountability for those selected to air their testimonies in court.

This results in the individualisation of victims when the very nature of the crime may have been against a collective group. For example, the fact that crimes against humanity encompass particular groups who might have been, collectively, the victim

³²⁰ Sentencing Judgment, IT-96-22-T, 29 November 1996.

³²¹ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, accessed via: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx

³²²

of attacks means that the international community is eager to seek recognition and protection for groups, not just as a composite of individuals.

The recent trial and conviction of Charles Taylor has provided some accountability, but has failed to provide recognition for a large number of victims.³²³ Outside the Court the news reporters showed images of Taylor's victims most of whom had their limbs hacked off with machetes. Victims are still living in poverty with limited health care and essential supplies. Although, at the very least the Court recognised Taylor was responsible and held to account, albeit for a charge of aiding and abetting,³²⁴ and this in turn must provide some acknowledgement that there are victims. This could loosely be deemed some form of recognition, but surely recognition should go further and impact upon the lives of the victims.

The OTP has to make difficult decisions about which charges will stand up in court and not overburden the charge sheet to make sure the trial is expeditious. This inevitably means some victims will be short-changed (truth), but that is balanced against a good prosecutorial strategy (justice).

Prosecutions do encounter a number of obstacles and risk becoming show trials as in the case of Milosevic, which potentially risk de-legitimising the process.³²⁵ Whilst making a mockery of the institution, the more important focus should be on the victims and/or their families. The delays caused through the refusal to accept the

³²³ *Prosecutor v. Charles Ghankay Taylor*, 30 May 2012, SCSL-03-01-T, accessed via: <http://www.sc-sl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3d&tabid=107>

³²⁴ Special Court for Sierra Leone Press Release, Charles Taylor Convicted on all 11 Counts, 26 April 2012 accessed via: <http://www.sc-sl.org/LinkClick.aspx?fileticket=by3HPDDiFTM%3d&tabid=232>

³²⁵ M. Koskeniemi, 'Between Impunity and Show Trials,' (2002) 6 *Max Planck Yearbook of United Nations Law* at 32-35.

court's jurisdiction, continual denials and lack of acknowledgement have further repercussions for those directly affected by the actions of the defendant.

The practicalities of carrying out prosecutions may result in the most senior leaders being held accountable for atrocity, but fails to address all involved. The limited nature of participants will also have an impact on the narrative that can be adduced through trial. This selectivity diminishes the quest for accountability and raises a number of questions on whether victims and their families are satisfied knowing that leaders who orchestrated the atrocity had been held accountable, rather than the individual pulling the trigger, or planting explosives that has blown off the victims limbs.

Summary

This chapter has explored the role of prosecutions in relation to ascertaining truth, providing justice and recognition with a view to understand the role such prosecutions play in providing accountability. There are a number of concerns when it comes to accountability and prosecutions. Firstly, the unrealistic expectations placed on criminal trials. Second, the practical difficulties, impact of selectivity and the repercussions for accountability. Third, the complex issues faced by a post-conflict state go beyond law.

Chapter Six: Discussion on the issues

It is the author's view that responding to atrocity within a state has no one size fits all answer when it comes to an accountability mechanism. Each conflict has its own political and social dynamics and it is perhaps the case that accountability is indissolubly tied to political and social reality. This links with Akhavan's notion of the 'political realists'.³²⁶ Neither the alternative mechanisms nor prosecutions fit with what Rubenstein describes as a 'standard model' of accountability as mentioned in Chapter 1.³²⁷ In which case, lustration might be the very best form of accountability: certain people lose their power, whilst society gets on with rebuilding without public focus on divisive debates.

The discussion thus far has explored the mechanisms available to post-conflict societies, and their struggles to deal with the past, as a means of pursuing accountability. It seems that out of the mechanisms discussed, Drumbl is correct in his assertion that prosecutions often become the default setting when either states themselves or the international community as a whole are faced with dealing with the most heinous crimes.³²⁸ This is, at least, a departure from the classic assumption that internal or external conflict is exclusively a matter for sovereign states.

The Special Court of Sierra Leone stated '...there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law'.³²⁹ The statement by the Special Court of Sierra Leone is what prompts Drumbl's fears about having an overreliance on the criminal law to provide

³²⁶ P. Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism,' (2009) 31(3) *Human Rights Quarterly* at 625.

³²⁷ J. Rubenstein, 'Accountability in an Unequal World,' (2007), 69 (3) *The Journal of Politics* at 616.

³²⁸ M. Drumbl, *Atrocity, Punishment and International Law* (2007) Cambridge University Press

³²⁹ *Prosecutor v Kallon and Kamara*, Special Court of Sierra Leone, A.Ch. 13.3.2004 para.82.

accountability in extraordinary circumstances. States want justice done and seen to be done, even if that means having a minimal, reactive, international legal regime; if there is an emerging norm around amnesties then this too is a contribution to the international legal order, even if extraordinary crimes seem to require bespoke responses.

Truth

The establishment of the truth is both a requirement and necessity when holding an individual or institution to account. It was Supreme Court Justice Robert Jackson at Nuremberg who emphasised the importance of establishing a narrative detailing the full extent of the conflict.³³⁰ An accurate and fulsome narrative demands parties on all sides enter into a discourse and provide an account of their actions, inactions or experiences.

The discussion has focused on the merits of using conditional amnesties as outlined in Chapter 3. Conditional amnesties require individuals to engage with a truth-ascertaining process as part of the agreement to grant amnesties. Whilst many prosecution commentators, like Orentlicher³³¹ and Ricoeur,³³² effectively demand the

³³⁰ Report from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, to the President (June 7, 1945) 39 *American Journal of International Law* at 178, 184 (Supp. 1945) in M.P. Scharf, 'From eXile files: An essay on trading justice for peace,' (2006) 63 *Washington and Lee Law Review* 339-376 accessed via:

http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1140&context=wlulr&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.uk%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dscharf%2520exile%26source%3Dweb%26cd%3D1%26ved%3D0CC4QFjAA%26url%3Dhttp%253A%252F%252Fscholarlycommons.law.wlu.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1140%2526context%253Dwlulr%26ei%3DX5HAULKcPliA4gSN2YC4Aw%26usq%3DAFQjCNEN71lqEhNMv1wtQZZq_BJdDqgZfQ#search=%22scharf%20exile%22

³³¹ D. Orentlicher, 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2585-93.

³³² P. Ricoeur, *Memory, history, forgetting* (2004) University of Chicago Press

prosecution of perpetrators of past wrong-doing, some others such as Drumbl,³³³ Mallinder and McEvoy argue that conditional amnesties have the capacity to provide accountability to victims and the wider community due to the extent of the truth that can be uncovered.³³⁴ Perpetrators are perhaps more open and honest as to their wrong-doing knowing they are protected from prosecution. Whereas if perpetrators live in fear of facing prosecutions for their misconduct they are more likely to censor the extent of their truth-telling for fear it would be used against them during trial.

Arguably both prosecutions and truth commissions seek to reconstruct facts with the main difference being a truth commission does not involve criminal prosecutions and often include an amnesty.³³⁵ One of the benefits of a truth commission is the focus on producing a report containing an official version of events. However, it seems the focus of international criminal justice is on the allocation of guilt, thereby making the primary purpose retributive. So whilst a trial may provide a contested truth, the full extent of the truth is limited due to the adversarial nature of criminal trials. Whereas, a truth commission can provide a holistic truth, one which could perhaps stand the test of time.

Hayner discusses the difficulty of States when dealing with the dilemma of addressing past abuses through prosecutions or granting amnesty in the pursuit of the cessation of hostilities and the emergence of a new democratic regime.³³⁶

³³³ M. Drumbl, *Atrocity, Punishment and International Law* (2007) Cambridge University Press

³³⁴ For example see; L. Mallinder and K. McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies', (2011) 6(1) *Contemporary Social Science* 107-128.

³³⁵ M. Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law*

³³⁶ P.B. Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study', (1994) 16(4) *Human Rights Quarterly* at 597, in B. Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws*. (2002) Longman, Pearson Education at 19.

Hayner states '[i] used to feel very strongly that truth needs to come out. But there are others here that don't feel that way; they feel that it is most important to focus on the elimination of future abuses...'.³³⁷

Criminal trials do provide a contested truth, but due to the adversarial nature of such trials, is one which fits with the prosecutions' legal argument, whilst the defence counsel aim to challenge the 'truth' in a way which works in their own favour. Such a system only provides for a limited amount of account-giving by both perpetrators and victims. For example, the Prosecutorial Strategy mentioned in Chapter 5 makes it clear that the Office of the Prosecutor will prioritise the investigations and prosecutions of those most responsible, in addition the accused are unlikely to incriminate themselves through their own testimony which, again, hinders the extent of account making and, for example, censors their responses to questions under cross examination. The account-giving by victims is also limited, not only for practical reasons and the number of victims that are successfully identified, but also the process is perhaps intimidating, even alien, for some victims and witnesses.

Justice

Scharf observed that the reality of situations in which atrocities take place frequently present the need to negotiate to end conflicts and prevent further crimes long before one can even think of bringing perpetrators to justice.³³⁸ In this vein, the initiation of

³³⁷ Ibid

³³⁸ M.P. Scharf, 'From eXile files: An essay on trading justice for peace,' (2006) 63 *Washington and Lee Law Review* 339-376 accessed via:
http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1140&context=wlulr&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.uk%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dscharf%2520exile%26source%3Dweb%26cd%3D1%26ved%3D0CC4QFjAA%26url%3Dhttp%253A%252F%252Fscholarlycommons.law.wlu.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1140%2526context%253Dwlulr%26ei%3DX5HAULKcPliA4gSN2YC4Aw%26usq%3DAFQjCNEN71lqEhNMv1wtQZZq_BJdDqgZfQ#search=%22scharf%20exile%22

prosecutions and threat of widespread prosecutions in a post-conflict society, which has been subject to a complex transition, can potentially lead to uprising and protests from supporters of those on trial and further retaliation. So to insist perpetrators be brought to justice through the use of prosecutions would be to prolong a conflict and thus increase the number of crimes committed.³³⁹

The cessation of conflict often requires negotiation to prevent further crimes long before anyone can even think of bringing perpetrators to justice.³⁴⁰ In fact, in his article, Scharf argues the default position of insisting on prosecutions can enable conflicts to continue.³⁴¹

Amnesties and truth commissions have the potential to provide a more fulsome account of events as well as the potential to help facilitate the process of lustration. This provides an additional dimension to the benefit of amnesties, over prosecutions.

The demand for accountability and the seeking of justice seem to stem from the international community's need to demonstrate leadership and foster the rule of law nationally, regionally and internationally. The narrow scope of the ICC which focuses on African states does pose some problems with regards to the perceived selectivity issues.

³³⁹ M.L. Wade, 'Genocide: The Criminal Law between Truth and Justice,' (2009) 19(2) *International Criminal Justice Review* at 157.

³⁴⁰ M.P. Scharf, 'From eXile files: An essay on trading justice for peace,' (2006) 63 *Washington and Lee Law Review* 339-376 accessed via:
http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1140&context=wlulr&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.uk%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dscharf%2520exile%26source%3Dweb%26cd%3D1%26ved%3D0CC4QFjAA%26url%3Dhttp%253A%252F%252Fscholarlycommons.law.wlu.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1140%2526context%253Dwlulr%26ei%3DX5HAULKcPliA4qSN2YC4Aw%26usq%3DAFQjCNEN71lqEhNMv1wtQZZq_BJdDqgZfQ#search=%22scharf%20exile%22

³⁴¹ Ibid

Recognition

Prosecutions do provide recognition of past wrong-doing as well as those individuals most responsible for past wrong-doing. However, due to the limited nature of criminal trials and their inherent selectivity of those most responsible and the number of witnesses that can participate, this hinders the extent to which recognition can be provided. Limited recognition can be provided through guilty verdicts and the awarding of reparations to identified victims.

It is important to remember that conditional amnesties do not deny past wrong-doing, but provide an opportunity to create a historical narrative whilst helping to reconcile a society and aid reconstruction. The use of amnesties can also help stabilise a society which is undergoing a difficult period of transition.

Truth commissions do provide recognition for past wrong-doing on both an individual and institutional level through a more extensive truth-ascertaining process than prosecutions. One which the wider community can participate in to produce a historical record of the conflict, detail the wrong-doing, and instances of crimes committed by a state. Such a process should provide a more fulsome truth which victims and the wider community help repair and heal wounds from past conflict.

‘To repair victims’ harm and promote reconciliation, a truth commission should be only one part of a wider programme of reform. A state that establishes a

truth commission without accompanying reforms raises doubts about its commitment to the process of reparation and reconciliation'.³⁴²

The initiation of an investigation and subsequently a prosecution provide some form of recognition to victims. However, whilst there are similarities between truth commissions and prosecutions, fundamentally, prosecutions are devised to prosecute and punish. Drumbl is concerned with using a mechanism which concerns itself with individuals to address wrong-doing and help reconcile a post-conflict state when it is the community, the collective which has also been seriously damaged by the conflict. As such, the uses of the alternative mechanisms discussed can have a much broader impact than prosecutions alone.

It is difficult to determine in any situation whether truth, justice, recognition and contribution to a historical record have been achieved. International courts do not operate in a vacuum but are part of numerous efforts to rebuild a transitional society. Trials are not 'ends in themselves', and can only be successful if other measures are simultaneously being taken.³⁴³ It might also be the case that some states do not want to, or cannot, rebuild the rule of law, such as in the Democratic Republic of the Congo and Somalia.

The effectiveness of a truth-ascertaining system in a wider sense than the legal establishment of guilt depends on the perception of the affected communities. Only if they accept the outcome as truthful can this objective be potentially met. The

³⁴² D. Roche, 'Truth Commission Amnesties and the International Criminal Court,' (2005) 45 *British Journal of Criminology* at 579.

³⁴³ M. Drumbl, *Atrocity, Punishment and International Law*, (2007) Cambridge University Press at 205-209.

establishment of the truth about a conflict is multi-layered and complex, and there is not one mechanism which can fully ascertain the truth.

Arguably, the ICTY has failed to bring the ethnic communities in the former Yugoslavia closer together.³⁴⁴ In fact, Clark argues that the ethnic groups still believe their own truth, deny their own crimes, and disregard some of the findings made by the ICTY. This widespread denial on all sides has obstructed the reconciliation process.³⁴⁵ The ICTY has been subject to a number of criticisms from both scholars and lawyers.

A notable criticism of the ICTY is that many Serbs argue it is an anti-Serb court, particularly because the highest acquittal and low sentencing rate is among the Muslim defendants.³⁴⁶ Further obstacles include, the denial by Serbs that the massacre at Srebrenica amounted to genocide, the Croats are dissatisfied because their main hero, Gotovina, was convicted and the Muslim communities are irritated because their heroes had to face international justice too.³⁴⁷ The recent release of Gotovina following his conviction being quashed could lead to the appeasement of some, whilst reigniting tension from other communities.

Prosecutors by necessity and legal training will always exercise their discretion to pursue the most winnable cases, not necessarily the most deserving.³⁴⁸ The Prosecutorial Strategy of the Office of the Prosecutor (OTP) at the ICC is based on

³⁴⁴ J. Clark, 'Transitional Justice, Truth and Reconciliation: An Under-Explained Relationship,' (2011) 11 *International Criminal Law Review* at 247.

³⁴⁵ *Ibid* at 249

³⁴⁶ *Ibid*

³⁴⁷ *Ibid*

³⁴⁸ M. Drumbl, *Atrocity, Punishment and International Law*, (2007) Cambridge University Press at 205 - 209.

four fundamental principles which directly feed into the five objectives for the period of 2009-2012.³⁴⁹ The Strategy clarifies the key priorities for the OTP as well as providing a statement by which the efficiency of the court can be measured against.

These four principles which underpin the Prosecutorial Strategy are firstly, to adopt a positive approach to the principle of complementarity, which provides the Office of the Prosecutor will encourage states to pursue national proceedings where possible.³⁵⁰ Second, undertake 'focused investigations and prosecutions', which drives the Office of the Prosecutor to concentrate on the prosecution of those individuals most responsible.³⁵¹ Third, engage with victims and encourage their participation in investigations and prosecutions.³⁵² Fourth, is 'to maximise the impact of the activities', which should 'contribute to the prevention of future crimes'.³⁵³

These underlining principles have led to the objectives for 2009-2012 to include the completion of at least three trials and start proceedings in another case,³⁵⁴ 'continue with all on-going investigations',³⁵⁵ be proactive in the monitoring of potentially new situations which will fall within the jurisdiction of the ICC,³⁵⁶ and to 'enhance cooperation with states'.³⁵⁷

³⁴⁹ Office of the Prosecutor, ICC, The Hague, Prosecutorial Strategy 2009-2012, 1 February 2010 last accessed on 28/11/12 via: <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>

³⁵⁰ Ibid para.17.

³⁵¹ Ibid para.19.

³⁵² Ibid para.22.

³⁵³ Ibid para.23

³⁵⁴ Ibid para.25

³⁵⁵ Ibid para.31

³⁵⁶ Ibid para.36

³⁵⁷ Ibid para.41

This selectivity, whether or not it is a necessity for practical reasons, impacts on accountability and the extent in which truth, justice and recognition can be achieved. In reality any approach to post-conflict justice that equates accountability with retribution not only produces a few 'officially guilty', but also provides many more 'false innocents'.³⁵⁸ The Office of the Prosecutor (OTP) and the ICC are subject to constraints, whilst faced with ideological pressures. In essence, the OTP works like the Crown Prosecution Service, but is also the Gatekeeper to international justice and all that that entails about global law and order after two World Wars.

Mallinder and McEvoy call for 'broadening the gaze', which involves looking to other social sciences to help provide post-conflict justice.³⁵⁹ Dealing with atrocity requires the complex needs of victims to be addressed, needs which arguably go beyond those that could be satisfied by simply punishing perpetrators.³⁶⁰

Overview

After a sustained period of conflict where there is a large number of victims, as well as perpetrators such as in Rwanda, those left on the ground will be left 'with a sense of disconnection'.³⁶¹ The 'disconnection' occurs in respect of the wider community, with the state, the rule of law (or lack thereof) as well as the legal processes taking place in international courts.

³⁵⁸ J. Steinhert, 'Fin de siècle criminology,' (1997) 1(1) *Theoretical Criminology* 111-129 in L. Mallinder and K. McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies,' (2011) 6(1) *Contemporary Social Science* at 123.

³⁵⁹ L. Mallinder and K. McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies,' (2011) 6(1) *Contemporary Social Science* at 123.

³⁶⁰ S. Walklate, *Handbook of victims and victimology* (2007) Willan, Cullompton.

³⁶¹ M.J. Gallant and H.M. Rhea, 'Collective Memory, International Law, and Restorative Social Processes After Confalgration: The Holocaust', (2010) 20(3) *International Criminal Justice Review* at 270.

The individualisation of accountability within international criminal justice has a dominant effect on how the international community views victims and the role law plays in addressing their individual experiences.³⁶² If we are referring to the restoration of a once conflict ridden state, efforts should be made to look at ways to heal, what Gallant and Rhea call, 'the collective',³⁶³ one which moves beyond the dominant punitive measures of criminal trials, thereby acknowledging 'law alone cannot appease a community, or those within it, who experienced a terrifying past'.³⁶⁴

Fournet emphasises the importance to adapt institutions following a period of conflict to aid 'the recovery process'.³⁶⁵ Therefore, pluralising the response to atrocity in a post-conflict society provides an opportunity to come to terms with the past, as well as aiding the sense of community, which both help to provide reconciliation. It is also imperative for any process to engage with, and actively encourage participation by victims, as re-building a state cannot happen without this happening.³⁶⁶

The participation by victims in the investigation and prosecution of the chosen perpetrators is said to be encouraged in the Prosecutorial Strategy of the Office of the Prosecutor (OTP). It also refers to the issue the ICC will be selective in who it chooses to prosecute, which may also hinder the number of victims that are able to have a meaningful input in the process. The practical limitations and adversarial

³⁶² Ibid at 272

³⁶³ Ibid 265-279

³⁶⁴ Ibid at 272

³⁶⁵ C. Fournet, *The Crime of destruction and the law of genocide: Their impact on collective memory*, (2007) Ashgate Publishing Group, Oxford, UK, in M.J. Gallant and H.M. Rhea, 'Collective Memory, International Law, and Restorative Social Processes After Conflagration: The Holocaust' (2010) 20(3) *International Criminal Justice Review* at 270.

³⁶⁶ C. Villa-Vicencio, 'Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet', (2000) 49 *Emory Law Journal* at 209.

nature of a criminal trial means the prosecution will be restricted and the defence advocates will 'produce an array of legal arguments designed to challenge and exclude from the court record some of the most basic information used in persuasive storytelling and the writing of history'.³⁶⁷ This process is therefore not conducive to providing a more fulsome account of the conflict and encounters a number of obstacles which limits the extent of the truth-telling. Although, during the course of a criminal trial opportunities arise to provide a contested truth.

It has been stated that '...virtually all cases of mass abuses, accountability via criminal trials must necessarily be selective.'³⁶⁸ This is also implied by the Prosecutorial Strategy of the OTP at the ICC, which states the ICC will focus on those individuals who are viewed as being the most responsible.³⁶⁹ Even if it was possible to prosecute all wrong-doers Ratner *et al* have questioned whether holding individuals accountable is enough.³⁷⁰ It could be argued that any response undertaken by a state or the international community would never be enough for addressing the heinous crimes that fall within international criminal law. International criminal law serves two purposes: firstly provides opportunities to confront past atrocity and secondly, prevent future conflict.³⁷¹ This leads to questions over whether or not it is possible to fulfil the full extent of these objectives, and in addition, how these are measured.

³⁶⁷ M. Marrus, *History and the Holocaust in the Courtroom*, (unpublished manuscript delivered at the conference Searching for Memory and Justice: The Holocaust and Apartheid, Yale University, February 8-10, 1998) in C. Villa-Vicencio, 'Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet', (2000) 19 *Emory Law Journal* at 211.

³⁶⁸ N.J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', (1996) 59(4) *Law and Contemporary Problems* 127-152.

³⁶⁹ The Prosecutorial Strategy (2009-2012) of the Office of the Prosecutor, ICC last accessed via: <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>

³⁷⁰ S.R. Ratner, J.S. Abrams and J.L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, (2009) 3rd Edition, Oxford University Press at 1-2.

³⁷¹ *Ibid*

There are excessive expectations of international courts and tribunals on what they can realistically deliver on behalf of the international community. There is perhaps a need to compromise due to the practical difficulties with the number of perpetrators involved in past wrong-doing, as well as victims. These practical difficulties are inherent in a mechanism which was not designed to address wrong-doing on such a large scale.

Concern has been raised on the use of the criminal law and Westernised principles of due process to address extraordinary crimes.³⁷² This Westernised assumption that justice is achieved through criminal trials often occurs away from the locality of the wrong-doing, thereby potentially hindering the impact such trials can have on the affected community as they often fail to resonate on the ground. Drumbl questions whether criminal trials which have been designed to punish individuals for 'ordinary' crimes should be the mechanism used for often widespread and systematic extraordinary crimes.³⁷³

Drumbl goes further and calls into question the move to individual criminal accountability when the very nature of the crimes of genocide and crimes against humanity, for example, concern a collective group. In this context, a 'collective' in terms of both perpetrators of heinous crimes as well as their victims. There is also a more fundamental problem, the idea of criminality in this context which raises two main questions. Firstly, whether or not there can be a crime when there is no rule of law to violate. Second, if you can label someone a criminal when there are no social

³⁷² M. Drumbl, *Atrocity, punishment, and international criminal law*, (2007) Cambridge University Press,

³⁷³ Drumbl, M. *Atrocity, punishment, and international criminal law*, (2007) Cambridge University Press,

norms. In essence, the idea of crime presumes the existence of law and in some circumstances the law failed to the idea of criminality must too.

Summary

Time has come for modesty as to what these institutions can achieve in terms of justice. One of the reasons is that adversarial individual criminal law falls short in terms of retribution, deterrence and other goals. The criminal law is built on what Drumbl calls a fiction.³⁷⁴ The fiction is wide scale atrocity as being the crime of men, atrocity is the crime of individuals but it is also much more. Atrocity is also a product of groups and collective action. Yet all the criminal law can do is pin blame on those who are the most immediately responsible. It thereby tries to offer a simple solution to extremely complex sources of extreme evil. However, in the process, it creates authorised narratives of events, neutralises and censures criminal leaders, and demonstrates how the rule of law should work. It offers a simple solution which may soothe the sensibilities of some and might ease fears, but only blames a handful of wrongdoers. Drumbl argues the collective and systemic nature of violence should push us beyond the individual based criminal law to actively consider what collective justice would look like.³⁷⁵

A post-conflict society is faced with a number of complex issues to help facilitate a transition from a previous regime to a new democracy. The issues are of concern to the wider community and only through adopting a mechanism which allows for a broader perspective can the society move forward. Selective prosecutions are not the answer to a post-conflict society and although prosecutions may have to happen

³⁷⁴ Ibid

³⁷⁵ Ibid

the international community should not underestimate the merits of both conditional amnesties and, perhaps more so, truth commissions. Such alternatives provide more of an opportunity for the wider community to be involved in a process of truth-telling, healing and reconciliation, thereby having a restorative impact on the society. These processes are also future-orientated in that they can help facilitate the process of lustration, but also provide a greater opportunity to learn from the past and to help foster a sense of community to which it can move forward.

The stabilisation of a post-conflict society is paramount to preventing further atrocity. As previously discussed in Chapter 3, an amnesty has the potential to facilitate such an objective. A post-conflict state, where the bulk of the conflict has ended without amnesty, and has achieved stabilisation, it may choose to formally prosecute perpetrators or opt for a truth commission. What is clear, is that whichever accountability mechanism is used, it is tasked with operating within a complex situation and with conflicting demands.

International criminal justice seems to be increasingly concerned with moving unique and complex issues within a post-conflict state, viewed by Whiting as the 'extraordinary, to the ordinary'.³⁷⁶ Whiting is referring to this push for using a criminal justice system which is predicated on prosecutions and punishment and constructed within a domestic setting, and transplanting it into an 'international realm'.³⁷⁷

It is important for international criminal law should be pluralised to formally include alternative mechanisms to prosecutions which should also allow for local justice, for

³⁷⁶ A. Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50 *Harvard International Law Journal* 50, at 339.

³⁷⁷ Ibid

example the use of Gacaca courts in Rwanda. Situations are, and should be, treated on a case by case basis and by allowing the possibility of implementing alternatives to a situation means a repertoire of mechanisms are at the disposal of the international community to address atrocity. Formally legitimising the utility of alternative mechanisms, and using in conjunction with prosecutions, could provide more accountability than any single mechanism alone.

Chapter Seven: Conclusion

This thesis began by asking the question: '[i]n the pursuit of accountability are there more appropriate mechanisms than prosecutions?'. Amnesties and truth commissions were chosen as alternatives as they are frequently used, as well as, somewhat controversial amongst legal commentators.

A well-constructed amnesty, one described by Slye as being a restorative amnesty, would provide some accountability.³⁷⁸ Coupling an amnesty agreement with a truth recovery mechanism allows for victims to participate in the process, provides an opportunity for truth, thereby creating a narrative of events, and through this process provides victims, and other affected groups, a form of recognition.

Arguably, an amnesty often lacks the ability to ascertain truth and provide justice. However, amnesties can provide stabilisation within a post-conflict state and enables a process of lustration. Amnesties can also end the cycle of conflict and when pieced together can help establish the rule of law.

Truth commissions have a wider remit than trials. They take a holistic approach to accountability and not only help hold both individuals accountable, but also institutions. The very nature and scope of truth commissions are best placed to address such things as institutional failings and provide recommendations for reform to prevent future conflict. Coupled together, truth commissions and amnesties provide 'institutional accountability'.

³⁷⁸ R.C. Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* at 173.

Whilst formal prosecutions are the default setting for the international community they are not always the most appropriate mechanism. At first glance prosecutions seem to be the most effective form of accountability perhaps because they work within a legal and recognised process. However, further investigation draws the conclusion that lengthy trials and questionable plea-bargains, as in the case of the International Criminal Tribunal for Yugoslavia, diminishes the extent to which accountability can be achieved.

‘In certain circumstances, political compromise or alternatives to prosecution may be a necessity that cannot be easily escaped.’ This stems from the complex nature of a post-conflict society. Each post-conflict state has its own culture, traditions and understandings of the concepts of truth, justice and recognition.

Whilst the ICC and prosecutions should not be disregarded as an avenue for accountability it is important to be aware that there is no one size fits all approach to dealing with the past in a post-conflict society. Therefore, it is important to have a repertoire of mechanisms available as a response. Amnesties, truth commissions and prosecutions all have their place in international justice. The task is to determine which mechanism is the most appropriate and it should be left to states themselves, with the support of the international community to determine the most appropriate way to reconcile a post-conflict state.

Victim participation is vital to truth ascertainment, the establishment of justice and central to the importance of recognition. However, the participation of victims does have the potential to burden the system, in particular in criminal trials. Allowing

victims to be central to any accountability mechanism can only add credibility to the role it plays in a post-conflict society. It is important for any mechanism to establish safeguards to help prevent re-victimisation.

Although victim participation is important it is also cumbersome when it is representative participation, not 'victim witnesses' and yet the ICC adopts this approach. Thus, spreading into the role usually played by domestic institutions might suggest that the international community does not see accountability as wholly synonymous with prosecution. Conversely, victim participation might be playing two traditional roles. Firstly, they are sometimes witnesses for the prosecution, and second, they may have an input on remedies.³⁷⁹ Either way, the international community sees recognition as an important part of the ICC both in terms of making it part of the elements of the crimes (e.g. gendered crime, racial crime) and through more general participation.

This discussion has explored accountability in an international criminal justice context. Accountability is achieved through the ascertainment of the truth, and the discussion has explored the complexity of 'truth', achieving justice and providing recognition. No single mechanism can provide a 'standard model' of accountability, but it may be more appropriate to combine mechanisms to help move towards such a goal.

Word count: 28,115.

³⁷⁹ <http://jurist.org/paperchase/2012/08/icc-outlines-first-ever-reparation-plan-for-victims.php>

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