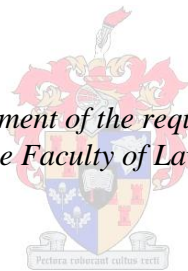


# **The Transformative Value of International Criminal Law**

by  
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## SUMMARY

The existential crisis of the international regime of criminal law is arguably a thing of the past. This is confirmed through a growing body of positive law and the existence of various international criminal courts, notably the permanent International Criminal Court which has been in operation since 2002. Moreover, it is significant that international criminal law (“ICL”) is developing towards increased domestic enforcement, in particular as a result of the complementarity regime envisioned by the Rome Statute of the International Criminal Court. States have generally been receptive and cooperative towards international criminal norms as well as the structures of international criminal justice. As a result international criminal laws are increasingly being *transformed* into national law and enforced by states on the domestic level.

Chapter 2 provides an overview of the abovementioned developments, the characteristics of ICL and certain key concepts. In lieu of the upward trajectory of ICL’s development, the thesis aims to determine whether ICL exerts an influence which holds ‘transformative value’. Chapter 3 unpacks this concept by delineating the different meanings afforded to transformation and identifying the reticent characteristics of transformative change, especially the underlying importance of values during processes of transformation. Transformative value is conceptualised broadly as the product and potential of the type of change that holds some utility for the *civitas maxima* (or the community of mankind).

In Part II, ICL’s transformative value is investigated from a historical and global perspective with emphasis on the purposes, values and politics of international criminal justice. Chapter 4 focuses on the Nuremberg IMT and the trial of Adolf Eichmann. It is submitted that these trials produced a paradigm shift that represents the transformative foundation of modern ICL. Chapter 5 investigates the purposes and aspirations of modern ICL with reference to its underlying assumptions as well as its objectives, the latter which may be found in positive law and the jurisprudence of international criminal courts. The research suggests that ICL is disposed towards objectives which are unique in comparison to those of domestic criminal law. While it cannot be denied that punishment under ICL is predominantly a backward-looking exercise in the tradition of domestic criminal law retributivism, ICL is somewhat removed from this paradigm due to its purpose- and value-driven nature. ICL is also expressive, normative and forward-looking in various respects.

Individual criminal liability is however not universally accepted as an appropriate response to collective violence. This is partly a result of ICL's endemic political dependency. Chapter 6 addresses the impact of politics on ICL's transformative value. ICL is closely associated with liberal-legalist ideals which essentially promote the interests of individuals. Although it constitutes an important element of ICL's transformative value, this political influence exposes ICL to criticism and may exert a disruptive influence on its transformative mandate. In this latter respect it is noted that ICL remains somewhat controversial and subject to the general limitations of the decentralised and state-dominated international legal system.

In Part III, ICL's transformative value is investigated using South Africa as a case study, with particular reference to its transitional- and post-transitional periods. Chapter 7 provides a domestic perspective of ICL's transformative value by investigating the interactions of ICL and the South African legal system, particularly the value of the transformation of ICL into national law. In this regard the impact of Constitutional provisions and national legislation pertaining to ICL are considered, as well as a number of cases related to matters of international criminal justice. It is argued that international criminal norms may promote human values over state authority and political interests in the domestic context. Domestic courts may serve as 'engine rooms' for transformative change through more effective enforcement of those international criminal norms that have been 'transformed' into national law through implementation legislation. The permeation of international criminal norms into the domestic sphere represents a foray of universal values into an area traditionally dominated by sovereign might and holds potential for promoting the interests of individuals as well as for the institutionalisation of human rights. Yet, as illustrated by the current rift between the ICC and the African Union, international and regional political affiliations may influence the ability of a state to meet its obligations towards international criminal justice.

In Part IV (Chapter 8), it is submitted that ICL is historically and ontologically aimed at change that is both backward-looking (repressive) and forward-looking (normative) as well as beneficial in a communitarian sense. ICL's transformative value derives from the value- and purpose-driven nature of international criminal norms, the political nature of international criminal justice and also from the interaction between international law and domestic legal systems. ICL may be viewed as an authoritative expression of the norms and values of the international community. As such, ICL and its institutions may be viewed not only as a

means of punishing the perpetrators of international crime, but also as part of the spearhead towards a desired alternative to the historical and present reality characterised by injustices which have gone unabated under the system of traditional Westphalian sovereignty. As egregious forms of the aforementioned injustices, macro criminality and impunity undermine the protection of internationally recognised individual rights. ICL seeks to remedy this through impacting on those individuals that have not yet acceded to the emergent universal consciousness of the majority in the international community. It is further argued that ICL's transformative impact is not confined to the "hard" impact of the application of substantive ICL in international and domestic courts. The international criminal justice system *as a whole* also produces a normative impact through a purpose-driven association with international values and certain political preferences.

This thesis offers a new way of thinking about the value, potential and limitations of the ICL regime, as well as the role of politics in international criminal justice.

## OPSOMMING

Die eksistensiële krisis van die internasionale strafregbestel is stellig iets van die verlede. Dít word bevestig deur die toenemende hoeveelheid positieweregsmateriaal en die bestaan van verskeie internasionale strafhove, in die besonder die permanente Internasionale Strafhof wat sedert 2002 in werking is. Daarbenewens is dit beduidend dat internasionale strafreg (hierna ‘ISR’) na binnelandse toepassing begin verskuif, bepaald as gevolg van die komplementariteitsregime wat die Rome Statuut van die Internasionale Strafhof beoog. State is oor die algemeen ontvanklik vir, en tegemoetkomend jeens, internasionale strafnorme sowel as die strukture van internasionale strafregspiegling. Gevolglik word internasionale strafwette al hoe meer tot in nasionale wette *getransformeer* en binnelands deur state toegepas.

Hoofstuk 2 bied ’n oorsig van bogenoemde ontwikkelings, die kenmerke van ISR en bepaalde kernbegrippe. In die lig van die opwaartse ontwikkelingstrajek van ISR, het dié tesis ten doel om te bepaal of die invloed wat ISR uitoefen, oor ‘transformasiewaarde’ beskik. Hoofstuk 3 ondersoek hierdie begrip deur die verskillende betekenis van transformasie uiteen te sit en die versweë kenmerke van transformerende verandering, veral die onderliggende belang van waardes in die transformasieproses, te bepaal. Transformasiewaarde word in die breë verstaan as die produk en potensiaal van die soort verandering wat een of ander nut het vir die *civitas maxima* (of die gemeenskap van die mensdom).

In deel II word die transformasiewaarde van ISR uit ’n historiese en internasionale hoek ondersoek, met die klem op die doel, waardes en politiek van internasionale strafregspiegling. Hoofstuk 4 konsentreer op die Neurenberg- internasionale militêre tribunaal en die verhoor van Adolf Eichmann. Daar word aangevoer dat hierdie verhore ’n paradigmaverskuiwing teweegbring het wat die transformerende grondslag van moderne ISR gelê het. Hoofstuk 5 verken die doelwitte en aspirasies van moderne ISR aan die hand van die onderliggende aannames en oogmerke daarvan. Laasgenoemde is te vinde in die positiewe reg en regsleer van internasionale strafhove. Die navorsing doen aan die hand dat die oogmerke van ISR uniek is in vergelyking met dié van binnelandse strafreg. Hoewel straf ingevolge ISR onteenseglik ’n hoofsaaklik terugblikkende oefening in die vergeldingstradisie van nasionale strafreg is, is ISR tog ietwat verwyderd van hierdie paradigma vanweë die

doel- en waardegedrewe aard daarvan. ISR is in baie opsigte ook ekspressief, normatief en toekomsgerig.

Individuele strafregtelike aanspreeklikheid word egter nie allerweë as 'n toepaslike reaksie op kollektiewe geweld aanvaar nie. Dít is deels 'n gevolg van die endemiese politieke afhanklikheid van ISR. Hoofstuk 6 handel derhalwe oor die impak van politiek op die transformasiewaarde van ISR. ISR hou ten nouste verband met liberaal-legalistiese ideale wat in wese individue se belange bevorder. Hoewel dit 'n belangrike element van die ISR-transformasiewaarde uitmaak, stel hierdie politieke invloed ISR ook bloot aan kritiek, en kan dit 'n ontwrigtende uitwerking op die transformasiemandaat daarvan hê. In dié verband word daarop gelet dat ISR ietwat omstrede bly, sowel as onderworpe aan die algemene beperkinge van die gedesentraliseerde en staatsoorheerste internasionale regstelsel.

In deel III word die transformasiewaarde van ISR aan die hand van Suid-Afrika as gevallestudie ondersoek, met bepaalde verwysing na die oorgangs- en na-oorgangstydperke van die land. Hoofstuk 7 bied 'n binnelandse beskouing van die transformasiewaarde van ISR deur ondersoek in te stel na die wisselwerking tussen ISR en die Suid-Afrikaanse regstelsel, veral die waarde van die transformasie van ISR tot in die nasionale reg. In hierdie verband word daar besin oor die impak van grondwetlike bepalings en nasionale wetgewing met betrekking tot ISR, sowel as 'n aantal hofsake in verband met aangeleenthede van internasionale strafregspleging. Daar word aangevoer dat internasionale strafnorme in binnelandse verband straks mensewaardes bo staatsgesag en politieke belange bevorder. Binnelandse howe dien moontlik as 'enjinkamers' vir transformerende verandering, deur daardie internasionale strafnorme wat deur inwerkingstellingswetgewing tot in die nasionale reg 'getransformeer' is, doeltreffender toe te pas. Die deurdringing van internasionale strafnorme tot in die binnelandse sfeer stel 'n verskeidenheid universele waardes bekend op 'n gebied wat tradisioneel deur soewereine mag oorheers is, en hou potensiaal in vir die bevordering van individuele belange sowel as vir die institusionalisering van menseregte. Soos die huidige skeuring tussen die Internasionale Strafhof en die Afrika-unie egter toon, kan internasionale en streek- politieke bande 'n invloed hê op 'n staat se vermoë om sy verpligtinge teenoor internasionale strafregspleging na te kom.

In deel IV (hoofstuk 8) word aangevoer dat ISR histories en ontologies afgestem is op terugblikkende (onderdrukkende) én toekomsgerigte (normatiewe) verandering, sowel as

verandering wat een of ander gemeenskapsvoordeel inhou. Die transformasiewaarde van ISR spruit uit die waarde- en doelgedrewe aard van internasionale strafnorme, die politieke aard van internasionale strafregspiegling, sowel as die wisselwerking tussen internasionale reg en binnelandse regstelsels. ISR kan as 'n gesaghebbende openbaring van die internasionale gemeenskap se norme en waardes beskou word. As sodanig, is ISR en die instellings daarvan nie net 'n middel om die plegers van internasionale misdaad te straf nie, maar ook deel van die strewe na 'n wenslike alternatief vir die historiese én huidige realiteit, wat gekenmerk word deur onregte wat ongebreideld onder die stelsel van tradisionele Wesfaalse soewereiniteit voortduur. Makrokriminaliteit en strafloosheid, synde uiterste vorme van voormelde onregte, ondermyn die beskerming van internasionaal erkende individuele regte. ISR beoog om dít reg te stel deur 'n invloed uit te oefen op daardie individue wat nóg nie die ontluikende universele bewustheid van die meerderheid in die internasionale gemeenskap openbaar nie. Daar word voorts betoog dat die transformerende impak van ISR nie tot die 'harde' impak van die toepassing van substantiewe ISR in internasionale en binnelandse howe beperk is nie. Die stelsel van internasionale strafregspiegling *in die geheel* het ook 'n normatiewe impak deur middel van 'n doelgedrewe verbondenheid aan internasionale waardes en bepaalde politieke voorkeure.

Hierdie tesis bied 'n nuwe denkwyse oor die waarde, potensiaal en beperkings van die ISR-bestel, sowel as die rol van politiek in internasionale strafregspiegling.



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## LIST OF ABBREVIATIONS

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ANC	African National Congress
APLA	Azanian People's Liberation Army
ASP	Assembly of State Parties (to the International Criminal Court)
AU	African Union
AZAPO	Azanian Peoples Organisation
BIA	Bilateral Immunity Agreement
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IFP	Inkatha Freedom Party
IMT	International Military Tribunal at Nuremburg
IMTFE	International Military Tribunal for the Far East
NATO	North Atlantic Treaty Organisation
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority (of South Africa)
OTP	Office of the Prosecutor of the International Criminal Court
PAC	Pan Africanist Congress
PCIJ	Permanent Court of International Justice
PCLU	Priority Crimes Litigation Unit
R2P	Responsibility to Protect
SALC	Southern African Litigation Centre
SANDF	South African National Defence Force
SAPS	South African Police Service
SLSC	Sierra Leone Special Court
SWAPO	South West African Peoples Organisation

TRC	South African Truth and Reconciliation Commission
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USA	United States of America
ZANU-PF	Zimbabwe African National Union – Patriotic Front
ZEF	Zimbabwean Exiles Forum

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**PART I**  
**INTRODUCTION AND OUTLINE**

## CHAPTER 1

### INTRODUCTION

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“A tree is known by its fruit.”<sup>1</sup>

#### 1.1 Foreword

Since the establishment of the International Military Tribunal at Nuremberg (hereafter “Nuremberg IMT”), international law in general has shifted its focus away from interstate regulation towards producing direct effects within states.<sup>2</sup> At the same time, states have become increasingly receptive towards the norms and values of international law. The prevailing international human rights movement necessitates a domestic legal system and foreign policies which are well aligned with international criminal law (hereafter “ICL”) in order to show a government committed firstly, to protecting against serious human rights violations of its own citizens and secondly to punishing the worst individual transgressors of ICL norms on behalf of the international community.<sup>3</sup> The creation of the International

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<sup>1</sup> This proverb refers to the notion that a person may be judged according to his or her actions. With reference to this proverb, Snyman argues that the value of a legal regime should be measured according to its practical results. In particular, Snyman notes that the lofty aspirations in the South African Bill of Rights stand in stark contrast to the country’s “dysfunctional” criminal justice system. See Snyman CR *Criminal Law* (Fifth Edition) (2008) LexisNexis, Durban 23-24.

<sup>2</sup> Slaughter AM and Burke-White W “The Future of International Law is Domestic (or, The European Way of Law)” (2006) 47 (2) *Harvard Journal of International Law* 327-352, 328. The authors contend that international law engages directly with domestic institutions in three ways: 1) Through strengthening domestic institutions; 2) through acting as a ‘backstop’ when national legal systems are unwilling or unable to enforce international law (especially through the Rome Statute of the International Criminal Court, article 17); and 3) through acting as a catalyst to compel states to act.

<sup>3</sup> Significant in this regard is the Responsibility to Protect (“R2P”) under which states have a responsibility to protect their citizens from various international crimes, see UNGA Resolution 60(1) (2005) (World Summit Outcome Document of the High-level Plenary Meeting of the General Assembly) para 138; see

Criminal Court (hereafter “ICC”) and the complementarity regime contained in the Rome Statute of the ICC (hereafter “Rome Statute”) offers arguably the best illustrations of the intended intrastate application of international legal norms. These developments allude to a novel purpose for international law which goes beyond its traditional regulatory function to emphasise instead the international community’s desire to alter the *status quo*. This desire points towards a developing commonality of basic human values. In this regard the emergence and rapid expansion of an international regime of criminal law is one of the most significant developments in modern international law. Along with other cosmopolitan developments which promote the interests of the individual, ICL may be regarded as a precursor of an international legal order depending less on traditional, sovereignty-based state cooperation, but more on shared international values and enforceable rights under international law.<sup>4</sup> As we move slowly toward the Kantian conception of a ‘world legal order’, it becomes imperative to understand those bodies of law which aim to transform, or change for the better, the world we live in.<sup>5</sup> ICL represents such a development and its socio-legal impact, value and potential are the primary points of focus in this thesis. Does (or will) the ‘tree’ of international criminal justice bear fruit?

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also Drumbl MA “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity” (2004-2005) 99 (2) *Northwestern University Law Review* 538-611, 546: “The community of international human rights activists support the expansion of the international criminal justice paradigm and, according to William Schabas, thereby has ‘adjusted its historic predisposition for the rights of the defence and the protection of prisoners to a more prosecution-based orientation’”. See also Schabas WA “Sentencing by International Tribunals: A Human Rights Approach” (1997) 7 *Duke Journal of Comparative and International Law* 461-518, 515.

<sup>4</sup> This resonates with Grotius’s view of international law as natural law binding upon all states by way of reason. See Johnson D, Pete S and Du Plessis M *Jurisprudence: A South African Perspective* (2001) Butterworths, Durban 34-35.

<sup>5</sup> See Wallace RMM and Martin-Ortega O *International Law* (Sixth Edition) (2009) Sweet and Maxwell, London 263: “The establishment of the [ICC] is evidence that the international community recognizes that there is a role for a *permanent international legal regime*” (emphasis added). See also Wise EM “*Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite*” in Bassiouni MC (ed.) *International Criminal Law (Volume II): Procedural and Enforcement Mechanisms* (Second Edition) (1999) Transnational Publishers, New York 15.

Criminal law is increasingly being used as a response to social evil and a means for intervention and regulation based on international authority.<sup>6</sup> The paradigm of recourse to criminal law as an instrument of transformation is however not yet fully understood nor accepted and has therefore been met with some criticism. This is mostly the result of the *sui generis* nature and purposes of ICL. The aim of this study is to holistically determine the transformative value of ICL from a critical perspective and to provide a forward-looking analysis of the potential for socio-legal transformation via this body of law.

Furthermore, as a result of the intrastate aspirations of international law and the increased commonality of values described above, many states including democratic South Africa have incorporated or transformed international criminal norms into their domestic law.<sup>7</sup> This development is equally significant for its capacity to circumvent power in support of principle and consequently for the value which it may hold for individuals. The second part of the research question addresses this interaction and the value thereof.

## **1.2 Research question**

What is the transformative value of international criminal law in general, and for the South African domestic legal system in particular?

## **1.3 Methodology**

The study comprises investigations in two complementary segments, namely the determination of ICL's transformative value from a general perspective (from above) and the transformative value of ICL from a domestic legal perspective (from below) using South

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<sup>6</sup> See Stolle P and Singelstein T "On the Aims and Actual Consequences of International Prosecution" in Kaleck W, Ratner M, Singelstein T and Weiss P (eds.) *International Prosecution of Human Rights Crimes* (2007) Springer Berlin Heidelberg, Heidelberg 49.

<sup>7</sup> According to section 231-232 of the Constitution of the Republic of South Africa, 1996, international agreements that have been enacted into South African law through national legislation and customary international law are binding sources of law in the Republic unless they are inconsistent with the Constitution or an Act of Parliament. On incorporation and transformation of international law, see Chapter 3 para 3.2 *infra*.

Africa as a specially selected case study.<sup>8</sup> By determining the scope of ICL's influence, this thesis aims to make a tangible contribution to the field by furthering the understanding of the purposes and values of ICL as well as various supranational interactions ("transformative synergies") involving ICL.<sup>9</sup> The focus of the thesis falls largely on the use of ICL during transition and in the wake of mass atrocities; ICL's interactions with domestic legal systems and politics; and the potential of ICL to act as a conduit for socio-legal transformation.

Part I of this thesis serves as a general introduction to (and demarcation of) the research. Chapter 2 offers a brief history of ICL and investigates the nature and characteristics thereof. It contains a number of critical pointers which are relevant to the research question. Chapter 3 considers the cross-disciplinary understandings of *transformation* and clarifies the concept of *transformative value*. The concept is central to the research question and the thesis. An open definition for the concept is proposed at the end of Chapter 3, namely *change that benefits the civitas maxima*.<sup>10</sup> It is important to note that the proposed open definition of transformative value will not be strictly applied herein, but is intended as a general guide for addressing the research question.<sup>11</sup>

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<sup>8</sup> The rationale for the use of South Africa as a case study is set out under Chapter 7 para 7.1 *infra*.

<sup>9</sup> On "transformative synergies", see Chapter 8 para 8.3.4 *infra*.

<sup>10</sup> Revived by Christian Wolff in the eighteenth century, the idea of the *civitas maxima* has its origins in Roman jurisprudence. It is inspired by natural law and refers to an abstract entity also known as the community of mankind or the international community of individuals. The notion is independent from accepting the existence (or future existence) of a world government and instead focuses on "utilitarian value derived from common and mutual interests". See Bassiouni MC *Introduction to International Criminal Law* (2003) Transnational Publishers, New York 18-20; Wise EM "Extradition: The Hypothesis of a *Civitas Maxima* and the *Maxim Aut Dedere Aut Judicare*" (1991) 62 *International Review of Penal Law* 111-112; for the open definition of 'transformative value' see Chapter 3 para 3.5 *infra*. In this thesis the notion of the *civitas maxima* is used to refer to the international community of individuals. In this community the collective interest transcends that of individuals. Accordingly, crimes under international law affect not only individuals, but on some level also the whole of mankind. Furthermore, punishment of a perpetrator of a crime that affects the international community is not only in the interest of the victims, but also in the interest of all individuals in the international community.

<sup>11</sup> See Chapter 3 para 3.1 *infra*.

Once the concept of *transformative value* has been introduced and delineated, the thesis turns to the identification and evaluation of the transformative value of ICL in general (Part II) through the foundations, rationale and objectives of ICL (Chapters 4 and 5); the politics of international criminal justice (Chapter 6); and in the domestic (South African) context (Part III, Chapter 7). Throughout, the enquiry proceeds against the background of the upward trajectory of the ICL regime's development and other important movements in international law: the movement away from *ad hoc* legalism (international tribunals) to an international criminal justice system based on the principle of complementarity; liberal-legalist ascendancy in international criminal justice; political transition (especially democratisation); and the international human rights movement.

Part IV (Chapter 8) reflects on the various aspects raised by the thesis and considers what conclusions can be drawn from it in its entirety. Chapter 8 contains a number of arguments in support of the general conclusion as well as submissions based on the research's findings.

#### **1.4 Sources**

The research is essentially conducted from an international law perspective. Since ICL emanates from the same sources as international law in general, the sources outlined in article 38(1) of the Statute of the International Court of Justice are applicable.<sup>12</sup> These are:

- International conventions, whether general or particular, establishing rules expressly recognised by the contesting states
- International custom, as evidence of a general practice accepted as law
- The general principles of law recognised by civilised nations
- Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>13</sup>

This notwithstanding, the preference given under article 38(1) to certain sources as primary sources over others as subsidiary, is not strictly adhered to since this may conflict with ICL in

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<sup>12</sup> Werle G *Principles of International Criminal Law* (Second Edition) (2009) TMC Asser Press, The Hague 49-50.

<sup>13</sup> Statute of the International Court of Justice (annexed to the Charter of the United Nations) 18 April 1946, article 38(1).

practice.<sup>14</sup> Therefore decisions of national or international courts are recognised as primary sources of law where applicable. The law of the Rome Statute, as “a partial codification [of ICL] by treaty”, also constitutes a primary source of law for use in this thesis.<sup>15</sup>

Furthermore, the investigation of ICL’s transformative value in the South African context (Part III) requires the use of legislation and case law from the South African legal system. The status of international (criminal) law in the South African legal system is set out in detail with reference to the Constitution of the Republic of South Africa, 1996 (“the Constitution”) in Chapter 7 para 7.4 *infra*.

## 1.5 Assumptions

The following assumptions underlie the research and writing of this thesis:

1. The upward trajectory in the development of ICL (as part of the broader expansion of international law) will continue and may result in greater application and enforcement of ICL norms.<sup>16</sup> Furthermore, as the influence and reach of ICL increases so too should its transformative value.
2. The influence and reach of the international criminal justice system is not confined to the application of ICL. The system *as a whole* produces an effect (or a ‘soft impact’) which goes beyond trial, judgment and punishment to produce a less tangible, yet valuable influence.<sup>17</sup> The norms and values of international criminal justice, and the domestic law

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<sup>14</sup> See Ferdinandusse WN *Direct Application of International Criminal Law in National Courts* (2006) TMC Asser Press, The Hague 5-6.

<sup>15</sup> Werle (Principles of International Criminal Law) (*supra*) 50; see also Chapter 2 para 2.2.3 *infra*.

<sup>16</sup> See Wallace and Martin-Ortega (International Law) (*supra*) 6: “The twentieth century witnessed an unparalleled expansion of international law. Evidence points to that expansion continuing in the twenty-first century”.

<sup>17</sup> This soft impact is closely related to the underlying importance of values in the transformative process as will be discussed at Chapter 3 para 3.4.6 *infra*. The conceptualisation of this distinction between the hard and soft impact of international criminal justice is aided by the well-known distinction between hard law and soft law under public international law. Hard law denotes binding law, rules or principles that create positive obligations. Soft law refers to non-legally binding international instruments containing



obligations of states towards international criminal justice may, for example, influence the decisions, behaviour and actions of prosecutors, lawmakers, policymakers, human rights NGOs, supranational organisations (such as the United Nations), states and individuals in the international community.

3. This study perceives ICL as a body of law encompassing the prosecution of international crime by international and domestic courts. It includes both criminal aspects of international law (this includes the *core crimes* contained in the Rome Statute: genocide, crimes against humanity, war crimes and aggression) and international aspects of domestic criminal law (prominent examples of such treaty crimes include drug trafficking, money laundering and terrorism).<sup>18</sup> Jurisdiction over crimes under international law is derived from public international law and results in direct criminality, while jurisdiction over treaty crimes derives from domestic legislation or from treaties and results in indirect criminality under international law.<sup>19</sup>
4. Socio-legal transformation is the over-arching objective of ICL from which all legal cultures and individuals can ultimately benefit. This hypothesis - that ICL has transformative value - is the primary point of focus throughout the thesis.
5. The future of ICL depends largely on the applicability of ICL in domestic criminal justice systems with the ICC as an institution of last resort, or backstop, for crimes under the

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general obligations and voluntary resolutions (to qualify as soft law it is required that these “guidelines” must appear in written form). Soft law lies between law and non-law and has proven to be a useful way of securing state consent in multilateral cooperation, but may also have persuasive force (especially in the long-run). See Dugard J *International Law: A South African Perspective* (2011) (Fourth Edition) Juta, Cape Town 33-34.

<sup>18</sup> Cryer R, Friman H, Robinson D and Wilmhurst E *An Introduction to International Criminal Law and Procedure* (2007) Cambridge University Press, Cambridge 3: “Similar terminological distinction...can also be found in other languages, such as German (*Völkerstrafrecht* compared with *Internationales Strafrecht*), French (*droit international pénal* and *droit penal international*) and Spanish (*derecho internacional penal* and *derecho penal internacional*)”. See also Wise EM “Terrorism and the Problem of an International Criminal Law” (1987) 19 *Connecticut Law Review* 801-808; these distinctions are set out more fully in Chapter 2 para 2.2.2 *infra*. Regarding the current status of the crime of aggression under the Rome Statute, see Chapter 2 footnote 61 *infra*.

<sup>19</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 2-3; Werle (Principles of International Criminal Law) (*supra*) 42-43. For a more detailed distinction between crimes under international law and international aspects of domestic criminal law, see Chapter 2 para 2.2.2 *infra*.

Rome Statute.<sup>20</sup> In addition to the obligations of states towards the ICC flowing from the Rome Statute and from the feature of complementarity, there have been unilateral efforts on the part of a few states to actively pursue the prosecution of international crimes through the use of extraterritorial grounds of criminal jurisdiction.<sup>21</sup>

## 1.6 Limitations and Demarcation

To limit the scope of this thesis, with the aim to stay as near as possible to the research question, some subjects or themes which are relevant to the study and which may feature regularly throughout the thesis will not be discussed in more detail than is required for

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<sup>20</sup> Bergsmo M “On the Long-Term Contributions of the Ad Hoc Tribunals and Lessons for the International Criminal Court” *Lecture Transcript*, Oxford, 29 January 2009, available at [http://www.prio.no/sptrans/1178274301/pp%20090129%20contributions%20tribunals%20\(lecture,%20xford\).pdf](http://www.prio.no/sptrans/1178274301/pp%20090129%20contributions%20tribunals%20(lecture,%20xford).pdf) (accessed 2012/07/20): “The ‘era of multiple international(ised) criminal jurisdictions’ is probably coming to an end [...] In the ‘new era’, we will have the ICC operating at the international level, complementary to national criminal justice. The centre of criminal justice for atrocities will gravitate to the national level”. This is also confirmed by UNSC Resolution 1503 (2003) (International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda) which instructed the ICTY to refer all lower- and mid-level accused back to the region for trial by domestic court. This directive gave recognition to an increased domestic capacity for trying international crimes. See ICTY Manual of Developed Practices (2009) 4, available from the ICTY-website at [http://www.icty.org/x/file/About/Reports%20and%20Publications/manual\\_developed\\_practices/icty\\_manual\\_on\\_developed\\_practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf) (accessed 2012/07/20). See also “Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict”, UN Doc. S/1999/957 (8 September 1999) 10, Recommendation B5 and B6 (the UN Secretary General recommended the UNSC to “encourage the development of judicial and investigative mechanisms with national and international components, which may be used when the prosecution of those responsible for genocide, crimes against humanity and war crimes” and to “urge Member States to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes”).

<sup>21</sup> Notable examples are the efforts of Spain to extradite Augusto Pinochet from England, see *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (1999) 4 All ER 897; *R v Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte* (No.2) (1999) 1 All ER 577; *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (No.3 ) (1999) 2 All ER 97; and the Belgian effort to prosecute Abdulaye Yerodia Ndombasi, the incumbent foreign minister of the Democratic Republic of Congo, by way of an international arrest warrant, see *Democratic Republic of the Congo v Belgium* (The “Arrest Warrant” case), Judgment, ICJ Reports 2002, 3.

addressing the research question. Chief among these topics are: transitional justice; the debate over the choice between, and the merits of, criminal prosecutions and alternative justice mechanisms respectively; the legality of amnesties under international law; the impact of immunities under customary international law on liability for international crimes; and international relations theory. In-depth discussions of the complexities and current debates prevalent within these topics will detract from addressing the research question more than it would contribute thereto.

## CHAPTER 2

### A BRIEF HISTORY AND OVERVIEW OF INTERNATIONAL CRIMINAL LAW

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#### 2.1 A Brief History of International Criminal Law

The existential crisis of ICL, in the decades following the acceptance of the Nuremberg Charter and the London Agreement, is arguably a thing of the past.<sup>22</sup> Before the Nuremberg IMT and the International Military Tribunal for the Far East (hereafter “Tokyo IMTFE”), ICL had originated from diverse sources such as the laws and customs of war resulting in unsystematic development over a period of almost 500 years.<sup>23</sup> Despite the gradual development of international crimes such as piracy and slavery up until the Second World War, ICL and international law in general, remained greatly underdeveloped.

The catalyst of ICL’s rise to greater prominence during the last 60 years has been the terrible effects of worldwide warfare and government sponsored human rights abuses.<sup>24</sup> The

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<sup>22</sup> The Charter of the International Military Tribunal (“Nuremberg Charter”), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(3), August 8, 1945, 58 Stat. 1544 E.A.S. No. 472, 82 UNTS 280. On ICL’s former existential crisis in general, see the influential article by Schwarzenberger G “The Problem of International Criminal Law” (1950) 3 *Current Legal Problems* 263-296.

<sup>23</sup> Sunga LS *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) Kluwer Law International, The Hague 2; see also Bassiouni MC “International Criminal Justice in Historical Perspective: The Tension between States’ Interests and the Pursuit of International Justice” in Cassese A (ed.) *The Oxford Companion to International Criminal Justice* (2009) Oxford University Press, Oxford 132: “The history of international criminal justice can be said to have its first precedent with the 1474 Breisach trial, where 26 judges of the Holy Roman Empire presided over the case of Peter von Hagenbach, who was accused of committing ‘crimes against the laws and nature of God’ in sacking and pillaging the city of Breisach”.

<sup>24</sup> See Kemp G *Individual Criminal Liability for the Crime of Aggression* (2010) Intersentia, Antwerp 9: “One way to look at the system of international criminal law is to view it as a reaction of the international

development of ICL proceeded incrementally after the First World War, but it was the horrors of the Second World War and the Jewish Holocaust that finally awakened humanity's dormant "universal consciousness".<sup>25</sup> This set in motion what would become some of the most significant developments in modern international law.<sup>26</sup> These developments - individual criminal responsibility for violations of international law; international human rights; and the emergence of supranational crimes – complement each other and demonstrate the growing acquiescence of states and the international community to depart from the traditional model of Westphalian sovereignty.<sup>27</sup>

Before the Nuremberg IMT and Tokyo IMT, international criminals faced either extrajudicial action (notably executions) or more often than not, impunity. Britain, for example, had favoured summary execution of the top leadership of the Nazi Party based on the fact that "their 'guilt was so black' that it was beyond the scope of any judicial process".<sup>28</sup> Furthermore, prosecutorial efforts on the domestic level "were considered to be hopelessly political and doomed".<sup>29</sup> To circumvent this, the post-war IMTs used the "vocabulary of international law" in an attempt to "lift [criminal] justice out of its politicized national

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community to atrocities". See also Ratner S and Abrahams J *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997) Oxford University Press, Oxford 5.

<sup>25</sup> Bassiouni MC "The Discipline of International Criminal Law" (2002) *Paper presented at the World Conference on International Criminal Law* (28 November – 4 December 2002) 14; see also Broomhall B *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003) Oxford University Press, Oxford 19 (referring to "the revolution in public consciousness").

<sup>26</sup> On the general impact of the Nuremberg IMT on international law, see Dugard (International Law) (*supra*) 322.

<sup>27</sup> See Hessler K "State Sovereignty as an Obstacle to International Criminal Law" in May L and Hoskins Z (eds.) *International Criminal Law and Philosophy* (2010) Cambridge University Press, Cambridge 44-45.

<sup>28</sup> See Bassiouni MC *International Criminal Law (Volume III): Enforcement* (Second Edition) (1999) Transnational Publishers, New York 41; see Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 18 (extra-judicial methods of dealing with perpetrators are now considered an unlawful response to international crime). In 1943, Churchill proposed that between 50 and 100 "world outlaws" should be shot within 6 hours without reference to any higher authority (see Kadri S *The Trial: A History from Socrates to OJ Simpson* (2006) Harper Perennial, London 228).

<sup>29</sup> Teitel R *Transitional Justice* (2000) Oxford University Press, Oxford 31.

context”.<sup>30</sup> The decision to resort to (international) law and the criminal trial as a means of dealing with the perpetrators of mass atrocity represents arguably the defining moment for international criminal justice. Although the post-war IMTs were, at the time, also a practical method of dealing with suspected war criminals, the legal legacy and symbolic value of these trials, and particularly that of the Nuremberg IMT, may be viewed as their greatest and most enduring contribution.<sup>31</sup> The IMT and IMTFE demonstrated the international community’s resolve to turn away from extrajudicial and unlawful treatment of international criminals towards hope for a future where accountability under the rule of law may become a reality even for the most heinous acts committed behind the veil of statehood and official capacity. As a consequence, individual criminal responsibility based on international jurisdiction has become one of the principle aims of successor justice.<sup>32</sup>

The proceedings at the Nuremberg IMT and the Tokyo IMTFE have, however, been criticised for its shortcomings.<sup>33</sup> Many viewed the trials as “victors’ justice” or “showcase trials” devoid of legitimacy owing to the one-sidedness of the prosecutions (only political and military leaders from the Axis countries stood trial) and a lack of equal representation of judges on the bench. Both trials were under the exclusive control of the victorious Allied forces. Many of the convicted persons received the death sentence which is regarded as unacceptable in the modern international criminal justice system. Furthermore the IMTs were

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<sup>30</sup> Teitel (Transitional Justice) (*supra*) 33. As will be discussed in the following paragraph, it cannot however be said that these tribunals were absolutely apolitical.

<sup>31</sup> See Chapter 4 para 4.2.3.3 *infra*. See also the opening statement of Robert H. Jackson, Representative and Chief of Council for the United States of America, during his opening address at the IMT (21 November 1945): “The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason”. And later: “This inquest represents the practical effort of 4 of the most mighty of nations, with the support of 14 more, to utilize international law to meet the greatest menace of our times – aggressive war”. Available at <http://www.ena.lu/> (accessed 2010/03/29).

<sup>32</sup> Teitel (Transitional Justice) (*supra*) 31.

<sup>33</sup> See Schwarzenberger G “Judgement of Nuremberg” (1947) 21 *Tulane Law Review* 329-361, 348-349; Dugard (International Law) (*supra*) 321; Cassese (Oxford Companion) (*supra*) 443.

said to have violated the principle of retroactive application of the law and, in relation to crimes against the peace, the principle of *nullum crimen sine lege*.

Many of the criticisms above are valid. Even so, history has generally cast the Nuremberg IMT in a favourable light and its contribution to modern ICL can be regarded as indispensable. These trials were certainly a less than perfect point of departure for the age of international criminal justice, but they were a point of departure nonetheless. The Nuremberg Principles (“a distillation of the Nuremberg judgement”), along with the United Nations Charter, embodied the growing consciousness of people across state boundaries and created new legal dynamics between individuals, states and the international community.<sup>34</sup> Supranational crimes - crimes against peace and crimes against humanity - were recognised and proscribed for the first time. Perhaps most importantly, the “Nuremberg revolution”, as it has since become known, advanced the notion that “crimes against international law are committed by men, not abstract entities”.<sup>35</sup> The principle of individual criminal responsibility for international crimes is now firmly established in international law.<sup>36</sup>

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<sup>34</sup> Teitel (Transitional Justice) (*supra*) 34; Broomhall (International Justice and the International Criminal Court) (*supra*) 19; see also UNGA Resolution 95(I) (1946) (Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal).

<sup>35</sup> See *Trial of the German Major War Criminals before the International Military Tribunal at Nuremberg* (Judgment and Sentence) (1947) 41 *American Journal of International Law* 172, 221.

<sup>36</sup> See Erasmus AE “Revisiting Schwarzenberger Today: The Problem of an International Criminal Law” (2003) 16 *South African Journal of Criminal Justice* 397: “The principle was subsequently adopted by the General Assembly and enshrined in the Nuremberg Principles [Principle 1 of the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal] and replicated in the International Law Commission’s Draft Codes of Offenses/Crimes Against the Peace and Security of Mankind [Article 1 of the Draft Code, 1954 and Article 2 of the Draft Code, 1996]. It has been enshrined in the statutes and jurisprudence of both ad hoc tribunals [art(s) 7(1) and 23(1) of the ICTY Statute and art(s) 6(1) and 22(1) of the ICTR Statute] and the ICC [Article 25 of the Rome Statute of the International Criminal Court]”. See also ICTY, *Prosecutor v Tadić* (Appeals Chamber: Judgment) Case No. IT-94-1-A, 15 July 1999, para 186: “The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability [...]”. For an overview of the dilemmas inherent to individual criminal responsibility as a response to state criminality, see Teitel (Transitional Justice) (*supra*) 34-36.

Furthermore, the Nuremberg IMT and particularly the precedent of individual criminal liability for international crime which it established, has been described as a historical highlight for proponents of the cosmopolitan theory. Hirsh contends that contemporary cosmopolitan theory:

“[...] understands the period following the Second World War as one in which the rupture between ethics and power is gradually being bridged. There is a growth of structural changes that bypass the system of independent states both from below and from above, creating significant networks of power that are no longer subject to state authority.”<sup>37</sup>

The increasing “supranational limitation of state power”, initiated at the IMTs and subsequently consolidated, can be perceived as the result of a movement from power-based actors (states) as the exclusive actors in international law, to norm-driven actors (the international community of individuals or the *civitas maxima*).<sup>38</sup> Humanity’s “universal consciousness” referred to earlier, found overt expression in the human rights movement. Through initiatives that protect the basic rights inherent to every human being by virtue of their very existence, individuals found for the first time a limited amount of protection and recognition under international law.<sup>39</sup> A multitude of treaties enshrined human rights, but also criminalised certain types of conduct on the international level. In combination, these instruments were meant to protect individuals and vulnerable groups from, especially, abuse of rights where the state or agents of state were involved.<sup>40</sup>

Following the IMT and IMTFE, ICL’s growth would be inhibited due to the political deadlock of the Cold War, which continued for almost half a century.<sup>41</sup> This period, saw a dramatic decrease in the number of international armed conflicts and a proliferation of non-international or internal conflicts and human rights abuses by tyrannical regimes and

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<sup>37</sup> Hirsh D *Law Against Genocide: Cosmopolitan Trials* (2003) Glasshouse Press, London 20.

<sup>38</sup> Kemp (Individual Criminal Liability) (*supra*) 9.

<sup>39</sup> See Dugard (International Law) (*supra*) 1-2: “Since World War II numerous treaties have been signed extending the protection of international law to individuals [...] Individuals benefit from the protection of international law and participate in its processes. They may also be prosecuted for international crimes. They cannot, however, be described as full subjects of international law”.

<sup>40</sup> See for example, the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the Genocide Convention (1948) and the Convention Against Torture (1984).

<sup>41</sup> Bassiouni (International Criminal Law: Enforcement) (*supra*) 53: “Justice was the Cold War’s casualty”.



totalitarian governments.<sup>42</sup> The death toll from these forms of victimisation far exceeded those from international armed conflicts.<sup>43</sup> International law was ill-equipped to address these new threats to international peace and individual human rights since, in the traditionally “liberal” international order, states had enjoyed exclusive sovereignty within their territorial boundaries and have been left to regulate their own internal affairs.<sup>44</sup> Traditionally, international law regulates external state conduct and, because it is tolerant and accommodating of the pluralism in political ideology and political systems among the states of the world, it does not attempt to prescribe or impose an overarching version of “the good” on states internally.<sup>45</sup> The nature of threats to international peace however, demanded a more flexible international criminal justice system capable of intervening when domestic criminal justice systems were unable to protect citizens or to administer justice. Despite these growing demands, the international law principle of non-intervention, coupled with the crippling effects of political deadlock in the UN Security Council, created an overwhelming obstacle to the development of an independent body of ICL during the Cold War period.<sup>46</sup>

In his influential article, “The problem of an international criminal law” (1950), Schwarzenberger posed an existential challenge to ICL and elaborated on the problems of ICL enforcement and the crucial importance of the state’s role in the domestic application of

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<sup>42</sup> Bassiouni (International Criminal Law) (*supra*) 3-4, 65.

<sup>43</sup> See Bassiouni MC “Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights” in Bassiouni MC (ed.) *Post-Conflict Justice* (2002) Transnational Publishers, New York 7: “During the course of the twentieth century it is estimated that conflicts of a non-international character and the abuses by repressive regimes have resulted in estimates of 170 million deaths of mostly civilians. This is compared with an estimated 33 million military casualties over the same time. Since World War II alone it is estimated that more than 250 conflicts of a purely internal character have occurred. These post-World War II situations, which include conflicts of a non-international character and the abuses of repressive regimes, have resulted in an estimated 86 million casualties” (footnotes omitted).

<sup>44</sup> Henkin L *International Law: Politics and Values* (1995) Marthinus Nijhoff Publishers, The Hague 104; see also the discussion of ‘classical liberalism’ in Chapter 6 para 6.3.2.1 *infra*.

<sup>45</sup> Henkin (International Law) (*supra*) 104.

<sup>46</sup> Charter of the United Nations, article 2(4) and article 2(7).

treaties.<sup>47</sup> Erasmus observes that, even sixty years after its initial publication, and in a more advanced international legal and political landscape, Schwarzenberger's article remains relevant to modern ICL scholars.<sup>48</sup> Schwarzenberger persuasively argued that ICL did not exist by comparing ICL with the character of municipal criminal law. His main objection to ICL was the lack of a central authority in the international order with the power to impose penal sanctions.<sup>49</sup> The article in its entirety was (and to a lesser extent still is) a challenge to "the meaning and value of 'international criminal law'".<sup>50</sup> His observation that both the "swords of war and of justice" are "[...] annexed to the Sovereign Power" and his main objection based on the absence of a central enforcement agency rings true in modern international law despite the establishment of institutions of accountability such as the *ad hoc* tribunals and the permanent ICC.<sup>51</sup> As will be discussed more fully in subsequent chapters, these latter institutions are heavily reliant on state cooperation for their effectiveness.<sup>52</sup>

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<sup>47</sup> Schwarzenberger (The Problem of International Criminal Law) (*supra*) 266-267: "To the extent to which such conventions impose a duty on states to enact municipal criminal legislation or to punish certain acts committed by their subjects or within their territorial jurisdiction, such conventions may be said to prescribe municipal criminal law. If however States should fail to live up to their treaty obligations, they themselves do not commit any 'international crime', but are merely responsible for breach of their treaty obligation".

<sup>48</sup> See Erasmus (Revisiting Schwarzenberger) (*supra*) 393-414.

<sup>49</sup> Erasmus (Revisiting Schwarzenberger) (*supra*) 394; see also Wise (Terrorism and the Problem of International Criminal Law) (*supra*) 829-830. Wise contends that "the existence of international criminal law *strictu sensu* depends on the existence of a relatively cohesive international community" and that "[insofar] as the international system does not correspond, in its basic structure, to a genuine 'community', it does not provide the requisite context for a body of international criminal law materially analogous to that which obtains in domestic legal systems". Nonetheless, Wise adds that ICL could be viewed as "a coherent and fruitful field of study".

<sup>50</sup> Erasmus (Revisiting Schwarzenberger) (*supra*) 393.

<sup>51</sup> Schwarzenberger (The Problem of International Criminal Law) (*supra*) 294. Damaska notes that "the sword of justice tends to be used most against individuals from states that occupy a lowly place in the de facto existing hierarchy of states". See Damaska MR "What is the Point of International Criminal Justice?" (2008) *Faculty Scholarship Series*, Paper 1573, available at [http://digitalcommons.law.yale.edu/fss\\_papers/1573](http://digitalcommons.law.yale.edu/fss_papers/1573) (accessed 2012/01/12) 330.

<sup>52</sup> See Chapter 6 para 6.3.4 and Chapter 7 para 7.6.2 *infra*.

There is some evidence that the tide may be turning against Schwarzenberger's reservations regarding ICL. His argument that universal criminal justice will only become a reality once the international community, and not states, wields the "sword of justice" has gradually become an objective of, rather than a critique against, ICL.<sup>53</sup> Modern ICL may be viewed as an expression of the will of the international community. This is largely due to resurgence of ICL since the 1990's, which in turn was made possible by a favourable political climate in the international order. The increased cooperation in the development of ICL at the supranational level is evidenced by the creation of the permanent ICC through a multilateral treaty. ICL is no longer viewed, as it was by Schwarzenberger and others, as non-existent. Rather, problems related to the enforcement of ICL are seen as imperfections, the "growing pains" of an emerging legal system or as defects owing to the anachronistic imbalance between power and principle in the international order.

The end of the Cold War signalled the end of the "bi-polar" era in the international order in which international law had been overshadowed by the ideological conflict between the United States of America and Communist Russia.<sup>54</sup> Since the fall of communism, the international order has been transformed and there has been a broader commitment (largely reflected in international law) to the interdependence of states, democracy, economic freedom and environmental issues.<sup>55</sup> With a newfound "unity" the international order could for the first time turn its attentions towards intrastate conflict and humanitarian catastrophes. The end of the Cold War also saw the re-emergence of cosmopolitanism in international law which "seeks to limit state sovereignty, and lays down minimum standards for the treatment of human beings by states".<sup>56</sup> Against this background ICL was to be resuscitated. Crucially, it is also against this background that modern ICL must be interpreted and understood.

The resurgence of ICL, following the Cold War, commenced through the establishment of the *ad hoc* International Criminal Tribunals (the "ICTY" and "ICTR")

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<sup>53</sup> Schwarzenberger (The Problem of International Criminal Law) (*supra*) 296.

<sup>54</sup> Henkin (International Law) (*supra*) 1.

<sup>55</sup> Henkin (International Law) (*supra*) 1.

<sup>56</sup> See Hirsh (Law Against Genocide) (*supra*) 1, 13-17.

during the 1990's.<sup>57</sup> The *ad hoc* tribunals represented the first institutions founded by the 'international community' to try individuals for international crimes.<sup>58</sup> From the outset, these tribunals faced a bevy of practical and legal problems. A lack of resources, bureaucratic hurdles and various legal issues combined to bring the tribunal's work to a grind.<sup>59</sup> The failures of the *ad hoc* tribunals confirmed the need for a more permanent system of international criminal justice and initiated a process which later culminated in the creation of the permanent ICC on 1 July 2002.<sup>60</sup> The permanent ICC has jurisdiction over genocide, crimes against humanity, war crimes and aggression, but is complementary to national courts with regards to the prosecution of such crimes.<sup>61</sup> A case involving one or more of these crimes is admissible to the court only in instances where the national courts of that State (with jurisdiction over the matter in terms of article 12(2)) are "unwilling or unable genuinely" to investigate or prosecute.<sup>62</sup> This is known as the system (or feature) of complementarity and will be discussed more fully in various parts of the thesis.<sup>63</sup>

The creation of the *ad hoc* tribunals and the permanent ICC has gone some way towards reversing the general tendency towards impunity for the perpetrators of international

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<sup>57</sup> On the resurgence of ICL since the 1990's, see Tallgren I "The Sensibility and Sense of International Criminal Law" (2002) 13 *European Journal of International Law* 561–595, 562 (footnote 4); Werle (Principles of International Criminal Law) (*supra*) 15-16.

<sup>58</sup> As opposed to the Nuremberg IMT and Tokyo IMTFE founded by the victorious Allied Forces, the ICTY and ICTR were established by the UN Security Council. See (ICTY Manual on Developed Practices) (*supra*) 3.

<sup>59</sup> Bassiouni (International Criminal Law: Enforcement) (*supra*) 63.

<sup>60</sup> Bassiouni (International Criminal Law: Enforcement) (*supra*) 63. The Rome Statute of the International Criminal Court (UN Doc A/CONF.183/9) was adopted on 19 July 1998 and received the 60 ratifications needed to enter into force on 1 July 2002.

<sup>61</sup> Rome Statute of the ICC, articles 5(1), 5(2) and 17. With regards to aggression, the original text of the Rome Statute stipulated that the Court may not prosecute acts of aggression until the crime was defined and conditions for the exercise of jurisdiction were set out [article 5(2)]. At the Kampala Review Conference article 5(2) was recalled from the Statute and a number of amendments accepted. Article 8 *bis* contains a definition of the crime of aggression while article 15 *bis* and article 15 *ter* sets out the grounds for the exercise of jurisdiction over the crime of aggression. The Court may not however, exercise jurisdiction before 1 January 2017, where after State Parties may decide to activate such jurisdiction.

<sup>62</sup> Rome Statute of the ICC, article 17.

<sup>63</sup> See Chapter 2 para 2.2.8 *infra*; Chapter 5 para 5.6.3 *infra*.

crimes. Although impunity is no longer the political “bargaining card” that it used to be, history shows that perpetrators of international crimes rarely end up in the courtroom.<sup>64</sup> Since the Second World War various alternatives to criminal justice have been used in response to situations of mass atrocity. Truth commissions, lustration and conditional amnesties have often been invoked in these situations, especially during transitional periods. These mechanisms are believed to be useful because of their potential to fulfil a combination of needs in transitional or post-conflict societies which outweigh the need for accountability in the retributive sense. Short-term peace, reconciliation, truth-finding and redress/reparation for victims may be mentioned in this regard. The inadequacy of national prosecutions in dealing with mass violence and state criminality may also have had a hand in the rise of alternatives to criminal justice.<sup>65</sup> One can cite selectivity, bias and the failure to address the needs of victims in national courts as factors that have contributed to the search for alternatives to criminal justice.<sup>66</sup> As a result of these shortcomings, and due to relatively successful resorts to alternatives to criminal justice (a notable example is the South African Truth and Reconciliation Commission), many dispute the courtroom as the appropriate forum to turn to after mass atrocity. Alvarez points out the following in this regard:

“Awareness of the alternatives to international criminal justice and the rationales offered to justify them cast a critical light on the assumptions of some that the ideal forum for mass atrocity is an international court, or that there is only a dichotomous choice between criminal accountability and total amnesia [...]”<sup>67</sup>

Criminal prosecutions can be used in conjunction with the alternatives outlined above, or as a complementary tool for achieving a broader justice. It is increasingly becoming clear that prosecutorial- and alternative justice approaches are not mutually exclusive. The UN seems to (at least tacitly) support this notion. On the basis of the popular slogan “no peace without justice”, it has supported different modes of justice in many post-conflict societies in the

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<sup>64</sup> Bassiouni (*supra*) in Bassiouni (Post-Conflict Justice) (*supra*) 4; Alvarez JE “Alternatives to International Criminal Justice” in Cassese (Oxford Companion) (*supra*) 25. Muammar Gaddafi and Joseph Kony may be taken as contemporary examples. The ICC issued arrest warrants for both. Having died at the hands of rebels during the civil strife in Libya, Gaddafi never made it to court, while Joseph Kony remains at large despite his newfound international notoriety.

<sup>65</sup> Alvarez (*supra*) in Cassese (Oxford Companion) (*supra*) 26-29.

<sup>66</sup> Alvarez (*supra*) in Cassese (Oxford Companion) (*supra*) 29.

<sup>67</sup> Alvarez (*supra*) in Cassese (Oxford Companion) (*supra*) 37.

interest of peace.<sup>68</sup> This stance was evident in South Africa (where the UN showed indirect support for the establishment of a truth commission which could grant conditional amnesties) and in Sierra Leone (where the UN supported the establishment of both criminal prosecutions and a truth commission).

## 2.2 The Characteristics of International Criminal Law and Some Key Concepts

### 2.2.1 The Dual- and *Sui Generis* Character of International Criminal Law

ICL is essentially a combination of international law and criminal law in the domestic law tradition that affects (mostly) individuals.<sup>69</sup> As such, it embodies substantive and procedural rules that are directed at repressing and preventing international crimes through punishment. Towards this end, it creates direct individual criminal responsibility under international law which, especially in partnership with human rights, attempts to affect a shift in international law from the traditional state-centred approach towards an international regime for the protection of individual rights.

ICL, as implied by its name, has legal characteristics of both criminal law and international law.<sup>70</sup> This creates a measure of legal symbiosis which makes ICL a unique

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<sup>68</sup> Scharf MP “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) 32 *Cornell International Law Journal* 507.

<sup>69</sup> See Bantekas I and Nash S *International Criminal Law* (Third Edition) (2007) Routledge/Cavendish, London 1; Tallgren (Sensibility and Sense) (*supra*) 562. According to Allan Norrie “[i]t can be said that the ultimate principle at the root of criminal law, and one which includes the principles of logic and legality, is the requirement of doing justice to individuals”. This includes perpetrators and victims of crime. See Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* (Second Edition) (2001) Butterworths, Edinburgh 10. Furthermore, Sir Hartley Shawcross referred to the individual human being as “the ultimate unit of all law”. See Shawcross H “Speeches of the Chief Prosecutors at the Close of the Case Against the Individual Defendants” (1946) HM Stationary Office, London 63. The only possible exception to individual criminal liability is the possibility of state responsibility for international crimes. In this regard see para 2.2.7 *infra*.

<sup>70</sup> Beyond this, ICL is also strongly affiliated with, and influenced by, human rights law. On the relationship between ICL and human rights in general see De Than C and Shorts E *International Criminal*

variant of international law, but also highlights underlying tensions which make ICL such a complex and ambiguous field:

“As a body of international law it requires an understanding of the sources and interpretation of international law. But it is also criminal law and as such needs substantive provisions that are clear and exact rather than the often more imprecise formulations of international law.”<sup>71</sup>

Predominantly an amalgamation of international law and criminal law, ICL is adversely affected at the level of its basic doctrinal foundations.<sup>72</sup> It exists as a body of law with goals, methods and characteristics of both vertical and horizontal legal systems.<sup>73</sup> This “split personality” has proved to be an encumbrance to ICL’s development.<sup>74</sup> In this regard it should be noted however that, to some degree, domestic criminal law (which is widely viewed as more ‘established’ than ICL) also fulfils seemingly conflicting roles.<sup>75</sup> Criminal law is based on somewhat of an internal paradox. Ideally, criminal laws and criminal justice systems should operate in a “normative, formal, predictable and equal” way that sets standards of behaviour. Yet, as an “interpreter of common values” it should be flexible enough to address any new social problems which may arise or to encapsulate emerging values within a community.<sup>76</sup>

Firstly, ICL may be viewed as a branch of public international law.<sup>77</sup> Traditionally, international law is primarily concerned with regulating the relationships between states and is a consent-driven system of hierarchical norms derived from the will of states and from

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*law and Human Rights* (2003) Sweet and Maxwell, London; Werle (Principles of International Criminal Law) (*supra*) 45-47; see also Chapter 8 para 8.3.4.1 *infra*.

<sup>71</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 12.

<sup>72</sup> Bassiouni MC “An Appraisal of the Growth and Developing Trends of International Criminal Law” in Dugard J and Van den Wyngaert C (eds.) *International Criminal Law and Procedure* (1996) Dartmouth Publishing Company, Aldershot 90.

<sup>73</sup> Bassiouni (*supra*) in Dugard and Van den Wyngaert (International Criminal Law) (*supra*) 90.

<sup>74</sup> Bassiouni (*supra*) in Dugard and Van den Wyngaert (International Criminal Law) (*supra*) 90.

<sup>75</sup> Tallgren (Sensibility and Sense) (*supra*) 562.

<sup>76</sup> Tallgren (Sensibility and Sense) (*supra*) 562; see also *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC). In this case the South African common law definition of rape was expanded to include anal penetration. The Constitutional Court ruled that an extension of the common law definition was necessary in order to reflect the spirit, purport and objectives of the Bill of Rights.

<sup>77</sup> Cassese A *International Criminal Law* (2003) Oxford University Press, Oxford 16.

state practice.<sup>78</sup> In contrast to general international law which is aimed at reconciling and facilitating cooperation between the diverse interests of states, ICL is part of a broad movement to recognise the rights and interests of individuals under international law.<sup>79</sup> From this perspective ICL is a body of public international law *sui generis*. Yet it cannot escape entirely from the general constraints created by the nature and characteristics of the system of international law (as briefly described above) of which it forms part. State cooperation remains a key ingredient of a successful international criminal law regime.

Cassese comments that international law's function is normative rather than repressive since it is mostly aimed at facilitating peaceful and effective cooperation between states.<sup>80</sup> In ICL the traditionally repressive function of general criminal law and the traditionally normative function of general international law combine so that it is possible to speak of ICL as a highly "normative" variety of criminal law. According to Cassese, ICL's unique nature can be ascribed to the fact that it is the only body of international law which "simultaneously derives its origin *from* and continually *draws upon* both human rights law and national criminal law".<sup>81</sup> ICL shares the rudiments of domestic criminal law systems in that it criminalises certain acts or behaviour and provides the rules and procedure (the means) for punishing individuals who act in contravention of criminal norms. Yet, the underlying rationale and normative purposes of ICL makes it more ambitious in its objectives than its domestic counterpart.<sup>82</sup> These dynamics, the simultaneously normative and repressive nature

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<sup>78</sup> Orakhelashvili A *Peremptory Norms in International Law* (2006) Oxford University Press, Oxford 7; Wallace and Martin-Ortega (International Law) (*supra*) 2-5.

<sup>79</sup> Cassese (International Criminal Law) (*supra*) 20.

<sup>80</sup> Cassese (International Criminal Law) (*supra*) 20.

<sup>81</sup> Cassese (International Criminal Law) (*supra*) 18; see also Chapter 8 para 8.3.4.1 *infra*. ICL and human rights share a historical- and purposive connection in that they have both emerged due to the horrors of the Second World War and aim to protect basic human rights.

<sup>82</sup> See Chapters 4 and 5 *infra*. International criminal courts and domestic courts applying ICL have pursued objectives which may be regarded as *sui generis* when compared to the traditional objectives of punishment. Furthermore, ICL pursues these objectives not only through punishment, but also through the trial itself (see Chapter 4 para 4.4 *infra*).



of ICL and its close partnership with human rights, gives ICL a *sui generis* character as “a special branch of criminal law”.<sup>83</sup>

It is then somewhat ironic that many of ICL’s general principles have been “borrowed” or “transplanted” from domestic criminal law. These general principles apply to all international crimes that create individual criminal responsibility.<sup>84</sup> Thus, ICL is wedged in between the general principles of criminal law, such as the presumption of innocence and the principle of legality, and the international community’s desire for accountability for international criminal acts. The foundational importance of the principle of legality (the underlying requirement of fairness, legal certainty and foreseeability) and the positivistic nature of criminal law clashes with the instant and near universal moral outrage of the international community which is often invoked by international crimes.<sup>85</sup> One of ICL’s greatest challenges is to satisfy the international community’s desire for accountability without denigrating the foundational principles of criminal law which lie at its centre.

The dual- and *sui generis* nature of ICL, the context in which international crime often occurs and the unique nature of the criminal that perpetrates international crime raises questions over the extent to which traditional criminal law punishment theory should be applied to ICL.<sup>86</sup> A cursory reading of the case law of the ICTY and ICTR shows that these courts almost exclusively apply the justifications of punishment that are commonly applied by domestic criminal courts, namely retribution and deterrence.<sup>87</sup> Overall, punishment under ICL retains a strong retributive element, whilst the realisation of utilitarian objectives, such as

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<sup>83</sup> Kor G “Sovereignty in the Dock” in Kleffner JK and Kor G (eds.) *Complementary Views on Complementarity* (2006) TMC Asser Press, The Hague 60; see also Haveman R, Kavran O and Nicholls J (eds.) *Supranational Criminal Law: A System Sui Generis* (2003) Intersentia, Antwerp.

<sup>84</sup> Werle (*supra*) in Cassese (Oxford Companion) (*supra*) 54; see also Tallgren (Sensibility and Sense) (*supra*) 562: “[...] international law, international lawyers and international decision-makers have recently taken tools out of the criminal law toolbox and started to apply them to the international law framework”.

<sup>85</sup> Tallgren (Sensibility and Sense) (*supra*) 564; Cassese A *International Criminal Law* (2003) 20-21.

<sup>86</sup> See Chapter 5 para 5.2.5 *infra*.

<sup>87</sup> The jurisprudence of international criminal tribunals on the justifications and purposes of punishment is discussed in Part II, Chapter 5 para 5.5-5.6 *infra*.

the various forms of deterrence, remains disputed.<sup>88</sup> Why then persist with ICL as a response to mass criminality? In trying to answer this question, Tallgren poses a further question: What would be left if ICL is hypothetically deprived of its utilitarian value and rationality?<sup>89</sup> ICL's value could emanate from objectives that are *sui generis* in relation to traditional criminal law punishment objectives or; objectives that are not dependent on punishment as the mechanism through which criminal justice is pursued. This possibly attaches an expressive, symbolic and pedagogical importance to ICL, where it acts as “the loudspeaker echoing the values of the international community”.<sup>90</sup>

### 2.2.2 International Crimes

Bassiouni notes that the duality between international law and criminal law, “is not easily reconcilable with respect to the very label of the discipline” in different legal systems.<sup>91</sup> At this point it may be useful to make a legal-theoretical distinction between components of ICL belonging to international law and those more appropriately viewed as part of national criminal law.<sup>92</sup> The differentiation between these crimes is exemplified by the distinction found in French doctrine between *droit international pénal* and *droit pénal international*. The former can be translated to mean “criminal international law”, while the latter can be equated with the term “international criminal law”. *Droit pénal international* deals with criminal aspects of international law (Van den Wyngaert refers to this as “*volkenrechtelijk strafrecht*”) and, as such, is understood to be part of international law.<sup>93</sup> The core crimes (currently consisting of genocide, crimes against humanity, war crimes and aggression) and crimes

<sup>88</sup> See Chapter 5 paras 5.6 *infra*; Drumbl MA *Atrocity, Punishment, and International Law* (2007) Cambridge University Press, Cambridge; see also Tallgren (Sensibility and Sense) (*supra*) 590.

<sup>89</sup> Tallgren (Sensibility and Sense) (*supra*) 591.

<sup>90</sup> See also Chapter 5 para 5.6.1 – 5.6.2 *infra*; see also Tallgren (Sensibility and Sense) (*supra*) 592-593. Tallgren believes that ICL comes close to “a religious exercise of hope” for the international community (at 593).

<sup>91</sup> Bassiouni (*supra*) in Dugard and Van den Wyngaert (International Criminal Law) (*supra*) 70 (footnote 3).

<sup>92</sup> See also Chapter 1 para 1.5 (assumption 3) *supra*.

<sup>93</sup> Van den Wyngaert C *Strafrecht en Strafprocesrecht: In Hoofdlijnen* (Book I) (Second Edition) (1994) Maklu Publishers, Antwerp 64-65; Bassiouni (*supra*) in Dugard and Van den Wyngaert (International Criminal Law) (*supra*) 70-73.

under customary international law, such as slavery and piracy, fall under this body of law. Crimes under *droit international pénal* have numerous other labels including “the most serious crimes of concern to the international community as a whole” (following the wording of the Rome Statute); macro-crimes; supranational crimes; international crimes *stricto sensu*; and international crimes proper.<sup>94</sup> These crimes are widely believed to be criminalised under customary international law. Furthermore, these crimes create individual criminal responsibility directly under international law and fall under the jurisdiction of the ICC.<sup>95</sup>

*Droit pénal international* deals with international law aspects of domestic criminal law (also referred to as transnational criminal law).<sup>96</sup> This deals with the issue of the competing grounds for jurisdiction of national courts to prosecute crimes with an international element.<sup>97</sup> For example, this would apply to extradition proceedings when either the victim or the offender is a non-national. Crimes under *droit pénal international* are also referred to as ‘other international crimes’, transnational crimes, treaty-based crimes, or distinct crimes. Treaty-based crimes (with the exception of the distinct crime of torture) have mostly developed to facilitate state cooperation in repressing crimes which have a transnational element. These include piracy, drug trafficking and acts of terrorism.<sup>98</sup> The

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<sup>94</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 10.

<sup>95</sup> Broomhall (International Justice and the International Criminal Court) (*supra*) 19-20, 25; Kemp (Individual Criminal Liability) (*supra*) 10-12; Werle (Principles of International Criminal Law) (*supra*) 29; see also Rome Statute of the ICC, article 25 (which provides for individual criminal liability).

<sup>96</sup> Van den Wyngaert (Strafrecht en Strafprocesrecht) (*supra*) 64. Van den Wyngaert refers to international aspects of domestic criminal law as “*tussenstaats strafrecht*”.

<sup>97</sup> Cassese (International Criminal Law) (*supra*) 15. Most commentators on international law list five types of jurisdiction: Territoriality (subjective and objective), nationality (sometimes referred to as active nationality/personality), protective, passive personality and universal jurisdiction. See Wallace and Martin-Ortega (International Law) (*supra*) 120-134; Shaw M *International Law* (Fifth Edition) (2003) Cambridge University Press, Cambridge 579-620. On the basic principles and different types of jurisdiction, see Dugard (International Law) (*supra*) 146-157. Furthermore, a distinction can be made between prescriptive jurisdiction and enforcement jurisdiction. In this regard see Werle (Principles of International Criminal Law) (*supra*) 66 footnote 375; Kemp G (ed.), Walker S, Palmer R, Baqwa D, Gevers C, Leslie B and Steynberg A *Criminal Law in South Africa* (2012) Oxford University Press, Cape Town 554-560; see also Chapter 7 para 7.6.1.2 *infra*.

<sup>98</sup> Werle (Principles of International Criminal Law) (*supra*) 42.

protection of the mutual interests of states which are threatened by these types of crime requires mutual criminalisation. The criminalisation does not spring from the treaty itself, but from the national law enacted by the state to give the treaty domestic effect, thus resulting in indirect criminality under international law.<sup>99</sup>

Whether as a ‘crime under international law’ or an ‘other international crime’, the crime in question must have an international element (or “a link to the international community”) to fall within the scope of ICL.<sup>100</sup> Thus, only crimes that threaten international interests (such as the “peace, security and well-being of the world”) or transnational interests will qualify.<sup>101</sup>

### 2.2.3 The Sources of International Criminal Law

Most sources of ICL may be found in the general sources of international law, notably treaties and customary international law.<sup>102</sup> Treaties on international crime often contain a definition and proscription of the relevant crime, but no prescribed sanction or penalty clause.<sup>103</sup> Such treaties also either obligate states to enact domestic legislation criminalising the relevant offense or, in those treaties which enshrine the principle *aut dedere aut judicare*, require by implication legislation to transform international crimes into domestic crimes.<sup>104</sup>

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<sup>99</sup> Boister N “Treaty Based Crimes” in Cassese (Oxford Companion) (*supra*) 540; Werle (Principles of International Criminal Law) (*supra*) 42.

<sup>100</sup> Werle (*supra*) in Cassese (Oxford Companion) (*supra*) 55. This is sometimes referred to as the “contextual element” of international crime (see Werle (Principles of International Criminal Law) (*supra*) 43).

<sup>101</sup> Werle (Principles of International Criminal Law) (*supra*) 43; see Rome Statute of the ICC, Preamble (3).

<sup>102</sup> See article 38(1) of the ICJ Statute for the remaining sources of international law.

<sup>103</sup> Van den Wyngaert (Strafrecht en Strafprocesrecht) (*supra*) 65; see also Bassiouni (*supra*) in Dugard and Van den Wyngaert (International Criminal Law) (*supra*) 93: “Only one attempt has been made so far to add specific sanctions to [an international crime] and that was in the 1971 Montreal Convention on Aircraft Hijacking which is not in effect”.

<sup>104</sup> See, for example, article 4(1) and article 7(1) of UNGA Resolution 39/46 (1987) (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). In ICJ, *Belgium v Senegal* (*Questions Relating to the Obligation to Prosecute or Extradite*) (Judgment) 12 July 2012, the court

The statutes of international courts and tribunals have also played an important part in the progressive development of ICL. The Rome Statute represents a semblance of a codification of ICL (or at the least, a progressive development towards the codification of ICL). The Rome Statute is a multilateral treaty which places certain obligations on signatory states with regard to the suppression and prosecution of international crimes. As a result, many nations have implemented domestic legislation criminalising international crimes based on the Rome Statute's definitions of the core crimes in articles 6-8. Depending on the forum where prosecution takes place, the application of the sources outlined above may vary. The application of international law in domestic courts, when prosecuting international crime, will depend on the constitutional provisions for the applicability of international law or the general status of international law in the relevant state.<sup>105</sup>

#### 2.2.4 Normative Hierarchy

There exists a normative hierarchy in international law which may affect the obligations of states towards some categories of international crime. International law norms can be either *ius dispositivum* or *ius cogens*. The former is subject to the will and national interest of states and apply "in the absence of any other agreed regime".<sup>106</sup> These are the consent-driven rules on which most of international law is based. In contrast *ius cogens* norms are independent of the will of states and are as such "intrinsically superior" and cannot be changed by way of agreement between states.<sup>107</sup> They are the highest norms in the normative hierarchy of

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attached the following meaning to article 7(1) of the Convention Against Torture (at para 95): "Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State". The judgment is available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=144&code=bs&p3=4> (accessed 2012/08/15).

<sup>105</sup> Akande D "Sources of International Criminal Law" in Cassese (Oxford Companion) (*supra*) 41.

<sup>106</sup> Fitzmaurice G "Third Report on the Law of Treaties" (1958) (2) *Yearbook of the International Law Commission* 21-46, 40. Translated from Latin, *ius dispositivum* means: "Law subject to the dispensation of the parties"; Brudner, A "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 *University of Toronto Law Journal* 219-254, 249-250.

<sup>107</sup> See Fitzmaurice (Third Report on the Law of Treaties) (*supra*) 40; Orakhelashvili (Peremptory Norms) (*supra*) 8. See also the dictum of Judge Tanaka *ICJ Reports* (1966) 298 in Orakhelashvili (Peremptory

international law and as a result have reached legal status as peremptory and non-derogable norms.<sup>108</sup> Article 53 of the Vienna Convention on the Law of Treaties (1969) refers to a norm of *ius cogens* as:

“[...] a peremptory norm of general international law [...] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>109</sup>

Many international crimes are acts which constitute a violation of an *ius cogens* norm. *Ius cogens* norms protect universal and fundamental values and interests of the international community. As such, breaches thereof offend not only the individuals and states involved, but also “a transcendent common good”.<sup>110</sup> A significant consequence of *ius cogens* is that it gives international law elements of a vertical and constitutional legal order.<sup>111</sup> As such, *ius cogens* is the only concept of international law which defends the national law analogy in the international legal system.<sup>112</sup> However, the existence of *ius cogens* norms does not alter the decentralised and horizontal nature of international law in general.<sup>113</sup>

The concept of *ius cogens* rules or norms goes hand in hand with what are referred to as obligations *erga omnes*. The latter is defined as an obligation which is regarded as fundamental and indispensable by the international community as a whole and from which no derogation is allowed under any circumstances. Once a norm has attained legal status as *ius cogens*, an *erga omnes* obligation arises as a legal implication to that status.<sup>114</sup> Many offences

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Norms) (*supra*) 53-54: Describing *ius cogens* as “[...] a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between states [...]”.

<sup>108</sup> Bassiouni MC “International Crimes: *Ius Cogens* and *Obligatio Erga Omnes*” (1996) 59 (4) *Law and Contemporary Problems* 63-67.

<sup>109</sup> Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

<sup>110</sup> Orakhelashvili (Peremptory Norms) (*supra*) 46-47, 288-289; see also Brudner (The Domestic Enforcement of International Covenants) (*supra*) 249-250.

<sup>111</sup> Orakhelashvili (Peremptory Norms) (*supra*) 9-10.

<sup>112</sup> Orakhelashvili (Peremptory Norms) (*supra*) 10-11.

<sup>113</sup> Orakhelashvili (Peremptory Norms) (*supra*) 78.

<sup>114</sup> Bassiouni (Ius Cogens and Obligations Erga Omnes) (*supra*) 63: “Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State,

against individuals now place *erga omnes* obligations on states. Hereby, states have an obligation to the international community to protect and enforce fundamental human rights. This was exemplified in the *Barcelona Traction* case in the International Court of Justice (ICJ) where the court stated that the protection of fundamental rights is of legal interest to all states worldwide.<sup>115</sup> Correspondingly, Article 19(2) of the International Law Commission's Draft Articles on State Responsibility (1996) defines an international crime as:

“An international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole.”

The following crimes have emerged as belonging to this category of “imperative law” or “compelling law”: genocide, crimes against humanity, war crimes, slavery (and slave related practices), apartheid, piracy, torture and aggression.<sup>116</sup> It is widely accepted that the international community as a whole has an interest in the prevention and prosecution of these crimes. According to Bassiouni, *ius cogens* crimes give rise to the following obligations *erga omnes*: “the obligation to prosecute or extradite, the obligation to provide legal assistance, the

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the non-applicability of the defence of “obedience to superior orders”[...], the universal application of these obligations whether in time of peace or war, their non-derogation under “states of emergency”, and universal jurisdiction over perpetrators of such crimes”.

<sup>115</sup> *Belgium v Spain (Barcelona Traction Light and Power House Co Ltd)* (1970) ICJ Reports 3, Second Phase, 32: “An essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”. See also Bantekas and Nash (*International Criminal Law*) (*supra*) 11, 153.

<sup>116</sup> Bassiouni (*Ius Cogens and Obligatio Erga Omnes*) (*supra*) 68; see also Dugard (*International Law*) (*supra*) 38-39 (the latter author does not list the prohibition of crimes against humanity as having attained peremptory norm status). See also ICJ, *Belgium v Senegal (Questions Relating to the Obligation to Prosecute or Extradite)* (Judgment) 12 July 2012, para 99, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=144&code=bs&p3=4> (accessed 2012/08/15): “In the Court's opinion, the prohibition of torture is part of customary international law and has become a peremptory norm (*jus cogens*). The prohibition is grounded in a widespread international practice and on the *opinio juris* of states”.

obligation to eliminate statutes of limitations, and the obligation to eliminate immunities up to and including heads of state”.<sup>117</sup>

### 2.2.5 Enforcement

International criminal law encompasses prosecution of international crimes through international and domestic authorities as well as the criminal law principles and procedures that govern the enforcement process.<sup>118</sup> The enforcement of ICL echoes the criminal law and international law elements which characterise ICL as a body of law. The broadest distinction is that drawn between direct and indirect modes as well as mechanisms of enforcement.<sup>119</sup> International courts and tribunals, such as the permanent ICC and the *ad hoc* tribunals, are examples of direct means of enforcement. Indirect enforcement refers to situations where ICL is enforced by national courts. In this regard the feature of complementarity in the Rome Statute is a significant development.<sup>120</sup> As will become more apparent throughout this thesis, cooperation and support from domestic criminal justice systems is crucial in both these methods of enforcement.

Regarding the indirect enforcement of ICL, it is necessary to consider briefly the scope of the duty to prosecute or extradite (*aut dedere aut judicare*) under international law. The alternate duty to prosecute or to extradite is provided for in a number of treaties, notably in the Convention on the Suppression and Punishment for the Crime of Genocide (hereafter “Genocide Convention”) and in the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (hereafter “Convention Against Torture”).<sup>121</sup>

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<sup>117</sup> Bassiouni (*supra*) in Bassiouni (Post-Conflict Justice) (*supra*) 25; see also UNGA Resolution 2391 (XXIII) (1968) (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity), articles 1 and 4.

<sup>118</sup> Cryer *et al.* (Introduction to International Criminal Law and Procedure) (*supra*) 3.

<sup>119</sup> See Werle (Principles of International Criminal Law) (*supra*) 80-81; Jessberger F “International v. National Prosecution of International Crimes” in Cassese (Oxford Companion) (*supra*) 208-211.

<sup>120</sup> See para 2.2.8 *infra*.

<sup>121</sup> See Orentlicher D “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1991) 100 *Yale Law Journal* 2537-2615, 2562-2567; UNGA Resolution 260 (III) (1951) (Convention on the Suppression and Punishment on the Crime of Genocide), article 6; UNGA Resolution 39/46 (1987) (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or



Furthermore, the preamble of the Rome Statute provides that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.<sup>122</sup> Under customary international law, the state of commission (that is the state within which the international crime was committed) is under an international legal duty to prosecute perpetrators of international crime.<sup>123</sup> However, it is also widely accepted that *at present* there exists no duty on states under customary international law to prosecute perpetrators of international crimes committed outside their territorial borders.<sup>124</sup> An exception exists only in respect of grave breaches of the Geneva Conventions, over which international law provides for mandatory jurisdiction.<sup>125</sup> Accordingly, any state is obliged under international law to prosecute perpetrators of grave breaches of the Geneva Conventions committed during an international armed conflict irrespective of whether the perpetrator is a national of the state in question or whether the relevant crimes were committed beyond its state borders.

### 2.2.6 Universal Jurisdiction

Criminal jurisdiction has expanded its reach and developed through state practice and international law towards two broad objectives. Firstly, to end impunity for perpetrators of international crimes and gross human rights violations and secondly to respond to increasing transnational criminal behaviour. Crimes subject to universal jurisdiction are widely viewed as conduct *mala in se* which must be criminalised in order to protect the interests and fundamental values of the international community. Some have acknowledged that the use of universal jurisdiction by states and “the prosecution of individuals responsible for [serious

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Punishment), article 7; see also ICJ, *Belgium v Senegal (Questions Relating to the Obligation to Prosecute or Extradite)* (Judgment) 12 July 2012, paras 92-95, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=144&code=bs&p3=4> (accessed 2012/08/15).

<sup>122</sup> Rome Statute of the ICC, preamble (6).

<sup>123</sup> Werle (Principles of International Criminal Law) (*supra*) 69.

<sup>124</sup> Werle (Principles of International Criminal Law) (*supra*) 71; see also Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 192-193. The latter author agrees that there is no general obligation to prosecute crimes committed extraterritorially without the existence of a ‘link’ between the state and the crime (via the presence of the perpetrator or the nationality of the victim(s)).

<sup>125</sup> Werle (Principles of International Criminal Law) (*supra*) 70.

crimes] promotes the better realisation of human rights and the prevention of crimes in the future, as well as institutionalising the rule of law”.<sup>126</sup>

It is widely accepted that the international community as a whole has an interest in the prevention and prosecution of certain crimes. These crimes are regarded as so egregious by the international community that they transcend state sovereignty and are subject to universal jurisdiction.<sup>127</sup> Universal jurisdiction as a form of criminal jurisdiction is based on the universality principle which, by nature, embodies a permissive rule of customary international law.<sup>128</sup> Through it, if the conditions are met, a state can negate the principles of non-intervention and territorial sovereignty and legitimately exercise its domestic criminal jurisdiction under international law.<sup>129</sup> A number of crimes have consistently been recognised as being subject to universal jurisdiction owing to their severity and the universal condemnation which such conduct evokes from all nations and peoples of the world. The reasoning is that such crimes threaten the most fundamental interests of the international community.<sup>130</sup> It appears certain that genocide, crimes against humanity, piracy, war crimes

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<sup>126</sup> Inazumi M *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (2005) Intersentia, Antwerp 2.

<sup>127</sup> See *Eichmann v Attorney-General of Israel* (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR 277, 304: “Not only do *all the crimes* attributed to the appellant bear an international character but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent of its enforcement, to try the appellant”.

<sup>128</sup> Jessberger F “Universal Jurisdiction” in Cassese (Oxford Companion) (*supra*) 556. The *authority* to prosecute on the basis of the universality principle must be distinguished from the *duty* to prosecute under international law. The duty to prosecute is more constrained under international law than the ability of states to extend their prescriptive- and enforcement jurisdiction so as to cover crimes committed extraterritorially. See Chapter 7 paras 7.6.1.2 and 7.7.3 *infra*.

<sup>129</sup> Jessberger (*supra*) in Cassese (Oxford Companion) (*supra*) 556.

<sup>130</sup> These interests are broadly speaking: international peace and security, humanitarian concerns and universally held moral values. See Jessberger (*supra*) in Cassese (Oxford Companion) (*supra*) 556. See also the Rome Statute of the International Criminal Court, Preamble 3 which states that “grave crimes threaten the peace, security and well-being of the world”. See *Eichmann v Attorney-General of Israel* (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR 277, 291-293. In the *Eichmann*-case the Israeli court claimed universal jurisdiction as one of the bases of jurisdiction. Territoriality and passive

and torture are subject to universal jurisdiction at all times.<sup>131</sup> These crimes are offences under customary international law (crimes against humanity and war crimes), multilateral treaty or both (genocide and torture).<sup>132</sup> Traditional ‘pure’ or ‘absolute’ universal jurisdiction grants jurisdiction to any state “regardless of the *situs* of the offence and the nationalities of the offender and the offended” and “can as such be prosecuted in any state on behalf of the international community”.<sup>133</sup> It may be said that when a national court exercises universal jurisdiction it acts as an agent of the international community.<sup>134</sup>

In practice, and as illustrated by the *Arrest Warrant* case in the ICJ and the Spanish attempt to extradite Augusto Pinochet from the United Kingdom, states that have sought to invoke universal jurisdiction have run into legal and practical obstacles.<sup>135</sup> Nonetheless, in light of the above it may be said that universal jurisdiction represents a development that is closely aligned with the moral sentiments of the international community and the objective of establishing the rule of law internationally.

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personality were also invoked as bases for jurisdiction. See also Arendt H *Eichmann in Jerusalem: A Report on the Banality of Evil* (Revised and Enlarged Edition) (1963) Penguin Books, New York 261. Arendt is critical of the applicability of universal jurisdiction in Eichmann’s case since, in her view, Eichmann was chiefly accused of, and for his role in, crimes against the Jewish people.

<sup>131</sup> See Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 44; see also Shaw M *International Law* (2003) 592-593 (the author is of the opinion that piracy and war crimes are the only crimes clearly subject to universal jurisdiction).

<sup>132</sup> Dugard (International Law) (*supra*) 157-160.

<sup>133</sup> Randall KC “Universal Jurisdiction under International Law” (1988) 66 *Texas Law Review* 785-841, 788; Van der Vyver JD “Universal Jurisdiction in International Criminal Law” (1999) 24 *South African Yearbook of International Law* 107-132, 108; see also Cassese (Oxford Companion) (*supra*) 26-27, 555-556. Conditional universal jurisdiction (or, universal jurisdiction with presence) may be defined as the exercise of universal jurisdiction “when the suspect is already in the state asserting jurisdiction”, see Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 45. Conditional universal jurisdiction is discussed more fully in Chapter 7 para 7.6.1.2 *infra*.

<sup>134</sup> Dugard (International Law) (*supra*) 154; see also Hall KC “Universal Jurisdiction: Developing and Implementing an Effective Global Strategy” in Kaleck *et al.* (International Prosecution of Human Rights Crimes) (*supra*) 85.

<sup>135</sup> See Chapter 7 para 7.6.1.2 (footnote 1091) *infra*.

### 2.2.7 State- and Individual Criminal Liability

For demarcation purposes, this thesis requires a careful theoretical distinction between state responsibility and individual criminal liability for international crimes. These regimes are clearly distinguishable from each other, but given that states are often implicated in international crime, they may overlap in some instances.<sup>136</sup> In theory both states and individuals (as an actual or *de facto* agent of state or independently thereof) can be held accountable for international crimes.<sup>137</sup> This dual responsibility presents two legal avenues for addressing international crime, namely “criminal liability for the individual, falling under international criminal law, and state responsibility, regulated by international rules on this matter”.<sup>138</sup> As with criminal law in general, individual criminal responsibility in international law requires the requisite mental element of intent and knowledge for the wrongdoer to be

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<sup>136</sup> Bianchi A “State Responsibility and Criminal Liability of Individuals” in Cassese (Oxford Companion) (*supra*) 18-19. Bianchi also notes that “[it] would be misleading [...] to believe that [state responsibility and individual responsibility under international law] never intersect or overlap. Their relationship is better described in terms of ‘complementarity’ and their interaction may depend on a number of variables, including the context in which the issue of responsibility arises” (at 16). See also Werle (Principles of International Criminal Law) (*supra*) 41.

<sup>137</sup> Cassese (International Criminal Law) (*supra*) 19; see also Erasmus (Revisiting Schwarzenberger) (*supra*) 403-404. On the theoretical possibility of state responsibility, see the case brought by Bosnia and Herzegovina against Serbia before the ICJ (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*), Judgment, ICJ Reports 2007, 43). The Court found that Serbia was responsible under the Genocide Convention for its failure to prevent the genocide at Srebrenica (Bosnia) as well as its subsequent failure to cooperate with the ICTY over the prosecution of those responsible for the Srebrenica massacre. However, the court found that Serbia was not directly responsible for the commission of the genocide at Srebrenica nor had it incited the genocide or conspired towards its commission. Furthermore, the court ruled that “[...] the obligations in question in this case, arising from the terms of the [Genocide] Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature” (at para 170).

<sup>138</sup> Cassese (International Criminal Law) (*supra*) 19; see also Rome Statute of the ICC, article 25(4): “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of states under international law”.

held responsible.<sup>139</sup> In contrast, state responsibility “requires no fault to be established unless fault forms part of the primary obligation which is breached”.<sup>140</sup> Political considerations and the tendency of states to act primarily in their own best interest have thus far undermined efforts of establishing a framework of state criminal responsibility in international law.<sup>141</sup> Gaeta sights the international community’s ill-suited use of the traditional institutional framework of treaty law to cope with state criminality as another reason for the weak position of this form of criminal responsibility in international law.<sup>142</sup> As a result, the concept of state crime remains controversial.<sup>143</sup> Consequently, since the Nuremberg revolution, individual criminal liability has become the preferred mode of accountability for international crimes. This is part of a broad movement granting increased standing to individuals as subjects of international law.<sup>144</sup> Irrespective of whether the offender was acting as an agent of a state (within or outside of the scope of his official capacity), an organisation, or on his or her own accord in the perpetration of the relevant crime, this thesis focuses exclusively on the criminal liability of individuals under ICL.

### 2.2.8 The “ICC-Era” of International Criminal Justice

ICL most often addresses extraordinary crimes committed under extraordinary circumstances.<sup>145</sup> Although this is not necessarily the case, the fact that ICL is most often invoked as a response to war and mass atrocity is a practical reality which “pervades scholarship”.<sup>146</sup> The drafting and subsequent ratification of the Rome Statute however, heralded a new era for international criminal justice. Since the establishment of the ICC, the international criminal justice system envisions a structure of international criminal law where

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<sup>139</sup> Rome Statute of the ICC, article 25 and article 30; see also Bianchi (*supra*) in Cassese (Oxford Companion) (*supra*) 18.

<sup>140</sup> Bianchi (*supra*) in Cassese (Oxford Companion) (*supra*) 18.

<sup>141</sup> Bianchi (*supra*) in Cassese (Oxford Companion) (*supra*) 19.

<sup>142</sup> Gaeta P “International Criminalization of Prohibited Conduct” in Cassese (Oxford Companion) (*supra*) 63-64.

<sup>143</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 12.

<sup>144</sup> Bianchi (*supra*) in Cassese (Oxford Companion) (*supra*) 16.

<sup>145</sup> Starr SB “Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations” (2007) 101 (3) *Northwestern University Law Review* 1257-1314, 1257-1258.

<sup>146</sup> Starr (Extraordinary Crimes at Ordinary Times) (*supra*) 1257.

domestic jurisdictions are primarily responsible for, and capable of, prosecuting international crime. The system of complementarity has emerged as one of the most important features of the modern international criminal justice system. It encourages domestic criminalisation so that referral to the ICC should only be necessary where domestic courts are unwilling or unable to prosecute.<sup>147</sup> The ICC is designed only as a “backstop” or ‘fall net’ for extreme cases which cannot be handled by national courts.<sup>148</sup> Through this, complementarity gives primacy to indirect modes of ICL enforcement. Furthermore, the feature of complementarity serves as an incentive for the domestic incorporation of the core crimes or the transformation of core crimes into domestic law.<sup>149</sup> Complementarity is closely related to the principle of universal jurisdiction. In the Rome Statute it manifests as conditional universal jurisdiction which will feature more prominently in the discussion under Part III.<sup>150</sup> Hypothetically speaking, a perfectly functioning system of complementarity would leave little need for international courts in the international criminal justice system.<sup>151</sup> Regrettably, this is not a reality at present. Many states have either not yet ratified the ICC Statute or, are yet to implement legislation transforming the Rome Statute into domestic law.<sup>152</sup> International and domestic prosecutions of international crime have become more frequent since the establishment of the *ad hoc* tribunals, but remain mostly an exception to the norm of impunity.

By interpreting the principle with reference to the purposes of the Rome Statute, Stigen cites that the complementarity principle has developed to obtain two main purposes, namely to ensure the effective prosecution of international crimes and to some extent in order

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<sup>147</sup> Rome Statute of the ICC, article 17(1)(a).

<sup>148</sup> Du Plessis M “South Africa’s International Criminal Court Act: Countering Genocide, War Crimes and Crimes Against Humanity” Institute for Security Studies Paper 172, November 2008, 1, available at <http://www.iss.co.za/uploads/PAPER172.PDF> (accessed 2012/08/22).

<sup>149</sup> See Chapter 5 para 5.6.3 *infra* and Chapter 8 para 8.3.3 *infra*.

<sup>150</sup> See Chapter 7 para 7.6.1.2 *infra*.

<sup>151</sup> See Election of the Prosecutor, Statement by Mr. Luis Moreno-Ocampo, New York, 22 April 2003, ICC-OTP-20030502-10: “The efficiency of the International Criminal Court should not be measured by the number of cases that reach the court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this court, as a consequence of the regular functioning of national institutions, would be a major success”.

<sup>152</sup> For signature and ratification status, see <http://www.un.org/law/icc/index.html>.

to safeguard state sovereignty.<sup>153</sup> The beneficial consequences of complementarity are discussed in greater detail under chapters 5, 7 and 8 *infra*.

### 2.3 Concluding Remarks

ICL is in its post-ontological stage. The international criminal justice system has shown consistent growth and development since the end of the Cold War and has reached a reasonable degree of legal sophistication. The ICTY and ICTR are in the process of completing their mandates and will leave behind a valuable body of jurisprudence. Furthermore, a large part of ICL has been codified in the Rome Statute.<sup>154</sup> On the domestic level, many states have incorporated or transformed the core crimes of ICL and other transnational crimes into domestic law. Domestic prosecutions of perpetrators of international crime have been successful in a number of cases. This introductory chapter has shown that, even though the enforcement of ICL remains sporadic and selective, the proliferation of *ius cogens* norms and *erga omnes* obligations and a more realistic approach to universal criminal jurisdiction holds some potential for the position of the individual under international law.

Bassiouni comments that the pursuit of justice at both international and domestic level “is still a work in progress”.<sup>155</sup> One may contend that ICL’s objective of punishing and preventing international crime is one part of the greater pursuit of worldwide justice also represented by for example, international human rights. The concept of justice is however mired in complexity and characterised throughout history up to the present by long-standing legal-philosophical debates. The meaning and substance of justice remains a point of

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<sup>153</sup> Stigen J *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2009) Martinus Nijhoff Publishers, The Hague 15-19; see also Chapter 5 para 5.6.3 *infra*.

<sup>154</sup> There are currently seven situations before the ICC. In addition to this, the government of Mali has asked the ICC to investigate the current situation in the country following a coup early in 2012. Upon submission the OTP was conducting a preliminary inquiry on the matter. Ten years into its existence, the ICC has produced its first conviction (see ICC, *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Judgment) Case No. ICC-01/04-01/06, 14 March 2012) and produced its first sentencing judgment (see ICC, *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Decision on Sentence Pursuant to Article 76 of the Statute) Case No. ICC-01/04-01/06, 10 July 2012).

<sup>155</sup> Bassiouni (*supra*) in Cassese (Oxford Companion) (*supra*) 132.

contention between different states, legal cultures and academia. Furthermore, in the anarchic international order states readily “hide the fact that behind the common ‘us’ lies the self-interested ‘me’”.<sup>156</sup> Accordingly, some academics dispute the status of international law as ‘law proper’ and dismiss the prospect of global justice in the international legal order dominated by powerful sovereigns.<sup>157</sup> Because of the abovementioned debates and criticisms, ICL as a representative of international justice, or of “universal values”, may always be a disputed concept. What has become clear, however, is that the model of traditional Westphalian sovereignty is not effective in the pursuit of justice for and over individuals and that an alternative is both necessary and desired by the international community.<sup>158</sup>

I will not venture into political and legal-philosophical issues in more detail than is required to address the research question. Despite jurisprudential debates and the problems of hegemony and unilateralism in international law, the following is clear:

“In this age of globalization, there is increased commonality of norms, procedures, and processes in the world’s legal systems, thus reflecting the shared values these represent.”<sup>159</sup>

ICL is among the most powerful expressions of shared international values. Its development since the end of the Cold War provides evidence that ICL is a valuable contributor to the increased commonality of norms and values. The shared and fundamental values of international peace and security; and individual well-being, create a connection between the international community and the aspirations of international criminal justice. Through this, ICL is presented with an opportunity to align its objectives to optimally reflect these values. Part II focuses on the value (and values) of ICL in a world which will become inevitably more interdependent.

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<sup>156</sup> Dupuy PM “Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martii Koskenniemi” (2005) 16 (1) *European Journal of International Law* 131-137, 133.

<sup>157</sup> The problem of hegemonic dominance and the consequences thereof for the transformative value ICL will be discussed more fully under Chapter 6 paras 6.3.3 *infra*.

<sup>158</sup> According to Rodman, Westphalian sovereignty is “not about the principles of justice” but “about defining the prerogatives of sovereign states and facilitating diplomacy between them”. See Rodman K “Compromising Justice: Why the Bush Administration and the NGO’s are Both Wrong About the ICC” (2006) 20 *Ethics and International Affairs* 25-53, 26.

<sup>159</sup> Dupuy (Some Reflections on Contemporary International Law) (*supra*) 131.



## CHAPTER 3

### THE MEANING OF “TRANSFORMATIVE VALUE”

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#### 3.1 Introduction

Law fulfils many roles in society. Historically, the law’s role has been to proscribe or prohibit certain conduct in order to regulate human and social interactions as well as to provide a means for settling disputes. The judgment in the South African case, *S v Bradbury*, reflects this position by referring to law as a “social science” which “purpose is to regulate the conduct between man and man, and man and the State”.<sup>160</sup> As a “social science” or social system law is highly reflective of morality and the processes of individual and collective human reasoning, through which it aims to secure social stability and the distribution of mutual benefits in societies. This traditional function of law continues to be of great importance to contemporary societies. In modern times however, both international and domestic law has increasingly been used for a novel purpose, achieving transformation.<sup>161</sup> Justice has developed a transformative dimension in which it speaks to broader social wrongs and injustices in a more pro-active manner.<sup>162</sup> But what serves as the baseline for this increased reliance on law to achieve social transformation? Why turn to law as a social transformer and not to power and politics?

The historical mandate and rise of international human rights has arguably played a substantial role in establishing the modern proclivity towards transformative law. We are

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<sup>160</sup> 1967 (1) SA 387 (A) at 399 F.

<sup>161</sup> See for example, Teitel (Transitional Justice) (*supra*); Teitel (Transitional Jurisprudence) (*supra*); Zimring F and Hawkins G “The Legal Threat as an Instrument of Social Change” in Tapp JL and Levine FJ (eds.) *Law, Justice and the Individual in Society – Psychological and Legal Issues* (1977) Holt, Rinehart and Winston, New York 60-68.

<sup>162</sup> See Daly E “Transformative Justice: Charting a Path to Reconciliation” (2002) 12 *International Legal Perspectives* 73-183, 79-95.

indeed living in the “age of human rights”.<sup>163</sup> Human rights values, due to their universal appeal, have permeated so deeply into all areas of law and politics that it has permanently changed the nature of law “in favour of a robust conception of humanity, dignity, and freedom from oppression”.<sup>164</sup> As a manifestation of cosmopolitanism, international human rights has affected the international legal system in a manner that has caused international law to deviate from its traditional function of regulation founded on the principle of non-interference towards proscribing certain forms of human and state conduct. Human rights law as well as states and organisations campaigning for the universal recognition of human rights, continue to systematically transform the world in a direction intended to put an end to inhumanity, cruelty, poverty, war and other scourges of mankind.

It must be acknowledged however, that transformation has close ties with politics.<sup>165</sup> Much of legal transformation is either politically initiated or politically driven. A “liberalizing trend” and the phenomenon of democratisation have been a major feature of the international political sphere since the mid-20<sup>th</sup> century.<sup>166</sup> For example, Huntington described the “wave” of democracy that swept the world between 1974 and 1990 in which over 30 countries moved from authoritarian to democratic rule.<sup>167</sup> Since the end of the Cold War, the surge to establish liberal democracy around the world has not waned.<sup>168</sup> Legal transformation is a concept which must be viewed from within this broader political context.

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<sup>163</sup> See, for example, Meron T *International Law and the Age of Human Rights: General Course on Public International Law* Vol 301 (2003) Marthinus Nijhoff Publishers, The Hague; Henkin L *The Age of Rights* (1990) Columbia University Press, New York; Starr (Extraordinary Crimes at Ordinary Times) (*supra*) 1309.

<sup>164</sup> Starr (Extraordinary Crimes at Ordinary Times) (*supra*) 1309.

<sup>165</sup> This is especially evident in the context of transitional justice where law is invoked to achieve change in the direction of liberalisation and democratisation of society. See Teitel (Transitional Justice) (*supra*).

<sup>166</sup> Teitel (Transitional Justice) (*supra*) 5.

<sup>167</sup> See Huntington S *The Third Wave: Democratization in the Late Twentieth Century* (1991) University of Oklahoma Press, Norman 5.

<sup>168</sup> See Strydom HA “International and Public Law Debate on Cultural Relativism and Cultural Identity: Origin and Implications” *Inaugural Lecture*, 7 August 1997, University of the Free State, Bloemfontein; Joseph R “Democratization in Africa after 1989: Comparative and Theoretical Perspectives” in Anderson L (ed.) *Transitions to Democracy* (1999) Columbia University Press, New York 237-260.

Generally, ‘transformation’ is nearly synonymous with ‘change’. More specifically, it connotes a ‘special’ or ‘qualified’ manner of change. In the common grammatical sense, transformative change may be described as complete or comprehensive change as well as change in a positive sense or that is ‘for the better’.<sup>169</sup> Beyond this “face-value” meaning, transformation may have either a broad or a very narrow meaning depending on the context of its use. The meaning afforded to transformation differs across various disciplines. The term is often used in transitional- or post-conflict societies. In these contexts it refers broadly to various inter-related movements such as liberalisation from oppression, social upliftment, political and economic reform as well as reconciliation.

As mentioned, the term ‘transformation’ can also be afforded a very particular meaning. The well-known meaning attributed to transformation in the context of treaty law differs entirely from the meaning attributed to transformation by writers and commentators on transitional justice for example.<sup>170</sup> A further example is how the word transformation is used in South Africa where it describes “the process of making institutions and organisations more democratic”.<sup>171</sup> Apart from the existing level of ‘mystification’ surrounding the concept of transformation, this study is further complicated by the fact that ICL has on occasion fallen foul to political abuse, rhetoric and unrealistic expectations concerning its transformative potential.<sup>172</sup>

The hypothesis, that ICL has transformative value, is the central tenet of this study. To clearly define the research question and as a general point of departure, my first task is to clarify the meaning of ‘transformative value’ as it will be used hereafter. This section is concerned with describing transformation and transformative law (the analytical or descriptive approach) and to a limited extent, what it ideally should be (the normative approach). The goal is to create workable criteria as well as a defensible definition for

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<sup>169</sup> *Oxford Advanced Learners Dictionary* (Seventh Edition) (2006) Oxford University Press, Oxford.

<sup>170</sup> See for example the definition forwarded by Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 7: “Transformation [in the context of treaty law] denotes the enactment of a national law that mirrors the content of the international rule, thus transforming a rule of international law in a national one”.

<sup>171</sup> (*Oxford Advanced Learners Dictionary*) (*supra*).

<sup>172</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 9 (footnote 59).

characterising that which is considered to be transformative. The criteria put forward below are of a reticent and general nature and is neither intended to be a rigorous test nor a comprehensive definition.<sup>173</sup> Still, a general formulation must be provided since it is essential for the interpretation of the central research question. The criteria thus serve as both “*a standard on which judgement or decision can be based*” and “*a characterizing mark or trait*” for identifying ICL’s transformative value.<sup>174</sup> It is submitted that a flexible method rather than a strict definition will reflect not only the substantial transformative benefits and limits of ICL, but also its transformative potential. Collaboratively, these aspects produce ICL’s *transformative value*, the identification of which is the purpose of this thesis.

Two fundamental questions will be addressed in this section. Firstly, what is the meaning of the term *transformation* in modern legal language in the different contexts of its use which are relevant to the research question?<sup>175</sup> Secondly, what is indicative of legal mechanisms or legal acts with *transformative significance*?<sup>176</sup>

### 3.2 The Specific Meaning of Transformation: The Act of Transformation

Before proceeding to the broad meaning of transformation, it is necessary to discuss the conventional meaning of *transformation* that is well known to international lawyers. This

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<sup>173</sup> The dangers associated with a ‘closed’ definition of transformation should be noted. See Pieterse M “What do we mean when we talk about Transformative Constitutionalism?” (2005) 20 (1) *Suid-Afrikaanse Publiekreg/South African Public Law* 156. Pieterse warns that “uni-dimensional theory” on the meaning of transformation runs the risk of being “self-defeatingly limiting”, and further: “To avoid ‘transformation’ becoming nothing more than a buzzword, it is necessary to contemplate its meaning and implications in each of the contexts of its use”. Esterhuysen warns that “created meanings” for terminology such as ‘transformation’ can entangle such terms in “dogmatic and one-sided interpretations” (see Esterhuysen W “Truth as a Trigger for Transformation: From Apartheid Injustice to Transformational Justice” in Villavicencio C and Verwoerd W (eds.) *Looking Back Reaching Forward* (2000) University of Cape Town Press, Cape Town 148).

<sup>174</sup> (Oxford Advanced Learners Dictionary) (*supra*); Merriam-Webster online dictionary, available at <http://www.merriam-webster.com/dictionary/CRITERIA> (accessed 2009/11/24).

<sup>175</sup> This is mainly the use of the term under international law, transitional justice, constitutional law and criminal law.

<sup>176</sup> Teitel (Transitional Justice) (*supra*) 3.

meaning is relevant to application of international law and treaty law in national legal systems. This ‘conventional’ meaning is also related to the debate between the monistic and dualist theories or schools of thought on the relationship of international law and domestic law. More particularly, the last-mentioned theories address questions that arise when international and domestic law come into conflict. The debate surrounding the application of international law in domestic courts is particularly relevant to ICL as it is moving toward a vision of indirect enforcement through the incorporation and transformation of the law of the Rome Statute and other international criminal norms into domestic legal systems.<sup>177</sup>

*Transformation* is one of two methods for the domestic implementation of international law. The other method is referred to as *incorporation*. Ferdinandusse offers a summary of these two methods:

“**Incorporation** takes place when an international rule is integrated in the national legal order, so that the judiciary can directly apply that rule. This method of incorporation promotes complete implementation of the international rule, as it cannot be modified. **Transformation** denotes the enactment of a national law that mirrors the content of the international rule, thus transforming a rule of international law in a national one. This method of transformation gives the legislature the opportunity to tailor, or even modify, the international rule to fit the peculiarities of the national legal system. Technically speaking, international law is applied not at all after transformation. In these cases, national courts apply national law that reproduces the content of the original international norm.”<sup>178</sup>

Whether or not *incorporation* or *transformation* is required for international law to be applied in domestic courts depends on which of the theories on the relationship between international and domestic law (the monist and dualist theories) are supported within the state in question. Furthermore, constitutional and legislative provisions may place limitations on the applicability of international law within a state. As is the case in South Africa, the domestic applicability of international law is often governed by specific constitutional provisions.

There are three distinct theories on the role of international law in domestic legal systems. These consist of the monistic theory, the dualist theory and the second monistic

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<sup>177</sup> See Katz A “An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa” (2003) 12(4) *African Security Review* 25-30.

<sup>178</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 7.

theory.<sup>179</sup> Some domestic legal systems require an act of *incorporation* or *transformation* of international laws into domestic law before it becomes enforceable law.<sup>180</sup> This is known as dualism or the dualist theory. The dualist school of thought subscribes to the view that treaties have no special status in domestic law *ipso facto* due to the fact that international law and municipal law are distinct systems of law.<sup>181</sup> Without accompanying legislation to ‘adopt’ the treaty or give effect thereto, the treaty has no force in national courts or domestic law.<sup>182</sup> Accordingly, rights and obligations provided for in treaties only come into effect once they become part of a state’s domestic law through legislation that provides for the enforcement of such rights and obligations.<sup>183</sup> Dualists do not believe that there can be a conflict between international law and municipal law as they are mutually exclusive legal systems.<sup>184</sup> Incorporated treaty law or international law that has been transformed into domestic law has the same status as domestic law and is susceptible to legislative amendment or repeal.<sup>185</sup> Because of this, national courts in states that subscribe to the dualist approach treat non-transformed international law as non-binding foreign law.

The two monistic theories are polar opposites of each other. The first monistic theory views international law not as ‘law’ but as ‘guidelines’ that are always inferior in status to national laws.<sup>186</sup> In this way national law (as the superior form law) and state power have ascendancy over international law.<sup>187</sup> On the other hand, the second monistic theory views both systems as “a single conception of law” so that international laws apply directly in

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<sup>179</sup> Cassese A *International Law* (Second Edition) (2005) Oxford University Press, Oxford 213; Kemp (Individual Criminal Liability) (*supra*) 131-132.

<sup>180</sup> See Dugard (International Law) (*supra*) 42; Katz (An Act of Transformation) (*supra*).

<sup>181</sup> Aust A *Modern Treaty Law and Practice* (2000) 150; Kemp (Individual Criminal Liability) (*supra*) 132.

<sup>182</sup> Aust (Modern Treaty Law) (*supra*) 150; Kemp (Individual Criminal Liability) (*supra*) 132.

<sup>183</sup> Aust (Modern Treaty Law) (*supra*) 143.

<sup>184</sup> Wallace and Martin-Ortega (International Law) (*supra*) 38-39.

<sup>185</sup> Aust (Modern Treaty Law) (*supra*) 151.

<sup>186</sup> Cassese (International Law) (*supra*) 214; Kemp (Individual Criminal Liability) (*supra*) 131.

<sup>187</sup> Kemp (Individual Criminal Liability) (*supra*) 131.

municipal courts if the treaty was properly concluded and has entered into force.<sup>188</sup> Cassese explains the superiority of international law in the second monistic theory as follows:

“[...] sources of international law belong to a legal system that is hierarchically superior to municipal systems, not radically different from them. As a result, international rules can be applied as such by domestic courts without any need for transformation.”<sup>189</sup>

The secondary monistic theory thus gives international law ascendancy over municipal law.<sup>190</sup> In practise, domestic legal systems attempt to harmonise these conflicting views by taking an approach that is neither absolutely monistic nor dualistic.<sup>191</sup>

The *incorporation* or *transformation* (as a method of implementation of international law) can be seen as an “act of transformation” in a literal sense.<sup>192</sup> This denotes an act through which the international norm becomes domestically ‘active’ and may create social impact. Beyond legislative acts of transformation or incorporation lie the possible broader socio-legal repercussions or effects of the integrated law, which may be transformative according to the hypothesis of this thesis. The specific meaning of transformation and the transformative effects of acts of transformation as described above will be illustrated in Chapter 7 by looking at the status of international law in South Africa and the potential influence of ICL which has been transformed into South African municipal law.

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<sup>188</sup> Katz (An Act of Transformation) (*supra*) 26; Aust (Modern Treaty Law) (*supra*) 146: “[...] such treaties are commonly described as ‘self-executing’”.

<sup>189</sup> Cassese (International Law) (*supra*) 215.

<sup>190</sup> Wallace and Martin-Ortega (International Law) (*supra*) 38-39.

<sup>191</sup> Wallace and Martin-Ortega (International Law) (*supra*) 39. Dugard gives an example of this harmonising approach: “While maintaining that international law is not foreign law, monists have been compelled to accept that the whole body of international law binding on a state cannot be directly applied by municipal courts. This has led to the emergence of the ‘harmonization theory’ which qualifies the absolute monist position by acknowledging that in cases of conflict between international law and municipal law the judge must apply his own jurisdictional rules. This means that customary international law is to be applied directly as part of the common law, but that conflicting statutory rules and acts of state may prevail over international law” (footnotes omitted). See Dugard (International Law) (*supra*) 42-43; Aust (Modern Treaty Law) (*supra*) 146 (Even if the monist approach is followed there may be cases where legislation is needed); Cassese (International Law) (*supra*) 215.

<sup>192</sup> Katz (An Act of Transformation) (*supra*).

### 3.3 Alternative Meanings of Transformation

The term transformation is often encountered in the context of societal transitions. It is most often, but not exclusively, used in the field of transitional justice which falls within the broader field of transitional studies. Here transformation refers broadly to a *process of change*. The related concepts of transformation and transition both speak to unjust or oppressive political and legal systems, to broader social inequalities and to the goals of liberalisation and democratisation.<sup>193</sup> In this context, the concept of transformation has no fixed meaning.<sup>194</sup>

In an effort to identify transformation in its alternative meaning and to clarify the relationship between transition and transformation, I consider firstly a number of terminological distinctions. What are the correct cross-disciplinary meanings of the terms *transition* and *transformation* on the one hand, and *transitional justice* and *transformative justice* on the other? And how does one distinguish between these?

#### 3.3.1 'Transition' and 'Transformation'

The distinction between *transition* and *transformation* is more elusive than it appears at first. These terms are often used interchangeably in the same context.<sup>195</sup> This approach is not necessarily incorrect, but as Daly explains, certain critical differences must be considered:<sup>196</sup>

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<sup>193</sup> Roederer CJ “Transitional/Transformative Jurisprudence: Law in a Changing Society” in Roederer CJ and Moellendorf D (eds.) *Jurisprudence* (2004) 623-624 (it is noteworthy that the title of the aforementioned chapter refers to transition, transformation and change in the same breath).

<sup>194</sup> The only possible exceptions are those notions of transformation which are specific to a certain context, for example, the meanings of transformations in South Africa and the South African legal system. See para 3.4 *infra*.

<sup>195</sup> See for example Teitel (Transitional Justice) (*supra*); Roederer CJ “‘Living Well is the Best Revenge’ – If One Can: An Invitation to the Creation of Justice off the Beaten Path: Review essay of McAdams J *Transitional Justice and the Rule of Law in New Democracies*” (1999) 15 *South African Journal of Human Rights* 75-97, 78. The following passage from the latter work illustrates this point: “Further, each society’s *transformation* is in some sense a unique response to its unique past and present situation. Thus, it is doubtful that a grand theory of *transition* will emerge from the field [...]”. The author readily switches



“**Transition** suggests movement from one thing to another – from oppression to liberation, from oligarchy to democracy, from lawlessness to due process, from injustice to justice. **Transformation**, however, suggests that the thing that is moving from one place to another is itself changing as it proceeds through the transition; it can be thought of as radical change. A nation in transition is the same nation with a new government; a nation in the midst of a transformation is reinventing itself. Because transformation entails a recreation of the culture, it fulfils the promises of reconciliation and deterrence that transition alone cannot achieve.”<sup>197</sup>

According to transitional justice authority Ruti Teitel, a transition is a “change in a liberalizing direction”.<sup>198</sup> Transitions occur when there is a liberalising movement away from colonial, oppressive regimes or dictatorships towards a more just regime or society. The South African transition for example can be viewed as part of the so-called “Third Wave” of transitions to democracy.<sup>199</sup> Such a change of government or large-scale political movement is usually accompanied by an attempt to remedy the various injustices which are still present in societies even after a new government has taken over.

Daly’s definitions above suggest that it is likely for a society in transition to be simultaneously in the process of transformation, but that transitions and transformations do not accompany each other as a rule. It appears that transformation can take place independently of a transitional situation, or may even continue in the wake of a transition by becoming a permanent feature of the national legal system. South Africa’s post-apartheid society may be the best example of such a situation. In South Africa, the transition is completed and transformation is on-going.<sup>200</sup> A transition then has a fixed timeframe as opposed to transformation which is a long term process.

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between the use of the phrases ‘transformation’ and ‘transition’ and apparently uses them as near synonyms.

<sup>196</sup> Daly (Transformative Justice) (*supra*) 74.

<sup>197</sup> Daly (Transformative Justice) (*supra*) 74 (emphasis added).

<sup>198</sup> Teitel (Transitional Justice) (*supra*) 5.

<sup>199</sup> Huntington (The Third Wave) (*supra*) (the author describes the “third wave” as the numerous transition to democratic governance which occurred in various countries around the world between 1974 and 1990); Roederer (*supra*) in Roederer and Moellendorf (Jurisprudence) (*supra*) 628-629.

<sup>200</sup> While socio-economic and institutional transformation remains a high priority in South Africa, the democratic transition is completed to such an extent that some now refer to South Africa as a state that has moved from democracy to a “rogue democracy” (see Jordaan E “Fall from Grace: South Africa and the

### 3.3.2 Transitional Justice

*Transitional justice* is the study of the various institutional and legal responses during a transition to democracy.<sup>201</sup> The field of transitional justice has been defined as “the study of the choices made and the quality of justice rendered when states are replacing authoritarian regimes by democratic state institutions”.<sup>202</sup> Transitional justice as part of a democratisation or liberation process resides in both the political and legal realm. It lies at “the intersection between jurisprudence, comparative politics, and political theory”.<sup>203</sup> As a result of this, the legal and the political concepts of transformation tend to become distorted during transitions.

Transitional jurisprudence has emerged as the study of the complex interaction between politics and law in transitions. Teitel argues that legal responses “follow a distinctive paradigm” during transitional periods which is “guided by rule-of-law principles tailored to the goal of *political transformation*” (emphasis added).<sup>204</sup> This paradigm (or “transitional jurisprudence”) is described by Teitel as follows:

“Because transitions’ defining feature is their *normative shift*, legal practices *bridge a persistent struggle between two points: adherence to established convention and radical transformation*. Ultimately, a dialectically induced position emerges. In contexts of political upheaval, transitional jurisprudence comprises a partial and nonideal conception of justice: provisional and limited forms of constitutions, sanctions, reparations, purges and histories. Across categories of law, a distinctive legal form mediates the move between regimes. Law’s role here is transitional, and not foundational, constructive of critical changes in individual status, rights, and responsibilities – and, more broadly, of shifts in power relations. *As law’s function is to advance the construction of political change, transitional legal manifestations*

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Changing International Order” (2010) 30 *Politics* 82-92) and by the recent discussion of a ‘second transition’ during the ANC’s policy conference in June 2012.

<sup>201</sup> Bilsky L *Transformative Justice: Israeli Identity on Trial* (2004) University of Michigan Press, Ann Arbor 9: “Transitional justice theory addresses trials and other processes that take place during the transition from an authoritarian regime to a democracy”.

<sup>202</sup> Siegel R “Transitional Justice: A Decade of Debate and Experience” (1998) 20 *Human Rights Quarterly* 431-454.

<sup>203</sup> Posner E and Vermeule A “Transitional Justice as Ordinary Justice” (2004) 117 (3) *Harvard Law Review* 762-825, 762.

<sup>204</sup> Teitel (Transitional Justice) (*supra*) 213.

*are more vividly affected by political values in regimes in transition than they are in states where the rule of law is firmly established.* Thus, the jurisprudence of these periods does not follow such core principles of legality as regularity, generality, and prospectivity – the very essence of the rule of law in ordinary times. While the rule of law in established democracies is forward-looking and continuous in its directionality, *law in transitional periods is backward-looking and forward-looking, retrospective and prospective, continuous and discontinuous.*<sup>205</sup> (footnotes omitted; emphasis added)

Finding a balance between political and legal reactions to prior and current injustice during transition is difficult. According to Teitel:

“The central dilemma intrinsic to transition is how to move from illiberal rule and to what extent this shift is guided by conventional notions of the rule of law and individual responsibility associated with established democracy. A core tension emerges here in the use of law to advance transformation, as opposed to its role in adherence to conventional legality.”<sup>206</sup>

As a result, most transitional justice responses become a trade-off between the need for peace and the desire for justice. Teitel provides an eloquent description of the predicament of law during transitions:

“Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective”.<sup>207</sup>

Depending on the nature of the oppression or conflict, there may be a need for the successors to perform any or all of the following duties: attaining justice for the victims (retributive, reparatory and truth finding); holding perpetrators accountable; and facilitating short term peace, reconciliation and legal and socio-economic equality.<sup>208</sup> Many of these duties have roots in international law. Political responses such as democratic elections, as well as legal responses that are often grounded in international laws, are used in combination to attain these goals and to shape the liberalising movement.

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<sup>205</sup> Teitel (Transitional Justice) (*supra*) 215.

<sup>206</sup> Teitel (Transitional Justice) (*supra*) 27.

<sup>207</sup> Teitel (Transitional Justice) (*supra*) 6.

<sup>208</sup> Daly (Transformative Justice) (*supra*) 80 (footnote 12); Roederer (Living Well is the Best Revenge) (*supra*) 82.

### 3.3.2.1 Criminal Law in Transitions

Historically, criminal trials are one of the most prominent features in the field of transitional justice.<sup>209</sup> Recourse to criminal law during transitions gained popularity following the end of the Cold War. The use of criminal law during transitions is dependent on a multitude of factors. These factors include amongst others the nature of the transition, the nature and degree of prior human rights abuses, socio-economic conditions and the participation of the international community. As there is no longer “a dichotomous choice between criminal accountability and total amnesia”, there is also no longer a choice between a backward-looking and forward-looking approach to transitions.<sup>210</sup> Teitel argues that “[the] role of criminal justice in transitional times [...] transcends that of conventional punishment.”<sup>211</sup> Furthermore, Teitel argues:

“Criminal justice in some form, transitional practices suggest, is a ritual of liberalizing states, as it is through these practices that norms are publicly instantiated. Through known, fixed processes, a line is drawn, liberating a past, that allows the society to move forward. Though punishment is conventionally considered largely retributive, in transition, its purposes are corrective, going beyond the individual perpetrator to the broader society.”<sup>212</sup>

Teitel accordingly recognises the potential of criminal law to provide stability, but also to act as a forward-looking instrument of social change during transitions.<sup>213</sup> Thus it may be argued that the function of criminal justice during transition differs to some extent from the function of criminal law in stable domestic societies. Since criminal justice in domestic societies is fundamentally directed at upholding the rule of law, this discrepancy creates tension between the transformative use of criminal law and the rudiments of the rule of law principle.

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<sup>209</sup> Teitel (Transitional Justice) (*supra*) 27.

<sup>210</sup> Alvarez (*supra*) in Cassese (Oxford Companion) (*supra*) 37.

<sup>211</sup> Teitel (Transitional Justice) (*supra*) 66.

<sup>212</sup> Teitel (Transitional Justice) (*supra*) 67

<sup>213</sup> Teitel (Transitional Justice) (*supra*) 67.

### 3.3.2.2 Transformation and the Rule of Law during Transition

Transitions exhibit a tension between the rule of law and the transformative use of law.<sup>214</sup> According to Teitel, in transitions “[the] juxtaposition is always between the rule of law as settled norms versus the rule of law as transformative.”<sup>215</sup> The rule of law traditionally demands consistent application of the law to promote stability, foreseeability and predictability. Unlike transformative law, the rule of law is not aimed at facilitating change nor is it influenced by or based on morals. The rule of law is an abstract legal principle that has little to do with what is morally right or wrong, in fact adherence to the rule of law has often meant enforcement of unjust laws. This was observed in Nazi Germany and during *apartheid* in South Africa for example.

The conflict between the rule of law and transformation is especially palpable when it comes to predecessor criminal trials. In this context the domestic rule of law which is traditionally based on predictability and foreseeability clashes with the international rule of law representative of the desire of the international community to hold those persons whose acts have violated the rules of international law accountable. For instance under these circumstances, should the predecessors be tried under the law of the old regime or that of the new regime or should prosecution be instituted under international laws? Adherence to the criminal laws of the old regime perpetuates injustice which runs contrary to the international rule of law, while applying new (international) criminal laws retroactively runs contrary to the domestic rule of law principle. Even if it is accepted that impunity for perpetrators of certain categories of past injustice is absolutely prohibited, accountability in the retributive sense may require retrospective punishment which runs contrary to the principle of legality and the rule of law principle.

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<sup>214</sup> Roederer (*supra*) in Roederer and Moellendorf (Jurisprudence) (*supra*) 631. According to Roederer, “[j]ustice requires change, but too much change can be dangerously inefficient”.

<sup>215</sup> Teitel (Transitional Justice) (*supra*) 17.

The problem above can be approached from a legal positivist or natural law perspective.<sup>216</sup> Positivists argue that politics is the appropriate means of responding to past injustices and to advance transformation.<sup>217</sup> Positivism stresses adherence to prior settled laws in order to achieve transformation. In contrast, the natural law position highlights moral rights over settled law. According to Teitel:

“...the natural law position highlights the transformative role of law in the shift to a more liberal regime. Under this view, putative law under tyrannical rule lacked morality and hence did not constitute a valid legal regime”.<sup>218</sup>

Dugard has made a similar argument in relation to the reliance on amnesties during the South African transition. He contends that the laws of the Apartheid regime must be denounced because they did not comply with the inner morality of the law and that, as a result, the amnesty process was circumspect.<sup>219</sup> He suggests that:

“[Justice], universal justice which transcends the requirements of political expediency, is an essential component of reconciliation [...] In South Africa, it is doubtful whether a just reconciliation can ever be achieved without the retrospective invalidation of the laws of apartheid.”<sup>220</sup>

Furthermore “[this] theory of transformative law promotes the normative view that the role of law is to transform the prevailing meaning of legality”.<sup>221</sup> From the natural law perspective there is a link between morality and transformative law and recognition of the potentially transformative role of criminal law to denounce prior injustice and to invalidate abusive laws of the former regime.

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<sup>216</sup> See Teitel (Transitional Justice) (*supra*) 12-15 where Teitel outlines the jurisprudential debate between HLA Hart and Lon Fuller on the nature of law, but also notes that the debate “failed to focus [...] on the distinctive problem of law in the transitional context”.

<sup>217</sup> Teitel (Transitional Justice) (*supra*) 14.

<sup>218</sup> Teitel R “Transitional Jurisprudence: The Role of Law in Political Transformation” (1997) 106 *Yale Law Review* 2021; Teitel (Transitional Justice) (*supra*) 14.

<sup>219</sup> Dugard J “Retrospective Justice: International Law and the South African Model” in McAdams J (ed.) *Transitional Justice and the Rule of Law in New Democracies* (1998) University of Notre Dame Press, London 286; Roederer (*supra*) in Roederer and Moellendorf (Jurisprudence) (*supra*) 636.

<sup>220</sup> Dugard (Retrospective Justice) (*supra*) 286.

<sup>221</sup> Teitel (Transitional Jurisprudence) (*supra*) 2021; Teitel (Transitional Justice) (*supra*) 14-15.

### 3.3.3 Transformative (Criminal) Justice<sup>222</sup>

*Transformative justice* is the collection of institutional- and legal responses which produce transformation. As opposed to transitional justice, transformative justice has a stronger moral undercurrent and is less infused with the political. However, as will be subsequently discussed, an absolute de-politicisation of transformative justice may not be possible.<sup>223</sup>

Transformative justice in the criminal law context demands a systematic approach to punishment which speaks to the broader social problems behind a specific crime.<sup>224</sup> Transformative justice has strong ties to restorative justice and envisions a reconciliatory approach to criminal justice involving the offender, the victim and the affected community.<sup>225</sup> According to Daly, the “two principal goals of transformative justice are the related aims of reconciliation and deterrence”.<sup>226</sup> Beyond these goals however, transformative justice “requires metamorphosis at all levels of society” which involves “changing the culture that pursued or tolerated the prior injustice”.<sup>227</sup> This process entails infusing new norms and

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<sup>222</sup> Transformative justice can be distinguished from transformational justice which refers to “the notions of justice that drive and also legitimise the process of transition and transformation”; see Esterhuysen (Truth as a Trigger for Transformation) (*supra*) 151.

<sup>223</sup> See Chapter 6 para 6.3.2.2 *infra* and Chapter 8 paras 8.3.4.2 and 8.3.5 *infra*.

<sup>224</sup> In South Africa’s transition to democracy this was achieved with a measure of success through alternatives to criminal justice. The South African Truth and Reconciliation Commission used a trade-off between amnesty and the truth as a socially restorative mechanism. Criminal prosecution remained a possibility if the applicant failed to provide full disclosure of the facts related to any act, omission or offense associated with political objectives between 1 March 1960 and 11 May 1994. See Cockayne J “Truth and Reconciliation Commissions (General)” and “Truth and Reconciliation Commission in South Africa” in Cassese (Oxford Companion) (*supra*) 544 and 551.

<sup>225</sup> Although transformative justice has strong ties with restorative justice it differs from it in that it takes restorative justice beyond the immediately affected parties and the criminal justice system. Thus transformative justice appears to emphasise utilitarian objectives. Both restorative justice and transformative justice generally place less emphasis on retribution as an objective of punishment.

<sup>226</sup> Daly (Transformative Justice) (*supra*) 84.

<sup>227</sup> Daly (Transformative Justice) (*supra*) 82-83 and 94.

values into a society which, although it has already undergone a transition, may not yet have accepted those values (often of a universal character) closely associated with the transition.<sup>228</sup>

Transformative justice operates through a number of institutions and modalities. Criminal trials, various types of truth commissions, blanket- or conditional amnesty and lustration may serve as vehicles for transformative justice.<sup>229</sup> Prosecutions are often used in conjunction with alternatives to criminal justice.<sup>230</sup> In some situations however, criminal accountability has been rendered impossible by *realpolitik* or by the desire for national peace and reconciliation.<sup>231</sup> The rise of alternatives to criminal justice has shown that a purely prosecutorial approach to mass atrocity (the “Nuremberg approach”) is likely to be an impractical means of simultaneously dealing with the past and moving forward.<sup>232</sup> It must be noted that the proliferation of alternatives to criminal justice has by no means rendered criminal prosecutions redundant to the transformational process. Prosecution remains relevant to transformative justice for a number of reasons. Firstly, impunity for perpetrators of mass atrocity and international crime offends the international community’s basic notion of justice and runs contrary to humanity’s instinctive demand for retribution in response to crime. According to Alvarez:

“The justifications for international criminal liability for perpetrators of the international crimes of genocide, war crimes, and crimes against humanity have remained essentially unchanged in the half century since World War II’s Nuremberg and Tokyo trials. Despite the vast literature on those famous prosecutions, including extensive critiques levelled at what they accomplished, there is a remarkable degree of consensus among international lawyers in favor of international criminal accountability for mass murderers, rapists, and torturers.”<sup>233</sup>

Secondly, denying justice and ignoring past violations through failure to bring offenders to court whenever possible (especially for egregious international crimes) decreases the chances

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<sup>228</sup> Later in this thesis I will address the notion of international (criminal) law as an expression of values, see para 3.4.6 *infra* and Chapter 6 para 6.2 *infra*.

<sup>229</sup> Daly (Transformative Justice) (*supra*) 96.

<sup>230</sup> Alvarez (Alternatives to International Criminal Justice) in Cassese (Oxford Companion) (*supra*) 37.

<sup>231</sup> Alvarez (Alternatives to International Criminal Justice) in Cassese (Oxford Companion) (*supra*) 26.

<sup>232</sup> Daly (Transformative Justice) (*supra*) 101-102.

<sup>233</sup> Alvarez J “Crimes of State/Crimes of Hate: Lessons from Rwanda” (1999) 24 *Yale Journal of International Law* 365-483, 365-366.



of a successful transformative process.<sup>234</sup> There may also be a strong desire among the victims of past injustices to see their former tormentors brought to book. Thirdly, the international community and human rights culture continues to express strong support for accountability for international crimes. The creation and continued support for the permanent ICC serves as an illustration of the desire that “the most serious crimes of concern to the international community as a whole must not go unpunished” and that impunity for the perpetrators of these crimes must come to an end.<sup>235</sup>

### **3.4 The Character of Transformative Change**

Change is the central feature of transformation. Below I provide a brief outline of the nature and characteristics constitutive of the type of change that is transformative.

#### **3.4.1 The (Limited) Relevance of Transformative Constitutionalism**

In South Africa, the term ‘transformation’ usually denotes the process of making institutions and organisations more democratic.<sup>236</sup> Furthermore, the Constitution of the Republic of South Africa is a legal instrument attributed with transformative qualities. An area of study which may be helpful for the identification of transformative change is “transformative constitutionalism”. In his seminal article “Legal Culture and Transformative Constitutionalism”, Klare described transformative constitutionalism as follows:

“[...] a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative

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<sup>234</sup> Daly (Transformative Justice) (*supra*) 100-101 (footnote 65). According to Daly, the “ICC Statute permitting jurisdiction if the state does not act codifies the international community's preference for action over inaction and, further, for criminal prosecution over alternatives”.

<sup>235</sup> Rome Statute of the International Criminal Court, Preamble (4) and (5).

<sup>236</sup> (Oxford Advanced Learners Dictionary) (*supra*).

constitutionalism connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law.”<sup>237</sup>

The notion of transformative constitutionalism features prominently in South African human rights and constitutional law discourse and is a widely discussed topic among South African lawyers and academics.<sup>238</sup> Writing on the subject, many lawyers and academics have elaborated on the possible meaning of transformation. Therefore, the premise for turning to transformative constitutionalism in this thesis is to identify a number of shared qualities or characteristics in those bodies of law or legal instruments which are part of public law, and which have been credited for producing the type of change that is transformative.

The relevance of transformative constitutionalism for this thesis is twofold. Firstly, in this chapter, I turn to transformative constitutionalism to outline the meaning of ‘transformative value’ and more specifically to identify and describe ‘transformative change’. Secondly, transformative constitutionalism’s relevance lies in the potential impact of the ‘transformative’ South African Constitution on the interaction between South Africa’s domestic legal system and international criminal justice.<sup>239</sup> Especially relevant in this regard is section 232 of the Constitution which potentially provides a basis for the prosecution of customary international crimes directly under common law.<sup>240</sup> Beyond these aspects, transformative constitutionalism’s relevance to this thesis is limited. Transformative constitutionalism proceeds essentially from a perspective which is specific to South African history, politics and law. This thesis focuses primarily on the international criminal justice system (international aspects of domestic criminal law and criminal aspects of international law) as well as the international- and domestic application thereof. Within this broader primary focus, the potential impact of the transformative Constitution on the application of ICL in South Africa must be considered and not the type of transformation more generally

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<sup>237</sup> Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal of Human Rights* 146-188, 150.

<sup>238</sup> See Klare (Transformative Constitutionalism) (*supra*) 157; Pieterse (What Do We Mean?) (*supra*) 157; Langa P “Transformative Constitutionalism” (2006) 17 *Stellenbosch Law Review* 351; Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) Juta, Cape Town.

<sup>239</sup> This is discussed more fully in Chapter 7 *infra*.

<sup>240</sup> Kemp *et al.* (Criminal Law in South Africa) (*supra*) 564-565; see also Chapter 7 para 7.7.3 *infra*.

associated with transformative constitutionalism, namely transformation through constitutionally entrenched socio-economic rights.

### 3.4.2 Transformative Change as Qualified ‘Social Change’

It has been noted above that transformation is nearly synonymous with change. Reitz observes that “much law is intended to enforce the status quo, but transformative law is intended to change society”.<sup>241</sup> According to Esterhuysen, ‘change’ in the broad meaning of the word (he refers to the “umbrella function” of the term) isn’t necessarily change for the better but could represent change in any unspecified manner.<sup>242</sup> Esterhuysen contends that “transformation means a new institution, a new culture and a new direction”.<sup>243</sup> Therefore, law that aims to be transformative cannot simply confirm or entrench societal consensus.<sup>244</sup> Rather, law can be regarded as transformative when it “[...] has the power to change society because a substantial segment of society has not yet adopted the values of the law.”<sup>245</sup> The

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<sup>241</sup> Reitz JC “Politics, Executive Dominance and Transformative Law in the Culture of Judicial Independence” (2009) *University of Iowa Legal Studies Research Paper* Number 09-06, 24.

<sup>242</sup> Esterhuysen (Truth as a Trigger for Transformation) (*supra*) 148-149. Under this umbrella function he distinguishes change through two divergent strategies: conforming strategies (“first-order change”) and transforming strategies (“second-order change”): “With first-order change, the system itself, including its structure, culture and defining values, does not change. The process takes place within the confines of the system itself and in terms of the basic principles and values of the system. The main purpose of the intervention is to preserve the fundamentals and the existing order of things by changing the non-fundamentals. This category of change is more usually known as adaptation, renovation, adjustment, incremental change or piece-meal engineering. The objective is to change behaviour within a prevailing system without affecting the culture, structure and the defining values of the system. Change is, moreover, regarded as an evolutionary process. Second order change is of a more radical nature. Its primary objective is not to intervene in the operation of an institution but to transform its structure, culture, defining values and overall form. Martel quite rightly refers to this prototype of change as structural change, emphasizing that a fundamental transformation of an institution’s total make-up is on the agenda. Bate coins the phrase ‘form- or frame-breaking’ to underline the decisive nature of second-order change. Strategies aimed at transformation inevitably break the evolutionary chain of development, creating discontinuity and variance of form. Put differently, transformation means a new institution, a new culture and a new direction”.

<sup>243</sup> Esterhuysen (Truth as a Trigger for Transformation) (*supra*) 148.

<sup>244</sup> Reitz (Politics, Executive Dominance and Transformative Law) (*supra*) 40.

<sup>245</sup> Reitz (Politics, Executive Dominance and Transformative Law) (*supra*) 33-34.

distinction between law that *confirms* public consensus and law that *shapes* public consensus to *create* new social norms is not always easily made. Moreover, transformative change must be distinguished from ordinary legal development, meaning the normal manner through which law adapts or evolves to meet shifting social needs.<sup>246</sup> How then can we distinguish ordinary legal evolution from legal transformation?

The legal evolution referred to above is often gradual and instinctive, resembling what Klare refers to as “reform”.<sup>247</sup> According to Klare, reform is not vast enough to encapsulate transformation. Yet, transformation falls short of a social revolution in the traditional sense.<sup>248</sup> The following observation by Teitel illustrates the difficulty in trying to establish a threshold for transformative change during a transition:

“Not all transformations exhibit the same degree of ‘normative shift’. Indeed, one might conceptualize transition along a transformative continuum in their relation to the predecessor regime and value system varying in degree from ‘radical’ to ‘conservative’ change.”<sup>249</sup>

Although transformation most often occurs in transitions and post-conflict situations, transitional justice mechanisms are not transformative *per se*. It is not change itself but the qualities of change and the effect of the change that provides the transformative element. As in Klare and Teitel’s respective views above, the manner of change is more than conservative reformation, yet does not necessarily have to amount to a radical political (and legal) revolution.<sup>250</sup> It is the substantial innovation, improvement or normative shift brought about by the change irrespective of the specific circumstances in which it takes place that determines whether or not it is transformative.<sup>251</sup> Thus, the type of change is the determining

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<sup>246</sup> See the distinction between “first-order change” and “second-order change” at footnote 242 *supra*.

<sup>247</sup> See Klare (Transformative Constitutionalism) (*supra*) 150: “I have in mind a transformation vast enough to be inadequately captured by the phrase ‘reform’, but something short of or different from ‘revolution’ in any traditional sense of the word”.

<sup>248</sup> Klare (Transformative Constitutionalism) (*supra*) 150.

<sup>249</sup> Teitel (Transitional Justice) (*supra*) 6. Later on in her book, Teitel refers to ‘radical’ and ‘conservative’ change as ‘critical’ and ‘residual’ respectively (at 216).

<sup>250</sup> Klare (Transformative Constitutionalism) (*supra*) 150; Teitel (Transitional Justice) (*supra*) 6.

<sup>251</sup> Consider the following example: During its lifetime a caterpillar may undergo many ‘changes’. It grows, changes colour, and so forth. But when the caterpillar ‘changes’ into a butterfly – it would be more

factor for identifying transformative value. It is the substance and quality of the change that provides the transformative element.

### 3.4.3 ‘Back to the Future’: Transformative Change as Forward- and Backward Looking

Transformation cannot be a dichotomous choice between backward-looking and forward-looking action. Pieterse, with significant references to both Teitel’s work on transitional jurisprudence and Klare’s seminal article, describes transformative constitutionalism as “historically self-conscious whilst simultaneously embodying an as yet unrealised future ideal”.<sup>252</sup> He notes that transformative constitutionalism is concurrently forward- and backward-looking, “maintaining legal continuity and simultaneously [facilitating] change”.<sup>253</sup> These forward- and backward-looking goals of transformation are illustrated well in the preamble to the South African Constitution:

“We the people of South Africa, recognize the injustices of our past” [and] “adopt this Constitution so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”<sup>254</sup>

Addressing a society’s past during a transition impacts upon its future and its prospects for a successful transformation.

In keeping with the familiar saying “there can be no peace without justice”, there can be no moving forward, no progressive change, before past wrongs and current injustices have been righted. Nor can there be justice without adherence to established principles of justice such as legal certainty and the rule of law. The first prize in any transition is to cultivate a peaceful and stable environment wherein past legal abuses can be addressed and remedied and where a platform can be created to protect against future abuses. To a certain extent,

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appropriate to say that the caterpillar has *transformed* into a butterfly, since the change is of such a nature that it is viewed (at least under the idiom of the caterpillar and the butterfly) to be a positive development.

<sup>252</sup> Pieterse (What Do We Mean?) (*supra*) 157-158.

<sup>253</sup> Pieterse (What Do We Mean?) (*supra*) 157: “...[transformative constitutionalism] is historically self-conscious whilst simultaneously embodying an as yet unrealized future ideal”. See also Teitel (Transitional Justice) (*supra*) 8 (especially Chapter 6 “Transitional Constitutionalism”).

<sup>254</sup> Preamble to the Constitution of the Republic of South Africa, 1996.

transformative change is determined by, and contingent upon, the nature of prior injustices.<sup>255</sup> This determines the threshold for transformative change. Whether through criminal trials or through alternatives to criminal justice, confronting the past is essential to any transformation. The legacy of past injustices must be eradicated and combined with a commitment to ensure that the wrongs of the past are never repeated.<sup>256</sup> Borrowing from the title of the 1980's American science fiction films, transformative change must serve to take a society *back to the future*. To an extent, the future is shaped both by the past and the *ex post facto* legal reaction thereto. To achieve transformation in this way is a daunting task, one requiring a balancing act between diverse and often conflicting legal duties and political interests. This is the crux of any transformation, how to optimally balance and mediate between the numerous and often divergent backward- and forward-looking objectives of peace, reconciliation, truth-telling, retribution, restoration and deterrence, all while remaining within the bounds of legality and the rule of law.

#### 3.4.4 The Utility Criterion

One approach to the concept of transformative change may be to regard it as the type of change with the property of being *useful*. Bearing this in mind, a good point of departure is perhaps the work of the utilitarian positivists. Writers such as Bentham, Austin and Mill rejected the idea of turning to natural law and natural rights to establish what the law is.<sup>257</sup> They worked towards a critical evaluation of law based on the criterion of utility. A thorough legal-philosophical analysis of utilitarian positivism falls beyond the scope of this thesis. What I am mostly interested in is the definition of utility or usefulness under utilitarian positivism. Bentham postulated utility as “[...] the property or tendency of a thing to prevent some evil or to procure some good [and] to augment the happiness of the community”.<sup>258</sup> Accordingly, “it is the greatest happiness of the greatest number that is the measure of right

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<sup>255</sup> See Teitel (Transitional Justice) (*supra*) 6: “As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative”.

<sup>256</sup> Pieterse (What Do We Mean?) (*supra*) 157.

<sup>257</sup> Kroeze II “Legal Positivism” in Roederer and Moellendorf (eds.) *Jurisprudence* (2004) 65-66.

<sup>258</sup> Stone J *Human Law and Human Justice* (1968) Maitland Publications, Sydney 122.

and wrong”.<sup>259</sup> Furthermore, a legal mechanism with utility is one with potential to maximise the good (or “*happiness*”) and minimises iniquity on a grand scale.<sup>260</sup> This can be observed in the work of Mill where he refers to *happiness* as “a good to the aggregate of all persons”.<sup>261</sup> Because of the emphasis on that which is in the interest of the common good, utilitarianism places a high value on equality, fairness and impartiality. Since every person in the utilitarian vision is entitled to share equally in the state of maximised happiness, an impartial judgment can be made as to what that would entail.<sup>262</sup>

In the criminal law context, utilitarianism manifests through the utilitarian theories of punishment, which views punishment as a means of obtaining social benefits. The premise for socially beneficial punishment is the transgression of a legal rule. Punishment to deter future crimes either of a specific individual or within the general public is a notable example. Utilitarian punishment theory is discussed more fully under Chapter 5 para 5.2.3.2 *infra*.

Based on the above, useful change may be taken to mean change which actively promotes the collective good (at times also through the prevention of common evils).

### 3.4.5 Legalism and the Individual as the Ultimate Object of Transformation

Sir Hartley Shawcross once referred to the individual human being as “the ultimate unit of all law”.<sup>263</sup> At the time of this statement the only exception was international law which was almost exclusively state-centred as a matter of custom and as a result of its historical development. Since the mass atrocities in the first half of the 20<sup>th</sup> century however, international law is increasingly being called upon to protect the individual, as Tomuschat

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<sup>259</sup> Bentham J A *Fragment on Government* (1776) in Burns JH (ed.) *The Collected Works of Jeremy Bentham* (1977) The Athlone Press, London 393.

<sup>260</sup> Kroeze (*supra*) in Roederer and Moellendorf (Jurisprudence) (*supra*) 66.

<sup>261</sup> Crisp R (ed.) *Mill on Utilitarianism* (1998) Oxford University Press, Oxford 77.

<sup>262</sup> “The History of Utilitarianism” *Stanford Encyclopaedia of Philosophy* First published 2009/03/19, available at <http://plato.stanford.edu/entries/utilitarianism-history/> (accessed 2010/04/29).

<sup>263</sup> Sir Hartley Shawcross (Speeches of the Chief Prosecutors) (*supra*) 63.

remarked: “[the] fate of the individual has become a matter of international concern”.<sup>264</sup> Especially significant in this regard is the rise of international human rights and ICL, which are both bodies of law fundamentally concerned with the individual.

Furthermore, legal protection for individuals is achieved through what is referred to as legalism. Shklar defines the legalist outlook as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”.<sup>265</sup> Legalism involves an abstraction which depersonalises the individual only for the purpose of equality before the law and confers upon individuals a certain legal status so all may receive equal benefits and treatment before the law. Theoretically, the impersonal manner in which law is applied creates an objectivity which benefits all not only a select few. For example, the international human rights movement aims to protect individuals through basic rights to which all humans are entitled purely through the fact of their existence.

It is submitted that to some extent utilitarianism, legalism and transformative law theory overlap on the ideal of mutual benefit. Similar to utilitarian and legalist reliance on equality and impartiality in the interest of individuals above, Reitz lists objective equality and ‘logical consistency’ (impartiality may also have been used) in the application of law as ideals closely related to transformative law. Reitz observes that:

“It is difficult to imagine that law meant to transform society could be applied in a way that results in different law for different people [...] law cannot be expected to change society unless it can be applied [...] with a logical consistency that is unaffected by who the parties are except to the extent that their relevant characteristics are specified in the law itself.”<sup>266</sup>

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<sup>264</sup> Tomuschat C *Human Rights: Between Idealism and Realism* (2003) Oxford University Press, Oxford 20; see also Wallace and Martin-Ortega (International Law) (*supra*) 93-94.

<sup>265</sup> Shklar JN *Legalism: Law, Morals, and Political Trials* (1964) Cambridge University Press, Cambridge 1; Shklar JN “In Defense of Legalism” (1966-1967) 19 *Journal of Legal Education* 51-58. In this article legalism is similarly defined as “the belief that morality consists of following rules and that moral relationships are a matter of duties and rights assigned by rules” (at 51).

<sup>266</sup> Reitz (Politics, Executive Dominance and Transformative Law) (*supra*) 49.



Writing on transformative constitutionalism, Langa too observes that the ultimate objective of the South African transformative project is a truly equal society.<sup>267</sup> It seems safe to conclude, as Reitz did, that an important part of the transformative law concept is substantive and formal equality of individual rights through impersonal and objective application of the law.<sup>268</sup> Although transformative processes may address specific social problems (and therefore only those individuals affected by such social problems) or pursue specific subsidiary goals, such processes are ultimately part of the broader ideal of improving the lives of individuals and, to this end, the impartial distribution of benefits among individuals. Therefore, law that aims to be transformative on the international level must similarly, strive towards an effect which is broadly to the benefit of the *civitas maxima*.

### 3.4.6 Values and Transformative Expression

“Part of the process of transformation [...] entails inculcating new values in the society.”<sup>269</sup> In order to be transformative, the impact of the law’s application must be such that it has the effect of communicating new values *en masse*, partly to reject the values of the prior injustice and partly in pursuit of the new ideal or the desired alternative. In relation to the South African transition to democracy, De Lange comments:

“Transformation is seen as a holistic project to *change* the attitudes, consciousness and material conditions of our people, and in a meaningful way *to reflect the values* that we struggled for and are now embodied in our constitution and in the human rights culture we strive for.”<sup>270</sup> (emphasis added)

The critical importance of the communication of values in a transformative project has been noted by Shapiro (reviewing Bilsky’s work in relation to the impact of ‘political’ trials, such as the Eichmann trial, on Israeli identity and collective consciousness):

“It is the impact on consciousness that provides the transformative element, rather than substantive change in the legal universe. It is transformative because it touches the heart of

<sup>267</sup> Langa (Transformative Constitutionalism) (*supra*) 353.

<sup>268</sup> Reitz (Politics, Executive Dominance and Transformative Law) (*supra*) 85.

<sup>269</sup> Daly (Transformative Justice) (*supra*) 83.

<sup>270</sup> De Lange J “The Historical Context, Legal Origins and Philosophical Foundation of the South African Truth and Reconciliation Commission” in Villa-Vicencio and Verwoerd (Looking Back Reaching Forward) (*supra*) 16.

things. Core values of the society and its political system are on trial. The results may, in effect, provide legitimacy to the existing order. They may also suggest the limits of the legal system in effectuating fundamental change.”<sup>271</sup>

The realism (or perhaps slight pessimism) in the latter part of Shapiro’s observation, that law may be limited in its ability to create fundamental change, is significant. Shapiro seems to suggest that the formalism which accompanies the application of laws and the procedural restraints of the trial mechanism creates certain limitations on the law’s ability to reflect and entrench values. To an extent Shapiro makes a valid point. Criminal trials are in many ways formally and practically bound (to depart from Shapiro’s restrictive choice of the word ‘limits’) by criminal law tradition, legal principles and by its procedures, but, as I will illustrate later in the thesis, other characteristics of (international) criminal justice are conducive to the communication of values *en masse*. See in this regard Chapter 5 para 5.6 and Chapter 8 *infra*.

If one subscribes to the view that transformation involves reflecting the mores of a society or the *civitas maxima* in the international context, one takes the view that transformation is to some extent impelled and compelled by human values or beliefs.<sup>272</sup> Commonly, societies in transition attempt to embrace values closely associated with liberal democratic beliefs, chiefly human rights and the rule of law principle. The legal norms that encapsulate transformative values are normally universal in character and therefore based on a broad moral resonance.<sup>273</sup>

As part of transformation, values can be expressed broadly in two ways. Firstly, social values can be expressed by legally entrenching them as legal norms or secondly, by criminalising acts which transgress social values. This necessitates a strong belief in legalism (as discussed above) as a means of protecting social values. According to Diane Marie

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<sup>271</sup> Shapiro AE “Book review: Bilsky L *Transformative Justice: Israeli Identity on Trial*” (2005) 15 (5) *Law and Political Book Review* 465, available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/bilsky505.htm> (accessed 2011/06/02); see also Chapter 4 para 4.3.4 *infra*.

<sup>272</sup> Esterhuysen (Truth as a Trigger for Transformation) (*supra*) 151.

<sup>273</sup> International human rights and ICL are widely accepted as expressions of universal or human values held by the international community as a whole. These notions will be revisited under Chapters 5 and 6 *infra*.

Amann the “[law] operates as a means for articulation and nourishment of social values”.<sup>274</sup> It does so through the repeated pronouncement of legal norms backed by the authority of political and moral legitimacy granted to it by a society. This function of law is often referred to as its expressive function and, since criminalisation is a means of expressing values, the expressive function of law “is of particular importance to criminal justice”.<sup>275</sup> According to Kahan “the condemning retort of punishment signals society’s commitment to the values that the wrongdoer’s act denies”.<sup>276</sup> As it is widely accepted that domestic criminal laws reflect the values of a closed society, punishment under ICL may be viewed as an expression of the values and norms of an abstract society, namely the international community or *civitas maxima*. Especially those international criminal norms which have attained *ius cogens* status may be viewed as norms that exist in the interests of mankind.

### 3.5 Concluding Remarks

The previous section highlighted a number of characteristics indicative of ‘transformative change’. In summary, transformative value may be formulated as follows:

**Transformative value is the product of change which is useful to the *civitas maxima*.**

Furthermore, it is possible to refer to the ‘transformative value’ of a body of law as the *potential* of that body of law to promote, contribute to, or supply the type of change that is transformative. As illustrated by the flowchart below (figure 1), transformation may occur through legal and/or political means. The study is primarily focused on legal transformation. In recognition of the fact that legal and political processes of transformation arise concurrently and cannot readily be separated due to the complexity of legal and political interaction during transformation, parts of this thesis are devoted to the politics of international criminal justice and the assessment of the influence of politics on ICL’s

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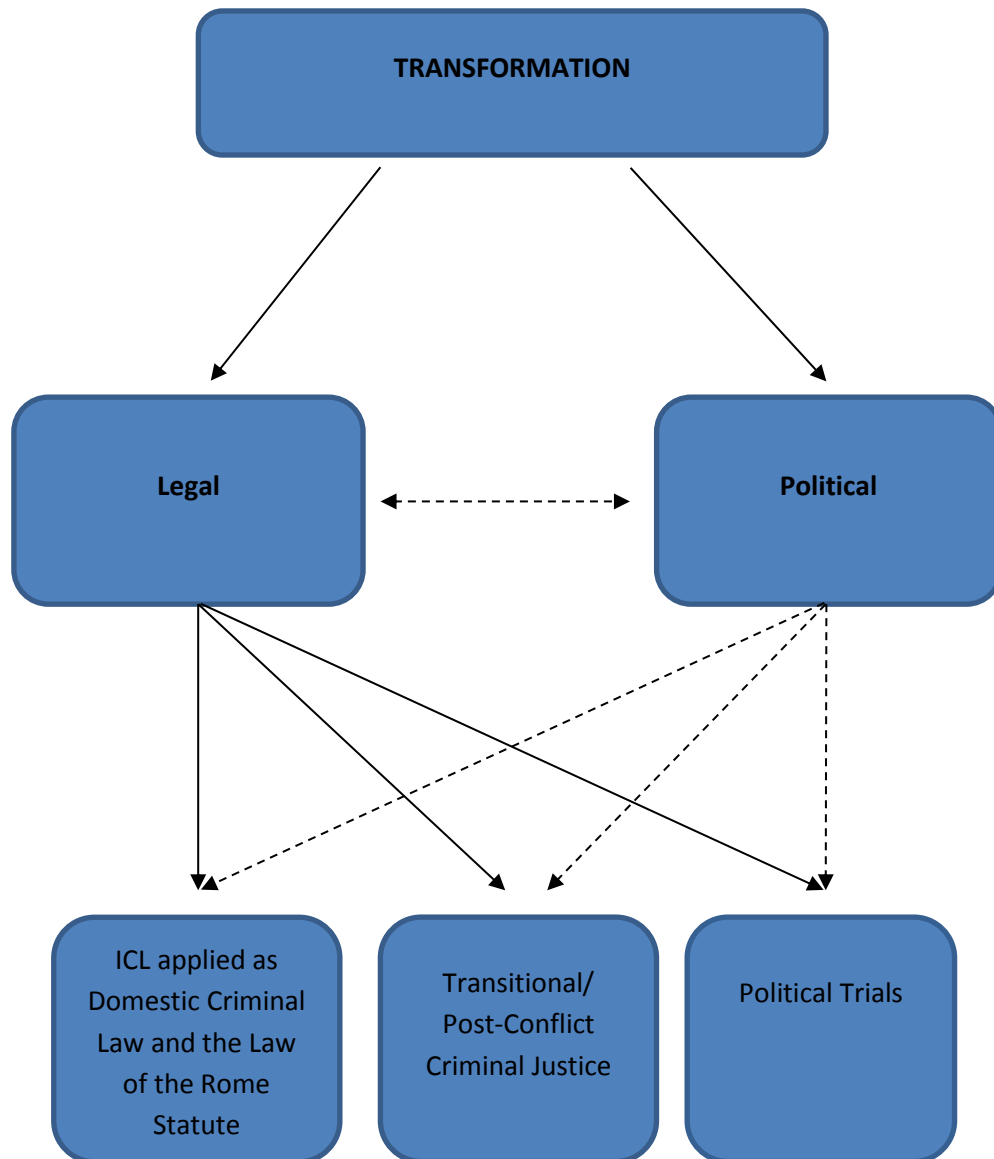
<sup>274</sup> Amann DM “Group Mentality, Expressivism, and Genocide” (2002) 2 *International Criminal Law Review*, 93-143, 95.

<sup>275</sup> On the expressive function of law in general, see Sunstein CR “On the Expressive Function of Law” (1996) 144 (5) *University of Pennsylvania Law Review* 2021-2053. Sunstein describes the expressive function as “the function of law in ‘making statements’ as opposed to controlling behaviour” (at 2024); see also Amann (Group Mentality) (*supra*) 120.

<sup>276</sup> Kahan DM “The Secret Ambition of Deterrence” (1999) 113 (2) *Harvard Law Review* 413-500, 420.

transformative value. The remainder of this thesis will focus on transformation which may (or may have) occur(ed) through:

1. The use of ICL in well-known historical and political trials, namely the Nuremberg IMT and the trial of Adolf Eichmann in Jerusalem (Chapter 4);
2. The use of ICL as a component of transitional justice or in post-conflict situations where ICL pursues retributive and utilitarian objectives (Chapter 5). This includes ICL as enforced by international criminal tribunals;
3. The consequences of the fact that ICL is to some extent politically motivated and supported (Chapter 6). Although political transformation is less acute in the international order than in the domestic, my approach is to focus on the political reasons for state support, abuse or abandonment of international criminal justice. This chapter includes investigation of the positive and negative influences of politicisation on the transformative value of ICL and criticism of the use of ICL to achieve political goals; and
4. Incorporation, transformation and other domestic interactions of ICL with particular focus on the South African state and legal system (Chapter 7).



\*Figure 1: The influence of politics on ICL's transformative value.

**PART II**  
**GENERAL TRANSFORMATIVE  
INFLUENCE: VALUE (AND VALUES)**

## CHAPTER 4

### TRANSFORMATIVE FOUNDATIONS

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#### 4.1 Introduction

Traditionally, the main areas of transformative jurisprudence have been in the field of public law, namely constitutional law, public international law, criminal justice and the rule of law principle.<sup>277</sup> Teitel argues that criminal law is one of three legal disciplines most reflective of the transformative potential of law during transitions.<sup>278</sup> Transformative legal processes are often seen during transitions and after conflicts. Since the establishment of the ICTY most post-conflict societal transformations and political transitions have involved transitional criminal justice processes at least to some extent. The historical roots of this phenomenon lay however at the International Military Tribunal at Nuremberg. The Nuremberg IMT established ICL's potential as a response to mass atrocity and as an alternative to extrajudicial means of dealing with war criminals.

Some years later, international criminal justice resurfaced through the well-known and controversial prosecution of Adolf Eichmann in Israel. In many ways the Eichmann trial relied upon the historical and legal precedent set by the Nuremberg IMT. The factual background of the trial is, like that of the Nuremberg IMT, related to events of the Second World War. Yet, the Eichmann trial left a legacy unique from that of the Nuremberg IMT. In contrast to the Nuremberg IMT, the prosecution of Eichmann took place in a domestic legal forum. Unlike the Nuremberg IMT, the Eichmann trial was not a case of victors' justice, but victims' justice. These unique aspects to Eichmann's prosecution have made its legacy for international criminal justice stand apart from the legacy of Nuremberg. Furthermore, the trial of Adolf Eichmann illustrated the value of prosecutions of international crimes in the

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<sup>277</sup> Reitz (Politics, Executive Dominance and Transformative Law) (*supra*) 35-36.

<sup>278</sup> The others similarly reflective of socio-legal transformation are the rule of law principle and constitutional justice. See Teitel (Transitional Jurisprudence) (*supra*) 8.

domestic setting. The role of the Eichmann trial in forging a narrative of history, national identity and victimisation is of particular interest.

The aim of this chapter is to investigate the legacies of the two abovementioned trials. It is submitted that these trials can be viewed not only as the foremost catalysts for modern ICL, but also as events which established ICL's transformative ability on various levels. In other words, these trials represent the transformative foundations of modern ICL. These transformative foundations present a logical point of departure in addressing the research question. This chapter is not intended as an exhaustive analysis of these trials. It focuses specifically on their transformative dimensions and serves as an introduction to Chapters 5 and 6. Some of the transformative aspects of these trials will therefore be dealt with in greater detail in the following chapter.<sup>279</sup>

Beyond the benefit of a historical perspective that an investigation of these trials entail, an examination of the Nuremberg IMT and the Eichmann trial has the added advantage that these trials mirror the general methodological approach adopted in this thesis. That is, they offer an international and domestic perspective respectively on the transformative value of ICL.

## **4.2 International Perspective: The International Military Tribunal at Nuremberg**

### **4.2.1 Background**

In the aftermath of the Second World War, the victorious Allies faced a unique practical and moral conundrum. How could the defeated and captured enemy best be dealt with? In lieu of the failed national trials policy of World War I, it was decided that leading figures of the German and Japanese regimes would stand trial in two international military tribunals ("IMTs"). Of the two post-war IMTs, the Nuremberg IMT has left the more enduring and valuable legacy. The reasons being firstly, that the Nuremberg IMT acted as the forerunner to the Tokyo IMTFE. The Tokyo IMTFE was largely modelled on the Nuremberg Tribunal, its

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<sup>279</sup> See Chapter 5 para 5.6 *infra*.



substantive jurisdiction and many other aspects of the London Charter.<sup>280</sup> Secondly, the Nuremberg IMT placed more emphasis on fairness than the Tokyo IMTFE. As will be discussed later on in this chapter, this enhanced the Nuremberg IMT's transformative value.<sup>281</sup> Consequently, the discussion of ICL's transformative foundations in international perspective is confined to the Nuremberg IMT.

The Nuremberg IMT has been the subject of equal amounts of both praise and criticism; pessimism and optimism; admiration and condemnation; and passionate debate. Some herald it as the trial of the century, a milestone for international justice and a tribute of power to reason.<sup>282</sup> Others see it as having been an experiment, a one-sided political act and a disguised show trial.<sup>283</sup> Regardless of the diverse viewpoints on the accomplishments and failures of the Nuremberg IMT, the ramifications of the trial for international criminal justice have been enormous.<sup>284</sup> Not only did the trial fast-track the development and acceptance of ICL as an independent and valuable system of law, but it also had an enduring impact on the objectives, values and character of modern ICL.<sup>285</sup> Furthermore, in Chapter 2 it was noted that the legal produce of the Nuremberg IMT, the Nuremberg Principles, along with the United Nations Charter, embodied the emergent mores of individuals irrespective of their

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<sup>280</sup> Bassiouni MC Nuremberg: Forty Years After" (1986) 80 *Proceedings of the 101st Annual Meeting (American Society of International Law)* 59-68, 61.

<sup>281</sup> See para 4.2.3.2 *infra*.

<sup>282</sup> Turley J "Transformative Justice and the Ethos of Nuremberg" (2000) 33 *Loyola of Los Angeles Law Review* 655-680. Consider also Justice Jackson's now famous opening address for the United States of America at the Nuremberg IMT: "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason".

<sup>283</sup> See Overy R "The Nuremberg Trials: International Law in the Making" in Sands P (ed.) *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003) Cambridge University Press, Cambridge 2, 28-29.

<sup>284</sup> See Overy (*supra*) in Sands (Nuremberg to the Hague) (*supra*) 28-29: "The International Criminal Court established in 2002 is a direct descendant of the Nuremberg Military Tribunal, as were the European Convention of Human Rights signed in 1950 and the genocide convention two years earlier"; Fichtelberg A "Fair Trials and International Courts: A Critical Evaluation of the Nuremberg Legacy" (2009) 28 (1) *Criminal Justice Ethics* 5-24.

<sup>285</sup> See Werle (Principles of International Criminal Law) (*supra*) 7: "[The Nuremberg Charter and the London Agreement] may be considered the birth certificate of international criminal law".

nationality and created new legal dynamics between individuals, states and the international community.<sup>286</sup>

#### 4.2.2 The Moral-Ethical and Legal Legacy of Nuremberg

Bassiouni distinguishes between the more intangible moral-ethical legacy and the tangible legal legacy of the Nuremberg IMT.<sup>287</sup> The moral-ethical legacy finds expression in the “intellectual ferment” since Nuremberg which, according to Bassiouni:

“[...] has strengthened individual and collective values in a large number of societies, some more than others, which in turn has contributed to heightening social consciousness, and which in turn has impacted on the development of law and legal institutions.”<sup>288</sup>

The moral-ethical legacy of Nuremberg is “to a large extent [...] reflected in the various human rights instruments which have developed since World War II”.<sup>289</sup>

The legal legacy of Nuremberg is an outgrowth, or a partial concretisation, of the moral-ethical legacy of Nuremberg. Moral, ethical and legal factors lie on the same continuum so that “moral-ethical considerations shape social consciousness and social consciousness impacts on the development of law and legal institutions”.<sup>290</sup> Bassiouni contends that the legal legacy of Nuremberg is threefold:

“[1]Legal instruments that are readily and directly attributable to Nuremberg; [2] legal instruments that reflect the moral-ethical values and intellectual ferment deriving from the Nuremberg legacy; and [3] the legal consequences of the behavioral transformation and social consciousness witnessed among post-Nuremberg generations.”<sup>291</sup>

Thus the Nuremberg inheritance consists of bolstered values and the basic foundations of the institutions, procedure and substantive law applied in modern international criminal justice. But is this legacy transformative in nature?

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<sup>286</sup> See Chapter 2 para 2.1 and footnote 34 *supra*.

<sup>287</sup> See Bassiouni (Nuremberg: Forty Years After) (*supra*) 59-68.

<sup>288</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 60.

<sup>289</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 64.

<sup>290</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 64.

<sup>291</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 60-61.

### 4.2.3 The Nuremberg Legacy as Transformative

The moral-ethical and legal legacy of the Nuremberg IMT is a sound point of departure for the investigation into the transformative value of ICL. The enduring impact of the Nuremberg IMT is threefold. Firstly, substantive criminal law innovations were established or set in motion at the Nuremberg IMT. Secondly, the Nuremberg IMT represented a radical break from the past for which it is still historically acknowledged. And finally, the Nuremberg IMT's impact on international social consciousness created a lasting and symbolic message of international unity and the transcendental potential of law and justice.<sup>292</sup>

#### 4.2.3.1 Substantive Criminal Law

The most palpable aspect of the legal legacy of Nuremberg is the application, development and later codification of customary international law. Nuremberg left a lasting and valuable jurisprudential legacy consisting of the Nuremberg Charter, the indictment and the judgment. The substantive crimes prosecuted at Nuremberg consisted of crimes against the peace, crimes against humanity and war crimes.<sup>293</sup>

The Nuremberg Principles, that is the principles of international law contained in the Nuremberg Charter and the judgment of the tribunal, were subsequently affirmed by the General Assembly by way of resolution 95(I) of 11 December 1946.<sup>294</sup> According to Cassese:

“[...] this approval and support meant that the world community had robustly set in motion the process for turning the principles at issue into general principles of customary law binding on member States of the whole international community”<sup>295</sup>

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<sup>292</sup> Turley (Transformative Justice) (*supra*) 659.

<sup>293</sup> Nuremberg Charter, article 6. It is interesting to note that the drafters of the Nuremberg Charter chose to include crimes against humanity within the substantive jurisdiction of the tribunal in order to cover crimes committed by Germany against its own citizens during or before the Second World War. This was done to enable the prosecution of crimes committed before the war which could not be prosecuted as crimes under the laws and customs of war. See Nilsson J “Crimes Against Humanity” in Cassese (Oxford Companion) (*supra*) 285-286.

<sup>294</sup> UNGA Res 95 (I) (1946).

The Nuremberg Principles have been reproduced in the Statutes of all the major international criminal courts and in various human rights treaties.<sup>296</sup> Furthermore the principles have been acknowledged in domestic prosecutions of international crimes.<sup>297</sup> Today, the Nuremberg Principles have achieved customary international law status.<sup>298</sup>

The prosecution of individuals under international law represented *the* defining moment in the history of international criminal justice. For the first time, government and military leaders could not hide behind the veil of state responsibility or membership to an organisation. The Nuremberg IMT had “the power to try and punish persons who [...] [committed crimes] whether as individuals or as members of [criminal] organisations”.<sup>299</sup> The “Nuremberg revolution”, as it has since become known, advanced the notion that “crimes against international law are committed by men, not abstract entities” and that “individual human rights ought to be protected also at the level of international law”.<sup>300</sup> The principle of individual criminal responsibility for international crimes is now firmly established in international law.<sup>301</sup>

#### 4.2.3.2 Fairness

In contrast to the Tokyo IMT, the Nuremberg IMT placed a high value on fairness. According to Bassiouni:

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<sup>295</sup> Cassese A “Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal: General Assembly 95(I), New York, 11 December 1946” United Nations Audiovisual Library of International Law, available at [http://untreaty.un.org/cod/avl/ha/ga\\_95-I/ga\\_95-I.html](http://untreaty.un.org/cod/avl/ha/ga_95-I/ga_95-I.html) (accessed 2012/02/29).

<sup>296</sup> Cassese (Affirmation of the Principles of International Law) (*supra*).

<sup>297</sup> Cassese (Affirmation of the Principles of International Law) (*supra*).

<sup>298</sup> Cassese (Affirmation of the Principles of International Law) (*supra*).

<sup>299</sup> Nuremberg Charter, article 6.

<sup>300</sup> *Trial of the German Major War Criminals before the International Military Tribunal at Nuremberg* (Judgment and Sentence) (1947) 41 *American Journal of International Law* 172, 221; Knoop GJ *Theory and Practice of International and Internationalized Criminal Proceedings* (2005) Kluwer Law International, The Hague 16.

<sup>301</sup> See Chapter 2 para 2.1 footnote 36 *supra*.

“It must also be noted that the Nuremberg trial offered more guarantees of procedural fairness to the defendants. Conversely, the Tokyo trial was shamefully unfair and riddled procedurally with every type of error, bias, prejudice and unfairness that one can imagine. Both objectively, and in contrast to its Tokyo counterpart, Nuremberg stands out from a procedural perspective as a relatively fair trial; under the circumstances and in light of history a leading example of procedural fairness that victorious powers could extend to the principles of their defeated enemies.”<sup>302</sup>

Article 16 of the Nuremberg Charter contained procedures to be followed to ensure a fair trial for the defendants. Article 16(e) for example, gave defendants the right to present evidence and to cross-examine prosecution witnesses. This represented a radical break from the past and was in and of itself a transformative development if one considers the crimes, the context in which they were committed and the era in which the Nuremberg IMT was established. Bassiouni comments that “[the] enduring legacy of Nuremberg is due principally to its attempts to insure procedural fairness to the defendants”.<sup>303</sup> Fichtelberg considers the emphasis placed on fairness as “the central condition for legitimacy” as the Nuremberg IMT’s greatest contribution, albeit one that has gone largely undervalued.<sup>304</sup> Although the proceedings at the Nuremberg IMT may not stand up to the standards of fairness of recent and current international criminal tribunals, it was by and large intended to be fair and transparent.

In retrospect, Bassiouni wrote of the “relative fairness” of the Nuremberg IMT.<sup>305</sup> Despite problems relating to the principle of legality and the denial of previously accepted defence of obedience to orders, the proceedings at Nuremberg were undoubtedly fair in relation to the alternative presented by historical precedent and other proposals put forward by the Allies for dealing with the Nazi leadership.<sup>306</sup>

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<sup>302</sup> See Bassiouni (Nuremberg: Forty Years After) (*supra*) 62.

<sup>303</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 64.

<sup>304</sup> Fichtelberg (Fair Trials and International Courts) (*supra*) 6.

<sup>305</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 64.

<sup>306</sup> Fichtelberg (Fair Trials and International Courts) (*supra*) 22 (footnote 1); see also Chapter 2 para 2.1 footnote 28 *supra*.

### 4.2.3.3 Symbolic Effect

Jonathan Turley believes that the Nuremberg IMT created a lasting legacy of transformative justice:

“Nuremberg showed that the goal of the world war was to bring justice and not simply domination. It was in the final moment that the trial distinguished World War II from all prior wars. It was through the trial that the world turned away from retributive justice and embraced transformative justice.”<sup>307</sup>

At the IMT the prosecution deliberately attached a moral element to an issue affecting international affairs.<sup>308</sup> The choice of legally regulated retribution over the precedent of vengeance was an important symbolic act, the reverberations of which can be seen in many subsequent legal responses to mass atrocity.

The decision of the victorious Allies to follow legal process and to afford fair trial rights to the defendants at Nuremberg forever changed the landscape of global politics. Following this “hidden revolution” at the Nuremberg IMT, the legitimacy of international criminal tribunals - derived from the fairness of the proceedings of such courts and their role as the “voice” of the international community – provided a way to *authoritatively* advance interests and communicate values, whether moral, legal or political.<sup>309</sup> The moment in which it seemed that international criminal justice had become viable and independent was also the moment that it became open to criticism due to the influence of politics on justice, as was encapsulated in the “victor’s justice” critique. Here was a marriage, for better or worse, between international criminal justice and politics.

Shklar describes the Nuremberg IMT, in terms of the broader distinction between law and politics, as a political trial. She comments that the remarkable nature of the Nuremberg IMT was not only a consequence of the trial being a first of its kind, but also because:

“It was a great drama in which the most fundamental moral and political values were the real personae. Emotionally and philosophically it confronted every thoughtful individual with the

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<sup>307</sup> Turley (Transformative Justice) (*supra*) 672.

<sup>308</sup> Fichtelberg (Fair Trials and International Courts) (*supra*) 21.

<sup>309</sup> See Chapter 5 para 5.6 *infra*.

necessity of making some clear decisions about his beliefs. For persons of liberal convictions and a strong commitment to legalistic politics it was a genuine moral crisis.”<sup>310</sup>

With regard to the purported “revolutionary” influence of the trial, Shklar was pessimistic:

“There is a great deal of reason to suppose that the [Nuremberg IMT] did in fact reinforce the dormant legal consciousness of [Germany’s professional and bureaucratic classes], which is more than can be said on behalf of its grandiose claims to revolutionize international law...”<sup>311</sup>

The latter part of this statement referring to the “grandiose” claims of the Nuremberg IMT, although it would have seemed true to Shklar and many others at the time, is today essentially discredited. Shklar considered the Nuremberg IMT as something that took place “in a social vacuum” or in a non-existing international order without international criminal laws.<sup>312</sup> This may have been true at the time. At present it is possible to speak of an international order, an international community and a system of international criminal law with more confidence. Furthermore, it is possible to point to the institutions and legal instruments that embody their existence, such as the ICC and the Rome Statute. How much of the change that occurred between the conclusion of the trial at Nuremberg and the present day was made possible by the precedent and legacy of the Nuremberg IMT? One would be hard-pressed to deny the Nuremberg IMT of any contribution in this regard.

The Nuremberg IMT has had a lasting impact on the values and collective consciousness of humanity. Bassiouni comments that although it is difficult or perhaps impossible to measure, the Nuremberg IMT transformed the collective values and behaviour of subsequent generations:

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<sup>310</sup> Shklar (Legalism) (*supra*) 155. According to Shklar, the Nuremberg IMT’s immediate function of preventing uncontrolled private vengeance by those directly injured shows “its enormous social value as an expression of legalistic politics on an occasion when it was most needed”, see Shklar (Legalism) (*supra*) 158.

<sup>311</sup> Shklar (Legalism) (*supra*) 156.

<sup>312</sup> Shklar (Legalism) (*supra*) 157.

“The social consciousness generated by Nuremberg (and Tokyo) has penetrated contemporary social values and social consciousness of the generations that were not present at the time of Nuremberg (and Tokyo).”<sup>313</sup>

The Nuremberg IMT as well as the Tokyo IMTFE to a lesser extent, is an expression and historical reminder of humanity’s post-Second World War values. It stands as a testament to an emergent universal social consciousness and of the heinous acts that awakened this collective consciousness. Despite the imperfect nature of the trial at Nuremberg, the international criminal justice movement initiated by it has since been regarded by many as a custodian of universal values and a demonstration of a growing sense of global interconnectedness.

Finally, the Nuremberg IMT may be viewed as the foundational act of a new form of international law, namely cosmopolitan (criminal) law.<sup>314</sup> As a response to Nazi atrocities, the Nuremberg IMT advanced a notion of humanity under which human beings are regarded as equals and as bearers of fundamental rights under a new *international* authority.<sup>315</sup> This was achieved through the Nuremberg IMT’s precedent of individual criminal liability which lies “at the heart of cosmopolitan criminal law”.<sup>316</sup> Shortly after the Nuremberg IMT, this new individual criminal liability under international law fell into sync with the post-Second World War human rights revolution which had been set off by the 1948 Universal Declaration of Human Rights.<sup>317</sup> Subsequent to the Cold War deadlock of international law, the *ad hoc* tribunals re-initiated the cosmopolitan movement which emerged from the Nuremberg IMT. Today, ICL is viewed by many as a manifestation of an emerging cosmopolitanism and a custodian of international human rights.<sup>318</sup>

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<sup>313</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 64.

<sup>314</sup> Hirsh (Law Against Genocide) (*supra*) 14.

<sup>315</sup> Hirsh (Law Against Genocide) (*supra*) 2.

<sup>316</sup> Hirsh (Law Against Genocide) (*supra*) 23.

<sup>317</sup> Luban D “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law” (July 2008) *Georgetown Law Faculty Working Papers*, available at <http://lsr.nellco.org/georgetown/fwps/papers/67/> (date accessed 2011/01/24) 7; UNGA Resolution 217A (III) (1948) (Universal Declaration of Human Rights).

<sup>318</sup> See Hirsh (Law Against Genocide) (*supra*); see also Chapter 6 para 6.2.2 *infra* and Chapter 8 para 8.3.4.1 *infra*.



#### 4.2.4 Criticisms of the Nuremberg IMT

From a legal point of view the proceedings at the IMT has been criticised due to a number of real and perceived shortcomings.<sup>319</sup> The trial was certainly a less than perfect point of departure for the age of human rights and international criminal justice. Many viewed the trials as “victors’ justice” or “showcase trials”, devoid of legitimacy owing to the one-sidedness of the prosecutions (only political and military leaders from the Axis countries stood trial) and a lack of equal representation of judges on the bench. The trial was in all respects exclusively controlled by the victorious Allies. Furthermore, many of the convicted persons received the death sentence, which is no longer legal under international law.<sup>320</sup>

The proceedings at the Nuremberg IMT were in many ways in violation of the principle of legality. The prosecution of crimes against the peace and crimes against humanity at the Nuremberg IMT’s constituted violations of the principle of retroactive application of the law and the principle *nullum crimen sine lege*.<sup>321</sup> No specific conventions or other international legal instruments suggested the existence of such crimes prior to the charges brought at Nuremberg.<sup>322</sup> Another problem relating to the principle of legality and to the *ex post facto* application of criminal law at Nuremberg was the denial of the traditionally accepted defence of obedience to superior orders.<sup>323</sup> Furthermore, no appeal or review of the judgment was available to any of the defendants.<sup>324</sup>

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<sup>319</sup> See Schwarzenberger (Judgement of Nuremberg) (*supra*) 329, 348-349; Dugard (International Law) (*supra*) 321; Cassese (Oxford Companion) (*supra*) 443.

<sup>320</sup> Charter of the International Military Tribunal (Nuremberg Charter) (1945), article 27.

<sup>321</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 61-62.

<sup>322</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 61-62.

<sup>323</sup> Charter of the International Military Tribunal (Nuremberg Charter) (1945), article 8: “The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires”. Superior orders was not recognised as a defence at the *ad hoc* tribunals, but is recognised as a defence against charges of war crimes in the ICC Statute (see Rome Statute of the ICC, article 33).

<sup>324</sup> Charter of the International Military Tribunal (Nuremberg Charter) (1945), article 26.

## 4.3 Domestic Perspective: The Trial of Adolf Eichmann

### 4.3.1 Background

A ground-breaking case regarding the domestic prosecution of international crime is the trial of Adolf Eichmann in the District Court of Jerusalem, and on appeal in the Israeli Supreme Court.<sup>325</sup> The Eichmann case stands apart due to the fact that it involved the application of substantive international criminal law despite the lull in ICL's historical development during the Cold War period.

Eichmann, a former Gestapo officer under Hitler's Nazi regime, had been abducted from Argentina to stand trial in Jerusalem mainly on charges of crimes against the Jewish people (counts 1-5), but also for crimes against humanity (counts 6-7 and 9-12), war crimes (count 8), and membership in a criminal enemy organisation (counts 13-15). These charges stem from his instrumental role in the Nazi government's policy of genocide against Jewish peoples in Europe, euphemistically referred to by the Nazi's as 'the final solution to the Jewish problem in Europe'. As the head of sub-department IV-B4 of the Reich Main Security Office, "Eichmann organized and coordinated the deportations of the Jews to the concentration camps".<sup>326</sup> Eichmann was convicted and sentenced to death for his crimes. The sentence and conviction was upheld in a subsequent appeal to the Israeli Supreme Court.

From an international- and a procedural law point of view, the case was a controversial one. Eichmann's prosecution was initiated by the State of Israel not only in order to bring him to justice, but also for the political objective of turning the trial into a

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<sup>325</sup> *Attorney-General of Israel v Eichmann* (District Court, Jerusalem) Case No. 40/61, 15 January 1961, 36 ILR 5; *Eichmann v Attorney-General of Israel* (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR 277.

<sup>326</sup> Ambos K "Some Considerations on the Eichmann Case" in Ambos K, Pereira Coutinho L, Palma MF and De Sousa Mendes P (eds.) *Eichmann in Jerusalem: 50 Years After (An Inter-Disciplinary Approach)* (2012) Duncker and Humblot, Berlin 125-126. Eichmann was convicted not only for his membership to organisations that had been declared to be criminal by the Nuremberg IMT, but also for his "active conduct" in the commission of the crimes in question (at 126). Therefore, Eichmann was convicted on the basis of "individual responsibility proper" (at 127). Ambos argues that this provides evidence of the fairness of the proceedings against Eichmann (see also para 4.3.6 *infra*).

didactic tool. The means used by the prosecution to realise this secondary purpose of the trial were often detrimental to Eichmann's prospects for a fair and impartial trial and will be dealt with in para 4.3.5 *infra*. Another issue that arose from the trial was the legality under international law of Eichmann's presence through abduction. No state may exercise police powers within the territory of another state without permission to do so.<sup>327</sup> Eichmann's abduction by Israeli security agents was therefore an act which constituted a clear violation of Argentina's territorial sovereignty under international law.<sup>328</sup> As a consequence, Argentina had a legitimate claim under international law for the return of Eichmann from Israel. Ultimately, Argentinian protestations went unheeded. The UNSC warned against future abductions and called for reparations from the Israeli government.<sup>329</sup> These reparations were never made and Eichmann remained in Israel where he was scheduled to be put on trial.

The charges of 'crimes against the Jewish people' and crimes against humanity were brought against Eichmann in terms of the Nazi and Nazi Collaborators (Punishment) Act of 1950. This act in its entirety can be viewed as a species of ICL, particularly the offence of crimes against the Jewish people. It is national criminal law of an international character, as crimes against the Jews were committed on foreign soil (in fact, the crimes could not have been committed on domestic soil since the state of Israel had not yet come into existence during the period in which the crimes were committed) and by a non-national of Israel. The charges of crimes against humanity related to Eichmann's role in the persecution of Jews (count 6) and plundering of Jewish property (count 7) and the deportation of non-Jewish civilian populations (counts 9-12). The Israeli court ruled that it was competent to hear all the charges against Eichmann on the basis of both extraterritorial and universal jurisdiction.

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<sup>327</sup> Dugard (International Law) (*supra*) 233; Charter of the United Nations (hereafter "UN Charter"), 24 October 1945, 1 UNTS XVI, article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

<sup>328</sup> See also the South African case *S v Ebrahim* 1991 (4) All SA 356 (AD) (where the court ruled that under Roman Dutch law an abducted person is not amenable to the criminal jurisdiction of the courts in the state to which he has been abducted since the state, as a party to the dispute, must approach the court with "clean hands"). See further, Johnson S *Peace Without Justice: Hegemonic Instability or International Criminal Law?* (2003) Ashgate Publishing, Aldershot 157-159.

<sup>329</sup> Johnson (Peace Without Justice) (*supra*) 158.

The relevance of the Eichmann trial for this study lies in the larger impact of the domestic prosecution of crimes against humanity and other crimes of an international character, through the use of extraterritorial jurisdiction and jurisdiction based on the principle of universality. Of particular interest is the impact of the aforementioned on the victims of the Holocaust and on the state of Israel. A further note of relevance lies in the trial's overall legacy and international impact. The relationship between the retributive-expressive function of the Eichmann trial and the didactic, consciousness-transforming effects thereof, may prove illuminating in the search for ICL's transformative foundation and the transformative effects of the prosecution of international crime in general.<sup>330</sup>

#### 4.3.2 'Victims' Justice': History, Memory and Identity

During the Eichmann trial, the state of Israel and the prosecution were not solely concerned with the prosecution of an individual for his crimes in the traditional sense. Lipstadt observes that bringing Eichmann to justice was the main objective of the trial, but that the trial "transformed Jewish life and society as much as it passed judgment on a murderer".<sup>331</sup> Eichmann's guilt however, had been a virtual certainty from the start. Undeniably, the trial has become closely associated with extrajudicial objectives and political goals. In retrospect the trial represents a "transformative moment for the State of Israel".<sup>332</sup> The trial centred not only on the prosecution of an individual, but also on Israeli identity and the suffering of victims of the Holocaust.<sup>333</sup> It has since been described as an instance of "retributory theatre".<sup>334</sup> The proceedings and accompanying events were characterised by exaggerations of the role of the accused. For example, the Israeli prime minister at the time, David Ben-Gurion, referred to Eichmann as "the greatest war criminal of all time".<sup>335</sup> In contrast, Hannah Arendt noted the ordinariness and the bureaucratic nature of Adolf Eichmann. This led her to formulate the now famous notion of "the banality of evil".

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<sup>330</sup> The didactic function or objective of ICL is discussed more comprehensively under Chapter 5 below.

<sup>331</sup> Lipstadt D *The Eichmann Trial* (2011) Nextbook/Schocken, New York (xi).

<sup>332</sup> Auerbach JS "Book Review of Lipstadt DE *The Eichmann Trial*" (2011) 48 (6) *Society* 550-553, 550.

<sup>333</sup> See Bilsky (Transformative Justice) (*supra*) 85-165.

<sup>334</sup> Morgan EM "Retributory Theatre" (1988) 3 (1) *American University International Law Review* 1-64.

<sup>335</sup> See Arendt (Eichmann in Jerusalem) (*supra*). In this famous work, Arendt offers many critical observations of the trial, some of which I will return to further below, see para 4.3.5 *infra*.

In reality, although Eichmann was in all likelihood a key player during the Holocaust, he was not one of the primary or even main architects thereof.<sup>336</sup> By creating the impression that he was however, the Israeli authorities succeeded in providing the trial with an element that would give it the desired transformative effect. The trial's historical significance and dramatic elements can be ascribed not to Eichmann as the personification of evil, but to the heinous nature of the crimes of the Holocaust and the identity of the victims on behalf of which the prosecution took place. The heinous nature of the crimes was not exaggerated however, if indeed it is at all possible to exaggerate the evil of genocide.

In contrast to the so-called "victors' justice" dispensed by the post war IMTs, the trial of Adolf Eichmann can be regarded as a case of "victims' justice". In his opening statement before the court, prosecutor Gideon Hausner famously stated that he was acting as the mouthpiece of six million accusers. Eichmann stood as an accused before a Jewish court, in the newly founded Jewish state of Israel, on trial for crimes committed against six million Jewish victims in Europe.

In contrast to the Nuremberg and Tokyo trials where the victors sat in judgment, the emphasis of the Eichmann trial was placed on the victims and not the perpetrator(s). The newly formed state of Israel, as representative of the victimised Jewish people, provided for the first time a forum where justice could be dispensed on behalf of victims.<sup>337</sup> The Israelis contended that the Jewish story needed to be told through the victims, something which the Nuremberg trial failed to do. At Nuremberg, the emphasis fell on documentary evidence. At the Eichmann trial however, over 100 victims of Nazi atrocities testified for the Israeli state and provided "the pulsing heart of the trial".<sup>338</sup> These testimonies were the primary focus of Eichmann's trial and were intended to imprint the victims' stories and history of the Holocaust into Israeli (and the universal) collective consciousness. Crimes against the Jewish people were the central charges of the prosecution. It signalled that the trial was not merely a continuation of the Nuremberg precedent which placed emphasis on international crime, excluding international crime which specifically targeted Jewish peoples.<sup>339</sup>

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<sup>336</sup> Ben-Naftali O "Eichmann" in Cassese (Oxford Companion) (*supra*) 656.

<sup>337</sup> Lipstadt (The Eichmann Trial) (*supra*) at xii; Bilsky (Transformative Justice) (*supra*) 103-113.

<sup>338</sup> Ben-Naftali (*supra*) in Cassese (Oxford Companion) (*supra*) 654.

<sup>339</sup> Bilsky (Transformative Justice) (*supra*) 103.

If documentary evidence created the historical record and served as the didactic tool at Nuremberg, victim testimony did the equivalent at the Eichmann trial. The focus of the trial on the victims and testimony merges the trial with Israeli history, memory and identity. Additionally, it may hold an enduring universal significance:

“...the Eichmann trial must enact not simply memory, but memory as change. It must dramatize upon its legal stage before the audience nothing less than a conceptual revolution in the victim. And this, in fact, is what the trial does. In this sense, the Eichmann trial is, I would submit, a revolutionary trial. It is this revolutionary transformation of the victim that makes the victim's story happen for the first time and happen as a legal act of authorship of history. This historically unprecedented revolution in the victim which was operated in and by the Eichmann trial is, I would suggest, the trial's major contribution not only to Jews, but to history, to law, to culture - to humanity at large. I will further argue that as a singular legal event, the Eichmann trial calls for a rethinking - and sets in motion a transvaluation - of the structures and the values of conventional criminal law.”<sup>340</sup> (footnotes omitted)

Lipstadt contends that the Eichmann trial changed the world's perception of victims of genocide.<sup>341</sup> In the courtroom they were no longer only victims, but also witnesses for the prosecution. For the first time since the Holocaust the victims could themselves play an active part in the pursuit of justice. Testifying became an act of empowerment and vindication. On the stand, in excess of one hundred victims became symbols of triumph over tragedy. The victims and the prosecution provided the theatre, a shocking real life drama, whilst the trial provided the audience.<sup>342</sup>

The trial with its many victims' testimonies and extensive media coverage had the effect of raising global awareness of the Holocaust and lead to research, teaching and a heightened general interest on the subject.<sup>343</sup> Even the term “Holocaust”, although in use

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<sup>340</sup> Felman S "Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust" (2000) *Theoretical Inquiries in Law* 1.2. Available at <http://www.jstor.org/stable/1344248> (accessed 2012/08/22).

<sup>341</sup> Lipstadt (The Eichmann Trial) (*supra*) xi.

<sup>342</sup> Lipstadt (The Eichmann Trial) (*supra*) 202.

<sup>343</sup> Loya H “Justice in Jerusalem” *Unpublished Research Paper* University of Stellenbosch (on file) 56.

before the trial, “was cemented into the lexicon of the non-Hebrew-speaking population when the court translators used it throughout the trial”.<sup>344</sup>

### 4.3.3 Domestic Prosecution of International Crime and Universal Jurisdiction

The Eichmann case is also historically relevant for its use of the principle of universal jurisdiction to prosecute serious international crimes.<sup>345</sup> The jurisdictional background to the case was *sui generis* in various respects. The case represented the first prosecution of an individual for crimes against humanity in a domestic court without a jurisdictional link to the perpetrator via nationality or the territory where the crimes were committed.

Furthermore, the state of Israel only came into existence in 1948 following the expiration of the British mandate over Palestine. The Israeli court’s assertion of jurisdiction over crimes committed against the Jews in Europe was therefore regarded as controversial. The court ruled that there were two grounds for asserting jurisdiction over the case. Firstly, the court considered the connection between Jewish people (including European Jews) and the Jewish state of Israel as a satisfactory ground for extraterritorial jurisdiction. Secondly, the court asserted universal jurisdiction over Eichmann’s crimes since, in the court’s view and following the Nuremberg precedent, they were crimes which could be prosecuted by any state as crimes under the Law of Nations. According to the Israeli Supreme Court:

“Not only do *all the crimes* attributed to the appellant bear an international character but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent of its enforcement, to try the appellant.”<sup>346</sup>

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<sup>344</sup> Lipstadt (The Eichmann Trial) (*supra*) 188.

<sup>345</sup> See *Eichmann v Attorney-General of Israel* (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR 277, 296; Van der Vyver (Universal Jurisdiction in International Criminal Law) (*supra*) 119. Some have argued that passive personality was the actual basis for jurisdiction in the Eichmann case since it was based on the identity of the victims.

<sup>346</sup> *Eichmann v Attorney-General of Israel* (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR 277, 304.

Through the articulation of the rationale underlying universal jurisdiction in the District Court of Jerusalem and in the Israeli Supreme Court, the Eichmann trial made a lasting contribution to international criminal justice.<sup>347</sup>

#### 4.3.4 The Eichmann Trial as a Political and Transformative Trial

In her book, *Transformative Justice: Israeli Identity on Trial*, Bilsky discusses the trial of Adolf Eichmann as one of four political trials that have helped shape the collective memory and identity of Israel.<sup>348</sup> Shklar defined a political trial as:

“[...] a trial in which the prosecuting party, usually the regime in power aided by a cooperative judiciary, tries to eliminate its political enemies. It pursues a very specific policy – the destruction, or at least the disgrace and disrepute, of a political opponent”.<sup>349</sup>

Bilsky departs from this “classical model” and defines a political trial in less abhorrent terms as “a trial in which the political authorities [seek] to advance a political agenda through criminal prosecution”.<sup>350</sup> Political trials are distinguishable from show trials because there is an element of risk to the authorities (the prosecution and state in a criminal trial) which is not present during a show trial.<sup>351</sup> The risk emanates from the fact that liberal criminal trials place a high value on fairness and impartiality and give a voice to both sides of the dispute. Through this the prosecuting authority runs the risks of the minority party’s counterclaim upending their political objectives.

Bilsky’s book addresses the ability of political trials, including the Eichmann trial, to “serve as a consciousness transforming vehicle”.<sup>352</sup> According to Bilsky, the strength of a transformative trial lies in its ability to transform a multi-layered political debate into a binary

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<sup>347</sup> Ben-Naftali (*supra*) in Cassese (Oxford Companion) (*supra*) 655.

<sup>348</sup> See Bilsky (Transformative Justice) (*supra*).

<sup>349</sup> Shklar (Legalism) (*supra*) 149.

<sup>350</sup> Bilsky (Transformative Justice) (*supra*) 2.

<sup>351</sup> Bilsky (Transformative Justice) (*supra*) 2-3.

<sup>352</sup> Bilsky (Transformative Justice) (*supra*) 3. Bilsky does not however, fail to remind her readers of the relative limits of transformative trials, stating that “[w]hatever social transformation the court can induce, it is never as radical as the one achieved by a political revolution”.



conflict represented in a criminal trial by the prosecution and the defendant.<sup>353</sup> The Eichmann represented a clash between two values of the state of Israel, namely Judaism and democracy.<sup>354</sup> Bilsky concludes that:

“...[the Eichmann] trial played an enormous role in transforming Israeli collective memory and identity. The transformative power of the trial consisted not only in determining the guilt of a Nazi perpetrator by a Jewish court, nor even in representing the story of the Jewish Holocaust for the first time on a public stage through survivor testimonies. Rather, its transformative importance lay in the public forum it created for translating the memory of the past into a concept of the state’s Jewish and democratic identity.”<sup>355</sup>

On the one hand, the Eichmann trial served as a mediator of sorts between the Jewish and the Democratic (personified by Hausner and Arendt respectively), between competing narratives, and between other binary conflicts.<sup>356</sup> On the other, it was the platform which brought these conflicts to the fore and addressed them in a civilised matter.<sup>357</sup>

#### 4.3.5 Criticism of the Eichmann Trial

The manner in which the Eichmann trial was conducted has elicited much criticism. Firstly, it was argued that the trial was not solely that of Adolf Eichmann, but that of Nazi Germany and the Nazi Party for the destruction of European Jewry during the Holocaust and of anti-Semitism in general throughout history.<sup>358</sup> To an extent this may have been due to the physical impossibility of putting Nazi- and anti-Semitic beliefs on trial as a whole. Furthermore, there were no Nazi leaders left to bring to trial.<sup>359</sup> The prosecution deliberately designed the trial as a great historical event instead of an ordinary criminal trial focused on the guilt of a single defendant.<sup>360</sup> Much of the evidence presented at the trial had no relation to the charges brought against Eichmann but was of an exhibitionist nature. Hundreds of

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<sup>353</sup> Bilsky (Transformative Justice) (*supra*) 4.

<sup>354</sup> Bilsky (Transformative Justice) (*supra*) 1.

<sup>355</sup> Bilsky (Transformative Justice) (*supra*) 14-15.

<sup>356</sup> Bilsky (Transformative Justice) (*supra*) 115.

<sup>357</sup> Bilsky (Transformative Justice) (*supra*) 115.

<sup>358</sup> Arendt (Eichmann in Jerusalem) (*supra*) 4; Loya (Justice in Jerusalem) (*supra*) 58.

<sup>359</sup> Loya (Justice in Jerusalem) (*supra*) 53.

<sup>360</sup> Lipstadt (The Eichmann Trial) (*supra*) 52.

Holocaust survivors were called as witnesses not only to prove Eichmann's guilt but to provide a detailed account of the horrors of the Final Solution, which was arguably the primary motivation of the trial. Witness testimonies emphasised the plight of the victims as well as the courage of those who resisted and formed part of a deliberate effort to speak to the State of Israel and the international community. Throughout the trial and in rendering their judgment the judges seemed to go along with the trials overall design to impress upon history.<sup>361</sup>

The trial was however, fundamentally staged as a criminal trial. Inevitably, any deviation from what is traditionally the central purpose of a criminal trial, namely to establish individual guilt, invites criticism. In her famous critical assessment of the trial, Hannah Arendt expressed the belief that “[the] purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes [...]”.<sup>362</sup> Arendt was critical of the prosecution's attempts to further extrajudicial, political goals through a criminal trial. Arendt also noted the serious disproportionality of arms between the prosecution and the defence. Defence witnesses could not testify in court because Hausner had indicated that they would be put on trial for crimes against the Jewish people.<sup>363</sup> Arendt wrote that:

“It quickly turned out that Israel was the only country in the world where defence witnesses could not be heard, and where certain witnesses for the prosecution, those who had given affidavits in previous trials, could not be cross-examined by the defence.”<sup>364</sup>

Secondly, the Israeli court's reliance on extraterritorial jurisdiction and universal jurisdiction is another aspect of the trial that has been subjected to criticism. Eichmann's lawyer argued that the court lacked jurisdiction and violated the territoriality principle. He argued that the crimes in question were committed before Israel achieved statehood and “on foreign soil [...] against people who had no connection to Israel” (although it must be conceded that many of the surviving victims of the Holocaust were residing in Israel by the

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<sup>361</sup> Loya (Justice in Jerusalem) (*supra*) 55. In contrast, Arendt's observation was that the judges did not act theatrically at any stage of the proceedings and showed “refreshing” impatience with the prosecutor's efforts to drag out the trial, see Arendt (Eichmann in Jerusalem) (*supra*) 4.

<sup>362</sup> Arendt (Eichmann in Jerusalem) (*supra*) 253.

<sup>363</sup> Arendt (Eichmann in Jerusalem) (*supra*) 220.

<sup>364</sup> Arendt (Eichmann in Jerusalem) (*supra*) 221.

time that the trial started).<sup>365</sup> Others suggested that an international tribunal may have been a more appropriate forum for Eichmann's trial since an international forum would have been less biased towards the accused, or at least would have been perceived as such.

#### 4.3.6 A Final Word on Eichmann

To this day, it is disputed whether the message of the Eichmann trial is of universal significance.<sup>366</sup> Many aspects of the trial indicate that its object was to impress upon Jewish people the message of "never again", rather than serving as a universal message of remembrance and warning. The dominant charges against Eichmann related to crimes against the Jewish people. All the state witnesses were Jewish Holocaust victims. These aspects of the trial may detract from its universal significance, but does not entirely do away with the universal significance of punishing those crimes which are said to offend the universal consciousness of mankind. The crimes committed by the Eichmann and his associates surely belong to the latter category of crimes, irrespective of the identity of the victims. Importantly, despite criticisms from those observing the trial from a mostly non-legal perspective (such as Hannah Arendt), Ambos contends that Eichmann was afforded a fair trial by the State of Israel.<sup>367</sup> This gives the legacy of the Eichmann trial 'staying power' in that it cannot easily be dismissed or delegitimised as a show trial. What is more, the Eichmann trial's legacy of the transformative potential of the domestic prosecution of international crime might yet discover a new lease of life in the imagined era where domestic courts are the primary *fora* for the prosecution of international crime.

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<sup>365</sup> Lipstadt (The Eichmann Trial) (*supra*) 58.

<sup>366</sup> Ben-Naftali (*supra*) in Cassese (Oxford Companion) (*supra*) 656.

<sup>367</sup> Ambos (*supra*) in Ambos *et al.* (Eichmann in Jerusalem: 50 Years After) (*supra*) 124-125. The author notes that Eichmann was duly informed of his right to silence and to legal representation of his choice. Furthermore, Eichmann was convicted on the basis of "individual responsibility proper" and not merely on the basis of his membership to various organisations which had been declared to be criminal by the Nuremberg IMT (see footnote 326 *supra*). Considering however some of the criticisms against the trial which have been noted in this chapter, it may be more appropriate to view the trial as "relatively fair" (borrowing Bassiouni's observation in relation to the fairness of the proceedings at the Nuremberg IMT, see para 4.2.3.2 *supra*).

#### 4.4 Concluding Remarks

A common feature of the Nuremberg IMT and the Eichmann trial emerges from this chapter. Both these trials were far from perfect. The victor's justice critique remains relevant to anyone who seeks an objective appreciation of international criminal justice. The numerous criticisms against these trials do not however, override their historical value for modern ICL. The radical and experimental nature of these trials may be the very aspect which has made them historically significant. Many of the transgressions against established legal principles at the Nuremberg IMT and Eichmann trial became valuable transformative precedents. The Nuremberg IMT's denial of the 'act of state' and 'obedience to orders' defences, for example, was a violation of the principle of legality at the time. However, it was crucial in order to produce the Nuremberg revolution that brought individuals within the reach of international law. At the Eichmann trial the disproportionate use of victims as state witnesses may have been prejudicial to Eichmann, but helped to create awareness of the importance of giving the victims of international crime a voice in court. These legacies live on in the Rome Statute of the International Criminal Court.

To echo Bassiouni's conclusion on the legacy of the Nuremberg IMT, we must distinguish in retrospect between the accomplishments, criticisms and expectations engendered by these historical trials.<sup>368</sup> No matter what historical perspective one takes on these trials, they represent powerful reference points for the transformative potential of international criminal courts and ICL. At these trials history was on the stand. Could it be that, to some extent, the larger and more legally inaccessible problem of humanity's propensity towards extreme evil was also at issue? At the very least the new social consciousness awakened through these trials, and from the horrors of the preceding events to which they owe their existence, the international community has inherited the motto of "never again".<sup>369</sup>

According to Luban, "the curious feature about ICL is that in it the emphasis shifts from punishment to trials".<sup>370</sup> The enduring legacy of the Nuremberg IMT, and post-

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<sup>368</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 64.

<sup>369</sup> Bassiouni (Nuremberg: Forty Years After) (*supra*) 65.

<sup>370</sup> Luban (Fairness to Rightness) (*supra*) 8.

Nuremberg trials such as the Eichmann trial, seems to confirm Luban's statement. Both trials had dramatic, theatrical and symbolic aspects. In the Eichmann trial the theatrical aspects of the trial seem to have been purposely manufactured and were consequently more pronounced than at the Nuremberg IMT. At Nuremberg it was the pioneering act of bringing international criminals to trial that provided the symbolic impact. The symbolism and dramatic effect of these trials give them an expressive value above and beyond ordinary criminal trials. The expressive effect is also more lasting. It becomes an enduring legacy that is closely aligned with the values and collective consciousness of the international community.

Modern international criminal courts represent a continuation of the legacies of the Nuremberg IMT and the Eichmann trial, but as a result of the criticisms elicited over the proceedings at Nuremberg and in Jerusalem, have moved towards greater emphasis on fairness, impartiality and procedural rights in the determination of individual criminal responsibility. The ICTY for example, has prosecuted perpetrators from both sides of the conflict in the former Yugoslavia (Croats and Serbs/"losers" and "victors") in order "to overcome the legacy of victor's justice established at Nuremberg and Tokyo".<sup>371</sup> The emphasis on fairness at Nuremberg has strengthened considerably through the *ad hoc* and mixed tribunals to the ICC. In the second sentencing judgment of Dražen Erdemović, this was highlighted by the ICTY Trial Chamber:

"The International Tribunal must demonstrate that those who have the honesty to confess are treated fairly as part of a process underpinned by principles of justice, fair trial and protection of the fundamental rights of the individual."<sup>372</sup>

Reliance on due process in international tribunals ensures that justice is seen to be done.<sup>373</sup> This is especially important for international criminal justice because prominent international criminal trials such as the Nuremberg IMT and the *ad hoc* tribunals may reach global audiences. During their operative years and beyond, these trials are dissected and placed under the microscope by the media and legal scholars. Some trials will remain as historical

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<sup>371</sup> Peskin *V International Justice in Rwanda and the Balkans* (2008) Cambridge University Press, Cambridge 93. The ICTR has been much less successful in this regard having prosecuted mostly perpetrators from the Hutu side of the conflict.

<sup>372</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: [Second] Sentencing Judgment) Case No. IT-96-22-T bis, 5 March 1998, para 21.

<sup>373</sup> Drumbl (*Atrocity, Punishment and International Law*) (*supra*) 175.

beacons or “intergenerational signposts”.<sup>374</sup> In this regard, the function and value of the international criminal trial is precipitated by fairness and impartiality.<sup>375</sup> The symbolism that attaches to international criminal trials and the global audience that interprets their legacy, endow them with an enhanced expressive value.

The shift in emphasis away from punishment at Nuremberg and in the Eichmann case offers a rationalisation for the fact that modern ICL imposes ordinary sentences on extraordinary criminals. This shift in emphasis suggests that there is some value innate to international criminal trials which results not from the subsequent act of punishment, but from the symbolic and expressive significance of the trial and the process of determining individual criminal responsibility. The shift in emphasis from punishment to the trial supposes objectives that are “extrinsic to purely legal values”.<sup>376</sup> It has become common cause that ICL, particularly in post-conflict situations, pursues other objectives alongside the traditional objectives associated with domestic criminal law. Beyond traditional objectives of retribution, deterrence, incapacitation and rehabilitation, international criminal tribunals have been mandated to achieve reconciliation, to uncover the truth and to create a historical record of events.<sup>377</sup> In addition, academics have alluded to other functions of ICL, such as the symbolic or didactic value of punishment and trial under ICL.<sup>378</sup> I refer to these other objectives as the *sui generis* objectives of ICL. The values of these *sui generis* objectives are addressed in Chapter 5. These *sui generis* objectives are often pursued through the symbolism of the trial itself or through larger messages conveyed by it.

Fichtelberg notes that another significant consequence of the IMT was a new fusion of criminal justice with the “political discourse of strategy and power”.<sup>379</sup> Henceforth international criminal justice would, like the rest of international law, only be viable if it was accompanied by the political will and cooperation of states. Then again, international

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<sup>374</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 175.

<sup>375</sup> Smeulers A “Punishing the Enemies of All Mankind: Review Essay of Drumbl MA *Atrocity, Punishment and International Law*” (2008) 21 *Leiden Journal of International Law* 971–993, 987.

<sup>376</sup> Luban (Fairness to Rightness) (*supra*) 8.

<sup>377</sup> See Chapter 5 paras 5.5 and 5.6 *infra*.

<sup>378</sup> See Chapter 5 paras 5.6.1 and 5.6.2 *infra*.

<sup>379</sup> Fichtelberg (Fair Trials and International Courts) (*supra*) 21.

criminal trials can be seen as a victory (albeit a small one) for the realm of law (idealism) over the realm of politics (political realism), the latter being less disposed towards the objective to combat impunity for the perpetrators of mass political violence.<sup>380</sup> To some degree, and at least partially as a result of the intentions of the international community, each international criminal tribunal asserts the growing transcendent and global character of law in a world previously characterised by impunity (especially in relation to state criminality) and Westphalian dominance of state politics over law in the international setting.

The vision of international criminal justice as truly universal justice driven by the shared values of the international community clashes with the vision of international criminal justice as a tool for global governance. As opposed to the first mentioned vision of international criminal justice, the latter would be inevitably and inexorably infused with the political. It is the latter, 'realist' vision of international criminal justice that has come to be most widely accepted. This begs the question, can the realisation of some or all ICL's objectives be considered transformative even if they are politically driven (some might prefer to say "politically tainted") and not truly universal? And, if we accept that ICL has inherited a transformative legacy, what does the modern adaptation of this legacy look like? I will turn to these questions in the remainder of Part II.

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<sup>380</sup> Luban (Fairness to Rightness) (*supra*) 10.

## CHAPTER 5

### THE OBJECTIVES OF INTERNATIONAL CRIMINAL LAW

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#### 5.1 Introduction

Transformation as described in Chapter 3, is a forward- and backward looking, goal driven process of change.<sup>381</sup> In this chapter the investigation into the transformative value of ICL turns to the following question, what are the essential purposes and aspirations of ICL and how is ICL poised to reach them? Stolle and Singelstein observe that this is arguably the most fundamental question in relation to the existence of international criminal justice, but remains unresolved:

“On the theoretical or conceptual level, the questions posed for criminal law include what goals to pursue and whether they are achievable. Although these are fundamental to criminal law neither scholarly literature nor case law has conclusively resolved these questions for nascent international criminal law.”<sup>382</sup>

It is submitted that the *raison d'être* for the international body of criminal law as well as ICL's ability to reach its penological objectives has a direct influence on its transformative value. Therefore, the questions put forward above may be addressed by firstly examining the historical and theoretical reasons for the existence of ICL; secondly, by investigating the penological purposes of ICL as found in positive law and the jurisprudence of international criminal courts and finally, by investigation of those utilitarian objectives which are unique to the field of ICL.

As an introduction, I begin this chapter by discussing the fundamentals of criminal law punishment theory, most of which also forms the foundations of ICL.<sup>383</sup> This is followed

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<sup>381</sup> See Chapter 3 paras 3.4 and 3.5 *supra*.

<sup>382</sup> Stolle and Singelstein (*supra*) in Kaleck *et al.* (International Prosecution of Human Rights Crimes) (*supra*) 38.

<sup>383</sup> In this chapter and throughout the thesis, the terms *punishment theory*, *objectives*, *goals*, *penological purposes* and *justifications* are used interchangeably to refer to the justifications and purposes of criminal



by an explanatory section on the difference between the goals of punishment of domestic criminal law and that of ICL as well as the reasons for these differences. Awareness of these differences is essential for the understanding of the transformative value and potential of ICL.

In this thesis I engage punishment theory from a specific angle. That is, punishment both as a human or social institution (Chapter 5) and a political act (Chapter 6) with underlying *purposes*.<sup>384</sup> In this view punishment theory is not exclusively aimed at *ex post facto* justification of sentences, but actively engaged in an *ante facto* pursuit to project values. The understanding of international criminal justice as a value- and purpose-driven legal mechanism is gained firstly by studying the rationale for the use of ICL as a response to radical evil and mass atrocity. To this end, the underlying assumptions of ICL as well as the justification for punishment under ICL are considered (Chapter 5). The second aspect crucial to the understanding of ICL as value- and purpose-driven, is the influence of politics on ICL (Chapter 6).

Furthermore, I take the view that punishment, although it is the primary effect-producing act of criminal law, does not represent the sole means through which ICL impacts upon individuals and communities. The more imperceptible expressive and didactic functions such as the ability to authoritatively communicate values as well as the symbolic effect produced through the enforcement of international criminal norms must be taken into account to appreciate ICL's overall transformative value. Furthermore, the 'soft impact' of ICL which goes beyond acts of punishment must also be taken into account in the determination of ICL's transformative value.<sup>385</sup>

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sanctions. See ICTY, *Prosecutor v Kunarac et al.* (Trial Chamber: Sentencing Judgment) Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, para 836 (and footnote 1430): "The Trial and Appeals Chambers of the International Tribunal generally consider what is variously and often interchangeably referred to, for example, as sentencing "objectives", "purposes", "principles", "functions" or "policy" in the assessment of the term of actual imprisonment for convicted persons".

<sup>384</sup> *Stanford Encyclopaedia of Philosophy*, "Punishment", available at <http://plato.stanford.edu/entries/punishment/> (accessed 2012/07/20).

<sup>385</sup> See also Chapter 8 para 8.5.1 *infra*.

## 5.2 Punishment Theory and Penological Justifications in International- and Domestic Criminal Law

### 5.2.1 Punishment Theory: The Justifications and Objectives of Criminal Law Punishment

The basic principles of punishment apply equally to domestic and international criminal law. Punishment is a legitimate act of vengeance regulated and inflicted by an authoritative body other than the victim(s).<sup>386</sup> As such, an act of punishment is an officially sanctioned deprivation of the “life, liberty or property of the offender”, inflicted on the offender because it is deserved (retribution) and because such punishment is believed to be socially beneficial (utilitarian theories).<sup>387</sup> Furthermore, punishment is closely associated with social values and acts as a “moral educator”.<sup>388</sup> It may be viewed as the symbolic embodiment of shared notions regarding what is just or unjust, or deserving or undeserving, of punishment.

Because punishment involves a deprivation of the rights of the offender, it is a firmly established principle that legitimate purposes should underlie criminal punishment.<sup>389</sup> All modes of criminal law (domestic, international or hybridised) gain their legitimacy from these punishment theories.<sup>390</sup> The punishment theories of criminal law are legal theories

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<sup>386</sup> Burchell J *Principles of Criminal Law* (Third Edition) (2005) Juta, Cape Town 68. In domestic law the state is the central authority charged with inflicting punishment on persons who commit crimes within its territory. In international law there is no central authority to enforce punishment for breaches of international criminal laws. In modern ICL, international crime is punished through international- or mixed courts and tribunals on the authority of the UNSC or a multilateral treaty such as the Rome Statute. Alternatively, prosecution and punishment takes place through domestic courts that are willing and capable of trying perpetrators of international crimes.

<sup>387</sup> Burchell (*Principles of Criminal Law*) (*supra*) 68; *Stanford Encyclopaedia of Philosophy*, “Punishment”, available at <http://plato.stanford.edu/entries/punishment/> (accessed 2010/06/08).

<sup>388</sup> Drumbl (*Atrocity, Punishment and International Law*) (*supra*) 174.

<sup>389</sup> Snyman (*Criminal Law*) (*supra*) 10; Stigen (*International Criminal Court and National Jurisdictions*) (*supra*) 12.

<sup>390</sup> Werle (*Principles of International Criminal Law*) (*supra*) 33; see also Cryer *et al.* (*International Criminal Law and Procedure*) (*supra*) 17 and Sloane (*The Expressive Capacity of International*

which provide the rationale and justification for acts of punishment. Punishment in turn breathes life into the objectives of criminal justice.<sup>391</sup> Punishment theory may also be viewed in the abstract as an articulation of the reasons for the existence of criminal law.<sup>392</sup> Punishment theories are not mutually exclusive and are almost always used in varying combinations to determine the sentence of a single perpetrator.<sup>393</sup> It may be said however that a *de facto* hierarchy of punishment objectives exists, in which retribution is the most prominent justification for punishment while deterrence is arguably the most prominent utilitarian justification for punishment.

It is important to distinguish the act of punishment or the sentence imposed from the theoretical justifications for punishment found in the wide range of recognised punishment theories. The sentence imposed is not purely a reflection of penological objectives. Other considerations such as the gravity of the crime, the public interest and the personal circumstances of the perpetrator, may be taken into account as aggravating or mitigating factors. In *Kunarac*, the Trial Chamber of the ICTY noted that:

“What appear to be justifications for imprisoning convicted persons, or theories of punishment, actually are treated as or resemble sentencing factors, in the sense that these considerations are consistently said to affect, usually in an unspecified manner, the length of imprisonment.”<sup>394</sup>

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Punishment) (*supra*) 1-2: “Punishment [...] whether authorized by international or national law requires justification; otherwise, it is simply cruelty”.

<sup>391</sup> Sloane (The Expressive Capacity of International Punishment) (*supra*) 1: “[...] punishment is the distinctive feature of criminal law, and sentencing the vehicle through which it pursues its objectives, both practical and moral”.

<sup>392</sup> Sloane (The Expressive Capacity of International Punishment) (*supra*) 1-2.

<sup>393</sup> The overlapping use of different punishment theories may create tensions since these theories are not always compatible with each other. However, the overlapping use of theories may also produce positive synergies. Punishment to exact retribution may for example be hard to reconcile with punishment which is intended to rehabilitate the accused. On the other hand, retributive punishment may serve to ensure that the offender receives his or her just deserts. Moreover, it may have expressive-didactic effects which reach beyond the offender, producing a social message which in turn may have a general deterrent effect. See Drumbl (Atrocity, Punishment and International Law) (*supra*) 149.

<sup>394</sup> ICTY, *Prosecutor v Kunarac et al.* (Trial Chamber: Sentencing Judgment) Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, para 836.

Referring to this dictum and the sentencing practice of the *ad hoc* tribunals, Henham notes a general “failure to distinguish or overtly articulate the crucial difference between the general justifications for sentencing and their specific relevance as guides to principled sentencing in particular cases [...]”.<sup>395</sup> I am predominantly interested in the general purposes of punishment, not the effect of such purposes on the sentence of accused persons. Punishment theory and sentencing are topics that go hand in hand. Nevertheless, they remain distinct topics.

### 5.2.2 The Principle of Legality

Even though criminal punishment should be justified or serve some purpose, the harm to the wrongdoer can never outweigh the broader social benefit of the punishing sanction. To prevent arbitrary or unfair deprivation of rights, the principle of legality endeavours to ensure that criminal law is applied in compliance with notions of justice, fairness and individual freedom.<sup>396</sup> The principle of legality, also referred to as the *nullum crimen sine lege* principle (literally translated from Latin to mean “no crime without a law”), states that an act which is not illegal may not be punished. The principle of legality is comprised of a number of rules:<sup>397</sup>

- a) The *ius acceptum* principle holds that a person may not be punished for an act which is not legally recognised as a criminal act.
- b) The prohibition of retrospective application of criminal law or the rule against *ex post facto* laws (*ius praeivium*).
- c) The rule that the definitions of crimes should be precise and settled (*ius certum*).
- d) The rule that criminal law statutes should be strictly construed (*ius strictum*).
- e) The abovementioned principles are to be applied *mutatis mutandis* to the sentencing phase of criminal proceedings. This notion is embodied in the principle *nulla poena sine lege*.<sup>398</sup>

<sup>395</sup> Henham R “The Philosophical Foundations of International Sentencing” (2003) 1 *Journal of International Criminal Justice* 64-85, 70.

<sup>396</sup> See Burchell (Principles of Criminal Law) (*supra*) 94; see also Snyman (Criminal Law) (*supra*) 36-38.

<sup>397</sup> For a more detailed overview of the rules of the principle of legality in criminal law, see Gallant KS *The Principle of Legality in International and Comparative Criminal Law* (2009) Cambridge University Press, Cambridge 11-19 (the author lists eight rules of the principle of legality).

<sup>398</sup> Snyman (Criminal Law) (*supra*) 36-37.

Historically, international criminal justice has been mired in controversy over observance of the principle of legality. The Nuremberg IMT and Tokyo IMTFE trials were criticised by many as contrary to the principle of legality, specifically the *ius acceptum* and *ius praeivium* principles.<sup>399</sup> For example, in his (largely ignored) dissenting opinion at the Tokyo IMTFE, Judge Radhabinod Pal of India asserted that “new crimes cannot be created under international law and enforced without precedent”.<sup>400</sup>

In contrast with the post-world war military tribunals, the principle of legality has become a core principle of modern international and internationalised criminal courts.<sup>401</sup> International crimes are now more firmly established and clearly defined under both customary international law and treaty law. It is also widely accepted that the principles *nullum crimen sine lege* and *nulla poena sine lege* have attained customary international law status.<sup>402</sup> Furthermore, retroactive application of criminal law and retroactive punishment represent clear violations of international human rights.<sup>403</sup> The principle of legality may create restrictions to the exercise of international criminal justice by domestic or international courts and cannot be ignored by any international or internationalised criminal jurisprudence.<sup>404</sup>

### 5.2.3 Absolute and Utilitarian Theories

Broadly speaking, all punishment theories can be classified as either *absolute* (backward-looking punishment inflicted on the offender because it is deserved) or *utilitarian* (forward-looking punishment with some broader social utility). All punishment theories are

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<sup>399</sup> See Bassiouni (Nuremberg: Forty Years After) (*supra*) 59-68; see also Chapter 4 para 4.2.4 *supra*. For a general discussion on compliance with the principle of legality at the Nuremberg IMT and Tokyo IMTFE see Gallant (Principle of Legality) (*supra*) 67-155.

<sup>400</sup> Jayasimha S “Victor's Justice, Crime of Silence and the Burden of Listening: Judgement of the Tokyo Tribunal 1948, Women's International War Crimes Tribunal 2000 and Beyond” (2001) *Law, Social Justice and Global Development Journal* (Electronic journal), available at [http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001\\_1/jayasimha](http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_1/jayasimha) (accessed 2011/09/30).

<sup>401</sup> Gallant (Principle of Legality) (*supra*) 303.

<sup>402</sup> Gallant (Principle of Legality) (*supra*) 404.

<sup>403</sup> Gallant (Principle of Legality) (*supra*) 404.

<sup>404</sup> Gallant (Principle of Legality) (*supra*) 404.

accompanied by various theoretical and practical criticisms, the most important of which will be discussed in brief below.

### 5.2.3.1 Absolute Theory

The retributive or absolute theories of punishment represent the oldest and most widely accepted justification for punishment. Retribution is historically derived from the *lex talionis*, the notion of justice as proportional revenge (an eye for an eye) which is based on theological writings.<sup>405</sup> The modern day versions of these theories are rather more nuanced, but are still based on the basic idea that persons who infringe another's rights should themselves have their rights infringed upon.<sup>406</sup> It is a prerequisite that the punishment should fit the crime.<sup>407</sup> Thus, the concept of retribution is deeply synonymous with vengeance, albeit regulated by the state or some other authority.<sup>408</sup> Retribution therefore denotes a qualified form of revenge or vengeance.

Retributivist theories of punishment fall roughly into two categories. Kantian retributivism seeks to justify punishment by way of the criminal's implicit acceptance of a hypothetical social contract whereby, "whatever undeserved evil you inflict on another within

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<sup>405</sup> "The Law of Retribution" (or *lex talionis*) contains three interrelated claims: a) Punishment is justified only if it is deserved, b) it is deserved if and only if a person being punished has voluntarily done a wrong (and, specifically, the wrong being punished) and c) the severity of deserved punishment is that which is proportional to the severity of the wrongdoing. See Falls MM "Retribution, Reciprocity, and Respect for Persons" in Duff A (ed.) *Punishment* (1993) Dartmouth, Aldershot 27. The law exacting equality of punishment and crime (*lex talionis*) is embodied in the phrase "an eye for an eye, a tooth for a tooth". The law is stated three times in the Bible (Exodus 21:24, Leviticus 24:20 and Deuteronomy 19:21). In the past *lex talionis* has often permitted barbaric punishment. See Schabas (Sentencing by International Tribunals) (*supra*) 501.

<sup>406</sup> Burchell (Principles of Criminal Law) (*supra*) 69.

<sup>407</sup> See ICTY, *Prosecutor v Todorović* (Trial Chamber: Sentencing Judgment) Case No. IT-95-99/1-S, 31 July 2001 para 29: "The principle of retribution, if it is to be applied at all in the context of sentencing, must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed must be proportionate to the wrongdoing; in other words, that the punishment be made to fit the crime".

<sup>408</sup> See Schabas (Sentencing by International Tribunals) (*supra*) 501.

the people that you inflict on yourself”.<sup>409</sup> Although the quality and quantity of punishment is regulated by the court in this theory, punishment is essentially self-imposed since the offender has “willed a punishable action”.<sup>410</sup> Hegelian retributivism, on the other hand, seeks to justify punishment as an act which annuls the crime.<sup>411</sup>

A prominent retributive theory, the theory of just desert, suggests that a perpetrator should be punished in order to restore the moral order in society which was disturbed by the criminal act.<sup>412</sup> Burchell, with particular focus on the theory of just deserts, contends that retribution may be the only “true theory of punishment” as it alone justifies punishment as a *post facto* response to crime and focuses on punishment that is proportionate to the crime.<sup>413</sup> The notion of just deserts implies that punishment has both moral value and social benefit in that it restores moral and social order through proportional revenge.

In the context of international criminal justice, proponents of retributive theory contend that regulated vengeance protects public order by reducing the need for vigilantism. In post-conflict scenarios, retribution is credited for dissipating hate and the accompanying need for revenge amongst antagonistic groups, thereby linking retribution with reconciliation.<sup>414</sup> Retribution in the context of international criminal justice is also purported to express the condemnation and outrage of the international community over international crimes.<sup>415</sup>

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<sup>409</sup> Kant I *Metaphysics of Morals* (Edited by Gregor M) (1996) Cambridge University Press, Cambridge 6:332. Kantian retribution is closely aligned with the theory of just deserts. In this regard, see Burchell (Principles of Criminal Law) (*supra*) 72 (footnote 25).

<sup>410</sup> Kant (Metaphysics of Morals) (*supra*) 6:335.

<sup>411</sup> Hegel GWF *Philosophy of Right* (1820); Steinberger PJ “Hegel on Crime and Punishment” (1983) 77 *American Political Science Review* 858-870, 860.

<sup>412</sup> Burchell (Principles of Criminal Law) (*supra*) 72; Snyman (Criminal Law) (*supra*) 12.

<sup>413</sup> Burchell (Principles of Criminal Law) (*supra*) 81.

<sup>414</sup> Shklar (Legalism) (*supra*) 158. According to Shklar, the Nuremberg IMT’s immediate function of preventing uncontrolled private vengeance by those directly injured shows “its enormous social value as an expression of legalistic politics on an occasion when it was most needed”.

<sup>415</sup> ICTY, *Prosecutor v Aleksovski* (Appeals Chamber: Judgment) Case No. IT-95-14/1-A, 24 March 2000, para 185; ICTY, *Prosecutor v (Monir) Nikolić* (Trial Chamber: Sentencing Judgment) Case No. IT-02-60/1-S, 2 December 2003, paras 86-87.

### 5.2.3.2 Utilitarian Theory

The utilitarian or relative theories of punishment portray punishment as an act which may produce social benefits. The utilitarian theory of punishment is related to the political philosophy of utilitarianism which developed in the late 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>416</sup> Bentham in particular expounded a theory of criminal sanctions based on utility.<sup>417</sup> In contrast to the retributive theory, which does not primarily pursue any purpose beyond the act of punishment itself, utilitarian theory sees punishment as a means for achieving a secondary purpose.<sup>418</sup> Accordingly, “the greatest possible happiness of the greatest number of persons may require the infliction of the greatest misery on a few”.<sup>419</sup> Punishment as a means to a secondary goal may however result in punishment which exceeds the harm produced by the perpetrator’s criminal deed.

The goal of utilitarian punishment theory is to maximise the social benefit of punishment while minimising the social harm of criminal conduct. The aim of punishment is generally to provide a disincentive to criminal activity and to transform the values of offenders (or potential offenders) into those shared by the larger community. Utilitarian theories of punishment include deterrence (general and specific deterrence), incapacitation (an enhanced form of specific deterrence) and rehabilitation.

To achieve these goals, utilitarian theories are forward-looking in nature and focused on both the objective behind the punishing act and its consequences by weighing up the costs and benefits thereof.<sup>420</sup> Bentham formulated the basic notion of criminal behaviour as a phenomenon which is loosely based on rational choice. He wrote:

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<sup>416</sup> See also Chapter 3 para 3.3.4 *supra*.

<sup>417</sup> See Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 20.

<sup>418</sup> Snyman (Criminal Law) (*supra*) 10-11.

<sup>419</sup> Tallgren (Sensibility and Sense) (*supra*) 569.

<sup>420</sup> Tallgren (Sensibility and Sense) (*supra*) 569; Amann (Group Mentality) (*supra*) 115.



“[...] the profit of the crime is the force which urges man to delinquency: the pain of the punishment is the force employed to restrain him from it. If the first of these forces be the greater, the crime will be committed; if the second, the crime will not be committed.”<sup>421</sup>

In the simplified economic theory of punishment, crime can be analysed as a choice between profit (crime) and loss (punishment). In theory, crime can be prevented by providing a potential loss to the offender which is greater than the potential gain that would be received through committing the criminal act.<sup>422</sup>

This economic perspective on the deterrence of criminal activity relates closely to the equalitarian goal of punishment. From the equalitarian perspective, criminal law is intended to restore the balance in society:

“Criminal law is concerned with maintaining the *equal distribution of a specific set of benefits* among the members of the community: in particular, the benefits of autonomy of action within a sphere which should be beyond interference by others.”<sup>423</sup> (emphasis added)

This echoes the ideals of social equality and protection for individuals from other individuals and state power. As a result of its undertaking to maximise social benefits, utilitarianism is therefore predominantly concerned with the maintenance of social equality.<sup>424</sup>

The most prominent utilitarian theory of punishment is the deterrence (or prevention) theory. Deterrence theorists view punishment as “a policy aimed at creating efficient behavioural incentives” through “credible and authoritative communication of a threat of sanction”.<sup>425</sup> This theory takes two forms, specific and general deterrence. Specific deterrence aims to deter an offender from committing similar crimes. General deterrence theory holds that the act of punishing one offender will have a deterrent effect on a larger group of

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<sup>421</sup> Bentham J *An Introduction to the Principles of Morals and Legislation* (1789) in Eide E, Rubin PH and Shepherd JM *Economics of Crime* (2006) Now Publishers, Hanover (USA) 3.

<sup>422</sup> See Sloane (The Expressive Capacity of International Punishment) (*supra*) 40-41. The author expresses doubt as to the applicability of the rational actor model of deterrence in the context of international crime.

<sup>423</sup> Sadurski W “Theory of Punishment, Social Justice and Liberal Neutrality” in Duff (Punishment) (*supra*) 7.

<sup>424</sup> See also Chapter 3 para 3.4.5 *supra*.

<sup>425</sup> Kahan (The Secret Ambition of Deterrence) (*supra*) 415; Sloane (The Expressive Capacity of International Punishment) (*supra*) 39; Snyman (Criminal Law) (*supra*) 15-17.

potential offenders. The problem with this particular utilitarian approach is that a perpetrator's conduct may be met with disproportional punishment in order to advance the greater good. The offender then becomes the "sacrificial lamb" of the community. This creates the risk of disproportionate punishment which is unfair towards the offender and runs contrary to the principles of fairness and legality. This is especially relevant in the event that mitigating factors are ignored.

The notion of punishment as a deterrent is however somewhat speculative overall due to an absence of conclusive empirical evidence.<sup>426</sup> In theory successful deterrence should produce peace and reconciliation. This effect is equally difficult to measure.<sup>427</sup> The call for empirical evidence on the effectiveness of deterrence works on the assumption that there is a way to provide empirical proof that international courts deter crime. There is doubt over the accuracy of this assumption. Firstly, it may well be impossible to prove the state of mind of the *potential* offender. Secondly, if deterrence is effective, it may not be possible to measure that which is *not there* or which has *not materialised* since it has been effectively prevented.

The speculative nature of deterrence theory, especially general deterrence, is even more pronounced in the context of international crimes and criminals than it is for domestic criminal justice systems. The effectiveness of international criminal law and international trials as a deterrent of future crimes is placed in serious doubt by a number of realities in international criminal justice. Firstly, the historical reality of international criminal justice is that accountability is the exception and impunity the norm. The larger the scale and extent of the criminal acts, the more unlikely perpetrators will face criminal prosecutions. Secondly, as

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<sup>426</sup> See Ku J and Nzelibe J "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" (2006) *Hofstra University School of Law Legal Studies Research Paper Series*, Research Paper No. 06-22, 13.

<sup>427</sup> See Clark JN "Peace, Justice and the International Criminal Court: Limitations and Possibilities" (2011) 9 (3) *Journal of International Criminal Justice* 521-545, 539: "[...] the actual effects of criminal trials and the extent to which they do in fact aid social peace and stability remain empirically under-explored. Arguably, one reason for this is that the task of actually measuring impact presents significant challenges. Peace, for example - not in the negative sense of an absence of conflict but in the thicker, more positive sense of reconciliation - is an intangible concept that cannot be easily measured or quantified" (footnote omitted).

described by Drumbl, the theoretical foundation of deterrence theory is (even) less applicable to international crimes:

“[...] deterrence’s assumption of a certain degree of perpetrator rationality, which is grounded in liberalism’s treatment of the ordinary common criminal, seems particularly ill fitting for those who perpetrate atrocity. This assumption already is hotly debated within the context of isolated common crime. However, its viability already is even more problematic in the context of the chaos of massive violence, incendiary propaganda, and upended social order that contours atrocity.”<sup>428</sup>

The characteristic mix of “evils” and “banalities” that spawn international crimes and the extreme contexts in which these crimes occur, namely collective violence, mass atrocity, administrative massacres and gross violations of human rights, place the deterrent value of ICL in further doubt.<sup>429</sup> It is disputed whether people can always be treated as “rational calculators, who carefully weigh up the costs and benefits of their actions” before committing criminal acts.<sup>430</sup> For this reason international criminal courts have on occasion elected not to give “undue prominence” to deterrence in sentencing.<sup>431</sup> However, as will be illustrated further below, deterrence remains one of the fundamental purposes of ICL overall and has been cited by international criminal tribunals as an objective of punishment and in positive law documents.<sup>432</sup>

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<sup>428</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 171.

<sup>429</sup> Hannah Arendt famously coined the phrase “the banality of evil” in her report on the trial of Adolf Eichmann. See Arendt (Eichmann in Jerusalem) (*supra*).

<sup>430</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 20.

<sup>431</sup> ICTY, *Prosecutor v (Momir) Nikolić* (Trial Chamber) Case No. IT-02-60/1-S, 2 December 2003, para 90; ICTY, *Prosecutor v Babić* (Trial Chamber: Sentencing Judgment) Case No. IT-03-72-S, 29 June 2004, para 45.

<sup>432</sup> See Chapter 5 para 5.5 *infra*; See for example ICTR, *Prosecutor v Jean Kambanda* (Trial Chamber I: Judgment and Sentence) Case No. ICTR-97-23-S, 4 Sept. 1998, para 28; ICTY, *Prosecutor v Erdemović* (Trial Chamber: Sentencing Judgment) Case No. IT-96-22-T, 29 November 1996, paras 64-65; see also Rome Statute of the ICC, preamble (5).

### 5.2.4 Overlap between Domestic and International Criminal Law Objectives

One should bear in mind that ICL at its core, retains the basic features of criminal law. ICL is fundamentally criminal law extrapolated to a unique international legal setting. It is pure criminal law in the sense that it prohibits, criminalises and sanctions punishment for pre-defined conduct. As a result of this extrapolation, the punishment objectives and social function of ICL and those in domestic law are shared on many levels. The standard justifications for punishment found in domestic criminal law apply to ICL, but is subjected to its unique nature and the abnormal setting in which it most often finds application.<sup>433</sup> These standard justifications of punishment (retribution, general and special deterrence, incapacitation and rehabilitation) give rise to unique justificatory problems in the context of ICL.<sup>434</sup>

Despite differences that originate from ICL's unique status and character, its purpose is fundamentally aligned with that of national criminal law. That is, punishment as retribution with broader expressive significance.<sup>435</sup> Punishment is a way of communicating legal norms to societies as well as individuals, whether a distinct social group or the international community. These norms are based on shared social values. Furthermore, Garland suggests that:

“[...] penalty communicates meaning not just about the crime and punishment, but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters.”<sup>436</sup>

Individually and collectively, the rationalisation of sentencing through the theories and justifications of punishment generate this ‘broader expressive significance’.<sup>437</sup>

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<sup>433</sup> Luban (Fairness to Rightness) (*supra*) 8.

<sup>434</sup> Luban (Fairness to Rightness) (*supra*) 8.

<sup>435</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 17: “[...] much of the implementation of international criminal law is intended to be at the domestic level, therefore it is questionable whether the objectives of punishment ought to differ significantly between international and municipal criminal law”. Sloane (The Expressive Capacity of International Punishment) (*supra*).

<sup>436</sup> Garland D *Punishment in Modern Society: A Study in Social Theory* (1990) University of Chicago Press, Chicago 232.

<sup>437</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 19 – 26.

Punishment theories are not mutually exclusive and are invoked in varying combinations depending on the gravity of the crime, the circumstances of the case, the characteristics and values of the applicable criminal justice system and the political affiliation of the punishment authority.<sup>438</sup> The retributive theories in particular are relevant irrespective of whether international or domestic crimes are being punished. However, many have come to view a purely retributive approach as too primitive and outmoded. The emergence of utilitarian justifications for punishment has prodded both international and domestic courts into a position where they are wary of relying solely on retributive theories.<sup>439</sup>

In addition to the punishment purposes outlined above, ICL recognises other purposes which are mostly alien to domestic criminal law punishment theory.<sup>440</sup> Reconciliation, expressivism or symbolism, truth-finding, creating a historical record and giving voice to the victims of mass atrocity are all goals that have been associated with ICL. It is significant to note, as David Luban does, that these goals are at times pursued through trials and not punishment.<sup>441</sup> I return to these, the *sui generis* and trial objectives of ICL, at para 5.6 *infra*.

### 5.2.5 Some Unique Considerations in Penal Justifications for International Crime

The majority of academic writing on punishment theory has been written from the perspective of domestic criminal law systems. Much of ICL's criminology and penology has

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<sup>438</sup> For example, retributive punishment may have a general deterrent effect through sending a message to the public that those who infringe the law run the risk of criminal sanction. See Drumbl (Atrocity, Punishment and International Law) (*supra*) 149.

<sup>439</sup> See Stanford Encyclopaedia of Philosophy, "Punishment", available at <http://plato.stanford.edu/entries/punishment/> (accessed 2010/06/08): "[...] justification requires some accommodation to consequentialist [forward-looking] as well as to deontological [backward-looking] considerations. A strait-laced purely retributive theory of punishment is as unsatisfactory as a purely consequentialist theory with its counter-intuitive conclusions (especially as regards punishing the innocent). The practice of punishment, to put the point another way, rests on a plurality of values, not on some one value to the exclusion of all others".

<sup>440</sup> Luban (Fairness to Rightness) (*supra*) 8.

<sup>441</sup> Luban (Fairness to Rightness) (*supra*) 8.

been supplanted from that of national criminal law systems in liberal states.<sup>442</sup> The development of a distinct criminology and penology for ICL has not been forthcoming as yet. In part, this is one of many consequences of the fallacious application of the domestic law analogy to international criminal justice.<sup>443</sup> Despite the similarities between domestic and international criminal punishment objectives there are a number of fundamental differences which necessitates distinct and unique consideration of the penal justifications in international criminal justice:<sup>444</sup>

1. Most literature on the application of punishment theory approaches the subject from the domestic perspective of the state-individual-dichotomy. Much of the literature written from the domestic perspective concerns the state's authority to punish (the limits on the legislative authority regarding criminalisation) and the legal limits to the exercise of that authority by the state (the courts and the police). The state-individual-dichotomy is less applicable to ICL as the institutions of international law are dissimilar to those found in national legal systems. There are no central legislative and enforcement bodies in the international legal order. The institutions in the international order (the UNSC, General Assembly and international courts) cannot be accurately compared by way of analogy to national institutions.
2. ICL is most often invoked in cases of mass atrocity and mass criminality which lie beyond the ambit of what domestic laws and courts are able to deal with.<sup>445</sup> Much of ICL

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<sup>442</sup> Burchell defines criminology as “the study of criminals and the incidence of different types of crimes, in order to explain the phenomenon of crime”. The author defines penology as “[the branch of criminology that] seeks to devise methods and techniques for dealing with criminals so as to address the causes of their criminal behaviour and to rehabilitate the offender so that he or she will not again commit a crime”. See Burchell (*Principles of Criminal Law*) (*supra*) 18.

<sup>443</sup> Tallgren defines the general domestic analogy as “the assumption that the principles regarded as valid in inter-individual relations apply in inter-state relations as well”. See Tallgren (*Sensibility and Sense*) (*supra*) 566.

<sup>444</sup> For a general discussion of the flaws in the analogy between national and international criminal justice as they relate to punishment objectives, see Sloane (*The Expressive Capacity of International Punishment*) (*supra*).

<sup>445</sup> Cryer *et al.* (*International Criminal Law and Procedure*) (*supra*) 17; see also Sloane (*The Expressive Capacity of International Punishment*) (*supra*) 3. The author remarks that crimes such as genocide, crimes

addresses the repercussions of collective violence.<sup>446</sup> During mass atrocity or collective violence a diverse set of crimes are often committed by organised groups for the purpose of obtaining “social control”.<sup>447</sup> Domestic criminal law systems are often simply incapable of addressing such systemic types of crime. Prosecution in domestic courts may be impractical because the crimes are too widespread and overwhelmingly numerous. This is often seen in times of internal armed conflict when international humanitarian law becomes applicable, or in failed states where there is no longer a central government in control of a state territory. Furthermore, the crimes themselves are often alien concepts to domestic criminal law systems.

Exactly how groups of people living in harmony can suddenly turn against each other in violence remains a vexing question.<sup>448</sup> Somewhat paradoxically, ICL allocates individual liability for crimes committed in such a collective or group context.<sup>449</sup> Understanding collective violence requires “an altogether different paradigm from the one adopted for individual violence”.<sup>450</sup> Accordingly, “[where] ordinary criminal law is a product of continuity, pure ICL is a product of discontinuity”.<sup>451</sup>

ICL also deals with a very different breed of criminal than its domestic counterpart.<sup>452</sup> Conversely, the punishment for these extraordinary criminals remains very ordinary. As Drumbl explains, “[the] enemy of humankind is punished no differently than a car thief,

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against humanity, war crimes and torture typically occur in “a normative universe that differs dramatically from the relatively stable, well-ordered society that most national criminal justice systems take as their baseline”.

<sup>446</sup> Ceretti A “Collective Violence and International Crime” in Cassese (Oxford Companion) (*supra*) 5-6; Swart B “Modes of International Criminal Liability” in Cassese (Oxford Companion) (*supra*) 89: “International crimes are largely collective phenomena. They usually require the cooperation of many actors, who are more often than not, members of collectivities.”

<sup>447</sup> Ceretti (*supra*) in Cassese (Oxford Companion) (*supra*) 6.

<sup>448</sup> Ceretti (*supra*) in Cassese (Oxford Companion) (*supra*) 8.

<sup>449</sup> Swart (*supra*) in Cassese (Oxford Companion) (*supra*) 89.

<sup>450</sup> Ceretti (*supra*) in Cassese (Oxford Companion) (*supra*) 5.

<sup>451</sup> Luban (Fairness to Rightness) (*supra*).

<sup>452</sup> See also para 5.2.5 (5) *infra*.

armed robber, or felony murderer [...]”<sup>453</sup> The predominant punishment for international crime is imprisonment.

The exceptional nature of the perpetrators of international crime, the uniqueness of their crimes as well as the extraordinary context in which the crimes occur requires a unique reflection on the goals of punishment for international crimes. Firstly, international crime appears to have a more enduring negative effect on communities than domestic crimes. This may require addressing the legacy of the past or broader social evil which produced mass violence. Penological purposes will therefore have to be directed at least partially at objectives which go beyond the specific perpetrators to achieve punishment that will benefit affected communities.

3. The goals of ICL include and exceed the goals of domestic criminal justice in quantity. As a result, there is an “overabundance” of goals in international criminal justice in spite of a lack of financial and institutional support.<sup>454</sup> Despite the almost automatic persistence with the traditional goals of retribution and deterrence, no solid hierarchy of priorities has emerged to provide international criminal courts with guidance as to what their contribution could or should be.<sup>455</sup> As a result, international criminal courts may find themselves overburdened by unrealistic expectations. To complicate matters, some of the goals of international criminal justice create tension or disharmony within the discipline.<sup>456</sup> The best and arguably the most complex example of this, is the conflicting goals of peace (reconciliation) and criminal accountability in post-conflict situations.<sup>457</sup> Prosecuting the ‘big fish’ such as heads of state and senior military officials could disturb a fragile peace or ceasefire and plunge a divided post-conflict or transitional society into further civil unrest. Also, creating an accurate and comprehensive historical record in post-conflict situations may be at odds with the practical limitations of international

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<sup>453</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 5.

<sup>454</sup> Damaska (What is the Point of International Criminal Justice?) (*supra*) 331; Damaska, M “Problematic Features of International Criminal Procedure” in Cassese (Oxford Companion) (*supra*) 178.

<sup>455</sup> Damaska (What is the Point of International Criminal Justice?) (*supra*) 339-340.

<sup>456</sup> Damaska (What is the Point of International Criminal Justice?) (*supra*) 331-335; Damaska (*supra*) in Cassese (Oxford Companion) (*supra*) 178.

<sup>457</sup> Damaska (*supra*) in Cassese (Oxford Companion) (*supra*) 178



courts.<sup>458</sup> Historically, only a handful of ‘top level’ perpetrators have stood trial, while mid- and low level perpetrators either benefit from immunity or are dealt with through alternative justice mechanisms, not all of which contribute towards creating a historical record.

It may be argued that the overabundance of objectives, the lack of priorities of punishment and the problem of conflicting objectives in international courts are to a large extent created by the lack of a clearly defined and universally accepted *raison d'être* of ICL. However, it may be contended that national criminal justice systems experience many of the same problems in relation to punishment.<sup>459</sup> Achieving an optimal balance of objectives is essential for both national and international courts. This may however be harder to achieve in international criminal courts as there is typically a greater diversity of needs and interests to serve through punishment.

4. Traditionally, criminal law reflects the values of relatively homogenous societies. ICL is intended to serve an “international community” with conflicting interests and values. Despite the harmonising effects of globalisation, international law and human rights, the international community remains comprised of a fusion of sovereigns and societies with possibly conflicting values. Domestic criminal law serves communities of at least the same nationality and often the same ethnic, cultural and religious affiliation with a greater degree of conformity on moral and social ‘rights’ and ‘wrongs’. This also lends more conformity to the goals and values of criminal justice. Law is a normative expression of (some of) the values of a society.<sup>460</sup> The purpose for which the legal norm was created reflects directly or indirectly on the underlying values of a society.<sup>461</sup> In the international context however, it is mostly accepted that ICL champions the values of the international community or the *civitas maxima*. This being said, many would dispute international law as truly representative in such a universal way.<sup>462</sup> The idea of ICL as a normative expression of the values of the international community creates a number of difficulties.

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<sup>458</sup> Damaska (*supra*) in Cassese (Oxford Companion) (*supra*) 178.

<sup>459</sup> Damaska (What is the Point of International Criminal Justice?) (*supra*) 340.

<sup>460</sup> Dror Y “Values and the Law” 17 (4) *The Antioch Review* (1957) 440-454, 441-442.

<sup>461</sup> Dror (Values and the Law) (*supra*) 441-442.

<sup>462</sup> See Chapter 6 paras 6.2.1-6.2.2 *infra*.

Firstly, since the *civitas maxima* is an abstract concept, it is not always easy to identify those values which can be considered truly universal and representative of the international community. Many of these values are continually evolving and, although widely preached as universal, are given differing degrees of normative protection in law. For example, it would be easier to argue that the crimes contained in the Rome Statute are crimes against the international community than it would be to argue the same for other international crimes such as drug trafficking or corruption. Secondly, since all states have differing pre-existing criminal justice systems that embody the normative expression of the values of their societies, a uniform international criminal justice system creates potential for a clash of social values in the criminal justice sphere. The clash between the ICTR and the Rwandan domestic criminal justice system over the use of the death penalty may be cited as an example of the clash between the differing values of the international order and those of a state.<sup>463</sup>

5. The perpetrators of international crime may be roughly categorised according to their level of participation. Consequently, criminal responsibility differs widely among the mass of perpetrators and cannot be punished uniformly. Top level perpetrators are the masterminds, architects or “conflict entrepreneurs” of mass atrocities.<sup>464</sup> These perpetrators often occupy the highest positions of governmental and military leadership. Mid-level perpetrators are typically those leading figures or leaders who are themselves subject to some higher authority or chain of command. Low level perpetrators are the foot soldiers or ordinary citizens who commit the majority of the actual criminal acts. To these groups may be added a fourth group, the bystanders and beneficiaries of mass atrocity who although not criminally liable (thus not ‘perpetrators’ in the strict sense), bear some moral responsibility through their inaction or apathy.<sup>465</sup> The level of moral blameworthiness descends from top level perpetrators to onlookers making allotment of criminal responsibility and delineation of sentencing policy between different classes of perpetrators exceedingly difficult.<sup>466</sup> National and international trials that prosecute

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<sup>463</sup> See para 5.5.2.2 *infra*.

<sup>464</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 25.

<sup>465</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 25; Fletcher and Weinstein (Violence and Social Repair) (*supra*) 580.

<sup>466</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 25.

individuals responsible for ordering or carrying out acts of mass violence leave the bystander group largely untouched.<sup>467</sup> Prosecution has mostly been aimed at top level perpetrators or “big fish” if possible and on mid- and low level perpetrators where practical. Two reasons have been put forward for this state of affairs. Firstly, the widely held view that top level perpetrators are the most deserving of punishment and secondly, the prosecution of all mid- and low level perpetrators is often a matter of impossibility.<sup>468</sup>

6. In international criminal justice there is a tendency, initiated by the prosecution at the Nuremberg IMT to place great weight and symbolic value on the trial itself.<sup>469</sup> Many scholars have described international criminal trials as symbolic events impacting on the collective memory, noting the pedagogical value that these trials may have.<sup>470</sup> Often the defendants become symbols of great evil and their punishment on the world stage reasserts the rule of law. In domestic legal systems symbolic trials such as these occur from time to time, but not as frequently as in the sphere of international criminal justice. In domestic criminal courts the emphasis is placed almost exclusively on the act of punishment. The *gravitas* which may attach to international criminal trials allows for the pursuit of goals which are mostly *sui generis* to international criminal justice and which are not necessarily dependent on the act of punishment. The value of the trial itself intensifies, especially where a high profile person or core crimes are involved.<sup>471</sup>

In light of the above, the assertion that the justifications for punishment under ICL are to be approached from a different angle appears to be warranted. Even though some goals, such as

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<sup>467</sup> See however, Chapter 8 para 8.4.1 *infra* where ICL’s ability to impact on the bystander group in the wake of mass atrocity is addressed in more detail; see also Fletcher LE and Weinstein HM “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation” (2002) 24 *Human Rights Quarterly* 573–639, 579.

<sup>468</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 25.

<sup>469</sup> See Chapter 4 para 4.2.3.3 *supra*.

<sup>470</sup> See Douglas L “The Didactic Trial: Filtering History and Memory into the Courtroom” (2006) 14 (4) *European Review* 514; Douglas L *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001) Yale University Press, New Haven; Osiel M *Mass Atrocity, Collective Memory and the Law* (1997) Transaction Publishers, New Brunswick; Drumbl, MA *Atrocity, Punishment and International Law* (2007) 173-176.

<sup>471</sup> Luban (Fairness to Rightness) (*supra*) 8.

retribution and deterrence, are common to both domestic and international criminal law, domestic criminal law punishment theory can only apply to ICL to a limited extent.<sup>472</sup> ICL is a response to a unique form of criminality with an international element. It is submitted that the problems associated with applying the domestic criminal law analogy to ICL should have a significant influence on the rationale for punishment of international crime.<sup>473</sup> ICL attempts to reach beyond the conventional objectives of domestic criminal law.<sup>474</sup> As will be discussed below, creating a historical record, truth-finding, increased accountability for gross human rights violations, rights and interests of victims and objectives related to reconciliation and international peace and security are among the *sui generis* objectives of international criminal justice and international criminal trials.<sup>475</sup>

### 5.3 The Historical and Theoretical Foundations of International Criminal Law

The historical and theoretical foundations of ICL may provide insight into the social benefits that are expected to materialise from the prosecution of international crimes and the change that ICL is expected to make to the *status quo*. These foundations constitute the *raison d'être* of ICL. They are based on certain assumptions regarding the use of criminal law to combat the phenomena which give rise to international crimes, namely state criminality, mass violence, armed conflict and other egregious acts of social evil. They also provide insight into the values that ICL protects and promotes.

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<sup>472</sup> As an example, one may take the objective of rehabilitation through punishment. The rehabilitation and social reintegration of a perpetrator of large scale human rights abuses would be highly unrealistic considering the nature and extent of the crime. According to Sloane “it is far from clear that terms of incarceration imposed by international tribunals can [...] rehabilitate serious war criminals and genocidaires” (See Sloane (The Expressive Capacity of International Punishment) (*supra*) 34). These situations cannot be equated to domestic rehabilitation, e.g. reintroducing a convicted murderer into society after the expiration of his or her sentence. See also Ratner S “The Schizophrenias of International Criminal Law (2001) 33 *Texas International Law Journal* 237-256, 251: “[...] the mechanical transfer of domestic criminal law principles to the international context [...] is fraught with danger”.

<sup>473</sup> See Chapter 8 para 8.5.1 *infra*.

<sup>474</sup> Examples include creating a historical record of the events, ending the culture of impunity or ensuring accountability for gross human rights violations, and objectives relating to international peace and security. See Damaska (*supra*) in Cassese (Oxford Companion) (*supra*) 177.

<sup>475</sup> See para 5.6 *infra*.

What are the purposes for which ICL exists? Most international criminal lawyers will not hesitate to assert that since “there can be no peace without justice”, ICL was created to end the culture of impunity for perpetrators of serious violations of human rights and criminality involving the state or state officials and that, simultaneously, ICL represents a means to deter future international crimes. Some would add that many international criminal laws (international aspects of domestic criminal law) are a practical response to the globalisation of crime. These answers are all demonstrably correct. However, the thesis argues that there may be more to ICL than what lies on the surface and in the preambles of treaties. It is submitted that ICL has reached a point in its development where it favours more ambitious and nuanced objectives.<sup>476</sup>

Since the creation of the ICTY, international criminal trials have accompanied many of the major social transitions around the world. The reliance on criminal proceedings in these situations has occurred in spite of a lack of empirical studies to provide data on the ability of international criminal justice to reach utilitarian punishment objectives. Retributive justice or the goal of criminal accountability provides the primary impulse for the prosecution of international crime, while it is mostly assumed that prosecution will provide some added utilitarian benefit. However, a number of ICL scholars have paused to ask the ‘why?’ question in a broader sense.<sup>477</sup> In the article “The Sensibility and Sense of International Criminal Law”, Tallgren asked why international criminal justice is justified as a response to large-scale crimes.<sup>478</sup> The author poses the following question with regard to ICL’s role:

“[...] does the ‘international criminal justice system’ need to protect the same interests as the national system in general? Are there any specific interest, the protection of which belongs among the exclusive tasks of the international community?”<sup>479</sup>

Prosecutions of the perpetrators of core crimes, violations of *ius cogens* norms or gross human rights violations have often been described as prosecutions in the interests of the international community, since the crimes involved are so egregious as to be universally

<sup>476</sup> Both arguments are set out more fully in paras 5.6 – 5.7 and Chapter 8 *infra*.

<sup>477</sup> See Tallgren (Sensibility and Sense) (*supra*); Osiel M “Why Prosecute? Critics of Punishment for Mass Atrocity” (2000) 22 (1) *Human Rights Quarterly* 118-147; Damaska (What is the Point of International Criminal Justice?) (*supra*).

<sup>478</sup> Tallgren (Sensibility and Sense) (*supra*) 565.

<sup>479</sup> Tallgren (Sensibility and Sense) (*supra*) 586.

offensive. Universal jurisdiction over these crimes, albeit a disputed notion, is based largely on the same rationale. However, the reliance on prosecutions in the name of universal interests and values has to some extent become a matter of rhetoric. References to notions such as the global rule of law, universal justice, ending the culture of impunity and human rights surface recurrently and dogmatically in the statutes, resolutions and judgments that relate to international criminal justice. Yet it remains difficult to explain exactly how the prosecution of an international criminal benefits everyone everywhere. For example, how exactly does the prosecution of an African warlord in The Hague benefit an Indian citizen who has never heard of the ICC? This question is difficult to answer because, as previously noted, prosecution on behalf of the international community is an abstract notion.<sup>480</sup> There is some evidence that substantiates the desirability of such prosecution, for example the increased multilateral- and inter-state cooperation on these matters. But is it useful? Strictly speaking, the desire for the prosecution of international crime is not *truly* and *absolutely* universal. The prosecution of international crimes seems to be more useful and desirable to some states or politically aligned factions in the international order than to others.<sup>481</sup> Yet, ICL's moral resonance in the international community is undeniable. In this regard, the following questions are relevant for determining the transformative value of ICL. Firstly, why is criminal law sometimes preferred as a response to radical evil and serious human rights abuses? Secondly, who or what is the authority or driving force behind this recourse to criminal law?

### 5.3.1 Why Address Radical Evil Through Criminal Law and Punishment?

Differently formulated, the 'why-question' may be put as follows - what benefits are thought (or hoped) to be attained through the punishment of international crimes? The investigation now turns directly to the assumptions and motivations behind punishment for international crimes. Only once this has been established can the second question above be considered.

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<sup>480</sup> See para 5.2.5 (4) *supra*.

<sup>481</sup> Notably, liberal states seem supportive of the ideal of an international criminal justice system. In this regard, see Bass GJ *Stay the Hand of Vengeance* (2000) Princeton University Press, Princeton; see also Chapter 6 para 6.3.2.2 *infra*.

### 5.3.1.1 The Basic Theoretical Rationale: State Criminality and Legalism

Certain general assumptions underlie international criminal justice as a response to the problem of international crime. According to Lee, international crimes exist because:

“[...] some acts of harm, because of their relation to the abuse of state authority or other violations of the state’s legitimacy conditions, are such that, for their suppression and accountability, we need to appeal to an alternative framework other than the one of states exercising their legitimate authority within their territories or over their citizens.”<sup>482</sup>

International criminal justice has developed partly out of the inability of states to deal with massive human rights violations internally. This inability occurs either because domestic legal systems are inept (unable) to deal with overwhelming nature and extent of the crimes or because the state itself is implicated in the commission of those crimes (and therefore unwilling to prosecute these crimes).<sup>483</sup> ICL may be viewed as an expression of the collective will of states and the international community to establish an “alternative framework” for criminal liability that is not restricted by the veil of sovereignty and state immunity. Therefore, the first assumption of the existence of ICL is that the problems of state complicity in mass violence and state inability to deal with mass violence can be addressed by an alternative supranational framework of criminal law.

How effective the aforementioned “alternative framework” has been, is an open question. Effecting penal sanctions for human rights violations in this alternative framework remains problematic. Firstly, even though much progress has been made towards ending the culture of impunity for perpetrators of international crime, widespread enforcement of ICL rules and effective cooperation in the prosecution of suspected perpetrators of international crime remains elusive. Despite the proliferation of human rights treaties and suppression conventions, state cooperation remains the most crucial element in ensuring that international crimes are effectively prosecuted. Secondly, as discussed above, many of the punishment theories applied in domestic criminal justice systems, and which have been subsumed into the abovementioned alternative framework, become less relevant when scrutinised in the unique and complex domain of the international criminal.<sup>484</sup> By no means does this indicate that ICL

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<sup>482</sup> Lee (*supra*) in May and Hoskins (International Criminal Law and Philosophy) (*supra*) 21.

<sup>483</sup> See Rome Statute of the ICC, article 17(1)(b).

<sup>484</sup> See para 5.2.5 *supra*.

is of no use to the international community. It merely indicates that our understanding of the ontological aspects of ICL is not as clear as it is for domestic criminal justice. In this regard, once more, greater acknowledgement is required for the fact that the domestic law analogy applies to ICL only to a limited extent.<sup>485</sup>

A second supposition underlying the international criminal law regime is the belief that mass atrocity and macro criminality can be addressed and remedied through holding individuals accountable under substantive criminal law similar to the way domestic crime is addressed by criminal laws and procedure. Thus, ICL is based on a strong faith in, on the one hand, the value of individual responsibility (even in the face of the complex matrix of responsibility inherent to collective violence) and, on the other, the power of legalism to shape and change human behaviour over time. It is hoped that ICL can address what Arendt and Kant have referred to as “radical evil” by treating extreme crimes as breaches of universal norms subject to criminal sanction.<sup>486</sup> International criminal tribunals focus on the determination of individual guilt with the hope that this will end the cycle of violence through preventing the imposition of collective guilt and the broad demonization of perpetrator groups.<sup>487</sup>

Arguably, the supposition of international crime as a breach of universal norms and the fact that such breaches are recognised under the established notions of *ius cogens* and obligations *erga omnes* creates a connection between the discipline of international criminal justice and natural law theory. Yet, ICL is confined to established criminal law principles of legality which requires, amongst other things, a high level of legal certainty and foreseeability. Thus ICL finds itself in a paradoxical state. ICL has emerged as a positivistic legal discipline restrained in its exercise by the rules of the principle of legality. Yet, it may be argued that to some extent ICL is founded on natural law ideals as yet unrealised in law.

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<sup>485</sup> See Sloane RD “The Expressive Value of International Punishment: the Limits of the National Law Analogy and the Potential of International Criminal Law” (2006) *Columbia Public Law and Legal Theory Working Papers* (Paper 06100), available at [http://lsr.nellco.org/columbia\\_pllt/06100/](http://lsr.nellco.org/columbia_pllt/06100/) (accessed 2011/08/30).

<sup>486</sup> Drumbl MA “Atrocity, Punishment and International Law” (2007) *Washington and Lee Public Legal Studies Research Paper Series* No. 2007-14, 3.

<sup>487</sup> Peskin (International Justice) (*supra*) 10.



Indeed, since the Nuremberg IMT, ICL has been operating at the junction between positive law and morality. The Nuremberg IMT consciously endeavoured to hold accountable the individuals responsible for radical evil by prosecuting these acts as international crimes, breaches of universal norms and crimes against the international community. This was the beginning of the attempt to criminalise radical evil under international law in a manner akin to the criminalisation of domestic criminal acts. As a result – and almost inevitably – the moral undertone of the prosecutorial effort at Nuremberg came into conflict with positive legal rules such as the prohibition on retroactive punishment. Although this is much less of a problem in modern ICL, an underlying tension between natural law ideals and positive law realities is still endemic to international criminal justice.

The third assumption of international criminal justice is that the existence (whether *ad hoc* or permanent) of international criminal courts and increased reliance on extraterritorial criminal jurisdiction by states will deter or prevent international crime or that such prosecution may produce other utilitarian benefits.<sup>488</sup> I return to this assumption specifically in greater detail below (see para 5.6 *infra*).

### 5.3.1.2 Protected Interests: Core Crimes and Other International Crimes

ICL has developed to this point essentially to protect certain interests and values. It is possible to distinguish between the interests protected by the criminalisation of acts which today constitute the core crimes of ICL (or crimes under international law) and the criminalisation of acts which constitute less egregious international crimes (other international crimes).<sup>489</sup>

All states and the international community as a whole have an interest in the prevention and prosecution of serious international crimes.<sup>490</sup> With reference to the Eichmann

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<sup>488</sup> See Tallgren (Sensibility and Sense) (*supra*) 569.

<sup>489</sup> See Chapter 2 para 2.2.2 *supra*.

<sup>490</sup> The Rome Statute refers to the crimes under its jurisdiction as “the *most serious crimes of concern to the international community as a whole*” which includes the crimes of genocide, crimes against humanity, war crimes and aggression (article 5). These crimes are collectively known as the *core crimes* of international criminal law. *Serious international crimes*, as I have used it here, is not confined to the core

case, Kemp identifies the three most important interests protected by the core crimes of international law, namely “humanitarian concerns”, “universal moral values”, and “foundations and security of the international community”.<sup>491</sup> The crimes in article 5 of the Rome Statute and the distinct crime of torture, which are widely regarded as having obtained *ius cogens* status under customary international law, are examples of international crimes that protect and project the abovementioned interests.<sup>492</sup>

Other less egregious crimes of international law and transnational crimes protect a multitude of interests. These crimes have developed to facilitate effective cooperation between states in fighting crimes with a transnational element or to speak to a particular scourge in the international community, for example, terrorism. The interests protected by less egregious international crimes are closely related to the interests of individual states, namely effective crime control and cooperation in criminal matters. Yet, in the larger scheme of things, efforts in international cooperation in criminal matters between individual states may be viewed as part of a larger project of the international community of states to ensure respect for human rights, accountability and the global rule of law.<sup>493</sup>

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crimes and includes international crimes such as torture and apartheid which are arguably crimes of international concern although not included as distinct crimes in the Rome Statute.

<sup>491</sup> Kemp (Individual Criminal Liability) (*supra*) 128; see also *Eichmann v Attorney-General of Israel* (Supreme Court of Israel) Case No. 336/61, 29 May 1962, 36 ILR 277, 291-293: “[Core crimes] constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations [...] Those crimes entail individual criminal responsibility because they challenge the foundations of [the] international society and affront the conscience of civilised nations ... [They] involve the perpetration of an international crime which all the nations of the world are interested in preventing”. See also Werle (Principles of International Criminal Law) (*supra*) 31-32.

<sup>492</sup> It may however be argued that the distinct crime of torture is unrelated to the interest of international peace and security.

<sup>493</sup> These utopian efforts are not universally supported. Outside of the circle of western liberal-minded states, the project of international (criminal) law has many detractors and critics. These criticisms are addressed under Chapter 6 *infra*.

### 5.3.1.3 Moral Objectives

Tallgren observes that serious international crime invites “intuitive-moralistic answers” in favour of punishment.<sup>494</sup> Accordingly, it is felt that the perpetrators of conduct *mala in se* and the “most serious crimes of concern to the international community as a whole” deserve punishment all the more than domestic criminals.<sup>495</sup> The moral justifiability of punishment for international criminals is not questioned but instinctive (the moral justifiability of the methods the determination of who should be punished and how is however an entirely different matter). Punishment for international crime is rarely a matter of asking “why”. Rather, the kneejerk of public sentiment proclaims that the perpetrators of these crimes should undoubtedly be punished. Indeed, some have come to view certain acts as so morally offensive that they are incapable of being responded to through even the harshest form of sanction.

Osiel notes the powerful retributive impulses that emerge in times of mass atrocity, stating by way of introduction to his article that if ever there was an ‘easy case’ warranting prosecution, mass atrocity is it.<sup>496</sup> He follows this up by immediately acknowledging that several doubts exist which may lead one “to conclude that criminal law is singularly unsuitable as a societal response to such wrongs”.<sup>497</sup> Even if one views the doubts on the

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<sup>494</sup> Tallgren (Sensibility and Sense) (*supra*) 564; Akhavan P “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment” (1996) 90 (3) *American Journal of International Law* 501-510, 501-502: “The unconscionable atrocities in the former Yugoslavia and Rwanda have become the twin pillars of *moral outrage* upon which the beginnings of a long-awaited international criminal jurisdiction can be discerned” (emphasis added).

<sup>495</sup> Rome Statute of the ICC, article 5(1).

<sup>496</sup> Osiel (Why Prosecute?) (*supra*) 118.

<sup>497</sup> Osiel (Why Prosecute?) (*supra*) 119-120. In this article, the author forwards “nine major reasons for doubting the wisdom of criminal prosecutions” as a response to mass atrocity:

1. Due to their unique nature, it may not be possible to conceptualise massive offenses in legal terms.
2. Novel legal doctrines conflict with established liberal/western legal principles.
3. The difficulty of identifying culpable parties.
4. The acts committed during mass atrocity may be so heinous and evil in nature that they are incapable of being met with punishment.
5. Other acts may be too banal in nature to warrant punishment.

suitability of criminal law as a response to mass atrocity as insurmountable factual obstacles, the individual and collective moral desire for retribution over acts such as those perpetrated during the Rwandan genocide would not diminish. Human nature, especially in cases involving large-scale victimisation, is not inclined towards unqualified forgiveness. Depending on the nature and extent of the conflict as well as the particularities of the society in question, reconciliation requires at least some form of public symbolic revenge or humiliation in exchange for the harm suffered. Taking the moral outrage over mass atrocity and human nature into consideration, controlled retribution to this effect by way of criminal trial is preferable to the possible alternatives, namely personal revenge and vigilantism.

From a moral point of view, if we accept the proposition that ICL enforces the moral outlook of the masses, the logical place to look for the reasons behind the punishment of international crime is the retributive theory of punishment. As Shklar observes, the Nuremberg IMT fulfilled an immediate and essential function “which is both the most ancient and the most compelling purpose of all criminal justice”.<sup>498</sup> That is, to “replace private, uncontrolled vengeance with a measured process of fixing guilt in each case, and taking the power to punish out of the hands of those directly injured”.<sup>499</sup> The retributive theory of punishment is more easily justified from a moral point of view than the utilitarian punishment theories.<sup>500</sup> Perhaps as a result of this, the retributive justification for punishment forms the foundation of punishment whether that punishment is dispensed by a domestic- or international criminal court.

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6. Alternative justice mechanisms may be superior to criminal trials as a response to mass atrocity.
  7. Political prudence may require that prosecution be kept away from the political agenda by the new government. Such “gag rules” may create a “choking” effect on the new democracy.
  8. Culpable parties may halt or undermine prosecutorial effort through wielding their political power thereby creating a political compromise which is damaging to judicial integrity.
  9. An objective and impartial criminal trial may evoke empathy for the perpetrators by normalising or rationalising behaviour which is deliberately considered by liberal societies to be ‘incomprehensible’.

<sup>498</sup> Shklar (Legalism) (*supra*) 158.

<sup>499</sup> Shklar (Legalism) (*supra*) 158.

<sup>500</sup> See para 5.2.3.1 *supra*.

The retributive element of punishment has been framed in expressive terms in international criminal tribunals.<sup>501</sup> Retributive expression is purported to communicate a message beyond the courtroom which clearly defines moral rights and wrongs. Closely associated with the expressive function of punishment, the objectives of denunciation and moral education are intended to denounce the wrong, to reaffirm the social norm which had been infringed and to educate the perpetrator and society as to the type of conduct which is unacceptable.<sup>502</sup>

Yet, it appears that retribution as the basic foundation of punishment falls short of what is expected from modern international criminal justice. Retribution has its limits.<sup>503</sup> Justice also requires more than retribution.<sup>504</sup> Fairness, due process, and the basic human rights of the accused must also be taken into account. From a moral perspective, retribution as *revenge* (albeit regulated revenge) comes into conflict with modern human rights discourse and the emerging ethos of restorative justice. Furthermore, it is important to consider the interests of transitional and post-conflict communities. Truth-finding, prevention of future atrocities and reconciliation are immediate and essential needs of these societies in which criminal justice plays but a part. Robert H. Jackson argued against a purely retributive approach in the prosecution and punishment of perpetrators of international crime:

“The satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment. If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied case.”<sup>505</sup>

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<sup>501</sup> See the discussion on the objectives of punishment as per the jurisprudence of the Nuremberg IMT and the *ad hoc* international criminal tribunals at para 5.5 *infra*.

<sup>502</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 23.

<sup>503</sup> Clark JN “The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina” (2009) 7 (3) *Journal of International Criminal Justice* 463-487.

<sup>504</sup> Clark (Peace, Justice and the International Criminal Court) (*supra*) 522-523.

<sup>505</sup> Jackson RH “Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders” (30 April 1945) 11, available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/nuremberg/documents/index.php?pagenumber=12&documentid=17-6&documentdate=1945-04-30&studycollectionid=nuremberg&groupid=](http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?pagenumber=12&documentid=17-6&documentdate=1945-04-30&studycollectionid=nuremberg&groupid=) (accessed 2011/10/11).

The moral worth of punishment under ICL cannot be based solely on the traditional retributive function of inflicting regulated and proportional revenge on the perpetrator. Retributive punishment is only acceptable when it is meted out subsequent to a fair and transparent trial, conducted under conditions where the defendant had been afforded the full measure of protection to which he or she is entitled to under the standards of international human rights. Furthermore, in the context of mass atrocity some have called for greater sensitivity to context and to pluralist notions of justice in the application of international criminal justice.<sup>506</sup> These calls are certainly justified. However, it is unthinkable to advance the notion that the objective of retribution should be dispensed with altogether. Doing so will almost certainly raise the ire of lawyers, human rights activists, victims, post-conflict societies and perhaps the entire international community. Rather, it is argued that international criminal justice has internal and external limitations to its applicability, with the result that it should be invoked in a more pragmatic and contextually sensitive manner to form part of a broader strategy of justice.<sup>507</sup>

### **5.3.2 Punishment under International Law: Authority, Values and Legitimacy**

Punishment under ICL represents an exercise of authority. But who or what represents the punishing authority in international criminal justice analogous to the state in domestic criminal law systems? Punishment through international criminal justice seems to be related to the interests and objectives of two movements, or groups. Firstly, the collective interest of the international community (as discussed above) and the international human rights movement with which it is closely associated. Secondly, hegemonic and political forces in the international system that seek to (ab)use criminal punishment as a legitimising tool. Thus, there seems to be a moral authority and a political authority driving the international criminal justice movement. These are discussed in paras 5.3.2.1 – 5.3.2.3 *infra*.<sup>508</sup>

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<sup>506</sup> See, for example, Drumbl (Atrocity, Punishment and International Law) (*supra*).

<sup>507</sup> See Drumbl (Atrocity, Punishment and International Law) (*supra*); see Clark (Peace, Justice and the International Criminal Court) (*supra*) 545.

<sup>508</sup> See also in Chapter 6 para 6.2 *infra*.

### 5.3.2.1 Punishment as an Expression of the Values of the International Community

Punishment is a social phenomenon. It is based on the values of a community and intended to protect those values. The rationale for international criminal justice in this view is to protect and uphold the values of the international community and to express their outrage over certain acts or situations.<sup>509</sup> According to Gaeta, the core crimes:

“[have their] roots in the gradual emergence of a set of ‘supra-national’ values, proper to the international community as a whole, that must be safeguarded against those states that – through their individual organs or their whole apparatus – disregard them.”<sup>510</sup>

Prosecution of international crimes often requires encroachment on the sovereign right of states to exercise exclusive criminal jurisdiction within their territory. Such encroachment is however, widely viewed as justifiable in light of the universally offensive nature of the crime and the international community’s desire to hold the perpetrators of such offenses accountable as *hostis humani generis*.

International criminal justice attempts to transcend the victim-offender dynamic, in some instances also the victim-offender-community dynamic. Apart from the individual victims of mass atrocity and the affected society, it is now widely accepted that some international crimes are wrongful acts against the international community as a whole due to the extraordinarily deplorable nature of the crime involved. This is confirmed by those crimes which have attained the status of *ius cogens* norms under international law. It is because of this universal condemnation that perpetrators of certain crimes, for example *genocidaires*, pirates and terrorists, are dubbed *hostis humani generis* (“the enemy of all humankind”). Mass atrocity and gross human rights violations invite a moral backlash from the international community. The response to such heinous criminal acts is more intuitive than it would be to domestic criminal acts. The international community is naturally more offended and morally repulsed by widespread, recurring and state sponsored human rights abuses than by human rights abuses that occur daily in any state in the guise of ‘ordinary crimes’. For example, a single act of murder may be universally condemnable, but in the absence of a

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<sup>509</sup> This may be referred to as ‘expressive retribution’. See ICTY, *Prosecutor v Aleksovski* (Appeals Chamber: Judgment) Case No. IT-95-14/1-A, 24 March 2000, para 185.

<sup>510</sup> Gaeta (*supra*) in Cassese (Oxford Companion (*supra*)) 66.

sensational or dramatic aspect it is highly unlikely to engender the same kind of moral outrage from the international community as is often seen with acts of murder committed with genocidal intent or as part of a widespread and systematic attack against a civilian population. Many international crimes warrant a higher level of condemnation because they represent violations of *ius cogens* norms. This is a spontaneous form of universal condemnation, not comparable to public denunciation of domestic crimes.

Although the *civitas maxima* is widely regarded as a benefactor from punishment for international crime, the way in which the international community interprets and benefits from punishment for international crimes is not yet fully understood. ICL is often confronted with problems that arise out of the notion of the international community as an abstract moral authority, which expresses its human values partly through international criminal laws. Much of the time, ICL must speak to a multifaceted audience comprised of the international community and its more directly affected subsets, the society and victims affected by international crime with unique needs.<sup>511</sup> There is no doubt that ICL may benefit from a firm understanding of the social intricacies of collective violence and the “contextual reality” in which punishment of international crimes takes place.<sup>512</sup> Greater understanding of these matters will enhance the ability of international criminal justice to project the international community’s desire for lasting respect for ICL and human rights, in the process nourishing post-conflict environments which ensure social healing and address more specific needs of affected societies.

Despite this, it appears that political and legal responses to international crimes and mass atrocity have not matched the moral outrage generated within the international community. As will be discussed subsequently, politics often plays a disruptive role in this

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<sup>511</sup> The values of a state or community can differ significantly from values purported to be those of the international community. This was illustrated by the tension between the ICTR and the Rwandan justice system over the use of the death penalty and generally through the on-going peace versus justice debate which is a prominent feature of many social transitions. On the tensions between the Rwandan state and the ICTR over the use of the death penalty, see Chapter 5 para 5.5.2.2 *infra*.

<sup>512</sup> Henham (Philosophical Foundations) (*supra*) 78 (footnote 68): “...context requires that international punishment must engage with the social world that gives it meaning and provide the means for reconciling and weighing different contexts [...] in ways which have moral resonance”.



regard.<sup>513</sup> ICL's historical development offers another possible explanation for the disparity between the international community's moral outrage and the low frequency of prosecution of international crime. ICL's extraordinary nature and the fact that it is of a relatively recent vintage has had an impact on what it aims to achieve. Overall, the emphasis has fallen on realistic prosecutions rather than over-zealousness and over-reaching.<sup>514</sup> This is understandable. A gradual and manageable evolution should ultimately increase ICL's legitimacy and objectivity. The short term effects of such slow development has been, and will continue be, criticised by some.

### 5.3.2.2 Punishment as Legitimation of Hegemonic Power<sup>515</sup>

In theory, international law is a neutral and independent system of justice. It is a system founded on principles of equality and impartiality. These fundamental principles have resulted in an almost automatic acceptance of the legitimacy of international law and international institutions. These characteristics of international law make it attractive to powerful states that may seek to (ab)use it as a disguised instrument for pacification, stabilisation and of authoritatively projecting norms and values onto the international order.<sup>516</sup> Especially the institutions of international criminal justice are not immune to this type of hegemonic exploitation. According to Henham:

“A significant paradigm for conceptualizing the activities of international criminal tribunals is to regard them as structural mechanisms concerned with the legitimation of hegemonic power, authority and control. As such they provide modalities which permit members of the international community to dispense a morally relative form of justice through legitimized repression.”<sup>517</sup>

And further:

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<sup>513</sup> See Chapter 6 (in general) and Chapter 8 para 8.3.5 *infra*.

<sup>514</sup> This approach was followed at the IMT where it was decided to limit proceedings to 22 defendants in order to minimise the risk of a botched trial. See Overy (*supra*) in Sands (Nuremberg to the Hague) (*supra*) 1-14.

<sup>515</sup> See also Chapter 6 para 6.3.3 *infra*.

<sup>516</sup> Krisch N “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order” (2005) 16 (3) *European Journal of International Law* 369-408, 377.

<sup>517</sup> Henham (Philosophical Foundations) (*supra*) 67.

“[...] in the context of the ad hoc tribunals, retribution in international criminal justice has been more readily equated with the concept of victor’s justice; vindication and western exculpation; the symbolic manifestation of hegemony.”<sup>518</sup> (footnotes omitted)

There are a number of political reasons for the recourse to criminal law in response to mass violence. These reasons derive from the ascendancy of Western ideas in international justice and, accompanying this Western centeredness, the ascendancy of liberal-legalist criminal law ideals in international criminal justice.<sup>519</sup> For liberal states, the protection of human rights has become an important matter, both internally and as a matter of foreign policy.<sup>520</sup> ICL, as part of the larger movement to protect and punish human rights abuses, is partly a manifestation of liberal morality. Liberalism and legalism are ideologies strongly associated with western political beliefs and demand that individuals stand trial for human rights abuses.<sup>521</sup>

It can be argued that states support or cooperate with international criminal justice on behalf of their citizens as part of the international community. From another vantage point, one which may be in greater conformity with the political nature of the international system, it may be argued that state support and cooperation towards international criminal justice is an overt act in the political interest of the state. This latter view also explains why certain states do not cooperate with international criminal justice mechanisms, or do so in an inconsistent manner. From this perspective, punishment through international criminal law and its institutions may be viewed as mechanisms to legitimise the interests of hegemonic forces in the international system.<sup>522</sup>

### 5.3.2.3 Legitimacy and the Problem of Selective Prosecution

The objective of ICL is to ensure maximum accountability for perpetrators of international crime and gross human rights violations. Unfortunately, this objective squares off against the

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<sup>518</sup> Henham (Philosophical Foundations) (*supra*) 68.

<sup>519</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 123.

<sup>520</sup> Bass (Stay the Hand of Vengeance) (*supra*) 16-21.

<sup>521</sup> Bass (Stay the Hand of Vengeance) (*supra*) 16-21.

<sup>522</sup> See Chapter 6 para 6.3.3 *infra*.

contemporary trend wherein impunity is the norm and accountability the exception. The reasons for the current state of affairs are partly ascribable to the enduring prevalence of sovereignty and the dominance of politics over international law in international relations. Successful prosecutions of perpetrators of international crime have been few and far between. For example, less than 4% of the estimated 100 000 Nazi perpetrators were eventually brought to trial.<sup>523</sup> Prosecutorial discretion has favoured prosecutions of only the “big fish” or those cases where the prospect of achieving a conviction was high. Furthermore, some international criminal courts have been limited in their prosecutorial discretion by an “artificial and politically convenient time frame”.<sup>524</sup> This use of the prosecutorial discretion, although arguably a pragmatic exercise, has resulted in criticism of ICL as a hegemonic, selective and inconsistent form of justice. It also clearly demonstrates the many inadequacies in the current system, particularly inadequacies of enforcement.

Selectivity in prosecutions represents a serious obstacle to some of the fundamental objectives of international criminal trials, namely retribution, deterrence and ending the culture of impunity for international crimes.<sup>525</sup> Selectivity in international criminal justice can be attributed to two factors, namely internal selectivity and randomness. Amann describes internal selectivity as “the inevitable choice by actors within a tribunal of certain defendants, certain witnesses, and certain incidents to the exclusion of others that also merit consideration”.<sup>526</sup> Randomness refers to the limited and haphazard production of international criminal justice based on an incidental convergence of political and external circumstances.<sup>527</sup> Drumbl contends, for example, that the ICC has a political incentive to investigate cases only

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<sup>523</sup> See Bass (Stay the Hand of Vengeance) (*supra*) 300; Amann (Group Mentality) (*supra*) 117 (footnote 106).

<sup>524</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 151.

<sup>525</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 30.

<sup>526</sup> Amann (Group Mentality) (*supra*) 116.

<sup>527</sup> Amann (Group Mentality) (*supra*) 116. The author notes that the conflicts that gave birth to the *ad hoc* tribunals were just two out of a number of similar conflicts which may have warranted the creation of similar tribunals. On selectivity in the prosecution of international crime, see Stolle and Singelstein (*supra*) in Kaleck *et al.* (International Prosecution of Human Rights Crimes) (*supra*) 46-48. These authors argue that the prosecution of Serbian leadership at the ICTY was an “attempt legally to justify the later NATO intervention” (at 47).

in those countries that are politically powerless, thereby ensuring that the Court involves itself only in countries that cannot jeopardise its funding and political standing.<sup>528</sup>

Skewed and selective prosecutions are the realities of a developing international criminal justice system with limited powers of enforcement. Such limited power of enforcement is endemic to the international legal system which is dependent on cooperation and based on consensus. Keeping this in mind, selectivity and randomness can at least be partially explained. It cannot however be viewed as morally or legally justified. The establishment of an effective framework for the relationship between domestic and international criminal systems represents the best hope for international criminal justice to achieve the consistency and impartiality which is required of criminal law. This framework has only recently been given renewed emphasis under the Rome Statute's scheme of complementarity, and will need many years to become solidified if at all possible.

One way of approaching the problem of skewed prosecutions and limited enforcement is to focus on more clearly defined targets, set within the framework of ICL's fundamental objectives. Who should be punished and for what conduct remain relevant questions. It would be unwise to ignore the influence of alternatives to criminal justice at this juncture. Stretching ICL objectives toward over-optimistic ideals could be detrimental to its still fragile existence and may hamper its prospects of achieving acceptance among hereto unsupportive states. Alternatives to criminal justice and restorative justice mechanisms such as South Africa's TRC and the *gacaca* courts in Rwanda have proved to be imperfect, but also useful and pragmatic responses to transitional and post-conflict periods. For now at least, the voice of reason calls for pragmatism and realism on the frontlines of international criminal justice.

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<sup>528</sup> Drumbl, MA *Atrocity, Punishment and International Law* (2007) 152; see also Damaska (What is the Point of International Criminal Justice?) (*supra*) 330: "[...] the sword of justice tends to be used most against individuals from states that occupy a lowly place in the de facto existing hierarchy of states".

#### 5.4 The Modality of ICL Objectives: Trial and Sentencing Objectives in International Criminal Justice

At least one negative aspect of the sudden proliferation of international criminal courts in the post-Cold War era is that international- and internationalised criminal courts were required to conduct trials and hand down sentences without being able to rely on a jurisprudence of punishment theory tailored specifically to international crimes and perpetrators of mass atrocities. ICL's inactivity during the Cold War period resulted in little practical development of the justifications for punishment for international crime. Indeed, until relatively recently and in light of more pressing matters in the field of international criminal justice, academic consideration of the penological purposes of international criminal law may not have been viewed as an issue requiring urgent consideration.

Following the end of the Cold War, and the creation of the *ad hoc* and hybrid criminal tribunals, there has been a regular output of jurisprudence by international criminal courts. Many writers have noted the lacuna in the application of punishment theory and sentencing jurisprudence at these tribunals and in the field of ICL in general.<sup>529</sup> Empirical studies on the effectiveness of international tribunals have been called for, but remain mostly lacking or unenlightening. As a result it remains hard to discern whether or not a nexus exists between the lofty aspirations of ICL, what it has achieved and that which it may be expected to achieve in future. In the tribunals themselves, the focus seems to have been more on the development of substantive international criminal law than on penology.

In the most notable works on sentencing practices of international criminal courts, much criticism has befallen the sentencing practice of the ICTY and ICTR.<sup>530</sup> Much of the criticism sights a lack of coherence, lack of methodology and randomness in sentencing at

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<sup>529</sup> Henham R *Punishment and Process in International Criminal Trials* (2005) Ashgate Publishing, Aldershot 1; Sloane (The Expressive Capacity of International Punishment) (*supra*).

<sup>530</sup> See Henham (Philosophical Foundations) (*supra*) 69: "Regrettably, the *ad hoc* tribunals have consistently failed to define [...] sentencing aims, or explored their meaning in the international trial context".

these tribunals.<sup>531</sup> Overall, the relationship between penological justifications, divergent factors influencing sentencing (for example the gravity of *international* crime and mitigating factors specific to the accused), the relative weight to be attached to these factors and the sentence imposed has not been well articulated.

Traditionally, penological justifications and sentencing objectives have been treated as synonymous concepts.<sup>532</sup> Punishment is simultaneously justified and rationalised through the purpose it is intended to serve. An imposed sentence is usually based upon more than one justification for punishment. The justification of punishment in turn typically consists partly of aspirations or purposes beyond punishment itself. International criminal justice mostly borrows its penological justifications from domestic penological justifications through the partly fallacious application of the domestic criminal law analogy to ICL.<sup>533</sup>

Yet, the objectives of international criminal justice cannot be confined to those which are pursued through sentencing. This notion defeats some of the criticisms regarding the inconsistency of sentencing practice in relation to penological justifications in international criminal justice mentioned above. The international criminal trial, as a symbolic and public event, and the allocation of guilt through the conviction have their own functions within the larger objective and rationale for international criminal justice. Luban observes that “the

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<sup>531</sup> See Ewald U “‘Predictably Irrational’: International Sentencing and its Discourse Against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices” (2010) 10 *International Criminal Law Review* 365–402; Drumbl (Atrocity, Punishment and International Law) (*supra*); Van Zyl Smit D “Punishment by International Criminal Tribunals: Ideal Example for National Criminal Justice, or Parody of a Penal Process?” Paper presented at the Annual Meeting of the American Society of Criminology in Denver, USA (2003) available at <http://www.asc41.com/www/2003/cmsindx.htm> (accessed 2010/03/02); Henham R “Some Issues for Sentencing in the International Criminal Court” (2003) 52 *International and Comparative Law Quarterly* 81-114, 82; see also Henham (Philosophical Foundations) (*supra*) 69: “The evidence of confusion and obfuscation on the part of the ad hoc tribunals relating to the possible scope and meaning to be accorded to penal justifications is incontrovertible”.

<sup>532</sup> See footnote 383 *supra*.

<sup>533</sup> Tallgren defines the general domestic analogy as “the assumption that the principles regarded as valid in inter-individual relations apply in inter-state relations as well”. See Tallgren (Sensibility and Sense) (*supra*) 566.

curious feature about ICL is that in it the emphasis shifts from punishment to trials”.<sup>534</sup> This shift in emphasis from punishment to the trial itself leads to the conclusion that some ICL’s objectives are “extrinsic to purely legal values”.<sup>535</sup> For example, a report by former UN Secretary Kofi Annan stated that the objectives of international criminal tribunals include accountability for perpetrators of serious violations of human rights and humanitarian law, prevention of future violations, seeking justice for victims, creating a historical account, national reconciliation, re-establishment of the rule of law, putting an end to violence and the restoration of peace in conflict situations.<sup>536</sup>

Furthermore, it must be mentioned that states often pursue international criminal justice as a means to fight transnational crime and for applying their criminal jurisdiction extraterritorially under certain circumstances. As a result, the objectives of international criminal tribunals applying ICL *strictu sensu* and the objectives of domestically enforced ICL (specifically that part of domestic law which constitutes ‘international aspects of domestic criminal law’) may not be absolutely aligned.

## 5.5 Sentencing Objectives of the IMTs, ICTY, ICTR and ICC

Since the establishment of the *ad hoc* tribunals there has been much debate and criticism over punishment and penology in international criminal courts. In the post-Cold War era, sentencing law in international courts has become more sophisticated than in its predecessors, the Nuremberg IMT, Tokyo IMTFE and the Eichmann trial.<sup>537</sup> The prevailing notion at these trials, namely that no punishment can truly fit egregious crimes such as genocide, has

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<sup>534</sup> Luban (Fairness to Rightness) (*supra*) 8.

<sup>535</sup> Luban (Fairness to Rightness) (*supra*) 8.

<sup>536</sup> Report by the Secretary General to the United Nations Security Council on Strengthening the Rule of Law in Post-Conflict Situations, UN Doc. S/2004/616 (23 Augustus 2004) 13 (para 38). See also Galbraith J “The Pace of International Criminal Justice” (2009) 31 *Michigan Journal of International Law* 79-143, 84 (footnote 19). In light of the role of the United Nations in the establishment and functioning of international criminal tribunals, Galbraith considers these objectives as the most authoritative statement on the objectives of international criminal tribunals.

<sup>537</sup> Sloane R “Sentencing” in Cassese (Oxford Companion) (*supra*) 509-510.

gradually diminished.<sup>538</sup> An investigation into the combination of punishment theories and justifications used by international courts in sentencing may help to clarify ICL's overarching objectives. Identifying these objectives will aid the investigation of the 'transformative value' of ICL. Furthermore, the ability of international courts to achieve these objectives may constitute an important element of ICL's transformative value.

Positive law documents provide little guidance as to the purpose of punishment in ICL. The supreme positive law objectives of international criminal justice are accountability, deterrence, prevention of future atrocities, prevention of state abuse through achieving greater individual accountability for egregious crimes and ultimately creating universal respect for human rights. Penological justifications can at best be inferred from the statutes of the major international criminal tribunals. Relative to positive law documents, sentencing jurisprudence from international courts has provided the clearest guidance as to the goals of ICL punishment. Although retribution (also in the guise of expressive retribution) and deterrence generally remain the central purposes of punishment, there has been a gradual movement away from the initial retributive objectives of punishment at the Nuremberg IMT toward recognition of punishment in favour of achieving some broader social utility. According to Sloane, "sentencing judgments refer frequently to the broader, architectural goals of ICL, e.g. restoring international peace and security, ending impunity, and promoting ethnic and national reconciliation".<sup>539</sup>

### 5.5.1 Early Punishment Institutions: The Nuremberg and Tokyo Tribunals

The Nuremberg and Tokyo trials represented the first legal proceedings which brought perpetrators of mass human rights violations within the ambit of criminal justice.<sup>540</sup> At these trials the purposes of punishment proceeded from what was essentially a retributive

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<sup>538</sup> Sloane (*supra*) in Cassese (Oxford Companion) (*supra*) 509-510. This was reiterated by Arendt in her correspondence with Karl Jaspers: "It may well be essential to hang Goering but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems". See Arendt, H/Jaspers, K *Correspondence 1926-1969* (Cited in Osiel (Why Prosecute?) (*supra*) 128) 54.

<sup>539</sup> Sloane (*supra*) in Cassese (Oxford Companion) (*supra*) 509-510.

<sup>540</sup> Golash D "Retribution for International Crimes", available at <http://www.chinalawsociety.com/admin/ewebeditor/UploadFile/20099814129362.doc> (accessed 2009/11/17).



impulse.<sup>541</sup> The widespread imposition of the death penalty at these tribunals provides perhaps the strongest evidence for this.<sup>542</sup> Both the IMT and IMTFE Charters authorised “death or such other punishment as shall be determined by it to be just”.<sup>543</sup>

Many regard the sentences, and indeed these trials as a whole, as an expression of “victors’ justice”. It is hard to deny that trials were an expression of the vengeance and values of the peoples of the victorious nations at that time just as much, if not more, than it was intended to deter future atrocities and to be a symbol of justice and the rule of law.<sup>544</sup> However, to some extent the Nuremberg IMT and Tokyo IMTFE were also expressions of the international community’s moral outrage. At Nuremberg this expressive or symbolic component of the trial and subsequent punishment was acknowledged by the prosecution. Robert H. Jackson cast the defendants as living symbols of an evil that will persist in the world long after they, the defendants, were gone:

“What makes this inquest significant is that these prisoners represent influences that will lurk in the world long after their bodies have turned to dust. We will show them to be living symbols of racial hatred, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalism and of militarism, of intrigue and war-making which have embroiled Europeans generation after generation, crushing its manhood, destroying its homes, and impoverishing its life.”<sup>545</sup>

Thus, the main impetus for the prosecutions at the Nuremberg and Tokyo was retribution in the traditional sense as well as the projection of a symbolic message of the victorious states’ belief in the rule of law principle.<sup>546</sup> Beyond these objectives, it would appear that the IMTs

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<sup>541</sup> Schabas (Sentencing by International Tribunals) (*supra*) 500; Sloane (The Expressive Capacity of International Punishment) (*supra*) 32-33.

<sup>542</sup> Schabas (Sentencing by International Tribunals) (*supra*) 500.

<sup>543</sup> Charter of the International Military Tribunal at Nuremberg (“Nuremberg Charter”) (1945) 82 UNTS 279, article 27; Charter for the International Military Tribunal for the Far East, 26 April 1946, TIAS No. 1589, article 16.

<sup>544</sup> Henham (Punishment and Process) (*supra*) 18-19.

<sup>545</sup> Opening Statement of Supreme Court Justice Robert H. Jackson, Chief Prosecutor for the United States, 21 November 1945 in Amann (Group Mentality) (*supra*) 121.

<sup>546</sup> See the opening statement of Robert H. Jackson, Representative and Chief of Council for the United States of America, in his opening address at the IMT (21 November 1945) at footnote 31 *supra*.

spent little time and effort on developing new rationales for punishment of international crime or to adapting punishment objectives to the international context.

### 5.5.2 The *Ad Hoc* Tribunals

Pioneering developments in the international legal order in the years since the Nuremberg IMT and Tokyo IMTFE have exerted a discernible influence on the penal justifications used by the *ad hoc* tribunals. Most notable was the influence of international human rights law which barely existed prior to the Second World War. By the time that statutes of the *ad hoc* tribunals were drafted, and under the influence of international human rights law, the death penalty was no longer regarded as legal under international law and rehabilitation had become a more prominent punishment objective.<sup>547</sup> As a consequence the ICTY and ICTR each invoked a lopsided array of justifications for punishment. Generally, retribution and deterrence are mentioned as the main purposes of punishment.<sup>548</sup> Incapacitation (or individual deterrence) and rehabilitation are occasionally mentioned. Reconciliation has been given some, mostly rhetorical, attention.<sup>549</sup>

#### 5.5.2.1 The ICTY

UNSC Resolution 827, which established the ICTY states:

“the establishment of an international tribunal and the prosecution of persons responsible for [...] violations of international humanitarian law will contribute to ensuring that such violations are *halted* and effectively *redressed*” (emphasis added).<sup>550</sup>

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<sup>547</sup> Sloane (The Expressive Capacity of International Punishment) (*supra*) 33; see also *Soering v United Kingdom* (European Court of Human Rights) Case No. 1/1989/161/217, 7 July 1989. In the latter case it was ruled that the United Kingdom was prohibited from extraditing Soering to the USA since this would lead to him being subjected to inhumane and degrading treatment while on death row.

<sup>548</sup> See Mettraux G *International Crimes and the Ad Hoc Tribunals* (2005) Oxford University Press, Oxford 345-346; ICTY, *Prosecutor v Mucić et al.* (Appeals Chamber: Judgment) Case No. IT-96-21-A, 20 February 2001, para 806.

<sup>549</sup> See Drumbl (Atrocity, Punishment and International Law) (*supra*) 150.

<sup>550</sup> UNSC Resolution 827 (1993) (Establishment of an International Criminal Tribunal for the Former Yugoslavia and Adoption of the Statute of the Tribunal).

Resolution 827 implies deterrence and retribution respectively as the fundamental objectives of the ICTY.<sup>551</sup> Neither Resolution 827 nor the ICTY Statute however makes any specific mention to retribution and deterrence as punishment objectives.

Furthermore, resolution 827 declares that “the prosecution of persons responsible for serious violations of international humanitarian law [...] would contribute to the restoration and maintenance of peace”. This falls firmly within the UNSC’s mandate to maintain international peace and security through the use of measures not involving the use of force under article 41 of the UN Charter. When viewed as an objective of criminal law, in terms of the traditional objectives of punishment, it may however be contended that such ambitious objectives represent a speculative effort on the part of the UNSC. This was most glaringly illustrated by the Srebrenica massacre which took place well after the establishment of the ICTY which as noted above, had been mandated to restore and maintain peace.

Although Resolution 827 makes no specific mention of reconciliation, the ICTY has often made a positive link between its work and national reconciliation in the former Yugoslavia as well as between such reconciliation and the maintenance of international peace and security.<sup>552</sup> According to the tribunal, guilty pleas in particular have a reconciliatory impact firstly “by helping to establish the truth, without which a society cannot move forwards” and secondly “by providing victims with a substantial degree of closure, as a result of the defendant acknowledging responsibility for his actions”.<sup>553</sup> There seems to be a lack of empirical evidence to prove the supposed positive link between the functions attributed to guilty pleas (including accountability via the acknowledgement of responsibility) and reconciliation.<sup>554</sup> Clark casts some doubt on the ICTY’s acceptance that guilty pleas create a reconciliatory effect through establishing the truth.<sup>555</sup> Clark’s criticism revolves around two key aspects:

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<sup>551</sup> See Schabas (Sentencing by International Tribunals) (*supra*) 498. See also Mettraux (International Crimes and the Ad Hoc Tribunals) (*supra*) 346 (footnote 15).

<sup>552</sup> Clark JN “Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation” (2009) 20 (2) *European Journal of International Law* 415-436, 421.

<sup>553</sup> Clark (Plea Bargaining) (*supra*) 434.

<sup>554</sup> Clark (Plea Bargaining) (*supra*) 421.

<sup>555</sup> Clark (Plea Bargaining) (*supra*) 415-436.

“First, truth is a contested concept, and therefore has no inherent positive value; and, secondly, the ICTY practice of charge bargaining means that the ‘truth’ that is established is often only an incomplete truth.”<sup>556</sup>

A survey of 1045 participants from Bosnia and Herzegovina conducted by the Centre for Human Rights in December 2010 showed that the majority of the participants did not believe that the ICTY contributed to national reconciliation.<sup>557</sup> Also, since the ICTY operates from The Hague, there has been an ever-present concern that the Tribunal is too far removed from the former Yugoslavia to have a reconciliatory impact.

In *Erdemović*, the Trial Chamber referred specifically to the establishment of the tribunal pursuant to UNSC resolution 827 and highlighted the ICTY’s “purposes and functions” as follows:

“The International Tribunal’s objectives as seen by the Security Council—i.e. general prevention (or deterrence), reprobation, retribution (or “just deserts”), as well as collective reconciliation—fit into the Security Council’s broader aim of maintaining peace and security in the former Yugoslavia.”<sup>558</sup>

However, in *Kunarac et al.* the ICTY Trial Chamber deemed it “inappropriate to have recourse to [UNSC resolution 827] for guidance on what the general sentencing factors of the International Tribunal should be”.<sup>559</sup> According to the Trial Chamber the resolution was never intended to serve as a sentencing guide, but should be viewed as an effort on the part of the UNSC to justify the establishment of the tribunal.<sup>560</sup>

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<sup>556</sup> Clark (Plea Bargaining) (*supra*) 424.

<sup>557</sup> “Trials have not helped reconciliation – Survey shows” *Balkan Insight*, available at <http://www.bim.ba/en/264/10/32161/> (accessed 2011/04/24).

<sup>558</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: Sentencing Judgment) Case No. IT-96-22-T, 29 November 1996, para 58. UNSC Resolution 827 makes no specific reference to the objective of reconciliation. The tribunal seems to have opted for a broad interpretation of the words “restoration and maintenance of peace” so as to include reconciliation as one of its objectives.

<sup>559</sup> ICTY, *Prosecutor v Kunarac et al.* (Trial Chamber: Sentencing Judgment) Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, para 824.

<sup>560</sup> ICTY, *Prosecutor v Kunarac et al.* (Trial Chamber: Sentencing Judgment) Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, para 824.

The first sentencing judgment of the Trial Chamber in *Erdemović* constitutes the first extensive consideration of sentencing principles by the ICTY. Retribution and deterrence were considered as the most important purposes of punishment:

“In the light of this review of international and national precedents relating to crimes against humanity (or crimes of the same nature), the Trial Chamber deems most important the concepts of deterrence and retribution. It further notes that in the context of gross violations of human rights which are committed in peace time, but are similar in their gravity to the crimes within the International Tribunal’s jurisdiction, reprobation (or stigmatisation) is one of the appropriate purposes of punishment. One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole. This concept moreover served as a basis for this Chamber’s deliberations in relation to the procedures pursuant to Rule 61 of the Rules, while noting that in none of these cases was there a conviction followed by a sentence.

On the basis of the above, the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity. In addition, thwarting impunity even to a limited extent would contribute to appeasement and give the chance to the people who were sorely afflicted to mourn those among them who had been unjustly killed.

Intimately related to the reprobative function is general prevention, which played a salient role in the judgements of the post-World War Two international military tribunals, as pointed out above. The Trial Chamber also adopts retribution, or “just deserts”, as legitimate grounds for pronouncing a sentence for crimes against humanity, the punishment having to be proportional to the gravity of the crime and the moral guilt of the convicted.”<sup>561</sup> (footnotes omitted)

The tribunal was sceptical about the applicability of rehabilitation as a purpose of punishment, clearly treating it as subsidiary to retribution, deterrence and stigmatisation.<sup>562</sup>

Taking into considering the “particularities” of the crimes within the ICTY’s jurisdiction, the

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<sup>561</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: Sentencing Judgment) Case No. IT-96-22-T, 29 November 1996, paras 64-65. See also *Prosecutor v Todorović* (Trial Chamber: Sentencing Judgment) Case No. IT-95-9/1-S, 31 July 2001 paras 28-29 (the Trial Chamber concluded that retribution and deterrence provided “the main principles in sentencing for international crimes”).

<sup>562</sup> Henham (Punishment and Process) (*supra*) 21.

court regarded the rehabilitative function of punishment as subordinate to retribution and deterrence.<sup>563</sup> Similar scepticism towards rehabilitation was expressed in *Kunarac et al.* and by the Appeals Chamber in *Mucić et al.*<sup>564</sup> In the second sentencing judgment of *Erdemović*, the potential rehabilitation of the offender was taken into account as a mitigating factor. According to the Trial Chamber the offender's "circumstances and character indicate that he is reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so".<sup>565</sup>

In *Babić*, the ICTY Trial Chamber took the view that the objective of special deterrence was not relevant as a sentencing principle.<sup>566</sup> The Trial Chamber also cautioned that punishment of an individual for the benefit of general deterrence would be unfair.<sup>567</sup> Referring *in casu* also to the sentencing appeal judgment in *Tadić*, the Trial Chamber in *Babić* therefore did not place "undue prominence" to the objective of deterrence.<sup>568</sup>

In the second sentencing judgment of Dražen Erdemović, the ICTY highlighted truth and reconciliation as purposes of the tribunal, and elaborated on the relationship between truth and reconciliation:

"The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions,

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<sup>563</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: Sentencing Judgment) Case No. IT-96-22-T, 29 November 1996, para 66.

<sup>564</sup> ICTY, *Prosecutor v Kunarac et al.* (Trial Chamber: Sentencing Judgment) Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, para 844; ICTY, *Prosecutor v Mucić et al.* (Appeals Chamber: Judgment) Case No. IT-96-21-A, 20 February 2001, para 806.

<sup>565</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: [Second] Sentencing Judgment) Case No. IT-96-22-T *bis*, 5 March 1998, para 16.

<sup>566</sup> ICTY, *Prosecutor v Babić* (Trial Chamber: Sentencing Judgment) Case No. IT-03-72-S, 29 June 2004, para 45.

<sup>567</sup> ICTY, *Prosecutor v Babić* (Trial Chamber: Sentencing Judgment) Case No. IT-03-72-S, 29 June 2004, para 45.

<sup>568</sup> ICTY, *Prosecutor v Babić* (Trial Chamber: Sentencing Judgment) Case No. IT-03-72-S, 29 June 2004, para 45; see also ICTY, *Prosecutor v Tadić* (Appeals Chamber: Sentencing Judgment) Case No. IT-94-1-A and IT-94-1-A *bis*, 26 January 2000, para 48; also reiterated in ICTY, *Prosecutor v (Dragan) Nikolić* (Appeals Chamber: Sentencing Appeal) Case No. IT-94-2-A, 4 February 2005, para 46.

to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.<sup>569</sup>

The correlation between truth and reconciliation, particularly the role of guilty pleas pursuant to plea bargains in this relationship, has been disputed.<sup>570</sup>

The Appeals Chamber of the ICTY in *Aleksovski* elaborated on the retributive purpose of punishment and its relation to the international community:

“[Retribution] is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these times [...] Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.”<sup>571</sup>

This dictum endorses the objective of expressive retribution and the view that retributive impulses are at least partially based upon the collective will of the *civitas maxima*. In this view, punishment is an expression of the international community’s abhorrence of the conduct in question because it offends and indirectly harms the interests of everyone in the international community. As was acknowledged in *Kupreškić*, the reinforcement of international criminal norms is a subsidiary objective closely related to the expressive intent of retributive punishment:

“[...] another relevant sentencing purpose is to show the people of not only former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust and respect

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<sup>569</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: [Second] Sentencing Judgment) Case No. IT-96-22-T bis, 5 March 1998, para 21.

<sup>570</sup> See Clark (Plea Bargaining) (*supra*) 424.

<sup>571</sup> ICTY, *Prosecutor v Aleksovski* (Appeals Chamber: Judgment) Case No. IT-95-14/1-A, 24 March 2000, para 185.

for the developing system of international criminal justice. *The Trial Chamber also supports the purpose of rehabilitation for persons convicted [...]*.<sup>572</sup>

In the dictum above, the subsidiary and almost cursory acknowledgement given to rehabilitation as a justification for punishment (see emphasis above) is particularly illustrative of the overall approach of the ICTY towards punishment objective in general and in particular towards objectives other than retribution and deterrence. On the whole retribution and deterrence have been most frequently invoked as penal justifications by the *ad hoc* tribunals. Also in *Kupreškić*, the ICTY reiterated that “in general, retribution and deterrence are the main purposes to be considered when imposing sentences before the International Tribunal”.<sup>573</sup> The same view was expressed in *Todorović* and *Krnojelac*.<sup>574</sup>

### 5.5.2.2 The ICTR

Shortly after the creation of the ICTY, the UNSC created the ICTR through Resolution 955.<sup>575</sup> Based largely on the same rationale as for the establishment of the ICTY, the ICTR was established with the belief or hope that the creation of an international criminal tribunal will ensure that violations are “halted and effectively redressed”.<sup>576</sup> Similarly it aimed to contribute to “the restoration and maintenance of peace”.<sup>577</sup> Resolution 955 is differentiated from Resolution 827 by the specific reference to reconciliation, stating that “the prosecution of persons responsible for serious violations of international humanitarian law [...] would contribute to the process of national reconciliation”.<sup>578</sup>

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<sup>572</sup> ICTY, *Prosecutor v Kupreškić et al.* (Trial Chamber: Judgment) Case No. IT-95-16-T, 14 January 2000, para 848.

<sup>573</sup> ICTY, *Prosecutor v Kupreškić et al.* (Trial Chamber: Judgment) Case No. IT-95-16-T, 14 January 2000, para 848.

<sup>574</sup> ICTY, *Prosecutor v Todorović* (Trial Chamber: Sentencing Judgment) Case No. IT-95-99/1-S, 31 July 2001, paras 28-29; ICTY, *Prosecutor v Krnojelac* (Trial Chamber II: Judgment) Case No. IT-97-25-T, 15 March 2002, para 508.

<sup>575</sup> UNSC Resolution 955 (1994) (Establishment of an International Criminal Tribunal for Rwanda and Adoption of the Statute of the Tribunal).

<sup>576</sup> UNSC Res 955 (*supra*).

<sup>577</sup> UNSC Res 955 (*supra*).

<sup>578</sup> UNSC Res 955 (*supra*).



In accordance with articles 12(2) and 15(3) of the ICTR Statute, the ICTR shares both its Appeals Chamber and prosecutor with the ICTY. Furthermore, the ICTR and the ICTY are based on similar or unified legal approaches.<sup>579</sup> Consequently, the approach of the ICTR to sentencing objectives is very similar to that of the ICTY discussed above.

In *Kambanda*, which was the ICTR's first sentencing judgment, the tribunal followed the ICTY's lead and endorsed retribution and deterrence as the main purposes behind punishment stating that:

“[it] is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.”<sup>580</sup>

These words are repeated verbatim in *Rutaganda*.<sup>581</sup>

In *Ruggia*, the ICTR Trial Chamber reiterates the objectives in Resolution 955 and the role of the tribunal within the duties of the UNSC under Chapter VII of the UN Charter.<sup>582</sup> Thereafter, the tribunal notes in an extraordinarily concise and open-ended fashion, that “[the] jurisprudence of the ICTR with regard to penalties has addressed the principal aims of sentencing, namely retribution, deterrence, rehabilitation and justice”.<sup>583</sup> On occasion the

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<sup>579</sup> Akhavan (The International Criminal Tribunal for Rwanda) (*supra*) 503.

<sup>580</sup> ICTR, *Prosecutor v Kambanda* (Trial Chamber I: Judgment and Sentence) Case No. ICTR-97-23-S, 4 September 1998, para 28.

<sup>581</sup> ICTR, *Prosecutor v Rutaganda* (Trial Chamber I: Sentencing and Judgment) Case No. ICTR-96-3-T, 6 December 1999, para 456.

<sup>582</sup> ICTR, *Prosecutor v Ruggia* (Trial Chamber I: Judgment and Sentence) Case No. ICTR-97-32-I, 1 June 2000, para 32.

<sup>583</sup> ICTR, *Prosecutor v Ruggia* (Trial Chamber I: Judgment and Sentence) Case No. ICTR-97-32-I, 1 June 2000, para 33.

ICTR has especially highlighted the objective of general deterrence “to dissuade for ever others who may be tempted to commit atrocities”.<sup>584</sup>

From the outset there have been tensions between the ICTR and the Rwandan domestic legal system. The Rwandan government was initially an active supporter of the establishment of an international criminal tribunal.<sup>585</sup> Later however, Rwanda (at the time a non-permanent member of the UNSC) voted against Resolution 955 and expressed dissatisfaction over the ICTR Statute on various grounds.<sup>586</sup> Some of the reasons for the Rwandan government’s dissenting vote seemed to indicate scepticism over the possible reconciliatory effects of certain provisions in the ICTR Statute:

“[...] the International Tribunal as designed in the resolution, establishes a disparity in sentences since it rules out capital punishment, which is nevertheless provided for in the Rwandese penal code. Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence. That situation is *not conducive to national reconciliation in Rwanda* [...] above all we requested the establishment of this Tribunal to teach the Rwandese people a lesson, to fight against the impunity to which it had become accustomed since 1959 and to promote national reconciliation. It therefore seems clear that the seat of the International Tribunal should be set in Rwanda; it will have to deal with Rwandese suspects, responsible for crimes committed in Rwanda against the Rwandese. Only in this way can the desired effects be achieved.”<sup>587</sup>

As Akhavan pointed out, many of the concerns of the Rwandan government proved to have been unwarranted.<sup>588</sup> Yet, the fact that tensions arose between the ICTR and Rwanda raises doubts over the transformative value of invoking ICL in a post-conflict society. This tension

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<sup>584</sup> ICTR, *Prosecutor v Musema* (Trial Chamber I: Judgment and Sentence) Case No. ICTR-96-13-A, 27 January 2000, para 986; see also ICTR, *Prosecutor v Elizaphan and Ntakirutimana* (Trial Chamber I: Judgment and Sentence) Cases No. ICTR-96-10 and ICTR-96-17-T, 21 February 2003, para 882.

<sup>585</sup> UN Doc S/PV 3453 (1994) 14-16; Akhavan (International Criminal Tribunal for Rwanda) (*supra*) 504-505.

<sup>586</sup> Akhavan (International Criminal Tribunal for Rwanda) (*supra*) 505-508.

<sup>587</sup> UN Doc S/PV 3453 (1994) 16.

<sup>588</sup> Akhavan (International Criminal Tribunal for Rwanda) (*supra*) 508.

is a result of disparity which may exist between the values of the international community and those of a state and highlights the need for a robust approach to post-conflict justice.<sup>589</sup>

### 5.5.3 The ICC

It seems as if the lack of clarity concerning penal justification in the *ad hoc* tribunals, and indeed throughout the emergence of ICL, has persisted into the new era of ICL. As the most prominent positive law document of ICL, one may be disappointed when turning to the Rome Statute for guidance on ICL's objectives. The preamble of the Rome Statute reiterates the ICC's purpose of establishing peace by "recognizing that [...] grave crimes threaten the peace, security and well-being of the world".<sup>590</sup> The preamble mentions two specific objectives of international criminal justice, "to put an end to impunity for the perpetrators" and "to contribute to the prevention of serious international crimes".<sup>591</sup> Furthermore, according to Stigen, the Rome Statute "appears to build on the assumption that a society which has experienced massive human rights violations cannot reconcile unless the guilty are held accountable".<sup>592</sup>

ICL is a branch of law which represents the international community's desire for legally entrenched peace.<sup>593</sup> This is confirmed by the references to "peace, security and well-being of the world" in the preamble of the Rome Statute. This logically leads one to suppose that a primary objective of ICL is preventative in nature. It pushes deterrence to the forefront as a primary goal of ICL in theory. Unlike retribution, deterrence is not a retrospective or posterior justification for criminal sanctions, but a forward-looking objective of punishment. It can be seen as a positive act aimed at realising a greater social benefit. In a statement made following his election as the ICC's first chief prosecutor, Luis Moreno-Ocampo, said that he would regard an absence of trials at the ICC as a consequence of effective institutional

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<sup>589</sup> See also Chapter 8 para 8.3.4.4 *infra*.

<sup>590</sup> Rome Statute of the ICC, Preamble (3).

<sup>591</sup> Rome Statute of the ICC, Preamble (5).

<sup>592</sup> Stigen (International Criminal Court and National Jurisdictions) (*supra*) 12.

<sup>593</sup> Werle (Principles of International Criminal Law) (*supra*) 31-31; see also Stigen (International Criminal Court and National Jurisdictions) (*supra*) 12-13.

protection at the national level as a major success.<sup>594</sup> Thus, deterrence also seems to be a prominent objective on agenda of the Office of the Prosecutor (hereafter “OTP”). Another objective of the ICC, greater cooperation and effectiveness at the national level, would be the first step towards the deterrent vision of international criminal justice.

Beyond these almost *tacit* objectives the Rome Statute is “virtually silent” on what considerations should be borne in mind when punishing offenders of international criminal law.<sup>595</sup> Article 76 of the Rome Statute enjoins the court to only impose an “appropriate sentence”. Surely, the justifications of punishment of the core crimes were not very high up on the agenda of many of the state parties involved in the negotiation and drafting of the Rome Statute. Rather than focusing the debate on appropriate and well-articulated punishment policy and purposes, the delegates were pre-occupied with other urgencies and high profile matters which featured more prominently in the negotiation and drafting of the Rome Statute, such as the heated debates over the Court’s jurisdiction and whether the death penalty should be included in the Statute or not.<sup>596</sup>

In the ICC’s first sentencing judgment, the Trial Chamber confined itself to the sentencing purposes set out in the preamble of the Rome Statute, namely that perpetrators of crimes under the Rome Statute must not go unpunished and that impunity of such crimes must be ended and their recurrence prevented.<sup>597</sup> Although the ICC has only recently handed down its first sentencing judgment, the OTP has claimed that the mere *investigation* into prohibited conduct can in itself act as a warning to potential offender of similar crimes.<sup>598</sup>

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<sup>594</sup> See Election of the Prosecutor, Statement by Mr. Luis Moreno-Ocampo, New York, 22 April 2003, ICC-OTP-20030502-10: “The efficiency of the International Criminal Court should not be measured by the number of cases that reach the court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this court, as a consequence of the regular functioning of national institutions, would be a major success”.

<sup>595</sup> Henham (Punishment and Process) (*supra*) 16.

<sup>596</sup> Henham (Punishment and Process) (*supra*) 16-17.

<sup>597</sup> See Rome Statute of the ICC, preambles (4), (5) and (9); ICC, *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Decision on Sentence Pursuant to Article 76 of the Statute) Case No. ICC-01/04-01/06, 10 July 2012, para 16.

<sup>598</sup> See the ICC website, FAQ’s (Office of the Prosecutor), available at <http://www.icc-cpi.int/Menus/ICC/Structures+of+the+Court/Office+of+the+Prosecutor/FAQ/> (date accessed 2009/07/27).

According to this claim the threat of criminal prosecution acts in a preventative and deterrent manner. The prosecution of Thomas Lubanga for the use of child soldiers in an armed conflict has, according to the ICC website, resulted in armed forces around the world adjusting their operational standards to the Rome Statute.<sup>599</sup> Similarly the UN, which has shown great support for the work of the Court, has claimed that the ICC has successfully fought impunity and forced governments to alter their behaviour.<sup>600</sup>

## 5.6 The *sui generis* objectives of ICL

In this section I refer to those (mostly) utilitarian objectives that are unique to ICL and may be regarded as *sui generis* objectives. By *sui generis*, I do not necessarily mean that these objectives are absolutely beyond the ambit of domestic criminal law. In fact, it is anticipated that domestic courts will be able to advance similar objectives in the complementarity-centred future of international criminal justice. These objectives are unique in the sense that, although they may be invoked by criminal courts applying ordinary criminal law, their significance is enhanced by the nature of ICL and context in which it is frequently applied. Many of these objectives have been recognised as subsidiary goals of punishment in international criminal tribunals.<sup>601</sup> Other *sui generis* objectives have received recognition through the work of ICL scholars.

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<sup>599</sup> See the ICC website, FAQ's (Office of the Prosecutor), available at <http://www.icc-cpi.int/Menus/ICC/Structures+of+the+Court/Office+of+the+Prosecutor/FAQ/> (date accessed 2009/07/27). Lubanga was subsequently found guilty in the first ever verdict delivered by the Court, see ICC, *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Judgment) Case No. ICC-01/04-01/06, 14 March 2012. In the subsequent sentencing judgment, Lubanga was sentenced to 14 years imprisonment, see ICC, *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Decision on Sentence Pursuant to Article 76 of the Statute) Case No. ICC-01/04-01/06, 10 July 2012.

<sup>600</sup> "International Criminal Court 'altered behaviour' – UN" *BBC News Africa* (2010/05/31). Arguably, the United Nations' support of ICL is grounded in the fact that world peace and international security represent the over-arching goals of both ICL and the United Nations. See Werle (Principles of International Criminal Law) (*supra*) 31.

<sup>601</sup> See Mettraux (International Crimes and the Ad Hoc Tribunals) (*supra*) 345-346.

### 5.6.1 The Expressive Function

A subsidiary goal that emerges from the jurisprudence of ICL is located within expressivist theory.<sup>602</sup> It has been noted that “[the] expressive function of law is of particular importance to criminal justice”.<sup>603</sup> The ideal of punishment as an expression of social values or, as an action carrying meaning, was recognised as early as the Nuremberg IMT.<sup>604</sup> At Nuremberg the defendants became symbols of a great and universal evil and their criminal liability and punishment under law the expression of the international community’s desire for accountability under the rule of law.<sup>605</sup>

Expressivism strikes a balance between the moral considerations of retributivism and the social benefit of deterrent theories.<sup>606</sup> Yet, expressive function of punishment transcends the traditional justifications for punishment. It aims to strengthen the public’s faith in the rule of law and is closely associated with the goals of creating an accurate historical record, establishing the truth, denunciation and public education.

The expressive theory emphasises the social meaning of punishment.<sup>607</sup> That is not the meaning intended by courts and lawmakers, but the actual meaning of punishment as it reaches the mind of the public or society.<sup>608</sup> In this way punishment under law is society’s way of expressing its condemnation over certain acts or sets of behaviour, and to bolster the public confidence in the rule of law. The criminal sanction reflects and projects the values of society by indicating “what it esteems” and “what it abhors”.<sup>609</sup> From this perspective, punishment “signals society’s commitment to the values that the wrongdoer’s act denies” and

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<sup>602</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 11-12.

<sup>603</sup> Amann (Group Mentality) (*supra*) 120.

<sup>604</sup> See Amann (Group Mentality) (*supra*) 118, 121. On the expressive function of law in general, see Sunstein (The Expressive Function of Law) (*supra*) 2021-2025.

<sup>605</sup> See Chapter 4 para 4.2.3.3 *supra*.

<sup>606</sup> Amann (Group Mentality) (*supra*) 119-120.

<sup>607</sup> Amann (Group Mentality) (*supra*) 118-119; Kahan (The Secret Ambition of Deterrence) (*supra*) 419-420.

<sup>608</sup> Amann (Group Mentality) (*supra*); Kahan (The Secret Ambition of Deterrence) (*supra*).

<sup>609</sup> Amann (Group Mentality) (*supra*) 118.

actively reinforces the norm that has been contravened.<sup>610</sup> One may also refer to this function of criminal law as ‘norm projection’ or ‘norm stabilisation’.

Expressivism is not strictly speaking an independent justification for punishment.<sup>611</sup> Rather, it is a “function and essential characteristic of punishment as a social institution”.<sup>612</sup> Expressivist theories, though having hereto received little attention, may be very significant to the field of ICL.<sup>613</sup> Drumbl, for one, contends:

“There is good reason to believe that punishment inflicted by an international tribunal operating prominently on the global agenda at the cusp of history has enhanced expressive value in asserting the importance of law, the stigmatization of the offender who transgresses that law, and the authenticity of the historical narrative that ensues.”<sup>614</sup>

Drumbl also acknowledges a positive link between the expressive function of international trials, norm stabilisation (or reinforcing moral consensus) and public education (or the didactic function).<sup>615</sup>

In his work on the expressive capacity of international sentencing, Sloane argues for the recognition of the expressive function of international criminal tribunals. In his view, one of the reasons that expressivism is valuable as a consideration in the justification of punishment under ICL is because it “focuses ... on the long term normative values served by any system of criminal law”.<sup>616</sup> Sloane believes that, because of political and resource constraints, the most realistic contribution of punishment under ICL lies in the legitimate, persuasive and authoritative institutional expression of justice.<sup>617</sup> Similarly, Luban takes the view that “the most promising justification for international tribunals is their role in *norm*

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<sup>610</sup> Kahan (The Secret Ambition of Deterrence) (*supra*) 420.

<sup>611</sup> Sloane (The Expressive Capacity of International Punishment) (*supra*) 38.

<sup>612</sup> Sloane (The Expressive Capacity of International Punishment) (*supra*) 38.

<sup>613</sup> See in general, Sloane (The Expressive Capacity of International Punishment) (*supra*); Amann (Group Mentality) (*supra*) 121.

<sup>614</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 175.

<sup>615</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 12.

<sup>616</sup> Sloane (The Expressive Capacity of International Punishment) (*supra*) 39.

<sup>617</sup> Sloane (The Expressive Capacity of International Punishment) (*supra*) 38-39; see also Chapter 5 para 5.6.1 *supra*.

*projection* under which trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means”.<sup>618</sup>

While expressivism and retribution are distinct penological justifications, they are interlinked to some extent. This has been acknowledged by international criminal tribunals and by writers on the subject.<sup>619</sup> As Drumbl explains:

“[...] a public that sees a wrongdoer punished in a manner that accords with perceptions of that individual’s just deserts can augment the value of the legal system in the eyes of that same public”.<sup>620</sup>

This notion of expressive retribution has been invoked by the ICTY in *Aleksovski* and also indirectly in *Kordić and Čerkez*.<sup>621</sup> Expressive retribution may also be referred to as stigmatisation.<sup>622</sup> In *Erdemović* the ICTY Trial Chamber stated that “[one] of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole”.<sup>623</sup> Thus expressive retribution as invoked by the *ad hoc* tribunals may be viewed as punishment specifically on behalf of the international community.

Much of expressive theory also relates to the norm-generating function (and messaging value) of the trial and conviction of perpetrators.<sup>624</sup> In expressive theory, punishment holds independent social value by communicating values of the international community to immediately affected societies. Punishment may reinforce, but also generate,

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<sup>618</sup> Luban (Fairness to Rightness) (*supra*) 9.

<sup>619</sup> See para 5.5 *supra*; Luban (Fairness to Rightness) (*supra*) 10.

<sup>620</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 149.

<sup>621</sup> ICTY, *Prosecutor v Aleksovski* (Appeals Chamber: Judgment) Case No. IT-95-14/1-A, 24 March 2000, para 185; ICTY *Prosecutor v Kordić and Čerkez* (Appeals Chamber: Judgment) Case No. IT-95-14/2-A, 17 December 2004, paras 1080-1081.

<sup>622</sup> See for example the use of the term “stigmatization” in ICTY, *Prosecutor v Erdemović* (Trial Chamber: Sentencing Judgment) Case No. IT-96-22-T, 29 November 1996, paras 64-65.

<sup>623</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: Sentencing Judgment) Case No. IT-96-22-T, 29 November 1996, paras 64-65.

<sup>624</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 174.



social norms.<sup>625</sup> Furthermore, punishment may send a signal to society that the trial and conviction, the formal legal process, is a reality.<sup>626</sup>

A compelling question in this regard is whether this messaging value, the ability to create authoritative narratives, is diminished if the court is unable to convict and render a judgment. An unusually high number of defendants at international criminal tribunals die before their cases can be completed. This was the case in, for example, the Milošević trial. Milošević's death four years into the trial resulted in the denial of "the single greatest test of the tribunal's and ICL's ability to forge an efficacious and transformative narrative".<sup>627</sup> A terminated trial does not necessarily equate to an exercise in futility. According to Waters:

"[...] a final judgment is not the only part of a trial that has any value; other effects manifest themselves throughout the trial process. Certainly, the residuum of a terminated trial has uses - the accumulated transcripts, exhibits, briefs, orders, and interim decisions constitute an archive with a meticulously documented provenance that any historian would value. It seems undeniable that other acts and images in a trial - confession in open court, a shocking film - can come to have an iconic or emotive value greater, in their way, than formal authority."<sup>628</sup>(footnotes omitted)

This view corresponds with the findings on the value of the Nuremberg IMT and the Eichmann trial under Chapter 4, in which it was noted that as a result of their historical significance, some trials may have an enhanced expressive and symbolic value.<sup>629</sup>

Without denigrating the aforementioned value, it must however be acknowledged that conviction and punishment remains central to the social function of criminal law in general. The notion of expressive condemnation through punishment in international criminal justice faces a fundamental predicament relating to the predominant method of punishment imposed by international criminal courts. How do you express condemnation for heinous and universal crimes through 'ordinary' modes of punishment such as incarceration? Perhaps this question

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<sup>625</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 174.

<sup>626</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 174.

<sup>627</sup> Waters TW "A Kind of Judgment: Searching for Judicial Narratives After Death" (2010) 42 *George Washington International Law Review* 279-348, 283.

<sup>628</sup> Waters (A Kind of Judgment) (*supra*) 297.

<sup>629</sup> See especially Chapter 4 paras 4.2.3.3 and 4.4 *supra*.

poses a more fundamental dilemma to the retributive justification for punishment. However, it remains relevant to expressivism through the shared connection between the aforementioned punishment objectives. On the one hand, ordinary punishment for extraordinary crime seems to defy logic. On the other, taking cognisance of the broader expressive function of punishment defends the historical and theoretical rationale for criminal law as a response to mass atrocity.<sup>630</sup>

### 5.6.2 The Didactic Criminal Trial: Creating an Historical Record<sup>631</sup> and the Shaping of Collective Memory

Criminal trials are concerned with individual conduct. Proceedings are conducted in such a manner as to place the court in a position to determine the guilt or innocence of each individual according to their acts or their unlawful failure to act in certain instances. As Hanna Arendt critically observed in her work on the trial of Adolf Eichmann:

“The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes - "the making of a record of the Hitler regime which would withstand the test of history," as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials - can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.”<sup>632</sup>

Former Chief Prosecutor Carla del Ponte issued a similar warning in her opening statement to the court in the trial of Slobodan Milošević by emphasising that “the accused is brought

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<sup>630</sup> See in this regard Chapter 8 (in general) *infra*.

<sup>631</sup> The objective of creating a historical record is closely related to the objective of truth-finding. See para 5.6.5.1 *infra*.

<sup>632</sup> Arendt (Eichmann in Jerusalem) (*supra*) 253. See also Kant (Metaphysics of Morals) (*supra*) 6:331: “[Punishment] can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the grounds that he has committed a crime; for a human being may never be manipulated merely as a means to the purposes of someone else [...] He must first be found to be deserving of punishment before any consideration is given to the utility of his punishment for himself or for his fellow citizen”.

before you to answer for his own actions and for his personal involvement in the crimes alleged against him”.<sup>633</sup>

Lawrence Douglas, in his work on international criminal trials as didactic tools, believes Arendt’s criticism to be significant, yet overstated:

“No one would deny that the *core* responsibility of a criminal trial is to resolve the question of guilt in a procedurally fair manner. To insist, however, as Arendt does, that the *sole* purpose of a trial is to render justice, and nothing else, defends a crabbed and unnecessarily restrictive vision of the trial form. The question is not whether the trial can serve the interests of history and memory, but how it can do so responsibly.”<sup>634</sup>

Douglas argues that due to the unique context in which these trials arise, the didactic function of criminal trials for perpetrators of mass atrocity does not play a subsidiary role to the allotment of criminal responsibility, but instead “lies at the very heart of the proceedings”.<sup>635</sup> Douglas cites, for example, the Nuremberg IMT and the trials of Eichmann and Milošević as “perpetrator trials” that have openly pursued didactic purposes. He describes the didactic effects of these trials as follows:

“Staged as exercises in collective pedagogy, these trials claimed to provide detailed and accurate representations of the larger sweep of historical forces that issued in acts of mass atrocity. In addition, these trials aimed to teach history lessons – they were orchestrated to locate in the historical record clear morals that could serve to shape the terms of collective memory. Finally, these trials aimed more concretely to honor the memory of victims and survivors, by providing a solemn public space in which anguished remembrance could take the form of legally probative testimony.”<sup>636</sup>

History and memory are brought into the trial firstly, and most importantly, through the historical and political context in which the trial occurs.<sup>637</sup> Secondly, through “filters”

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<sup>633</sup> ICTY, *Prosecutor v (Slobodan) Milošević* (Trial Transcript) Case No. IT-02-54, 12 February 2002 at 3-4.

<sup>634</sup> Douglas L “The Didactic Trial: Filtering History and Memory into the Courtroom” (2006) 14 (4) *European Review* 514. See also Douglas L *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2005) Yale University Press, New Haven.

<sup>635</sup> Douglas (The Didactic Trial) (*supra*) 514.

<sup>636</sup> Douglas (The Didactic Trial) (*supra*) 514.

<sup>637</sup> Douglas (The Didactic Trial) (*supra*) 515-516.

embedded in the criminal trial, such as the rules of evidence, that produce a historical account of the crimes and the larger context in which they were committed. These “filters” include verbal accounts from victims and witnesses, the unique substantive crimes with which the accused are charged and the application of unique principles of criminal accountability.<sup>638</sup> These formal and structural features in criminal trial proceedings “filter the movement of history and memory into the courtroom, albeit [...] subtly”.<sup>639</sup>

Douglas also points out the fact that the trial itself has no control over the historical impact and imprint it will leave on collective memory as this is unpredictable and dependent on various factors outside of the court’s control.<sup>640</sup> Despite Del Ponte’s avoidance of invoking symbolism at the ICTY, the media have considered some trials to have produced a symbolic impact.<sup>641</sup> The conviction of Krstić for example was regarded as having a symbolic impact because it was the first conviction of the crime of genocide in Europe since the Nuremberg IMT and because the Srebrenica massacre stood as “an emblem of ethnic cleansing in the Former Yugoslavia”.<sup>642</sup>

As a further example, the Eichmann trial is said to have created a lasting legacy through its impact on the Israeli collective consciousness.<sup>643</sup> Also, in 1985, the Argentine government under President Alfonsín became the second government after that of post-Second World War Germany to prosecute its own former military leaders for atrocities.<sup>644</sup> The prosecutions in the aftermath of Argentina’s Dirty War, the so-called “trial of the juntas”, were calculated specifically to infuse the collective conscience of the concerned parties with

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<sup>638</sup> Douglas (The Didactic Trial) (*supra*) 516–518.

<sup>639</sup> Douglas (The Didactic Trial) (*supra*) 516.

<sup>640</sup> Douglas (The Didactic Trial) (*supra*) 520-521.

<sup>641</sup> Amann (Group Mentality) (*supra*) 123 (footnote 136).

<sup>642</sup> Amann (Group Mentality) (*supra*) 123 (footnote 136); ICTY, *Prosecutor v Krstić* (Trial Chamber: Judgment) Case No. IT-98-33, 2 August 2001.

<sup>643</sup> See Chapter 4 paras 4.3.2 and 4.3.4 *supra*.

<sup>644</sup> “Twenty Years On, Amnesty End” *International Justice Tribune* (25 June 2005), available at <http://www.rnw.nl/international-justice/article/twenty-years-amnesty-end> (accessed 2011/10/28).

the notion that no one is above the rule of law.<sup>645</sup> Furthermore, the trials were designed to advance the principles of liberal morality amongst the public.<sup>646</sup>

In his book *Mass Atrocity, Collective Memory, and the Law*, Osiel acknowledges that collective memory is a woolly concept.<sup>647</sup> According to him the concept refers to:

“[...] the stories a society tells about momentous events in its history, the events that most profoundly affects the lives of its members and most arouse their passions for long periods. This category of events prominently includes wars, revolutions, economic depressions, large-scale strikes and riots, and genocides – as well as legal proceedings often arising from such upheavals. These events are also distinguished by the tendency for recollection of them to ‘hover over’ subsequent events, providing compelling analogies with later controversies of the most diverse variety. When a society’s members interpret such an event in common fashion, they derive common lessons from it for the future.”<sup>648</sup> (footnotes omitted)

The significance of collective memory lies in its susceptibility to exploitation as a political weapon.<sup>649</sup> This is especially dangerous in a deeply divided society where failure to address past injustices may breed the kind of collective memory that facilitates a common interpretation (as in the quoted text above) of past events serving to deepen social antagonism and possibly to renew the cycle of violence. It is preferable for collective memory to be shaped without such undesirable effects. In this regard, criminal trials may play a valuable role by serving as a vehicle to transform the consciousness of society.<sup>650</sup> A public trial may help to transform the memory of the past into a new social ethos based not on backward-looking notions of vengeance and antagonism, but on forward-looking notions of justice and

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<sup>645</sup> Osiel (*Mass Atrocity, Collective Memory*) (*supra*) 29. Under pressure from the military to avoid further trials, President Alfonsín passed two amnesty laws known as "due obedience" and "full stop" between 1986 and 1987. The military leaders who could not qualify for Alfonsín's amnesty were pardoned by subsequent president Carlos Menem shortly after taking office. More recently, both Alfonsín's amnesty laws and Menem's immunities were declared unconstitutional by the Argentine Supreme Court. See *Simón, Julio Hector y otros* (Supreme Court) Case No. 17/768, 14 June 2005.

<sup>646</sup> Osiel (*Mass Atrocity, Collective Memory*) (*supra*) 29.

<sup>647</sup> Osiel (*Mass Atrocity, Collective Memory*) (*supra*) 18 (footnote 28).

<sup>648</sup> Osiel (*Mass Atrocity, Collective Memory*) (*supra*) 18-19.

<sup>649</sup> See Chapter 4 para 4.3.4 *supra*.

<sup>650</sup> See Chapter 4 para 4.3.4 *supra*; Bilsky (*Transformative Justice*) (*supra*) 3.

reconciliation.<sup>651</sup> In this way a criminal trial may be a mechanism that takes society ‘back to the future’. A criminal trial becomes simultaneously a judgment on the past and a means of projecting binding social norms into the future.<sup>652</sup> The transformative potential, the potential for social utility, lies in the substance of the judgment but also in the manner in which it is interpreted by society at large. The argument is that criminal law embodies a certain shared morality which through criminal trials creates social solidarity.<sup>653</sup>

For what reasons should criminal trials be considered as the preferred social ritual in response to mass atrocity or administrative massacres? Durkheim’s criminology, according to Osiel, postulates that “[criminal] judgement serves its social purpose by vigorously expressing the uniform sentiment of righteous indignation aroused among all conscientious citizens by the defendant’s acts”.<sup>654</sup> Osiel concludes however that Durkheim’s criminology “offers only the most uncertain help in understanding criminal law’s potential contribution to social solidarity in times of deep political division and social trauma”.<sup>655</sup> Osiel advances three reasons to substantiate this conclusion. Firstly, he notes that Durkheim’s theory sees criminal trials only as an authoritative mechanism to interpret collective social sentiments without giving reasons for punishment as required by the legal systems of liberal societies.<sup>656</sup> Secondly, Durkheim’s account does not give recognition to the fact that dissenting opinion and disagreements may occur and have an enduring impact within society after mass atrocity.<sup>657</sup> Lastly, Durkheim focused solely on the public’s desire for retribution and not on the preservation of public order, thereby underestimating the complexity of mass atrocity.<sup>658</sup>

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<sup>651</sup> See Chapter 4 para 4.3.4 *supra*; Bilsky (Transformative Justice) (*supra*) 14-15.

<sup>652</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 148; see also Chapter 3 para 3.4.3 *supra*.

<sup>653</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 31.

<sup>654</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 33.

<sup>655</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 35.

<sup>656</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 31-32.

<sup>657</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 33.

<sup>658</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 34.

It must be noted therefore that the didactic value of international criminal trials is “not preordained”.<sup>659</sup> Prosecution of international crime may not always create the same impact as for instance, that which many claim was made by the Nuremberg IMT and the trial of Adolf Eichmann. Ultimately, a criminal trial must speak first and foremost to the immediately affected parties of the conflict or mass atrocity, in the victims, offenders and local populace. The challenge to international criminal tribunals of the future, especially the ICC and domestic courts applying ICL, will be to make proceedings intelligible to the parties most immediately affected. The liberal-legalist modality of international trials, although ostensibly fair, runs the risk of alienating its domestic audience and presents another argument for a more pluralistic and horizontal approach to mass atrocity.<sup>660</sup>

### 5.6.3 Purposes of the Complementarity Principle

Unlike domestic courts, the ICC cannot rely on independent agencies or something akin to a national police force to enforce its laws or its judgments. The ICC relies on cooperation from and with the existing enforcement agencies of member states. The Court derives authority from the Rome Statute, signed and ratified by its member states, and established in order to prosecute “the most serious crimes of concern to the international community as a whole”.<sup>661</sup> The Rome Statute does not only project the shared norms of its member states, but also has the ability both to shape state conduct and to coordinate state conduct in a mutually beneficial manner.<sup>662</sup> One of the ICC’s most potent tools in this regard is the regime of complementarity provided for under article 17 of the Rome Statute.

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<sup>659</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 175-176 (citing that the pedagogical effect of the Tokyo IMTFE cannot be compared to that of the Nuremberg IMT).

<sup>660</sup> This risk of alienating the domestic audience is one of the enduring criticisms against the ICTY and ICTR which are situated respectively in The Hague and in Arusha. See also Drumbl (Atrocity, Punishment and International Law) (*supra*) 123-147. Drumbl is critical of what he refers to as ‘legal mimicry’ – the “diffusion of liberal prosecutorial and correctional models” (at 123) – and argues that “[the] value of punishment will increase to the extent that it resonates with local populations, is internalized in ravaged communities, and can form a coordinated part of the postconflict transition instead of competing with other transitional justice mechanisms” (at 125).

<sup>661</sup> Rome Statute of the ICC, article 5.

<sup>662</sup> Buchanan A and Keohane RO “The Legitimacy of Global Governance Institutions” (2006) 20 (4) *Ethics and International Affairs* 405-437, 408.

The purpose of complementarity is ostensibly aligned with those mentioned in the Statute, namely “to put an end to impunity for the perpetrators” and “to contribute to the prevention of serious international crimes”.<sup>663</sup> On the surface of things, one may contend that the primary purpose of complementarity is to ensure greater accountability for perpetrators of crimes under the Rome Statute by ‘integrating’ the domestic legal systems of ICC state parties into the broader purpose of the Rome Statute. This also required providing the ICC with ‘back-up’ jurisdiction over such perpetrators. Under the complementarity regime, the ICC’s jurisdiction is triggered when state parties are unwilling or unable to discharge their prosecutorial obligations pursuant to the Rome Statute.

The feature of complementarity in the Rome Statute also appears to function as a mechanism with tacit purposes specifically calculated to make the ICC a ‘realistic’ institution. By interpreting the principle in conjunction with the purposes of the Rome Statute, Stigen cites that the complementarity principle has developed to pursue two main purposes:

- a. To ensure the effective prosecution of international crimes. The principle should ensure effective national investigations and prosecutions “partly by stimulating and partly by applying pressure” on them.<sup>664</sup> In turn, the ICC benefits from a more appropriate selection of cases to adjudicate and greater effectiveness when states are “unable or unwilling” to prosecute. Since the creation of the ICC, states are faced with the prospect of being labelled as “unwilling or unable” by the Court.<sup>665</sup> This unfavourable prospect, and the heightened political and media attention on international crime, make it more likely that states will initiate national prosecutions.<sup>666</sup>
- b. To safeguard state sovereignty. The complementarity principle mediates between the traditional view of state sovereignty and the diminished version of sovereignty which has gained momentum in the 20<sup>th</sup> century. The complementarity principle redefined the notion of sovereignty firstly to ensure a viable ICC and secondly, in recognition of the

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<sup>663</sup> Rome Statute of the ICC, Preamble (5).

<sup>664</sup> Stigen (International Criminal Court and National Jurisdictions) (*supra*) 18.

<sup>665</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 1.

<sup>666</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 1.



fact that sovereignty is still the organising principle in international law, not to do away with or impinge too radically on the traditional view of sovereignty.<sup>667</sup>

Similarly, Kleffner asserts that the feature of complementarity affects national criminal justice systems in a number of ways.<sup>668</sup> Amongst other things, complementarity impacts on national criminal justice systems by serving as an incentive for implementation legislation.<sup>669</sup> The incentive lies in the ‘win-win’ situation created by the feature of complementarity. States are incentivised to adopt legislation which “[safeguards] their primary right to investigate and prosecute those crimes within the jurisdiction of the ICC”, thus protecting their sovereignty.<sup>670</sup> On the other hand, the ICC and the international criminal justice system may benefit through more widespread and effective enforcement of the law of the Rome Statute.<sup>671</sup> As will be illustrated below using South Africa as a case study, the complementarity innovation in the Rome Statute is one of the most pertinent mechanisms through which ICL transforms domestic legal systems.<sup>672</sup>

The Rome Statute does not however impose an obligation on states to prosecute or extradite perpetrators of those customary international law crimes contained therein.<sup>673</sup> Akhavan refers to this deficiency as the Rome Statute’s “missing half” which he describes as “the absence of an express and enforceable obligation on states to repress international crimes before national courts”.<sup>674</sup> Thus, while the Rome Statute’s complementarity scheme assigns

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<sup>667</sup> Stigen (International Criminal Court and National Jurisdictions) (*supra*) 15-19.

<sup>668</sup> Kleffner JK “The Impact of Complementarity on National Implementation of Substantive International Criminal Law” (2003) 1 *Journal of International Criminal Justice* 86-113, 87.

<sup>669</sup> Kleffner (The Impact of Complementarity) (*supra*) 88-89.

<sup>670</sup> Kleffner (The Impact of Complementarity) (*supra*) 88.

<sup>671</sup> Without effective domestic implementation of the Rome Statute, many cases would have to be referred to the ICC. In this scenario the ICC risks becoming the primary forum to hear cases of genocide, war crimes, and crimes against humanity instead of being a back-up institution to prosecute such crimes as expressly provided for in the Rome Statute. See Kleffner (The Impact of Complementarity) (*supra*) 93-94.

<sup>672</sup> See Chapter 7 para 7.6 *infra* and Chapter 8 para 8.4.2 *infra*.

<sup>673</sup> Jessberger F and Powell C “Prosecuting Pinochets in South Africa: Implementing the Rome Statute of the International Criminal Court” (2001) 14 *South African Journal of Criminal Justice* 344-362, 348.

<sup>674</sup> Akhavan P “Whither National Courts? The Rome Statute’s Missing Half” (2010) 8 (5) *Journal of International Criminal Justice* 1245-1266, 1246.

the responsibility for enforcement primarily on national criminal jurisdictions, it does not at the same time create any obligation on national criminal jurisdictions to repress international crime. Also, it is unclear whether the Rome Statute creates an obligation on state parties to implement substantive international criminal law into their domestic criminal justice systems. Such an obligation does not appear plainly in the text of the Rome Statute. Some believe that such an obligation can be derived from the Statute as a whole since no rule exist which prohibits the inference of the existence of an implicit obligation from the text.<sup>675</sup>

Regardless of the existence of the obligations outlined above, the enactment of domestic legislation to give effect to the Rome Statute is common amongst State Parties. The incentive which complementarity provides and the normative influence it exerts, has resulted in a positive development for international criminal justice:

“If one considers the almost uniform response of States to the complementary nature of the ICC by seeking to ensure that conduct criminalized under the Rome Statute is equally punishable under their domestic law, complementarity – reinforced by the threat of the ICC exercising jurisdiction in case they do not – proves more effective than those express and clear obligations to implement under relevant international humanitarian and criminal law treaties – obligations which have long been met with a lack of compliance.”<sup>676</sup>

Complementarity has emerged as the only principle that can mediate between the emerging ideal of accountability under international law and the traditional dominance of the Westphalian model characterised by impunity and realism.<sup>677</sup> As such, the principle of complementarity creates breathing room for international criminal justice in the otherwise suffocating international order based mostly on sovereign independence and the unilateral interests of states.

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<sup>675</sup> Kleffner (The Impact of Complementarity) (*supra*) 92.

<sup>676</sup> Kleffner (The Impact of Complementarity) (*supra*) 94 (footnotes omitted).

<sup>677</sup> This notion is discussed in more detail in Chapter 8 para 8.3.3 *infra*.

#### 5.6.4 The International Rule of Law: Accountability and Ending the Culture of Impunity for Serious International Crimes

The “culture of impunity” thesis postulates that future international crime can be deterred and gradually eroded through putting an end to the historical fact that perpetrators who commit or instigate acts of mass atrocity usually escape criminal liability.<sup>678</sup> The “culture of impunity” thesis thus requires effective enforcement of ICL. One must acknowledge the fact that enforcement, even though having come a long way since Nuremberg, is far from effective enough in modern ICL to confidently endorse this theory. Few conflicts have been addressed through the establishment of international criminal tribunals or through domestic prosecutions. Moreover, in those instances where this has occurred, such prosecutions targeted only a small percentage of mostly mid- and low-level perpetrators. These facts significantly corrode the value of the “culture of impunity” thesis. The thesis is bolstered however by factors unrelated to problems of enforcement in ICL. One such factor is the possible contribution of the thesis to the (international) rule of law. It goes without saying that criminal sanctions and accountability are essential for strengthening the rule of law. This is not only true on the domestic level - it is a fact that is becoming more apparent as the international legal system continues to develop.

The objective of accountability for perpetrators of international crimes goes hand in hand with the realisation of an international legal order premised on the universal rule of law.<sup>679</sup> Norm stabilisation, a lesser renowned objective of ICL, aims to strengthen and uphold the rule of law in just this way. It is in stark contrast to the rule of law for perpetrators of international crime to escape being held accountable for their actions. As a qualified form of impunity, selective prosecution poses another threat to the rule of law.<sup>680</sup>

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<sup>678</sup> Ku and Nzelibe (Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?) (*supra*) 11. For an overview of various models for putting an end to impunity, see Beigbeder Y *Judging Criminal Leaders: The Slow Erosion of Impunity* (2002) Kluwer Law International, The Hague.

<sup>679</sup> The USA’s use of legal exceptionalism stands in stark contrast to this. See Hagan J, Levi R and Ferrales G “Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Tribunal for the Former Yugoslavia” (2006) 31 (3) *Law and Social Inquiry* 585-616, 587-588.

<sup>680</sup> See para 5.3.2.3 *supra*; Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 30.

However, the historical development of ICL shows a degree of friction between the requirements of the rule of law and the objective of ending the culture of impunity.<sup>681</sup> ICL has the arduous task of stamping out the culture of impunity and to reinforce the international rule of law, all while remaining within the bounds of legality and fairness which are principles central to the rule of law.<sup>682</sup> The rule of law requires uniformity and consistency in the functioning of any system of law. Accordingly, laws and decisions of courts must not be arbitrary. Legal obstacles related to established principles of fairness and the rule of law have plagued international- and mixed tribunals in post-conflict zones on numerous occasions during the last century. These problems have mostly been the result of the effort to meet the inimitable nature of the offense through normal trial proceedings. As a result, an ironic situation emerged where ICL aspired to bolster the global rule of law, while at other times it seemed inclined to thwart that very same principle.<sup>683</sup>

ICL often operates in extraordinary settings in which it strives towards equally extraordinary objectives. As a developing body of law inhibited by numerous factors, the challenge to ICL is to achieve a point of acceptance and efficiency in the international community of states which will match the desire of the international community of human beings for accountability for international crimes. It appears that many of the abovementioned problems are being stamped out as ICL continues to develop and becomes a more permanent feature of the international legal and political orders. Compared to the Nuremberg IMT, the *ad hoc* international tribunals have managed to make big strides toward stabilising international legal norms first applied at the Nuremberg IMT. This momentum is being carried forward by the ICC.

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<sup>681</sup> See Chapter 3 para 3.3.2.2 *supra*.

<sup>682</sup> Consider the following statement by Attorney-General Sir Hartley Shawcross, head of the British legal team, at the Nuremberg War Crimes Tribunal: “There are those who say that these wretched men should have been dealt with summarily without trial by ‘executive action’ [...] But that was not the view of the British Government. Not so would the rule of law be raised and strengthened on the international as well as upon the municipal plane [...] not so would the world be made aware that the waging of aggressive war is not a dangerous venture but a criminal one”. Quoted in Kadri (The Trial) (*supra*) 227-228.

<sup>683</sup> Teitel fittingly summed up the paradigm of justice during a transition as a situation in which “[the] juxtaposition is always between the rule of law as settled norms versus the rule of law as transformative”. See Teitel (Transitional Justice) (*supra*) 17; see also Chapter 3 para 3.3.2.2 *supra*.

## 5.6.5 Transitional Justice and the Needs of Post-Conflict Societies

Accountability is one of the core desires of victims and the international community in the aftermath of mass atrocity and gross human rights violations. However, criminal prosecutions are rarely a top priority during transitions or in the wake of mass atrocity. On many occasions criminal prosecution has had to play a secondary role to the demands of peace and reconciliation. Where prosecutions have taken place, accountability has not been exclusively based on the need for retribution. Consequentialist objectives related to the needs of post-conflict societies have received some recognition in international criminal tribunals. Below, I investigate the ability of international criminal trials to establish the truth, to advance social reconciliation and advance the interests of victims in transitional or post-conflict societies.

### 5.6.5.1 Truth-Finding<sup>684</sup>

#### 5.6.5.1.1 TRCs versus Criminal Trials? A Brief Overview

A truth commissions is a non-judicial (although they may sometimes have judicial features) and non-penal response to mass atrocity and gross violations of human rights that seeks to address the past in an effort to establish the truth for its own sake and for the sake of creating an historical account of past events.<sup>685</sup> Truth commissions emphasise the ideals of restorative justice and social restoration. As such, the public and often highly emotional proceedings before truth commissions are framed in a way which facilitates the exposure of the truth, apology, forgiveness and compensation. In contrast, criminal trials place emphasis on formalities and rights such as pleading, due process, rules of evidence, judgment and conviction or acquittal which are based on legal tradition and principles.

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<sup>684</sup> The objective of exposing the truth is closely related to the objective of creating a historical account outlined para 5.6.2 *supra* and reconciliation para 5.6.5.2 *infra*. See Fletcher LE and Weinstein HM “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation” (2002) 24 *Human Rights Quarterly* 573–639. Truth-finding is however more closely aligned with the pursuit of justice than the objective of creating an historical record.

<sup>685</sup> See Cockayne J “Truth and Reconciliation Commissions (General)” in Cassese (Oxford Companion) (*supra*) 543.

International criminal lawyers cite a number of problems with the use of TRCs in response to international crimes. Firstly, substituting criminal prosecutions for TRCs, with their non-penal character, undermines the rule of law in the successor regime.<sup>686</sup> Secondly, truth-telling through TRCs does not measure up to the quality of truth that emerges and is put on record through criminal trials.<sup>687</sup> During criminal trials evidence is first subjected to forensic scrutiny before being placed on record, where it is claimed that the truth will stand the test of time and prevent recurring repression.<sup>688</sup> Lastly, there is also the question of whether or not amnesties granted by TRCs are compatible with the obligation on states to investigate and prosecute international crimes.<sup>689</sup>

Although primarily concerned with retribution, deterrence and the other traditional and *sui generis* purposes, modern international criminal tribunals have acknowledged that criminal trials have a role in establishing the truth and that truth-finding is an important element in healing a divided society. In *Erdemović* for example, the ICTY Trial Chamber stated that:

“The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.”<sup>690</sup>

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<sup>686</sup> Cockayne (*supra*) in Cassese (Oxford Companion) (*supra*) 544.

<sup>687</sup> Cockayne (*supra*) in Cassese (Oxford Companion) (*supra*) 545; Schiff BN “Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission” in Bassiouni (Post-Conflict Justice) (*supra*) 327-328.

<sup>688</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 24; Schiff (*supra*) in Bassiouni (Post-Conflict Justice) (*supra*) 327-328.

<sup>689</sup> Cockayne (*supra*) in Cassese (Oxford Companion) (*supra*) 545; on the legality of amnesties under international law in general, see Chigara B *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (2002) Pearson Education Limited, Harlow; see also the discussion of the AZAPO case in South Africa in Chapter 7 para 7.5.1 *infra*.

<sup>690</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: [Second] Sentencing Judgment) Case No. IT-96-22-T *bis*, 5 March 1998, para 21.

According to Duff *et al.* “the truth at which the [criminal] trial purports to aim has an intrinsic, not merely an instrumental, importance among the aims of a criminal justice systems”.<sup>691</sup> Also, according to Schabas, “[much] of the struggle for international justice, and the battle against impunity, is a search for truth”.<sup>692</sup> It has been suggested that an enduring contribution of the Nuremberg IMT’s was its authoritative “affirmation of the facts of Nazi atrocities”.<sup>693</sup> This ability of the criminal trial to act as a forum or conduit of truth has been widely proclaimed since Nuremberg.<sup>694</sup> Carlos Nino attests to the superiority of trials over truth commissions in establishing the truth:

“[T]he public presentation of the truth is much more dramatic when done through a trial, with the accused contributing to the development of the story. Furthermore, the quality of the narration in an adversarial trial can not be fully replicated by other means. Even when an amnesty or pardons are issued at the end of the trial, they do not counteract the initial effect of such emphatic public disclosure.”<sup>695</sup>

It has been said that the criminal trial can create a version of events which will be accepted as the authoritative truth, which is subsequently assimilated into history and preserved. Owing to the high evidentiary standard in criminal trials, the whole truth may not emerge. The truth that emerges however, the so-called “legal truth” or “forensic truth”, may be viewed as very trustworthy since, in a properly constituted criminal trial, the verdict has been “justified by adequate and legitimate evidence”.<sup>696</sup>

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<sup>691</sup> Duff A, Farmer L, Marshall S and Tadros V *The Trial on Trial* (Volume III) (2007) Hart Publishing, Oxford 62.

<sup>692</sup> Schabas (Sentencing by International Tribunals) (*supra*) 499.

<sup>693</sup> Schabas (Sentencing by International Tribunals) (*supra*) 500.

<sup>694</sup> See Orentlicher (Settling Accounts) (*supra*) 2546 (footnote 32); Fletcher LE and Weinstein HM “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation” (2002) 24 *Human Rights Quarterly* 573–639, 587.

<sup>695</sup> See Osiel (Mass Atrocity, Collective Memory) (*supra*) 15 (footnotes 10-11).

<sup>696</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 173-176; Smeulers (Punishing the Enemies of All Mankind) (*supra*) 986. Regarding forensic truth, see Du Bois-Pedain A *Transitional Amnesty in South Africa* (2007) Cambridge University Press, Cambridge 204-205. The author defines forensic truth as “a selective reconstruction of an event according to very specific rules” of a court process; see also Duff *et al.* (The Trial on Trial) (*supra*) 91.

In contrast to the above however, many have disputed the truth-finding capabilities of criminal trials and question whether their design enables the whole truth to emerge. In any event, many domestic criminal justice systems may be overwhelmed by the project of dispensing justice (and by implication also the subsidiary objective of truth-finding) in the wake of mass atrocity or serious violations of human rights. Proponents of the truth-finding abilities of the criminal trial must therefore acknowledge the emergence of alternative justice mechanisms, notably truth commissions, as a means to exposing the truth. As opposed to criminal trials, where the truth is said to emerge through a process which entails the identification, exclusion and weighing of evidence, applicants before truth commissions are provided with an incentive to expose the truth voluntarily. According to Du Bois-Pedain:

“[...] unlike in the courtroom, where defendants are free to exercise their right to silence and thereby refuse to respond to the call [to account] directly, the amnesty process requires active and responsive account giving by applicants. In this respect, the amnesty process is therefore arguably superior to criminal trials – better placed than criminal trials to achieve the communicative objective of engaging with offenders in a dialogue about their conduct.”<sup>697</sup>

It is argued that in this way truth commissions may help to establish the “real truth” as opposed to the “trial truth” that emerges from the criminal justice process.<sup>698</sup>

Truth on its own does not however constitute justice. As a response to mass atrocity, the success of truth commissions is reliant upon the context of its use. A truth and reconciliation process does not produce automatic effects.<sup>699</sup> Perhaps truth commissions are sensitive to context to an even greater extent than the more universally appealing criminal trial. Depending on the context, the moral outcry and the accompanying demand for retribution induced by mass atrocity may outweigh the desire for truth, forgiveness and reconciliation. The South African TRC for example, benefitted from a combination of factors

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<sup>697</sup> Du Bois-Pedain (Transitional Amnesty in South Africa) (*supra*) 258.

<sup>698</sup> Judge Röling (judge of the Tokyo IMTFE) is accredited for the distinction between “real truth” and “trial truth” (see Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 27). Trial truth may be afforded a meaning similar to “legal truth” or “forensic truth” (see footnote 696 *supra*) while “real truth” has also been referred to as “historical truth”, see Du Bois-Pedain (Transitional Amnesty in South Africa) (*supra*) 214. The latter author shows clear support for conditional amnesties over criminal trials when it comes to the establishment of the historical truth.

<sup>699</sup> Cockayne (*supra*) in Cassese (Oxford Companion) (*supra*) 550.



that made the TRC not only the most practical transitional mechanism, but also the most morally acceptable one in light of South Africa's cultural and religious particularities.<sup>700</sup> This will not be equally true of every society in transition. Therefore, truth commissions should not be viewed as the preferred transitional or post-conflict mechanisms without due regards being given to contextual sensitivity, the needs of the effected society and the international community's demand for justice.

#### 5.6.5.1.2 The Influence of Plea Bargaining

Another popular mechanism with a purported truth finding benefit is the plea bargain.<sup>701</sup> Plea bargains (or 'plea agreements') of various sorts were used by prosecutors at the *ad hoc* tribunals and the East Timor Special Panels. At the ICTY, the trial and appeals chambers generally accepted the plea agreements that came before them.<sup>702</sup> In *Plavšić*, the ICTY Trial Chamber accepted that "full disclosure of serious crimes are very important when establishing the truth in relation to such crimes" and that such truth "together with acceptance of responsibility for the committed wrongs, will promote reconciliation".<sup>703</sup> Despite the aforementioned practice of the ICTY however, general opinion over whether plea bargains assist or detracts from the process of truth-telling seems to be more divided.

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<sup>700</sup> See Graybill L "To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission" (2001) (July-September) *Human Rights Review* 3-18.

<sup>701</sup> Plea bargains have also been praised for other benefits, including lightening the prosecutorial workload (this is especially beneficial to international tribunals established in the wake of mass atrocity and collective violence); evidence gathering for use against other perpetrators; reconciliatory benefits; and that justice is to some extent seen to be done (this is because the perpetrator enters a negotiated guilty plea and still receives a sentence). See Drumbl (Atrocity, Punishment and International Law) (*supra*) 164.

<sup>702</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 165.

<sup>703</sup> In terms of her plea agreement, Plavšić pleaded guilty in exchange for the dismissal of some of the charges in the original indictment. Plavšić was convicted of persecutions on political, racial and religious grounds (crimes against humanity) and received a sentence of 11 years imprisonment. See ICTY, *Prosecutor v Plavšić* (Trial Chamber: Sentencing Judgment) Case No. IT-00-39 and 40/1-S, 27 February 2003, para 80.

As mentioned, plea bargains come in different variations. Firstly, there is the plea bargain in which the trial is circumvented. Here the perpetrator confesses, enters a guilty plea and receives his or her commuted sentence. This type of plea bargain incentivises the perpetrator to tell the truth by presenting an opportunity to act in his or her best interests. Thus, plea bargains of this type work on the same basic principle as truth commissions, namely to create a forum for exposing the truth as well as an incentive to utilise it, only without the power to grant amnesty. The downside to this form of plea-bargaining is that the victims are denied the chance to appear in court and to tell their side of the story. Thus, it may be said that the truth is not made public to the same extent as through a criminal trial. As illustrated by the Eichmann trial, victim testimonies may have an important symbolic effect on the victims as a group or may have cathartic value for individual victims.<sup>704</sup>

Secondly, a plea agreement may amount to a quasi-contract between the prosecutor and the defendant under which parties to the dispute may for example, agree on underlying facts with the advantage that those facts will not have to be proved in a subsequent trial. The agreement may establish a range of possible sentences which are presented to the court for approval along with the perpetrators plea of guilty. Furthermore, under a plea agreement the prosecutor may agree to drop certain charges against the accused through what is known as charge bargaining, in exchange for information.<sup>705</sup> The greatest criticism against charge-bargaining is that it negates the retributive and expressive functions of the criminal trial in exchange for partial truth. Du Bois-Pedain notes that “[plea-bargaining] strategy at a criminal trial is essentially about figuring out how much of the truth to admit in order to ensure an optimal outcome”.<sup>706</sup> Therefore punishment is premised on what the perpetrator knows (the information that the accused has to offer) and not on meeting, through proportional sanction, the seriousness of the crimes that the perpetrator has committed and on exposing the whole truth.<sup>707</sup>

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<sup>704</sup> See Chapter 4 para 4.3.2 *supra*; Drumbl (Atrocity, Punishment and International Law) (*supra*) 164; see also Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 28 (casting some doubt on the cathartic effects of international criminal trials).

<sup>705</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 164.

<sup>706</sup> Du Bois-Pedain (Transitional Amnesty in South Africa) (*supra*) 210.

<sup>707</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 164.

### 5.6.5.2 Reconciliation

The objective of reconciliation is closely related to that of truth-finding.<sup>708</sup> The designation of South Africa's foremost transitional mechanism, the South African Truth and Reconciliation Commission, plainly suggested the regular acceptance of a symbiotic relationship between these two objectives.

It has been suggested that criminal trials foster reconciliation by establishing truth through authoritative narratives.<sup>709</sup> Documentary evidence and verbal testimony create narratives while the official and formalistic proceedings (the trial), judgment and punishment (if applicable) provide an authoritative edge to the version of events that has emerged in due course. The authoritative narrative theory suggests that fair and formal criminal judgments displace contradictory views and opinions within a divided society and promotes reconciliation through creating a shared understanding of the truth.<sup>710</sup> Authoritative narratives can emerge from the trial of a single defendant as was the purportedly the case in the trial of Adolf Eichmann, or from an entire body of jurisprudence such as that of the ICTY and ICTR.

Reconciliation is comprised of two aspects, external reconciliation between antagonistic states and internal reconciliation between individuals and societies within a state. Alongside the worldwide increase in civil wars and internal atrocities since the Second World War, the questions of how best to achieve lasting internal reconciliation in transitional and post-conflict societies has become pertinent. Of particular interest in the narrative of transitional justice has been the dilemma over how to balance the intuitive need for retribution and the more practical need for reconciliation and peace in the wake of mass atrocity and gross human rights violations. Retribution and reconciliation are, to varying degrees which may depend on historical, political and cultural factors within a post-conflict society, both considered as desirable commodities in any post-conflict society. Yet, because of their opposing natures, and because the demands of peace often outweigh the demands of

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<sup>708</sup> See ICTY, *Prosecutor v Erdemović* (Trial Chamber: [Second] Sentencing Judgment) Case No. IT-96-22-T bis, 5 March 1998, para 21; Clark (Plea Bargaining) (*supra*) 424.

<sup>709</sup> On the "Authoritative Narrative Theory", see Waters (A Kind of Judgment) (*supra*) 279.

<sup>710</sup> Waters (A Kind of Judgment) (*supra*) 285-288 (the author seems to use the term "transformative narratives" to refer to reconciliation through authoritative narratives).

justice, post-conflict societies have often opted for a balance in which reconciliatory mechanisms exceed retributive ones or where retribution is not seriously pursued. In the latter case, it is often argued that criminal trials are impractical and that the social need for peace is more important than the need for accountability in the short term. At other times the lack of retributive justice mechanisms could be attributed to the fact that criminal prosecutions had been ‘negotiated away’ by the outgoing oppressive government.<sup>711</sup>

The objective of reconciliation has become more closely associated with alternatives to criminal justice, such as the South African Truth and Reconciliation Commission (“TRC”). Reconciliation is most often required in the wake of mass atrocity or administrative massacres that have created a deeply-divided society, a deficit of justice or inter-social animosity. This antagonism may be based on actual injustice, the collective memory of past injustices and the struggle for power among different racial, ethnic or tribal groups. It is now widely accepted that reconciliation is imperative for the restoration and long-term maintenance of peace within a transitional or post-conflict state. The maintenance of international peace and security is also a central function of international law. This is confirmed through the most important international legal texts and positive law documents of the institutions of international law. Whether or not, and how much, retributive justice is required to successfully achieve or contribute to reconciliation and peace is much less certain.

In the transitional justice context there is much debate over whether or not retributive justice is linked to reconciliation in a post-conflict society. Since the establishment of the *ad hoc* tribunals, the trend to create international tribunals in the wake of mass atrocity has nonetheless strengthened. Diplomats and human rights activists create a connection between prosecutions (particularly for international crimes) and social reconstruction.<sup>712</sup> There is some support for a positive relationship between retribution and reconciliation. Moghalu, for example, argues that:

“[When] justice is done, and seen to be done, it provides a catharsis for those physically or psychologically scarred by violations of international humanitarian law. Deepseated

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<sup>711</sup> The South African transition serves as a prominent example in this regard. See Chapter 7 paras 7.5.1 and 7.5.2 *infra*.

<sup>712</sup> Fletcher and Weinstein (Violence and Social Repair) (*supra*) 578.

resentments – key obstacles to reconciliation – are removed and people on different sides of the divide can feel that a clean slate has been provided for.”<sup>713</sup>

The former deputy prosecutor at the ICTY, Graham Blewitt, maintained that “[the] ICTY was established, in part, as a measure for the maintenance of international peace and security, through its ability to contribute to reconciliation in the territorial States torn by violence and disunity”.<sup>714</sup> UNSC Resolution 955, which established the ICTR, refers specifically to reconciliation as an objective of the tribunal.<sup>715</sup> One of the reasons for the Rwandan government’s initial support of the ICTR was that they believed that:

“[...] it is impossible to build a state of law and arrive at true national reconciliation if we do not eradicate the culture of impunity which has characterized our society since 1959. The Rwandese who were taught that it was acceptable to kill as long as the victim was from a different ethnic group or from an opposition party, cannot arrive at national reconciliation *unless they learn new values*. The national reconciliation of the Rwandese can be achieved only if equitable justice is established and if the survivors are assured that what has happened will never happen again.”<sup>716</sup>

The Rwandan government subsequently withdrew its support for the establishment of the ICTR because it was unsatisfied with many of the provisions in the ICTR Statute and due to the fact that the tribunal’s jurisdiction was not within the control of the Rwandan state.<sup>717</sup> It is submitted that initial view of the Rwandese government referred to above highlights (perhaps

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<sup>713</sup> Moghalu KC “Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions” in Thakur R and Malcontent P (eds.) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (2004) United Nations University Press, New York 216.

<sup>714</sup> Blewitt G “The International Criminal Tribunal for the Former Yugoslavia and Rwanda” in Lattimer M and Sands P (eds.) *Justice for Crimes Against Humanity* (2006) Hart Publishing, Portland 151. See also ICTY, *Prosecutor v Plavšić* (Trial Chamber: Sentencing Judgment) Case No. IT-00-39 and 40/1-S, 27 February 2003, paras 80-81 (the ICTY Trial Chamber expressed the view that the accused’s guilty plea may have a positive impact on reconciliation).

<sup>715</sup> UNSC Resolution 955 (*supra*): “[...] the prosecution of persons responsible for serious violations of international humanitarian law [...] would contribute to the process of national reconciliation”.

<sup>716</sup> UN Doc S/PV 3453 (1994) 14.

<sup>717</sup> UN Doc S/PV 3453 (1994) 14-16; Akhavan (The International Criminal Tribunal for Rwanda) (*supra*) 505.

ironically) the contribution which criminal trials may make to reconciliation and towards social change more generally through value-expression.

Murphy is of the belief that “international criminal trials can contribute to *political reconciliation* [in transitional societies] by fostering the social [and moral] conditions required for law’s efficacy”.<sup>718</sup> These conditions, which the author extracts from the work of Lon Fuller, involve “ongoing cooperative interaction between citizens and officials, systematic congruence between law and informal social practices, legal decency and good judgement, and faith in law”.<sup>719</sup> Murphy notes an absence of these social and moral conditions in transitional societies and is optimistic about the contribution of international criminal trials to their re-establishment.<sup>720</sup> Her argument is that international criminal trials play an educative role in the transitional context by creating a stark contrast with the unjust practices and procedures of the past that encourages faith in the law among law-making and law enforcement officials and citizens.<sup>721</sup> Murphy seems to argue that fairness, in the form of internationally recognised fair trial principles which offers perpetrators basic protection from inhumane treatment during pre-trial detention, contributes to reconciliation.<sup>722</sup>

Yet, it has been contended that there are certain limitations to the exercise of assigning accountability to individual perpetrators of mass atrocity or gross human rights violations. As Fletcher and Weinstein have noted:

“Trials do not address the complicity of those who stood by or cheered a vicious leader or who elected a war criminal to represent them. Currently, there are no mechanisms to respond to the ways in which bystanders are implicated in the establishment and maintenance of societal structures that facilitate the onset and implementation of mass violence.”<sup>723</sup>

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<sup>718</sup> Murphy C “Political Reconciliation and International Criminal Trials” in May and Hoskins (International Criminal Law and Philosophy) (*supra*) 225.

<sup>719</sup> Murphy (*supra*) in May and Hoskins (International Criminal Law and Philosophy) (*supra*) 226-227.

<sup>720</sup> Murphy (*supra*) in May and Hoskins (International Criminal Law and Philosophy) (*supra*) 232-241.

<sup>721</sup> Murphy (*supra*) in May and Hoskins (International Criminal Law and Philosophy) (*supra*) 236-238.

<sup>722</sup> Murphy (*supra*) in May and Hoskins (International Criminal Law and Philosophy) (*supra*) 239-240.

<sup>723</sup> Fletcher and Weinstein (Violence and Social Repair) (*supra*) 580. On the limits of ICL as a response to mass atrocity in general, see Drumbl (Atrocity, Punishment and International Law) (*supra*).

International criminal tribunals have been hampered in their reconciliatory ambitions by numerous factors such as resource constraints, concerns over legitimacy and the location of tribunals outside the post-conflict state. Drumbl contends that international legal institutions have mostly failed to foster real reconciliation through punishment.<sup>724</sup> Furthermore, there is a lack of empirical evidence to establish whether claims to the reconciliatory effect of criminal trials are justifiable.<sup>725</sup> There appears to be much doubt as to the ability of criminal trials to contribute to reconciliation.<sup>726</sup>

Detractors of the notion that criminal trials have the ability to encourage reconciliation cite the success of truth commission relative to criminal trials in establishing the truth, securing a peaceful transition and fostering national reconciliation. Especially the South African TRC has often been heralded as a pragmatic and relatively successful transitional justice mechanism. I agree that criminal trials are not traditionally appropriate forums for establishing the interactive process of apology and forgiveness required for reconciliation.<sup>727</sup> Even though trials may facilitate reconciliation in this manner to a certain extent, the over-riding objective is to establish guilt or innocence of the alleged perpetrators. The accused may only be asked whether or not he or she regrets his or her actions. Although the accused may take the opportunity to apologise or to express regret (assuming that this aids reconciliation), he or she will never be asked to do so. Plea bargains represent an exception in this regard in that the accused may be incentivised towards making an apology or expression of regret in order to secure a more lenient sentence. To further dampen the prospect of the criminal trial contributing to reconciliation, the victim plays a minimal part in the trial process.<sup>728</sup>

It must be recognised however that most commentators on the matter do not approach the topic of post-conflict reconciliation from a position that expresses doubt over the potential

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<sup>724</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 150.

<sup>725</sup> Clark (Plea Bargaining) (*supra*) 421.

<sup>726</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 28.

<sup>727</sup> See Osiel (Mass Atrocity, Collective Memory) (*supra*) 128: “Only when apology succeeds in eliciting forgiveness does reconciliation occur”.

<sup>728</sup> There is however a movement in international criminal justice, spearheaded by the ICC, towards greater participation for victims of international crime. This is discussed at para 5.6.3.5 *infra*.

for criminal trials to support reconciliation. They approach the matter from a perspective that highlights the advantages that alternatives to criminal justice hold for reconciliation, *specifically* relative to the advantages of criminal justice for reconciliation *in particular*. Therefore, alternatives to criminal justice in this view can only be regarded as superior to the extent that one regards criminal justice and alternative mechanisms of justice as mutually exclusive or if one regards reconciliation to be the primary consideration or objective in the relevant post-conflict society. It cannot be denied that the international community desires accountability over certain crimes and an end to the culture of impunity. Moreover international criminal justice is partly an expression of this desire.<sup>729</sup> Despite often passionate rhetoric, alternatives to criminal justice have been preferred mostly on the basis that they are the most practical response to past injustice, not the best or most useful response for purposes of reconciliation. There seems to be an increasing consensus that where possible, these responses may optimise reconciliation if invoked in cooperation with each other.<sup>730</sup> The establishment of mechanisms both for accountability and for the promotion of truth and reconciliation in Sierra Leone and East Timor may be viewed as proof that retributive and reconciliatory mechanisms do not necessarily have to be regarded as mutually exclusive alternatives.<sup>731</sup>

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<sup>729</sup> See Bassiouni (*supra*) in Bassiouni (Post-Conflict Justice) (*supra*) 25.

<sup>730</sup> Fletcher and Weinstein (Violence and Social Repair) (*supra*) 573–639 (the authors argue that criminal trials are one of the necessary components in the process of social repair following mass atrocity).

<sup>731</sup> For a brief overview of the structure and mandate of courts and TRCs, see Coté L “Special Court for Sierra Leone” in Cassese (Oxford Companion) (*supra*) 515-517 (on the Special Court for Sierra Leone); 546 (on the Sierra Leone TRC); 307-308 (on the East Timor Special Panels); and 547 (on the Timor-Leste Commission for Reception, Truth and Reconciliation). Coté provides the following in summation to the overview provided: “Despite a longer timeframe than expected to complete its mandate and difficulties to finance its operations only by voluntary contributions, the SCSL has been considered by many as a success. Its hybrid nature with the participation of Sierra Leonean personnel and its location in the country directly affected by the crime committed are both enhancing prospects for the Court’s operations to be known, understood, and seen as legitimate by the victims in Sierra Leone. That alone would constitute quite an achievement for any international justice effort”.



No matter which side of the peace versus justice debate one subscribes to, the objective of reconciliation is closely associated with establishing the truth.<sup>732</sup> The ICTY highlighted this in the second sentencing judgment of Dražen Erdemović:

“The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process”<sup>733</sup>

Exposing and documenting the truth about past crimes and atrocities has been advocated as an objective of transitional societies from Argentina to South Africa. But, can true reconciliation be achieved solely by publicly exposing the truth? The South African TRC appears to provide an affirmative answer to this question. Yet, it may be contended that the South African transition was a *sui generis* phenomenon, a negotiated miracle that proved relatively successful because of the presence of a number of factors and characteristics which were unique to the South African transitional situation.<sup>734</sup> These factors were not only unique, but also exceptional. Hence the frequent use of the phrase “the miracle of the new South Africa” in reference to the post-Apartheid period. Also, the truth on its own does not amount to justice. Would a TRC similar to South Africa’s have worked in Rwanda or in the former Yugoslavia? Even if this is accepted as a possibility, how much retributive justice would have been required in partnership with the truth to create the ideal environment for reconciliation? This last question is an especially difficult one to answer. I will return to these questions under Chapter 7.<sup>735</sup>

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<sup>732</sup> Fletcher and Weinstein (Violence and Social Repair) (*supra*) 586.

<sup>733</sup> ICTY, *Prosecutor v Erdemović* (Trial Chamber: [Second] Sentencing Judgment) Case No. IT-96-22-T *bis*, 5 March 1998, para 21.

<sup>734</sup> See Chapter 7 para 7.5.1 *infra*.

<sup>735</sup> See Chapter 7 paras 7.5 and 7.7.4 *infra*.

### 5.6.5.3 Victims and Affected Groups

The context in which international crimes occur together with the fact that the victims of crimes such as genocide and crimes against humanity are often targeted only for the fact of their existence as a member of an identifiable group or subset of a civilian population, has elevated concerns over the needs of victims and victim participation in post-conflict criminal trials. Since the end of the Second World War, the rights of victims have been recognised on the international level through various UN ‘soft law’ instruments.<sup>736</sup> This growing concern over the interest of victims has developed to a point where some contend that “no accountability mechanism can be described as valid and just unless it gains a reasonable level of approval and acceptance from [...] victims”.<sup>737</sup> It is believed that punishment combined with greater victim participation in criminal trials provide a sense of closure and may facilitate reconciliation.<sup>738</sup>

Traditionally, the chief concern of international criminal courts has been to ensure accountability for serious international crimes. Other than exacting retribution for the wrongful acts committed against victims, the interests of victims have been a subsidiary concern of international criminal courts. Victim participation is mostly an alien concept to domestic criminal justice systems. This is especially true in criminal justice systems that follow the adversarial model. In the adversarial model the victim’s participation in the case is mostly limited to acting as a witness. Additionally, the interests of victims may be taken into account as one of many factors influencing the exercise of prosecutorial discretion. This has perhaps contributed to the fact that victim participation in international criminal proceedings had been very limited up until the creation of the ICC.

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<sup>736</sup> See UNGA Resolution 40/34 (1985) (Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power); UNGA Resolution 60/146 (2005) (Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law) and the Universal Declaration of Human Rights.

<sup>737</sup> Garkawe S “The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of Victims of Gross Violations of Human Rights?” (2003) 27 (2) *Melbourne University Law Review* 334-380, 335.

<sup>738</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 24.

Victims have been granted limited rights of participation in the Statutes and proceedings of the *ad hoc* tribunals. Punishment as a means of attaining justice on behalf of the direct and indirect victims of international crimes as well as “recognition of the harm and suffering caused to the victims” was acknowledged by the ICTY Trial Chamber in *Nikolić*.<sup>739</sup> However, in the ICTY and the ICTR victims could not participate in their personal capacity or promote their personal interests, they could only be heard as witnesses in the court. Furthermore, the prosecutor holds an exclusive discretion on whether to prosecute and on whether to act in the interests of victims or not.

The ICC is the first international court with the power to grant reparations to individual or collective victims of criminal conduct. The participatory rights of victims have found a measure of prominence partly in the Rome Statute, but mostly in the ICC Rules of Procedure and Evidence (“RPE”). These rights include legal representation for victims, participation during the trial, reparations, witness protection and protection related to the giving of evidence in court.<sup>740</sup> Victims are given “a voice” at crucial stages of the proceedings in the ICC and may present their “views and concerns” during the trial if their “personal interests” are affected.<sup>741</sup> Furthermore, article 79 of the Rome Statute establishes a trust fund for the benefit of victims and their families.

The manner in which the rights and interests of victims of mass atrocity have been pushed to the forefront of international criminal trials has been sighted by many as a positive development in international criminal justice and one which is well aligned with the international human rights movement for which ICL is also a torchbearer.<sup>742</sup> Although victim

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<sup>739</sup> ICTY, *Prosecutor v (Monir) Nikolić* (Trial Chamber: Sentencing Judgment) Case No. IT-02-60/1-S, 2 December 2003, paras 82 and 86.

<sup>740</sup> See Rome Statute of the ICC, articles 19(3), 53, 64, 68(3) and 75; Doak J *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008) Hart Publishing, Portland 136-137; see also Baumgarten E “Aspects of Victim Participation in the Proceedings of the International Criminal Court” (2008) 90 (870) *International Review of the Red Cross* 409-440, 410 (referring to the ICC’s scheme of victim participation as “relatively broad”).

<sup>741</sup> Rome Statute of the ICC, article 68(3).

<sup>742</sup> See for example, Human Rights Watch *Commentary on the Preparatory Commission of the International Criminal Court, Elements of Crimes and Rules of Evidence and Procedure* (July 1999) available at <http://www.iccnw.org/documents/HRWComment2ndPrepComJuly99.pdf>

participation and compensation schemes are praiseworthy and ambitious developments in international criminal justice, it does bring with it certain problems. Firstly, the participation of a large number of victims in the criminal process slows proceedings down considerably and might seriously undermine effort to ensure expeditious trials at the ICC. Secondly, the ICC may be viewed primarily as an institution of accountability or for ending the culture of impunity, with broader normative purposes and a limited amount of funding. This means that most of the ICC's institutional emphasis and funding must be directed at efforts for bringing perpetrators to justice in an adversarial trial rather than the compensation of victims. The adversarial confrontation leaves little room for parties outside the "battle" between the prosecution and the defence.<sup>743</sup> The wording of article 68(3) makes it clear that the interests of the victim must not outweigh and are subsidiary to the rights of the accused on trial. The ICC's primary focus on prosecutions is also reflected in the huge gap between its estimated annual budget for prosecution (100 million *Euros* go to the OTP) and the annual budget for the compensation of victims (1 million *Euros* go to the ICC's Trust Fund for Victims).<sup>744</sup> Reparations to victims whether in the form of restitution, compensation or rehabilitation, is also dependant on (or limited by) the convicted persons' available resources as well as on the harm caused by the crimes for which they were convicted.<sup>745</sup>

The ICC is making the most concerted effort at recognising the interests of victims in the history of international criminal justice. This is surely a positive and laudable development. However, such recognition ultimately falls far outside the ICC's primary mandate, namely to end the culture of impunity and contribute to prevention of the most serious crimes of concern to the international community as a whole. Recognition of the victims' interests and their participation during proceedings must be pursued in a manner that

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(accessed 2012/08/08) para 106 (at 45-46): "[...] reparations from perpetrator to victim can play a critical role in the healing process of victims, of societies as a whole and of the perpetrators themselves, and as such can be a factor in preventing future violations".

<sup>743</sup> De Hemptinne J "Victim Participation in International Proceedings" in Cassese (Oxford Companion) (*supra*) 563.

<sup>744</sup> "Convict a dictator and the money will flow" *International Justice Tribune*, 22 November 2011, available at <http://www.rnw.nl/international-justice/article/convict-a-dictator-and-money-will-flow> (accessed 2011/11/23).

<sup>745</sup> (Convict a dictator and the money will flow) (*supra*); see also Rome Statute of the ICC, article 75.

does not undermine the main objectives of the ICC. The challenge to the ICC is to try to maintain a balance between its primary mandate and the interests of victims, failure to do so runs the risk of the ambitious victim participation scheme becoming an encumbrance upon the effective functioning of the court.<sup>746</sup>

## 5.7 Concluding Remarks

The general retributive trend established at the Nuremberg IMT and Tokyo IMTFE has permeated into the culture and mechanisms of modern international criminal justice.<sup>747</sup> The justification for punishment in modern international criminal courts has been largely retributive and backward-looking.<sup>748</sup> For the most part, this is how it should be. Punishment is essentially regulated retribution. That is not to say however that the punishments dispensed by international criminal law institutions should merely condemn the criminal and crimes involved. It is also important to consider the larger underlying purpose of the international criminal justice system and the broader future utility that may be achieved through championing those objectives unique to international criminal justice. Nor are judges precluded from exercising their discretion within the limits of the law to give recognition to the fact that ICL is ultimately intended to pursue broader social purposes. Although retribution is still undoubtedly the main impetus for international criminal punishment, *retribution as revenge* is less relevant than before, especially in the international legal setting. Henham contends that the predominant retributive approach to international sentencing does not achieve the moral resonance required to strengthen the legitimacy of international punishment.<sup>749</sup> Also, in *Mucić et al.* the ICTY Trial Chamber acknowledged that “retributive punishment by itself does not bring justice”.<sup>750</sup> The significance of the movement from punishment with a closer resemblance to *lex talionis* at the Nuremberg IMT and Tokyo

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<sup>746</sup> Baumgarten (Aspects of Victim Participation) (*supra*) 439-440.

<sup>747</sup> Henham (Punishment and Process) (*supra*) 19.

<sup>748</sup> Henham (Punishment and Process) (*supra*) 20. Henham contends that “the overriding sentiment of punishment in the international arena consists of revenge and retribution tempered by poorly articulated allusions to deterrence (and occasionally rehabilitation and reconciliation)”.

<sup>749</sup> Henham (Philosophical Foundations) (*supra*) 66.

<sup>750</sup> ICTY, *Prosecutor v Mucić et al.* (Trial Chamber: Judgment) Case No. IT-96-21-T, 16 November 1998, para 1231.

IMTFE to a modern variant of *expressive retributivism* in contemporary international criminal tribunals must be acknowledged. Modern ICL has moved away from instinctive and ‘emotional’ responses to mass atrocity toward a more objective determination based on principles of fairness and the fair trial rights of the defendant (often expressed as the notion of “equality of arms”). In *Tadić*, for example, the ICTY acknowledged rehabilitation as a worthy punishment objective and hinted that punishment should not only fit the crime, but also the offender.<sup>751</sup> Retribution as revenge, albeit regulated and proportional revenge, counteracts the guiding virtues of the international community and the universal principles of justice for which international criminal courts are supposedly acting as beacons.<sup>752</sup> The retributive aspect of international punishment is less justified as a form of revenge than a reassertion of the fundamental values of humanity of which international crimes are representative.<sup>753</sup>

Retribution, and also the most widely accepted utilitarian objective in deterrence, will always be the logical point of departure for any criminal trial. Yet their ascendancy leaves more than enough room to acknowledge the potential social function and the lesser known value that criminal punishment under international law may hold. Acknowledging these *sui generis* functions of international criminal justice will likely require future jurisprudence that ‘chips away’ at the ‘permanent’ purposes of punishment through greater recognition of ICL’s fundamental forward-looking values and purposes. It is submitted that this would augment the transformative potential of international criminal justice.<sup>754</sup> As a *sui generis* form of criminal justice, ICL requires a *sui generis* theory and framework that enables trial and punishment for purposes ‘outside’ the traditional penological justifications of criminal law.

Furthermore, punishment theories common to domestic criminal law cannot be supplanted *mutatis mutandis* to ICL due to its unique nature.<sup>755</sup> A failure to fully differentiate,

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<sup>751</sup> ICTY, *Prosecutor v Tadić* (Trial Chamber: Sentencing Judgment) Case No. IT-94-1-S, 14 July 1997, para 61; see also Henham (Punishment and Process) (*supra*) 19.

<sup>752</sup> Henham (Punishment and Process) (*supra*) 17 (footnote 20).

<sup>753</sup> Henham (Punishment and Process) (*supra*) 17.

<sup>754</sup> See also Chapter 8 para 8.5.1 *infra*.

<sup>755</sup> See Sloane (The Expressive Capacity of International Punishment) (*supra*) (general criticism on the use of the national law approach to punishment under ICL).

acknowledge and understand the unique foundations and objectives of ICL risks undermining its potential. Because ICL is driven by forward-looking values and purposes, it intends to realise objectives which move beyond the purposes of criminal law punishment in the domestic setting and the objectives of the traditional theories of punishment. This is a consequence of ICL's unique supranational setting and area of application namely mass atrocity, collective violence and social transitions.<sup>756</sup>

The limited extent to which domestic criminal law analogy and traditional punishment theory applies to ICL, explains and perhaps justifies the numerous novel or *sui generis* punishment objectives of ICL outlined above. Considering the fact that ICL is already regarded as a *sui generis* system of supranational criminal law, there is no apparent danger in broadening the conceptualisation of its purpose to include these *sui generis* objectives.<sup>757</sup> This is however not ideally reflected in the jurisprudence of international criminal tribunals. Although there has been some recognition of objectives which are unique to the purposes for which ICL exists, the *ad hoc* international criminal tribunals have mostly varied in their approach to punishment purposes by being either conspicuously silent on the matter of theoretical justifications for punishment or dealing with the matter in a brief and formal manner by way of a few sentences which acknowledge mostly retribution and deterrence as the goals of punishment. Furthermore, the *ad hoc* tribunals have been rather inconsistent in applying justifications for punishment on international criminal acts and perpetrators. It appears that no specialised jurisprudence on the matter has been developed up to this point. The Rome Statute has not remedied this defect.

Punishment for international crimes is essentially a trade-off between effectively discharging international criminal justice's ambitious mandate and problems associated with over-reaching in its utilitarian punishment objectives, such as unfairness towards the accused if he or she should receive a sanction which is disproportionate to his or her crime.<sup>758</sup> Finding the right balance is crucial since the success or failure of ICL hinges firstly upon certainty

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<sup>756</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 17.

<sup>757</sup> On ICL as a *sui generis* system of supranational criminal law, see Haveman *et al.* (Supranational Criminal Law) (*supra*).

<sup>758</sup> See Damaska (*supra*) in Cassese (Oxford Companion) (*supra*) 177-179 (on potential problems which may arise due to the overly-ambitious agenda of international courts).

with regards to its essential objectives and secondly on it reaching those objectives.<sup>759</sup> ICL is already seriously inhibited on institutional and enforcement levels and cannot reach its objectives if they are overly-demanding. On the other hand, assuring accountability for perpetrators and preventing serious violations of human rights are now widely recognised ideals of the international community. Failure to achieve these ideals cannot be justified or tolerated much longer.

Finally, it cannot be overlooked that international criminal tribunals operate at a slow pace and a high cost.<sup>760</sup> The ICC's first judgment was delivered ten years after the court came into operation at a cost of roughly €100 million per annum.<sup>761</sup> The budgets of the *ad hoc* and hybrid tribunals are similarly disproportionate to the number of judgments that have been delivered by these courts.<sup>762</sup> Although understandable in light of the unique practical difficulties and contextual complexities faced by international courts, these considerations have "raised serious doubt about the value of these tribunals".<sup>763</sup>

Why then do the supporters of ICL sometimes overlook the inefficiencies of ICL in relation to domestic criminal law proceedings? Firstly, the differences between the objectives of domestic criminal law and those of ICL provide a measure of rationalisation for the slow pace of ICTs, especially the *sui generis* goals mentioned above. The recognition of the greater prevalence of goals which are long-term and forward-looking, offers a conceptualisation of ICL that makes short term retribution less imperative and delays in the conveyance of criminal justice (within limits of course) more acceptable. This is especially true if such delays are the result of efforts aimed at ensuring a fair and transparent trial, the

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<sup>759</sup> See Damaska (*supra*) in Cassese (The Oxford Companion) (*supra*) 178: "The prolixity of goals is far from harmless: the resulting disparities between aspiration and achievement may damage the reputation of any system of justice – let alone an immature one, whose legitimacy is not yet firmly established".

<sup>760</sup> See Goldbraith J "The Pace of International Criminal Justice" (2009) 31 (1) *Michigan Journal of International Law* 79-155, 79.

<sup>761</sup> ICC, *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Judgment) Case No. ICC-01/04-01/06, 14 March 2012; see also <http://www.iccnw.org/?mod=budgetbackground> (accessed 2012/03/26).

<sup>762</sup> See Drumbl (Atrocity, Punishment and International Law) (*supra*) 131.

<sup>763</sup> See Goldbraith (The Pace of International Criminal Justice) (*supra*) 82 and 142.



latter which constitutes an important aspect of the expressive and symbolic value of international criminal tribunals.

Secondly, states support the project of international criminal justice for reasons that are unrelated to the efficiency of ICL. International law is mainly aimed at creating consensus and achieving cooperation among states. International criminal justice as an expressive device of the international community is a fictitious notion that is becoming more realistic as ICL evolves, especially with the appearance of the permanent ICC. The ICC holds the potential, unparalleled in history, for wielding its influence from a global stage. The ICC's potential influence is however heavily dependent on political support for the Court and cooperation in terms of enforcement of the law of the Rome Statute. When presented with the opportunity of joining a cause articulated by the international community through international law, it is governments who make the choice to be involved or to associate as well as whether or not to keep their legal commitments towards courts and treaties. Domestic and international politics plays a crucial role in this regard. The following chapter investigates the relationship of politics and international criminal justice.

## CHAPTER 6

### THE TRANSFORMATIVE ATTRIBUTES OF INTERNATIONAL CRIMINAL LAW

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#### 6.1 Introduction

“If you claim that law is a type of politics, that it serves political ends, are you not suggesting that law is merely the instrument of the ruling class, to be used by it as it sees fit to promote its own interests?”<sup>764</sup>

The analysis of the objectives of ICL in the previous chapter addressed the historical and legal rationale for the existence of international criminal justice. The analysis also hints at what ICL can potentially achieve. To a certain extent, the objectives of ICL as highlighted in the previous chapter hints at the potential of ICL to benefit individuals, post-conflict societies and states. Yet, they are for the most part *theoretical* objectives. They can never be achieved without active support and cooperation from states. Tallgren noted that “the promise of the benefits of real law [...] confronts the unpredictable ‘reality’ of international politics” in international criminal justice.<sup>765</sup> For this reason, it is necessary to consider the influence of political power on ICL and its transformative potential.<sup>766</sup>

Some authors have endeavoured to illustrate that states support international criminal justice only when it is in their self-interest to do so or because there is an alignment of interests and political beliefs.<sup>767</sup> This notion, namely the politicisation of law, is reflected in

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<sup>764</sup> Shklar (Legalism) (*supra*) 143.

<sup>765</sup> Tallgren (Sensibility and Sense) (*supra*) 564. See also Hirsh (Law Against Genocide) (*supra*) 17: “[...] history [...] has repeatedly demonstrated that power politics overrides paper law”.

<sup>766</sup> At times such consideration will require references to the work of international relations theory and political science, but only to the extent that such references are necessary for addressing the research question.

<sup>767</sup> See Peskin (International Justice) (*supra*); Bass (Stay the Hand of Vengeance) (*supra*) (the author points out that mostly liberal states support international war crimes tribunals).

the opening quotation to this chapter above. The question posed by Shklar serves also to introduce the realist perspective on law, under which law is viewed as an instrument of power. The notion of “law as power” and the relationship between justice and power has notable significance to students of international law and international criminal justice. The interactions of international (criminal) law and politics which I investigate in this chapter are part of a complex field of study to which many have contributed.<sup>768</sup> My aim in this chapter is to consider some of these contributions in order to determine the influence of power and politics on ICL’s transformative value.

Because international law reflects the politics and values of the international order and serves purposes to this end, it may be contended that ICL responds to and is shaped by the political and economic forces that dominate the system.<sup>769</sup> The “internationalization of criminal justice” can be viewed as “a fusion of ideology and structure”.<sup>770</sup> The political and ideological motives and purposes behind ICL has (and will have) a profound impact on its transformative value since as a species of international law it is still largely based on the political acquiescence of states to concede their sovereign powers to an area of international regulation. In this thesis I approach the transformative value of ICL from a broad perspective to include interactions of ICL and politics that have a positive or negative impact on the transformative potential of ICL.

The investigation below proceeds from the notion of ICL as a device for the expression of the often conflicting values of states and the *civitas maxima*.

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<sup>768</sup> See Bass (Stay the Hand of Vengeance) (*supra*); Peskin (International Justice) (*supra*); Megret F “The Politics of International Criminal Justice” (2002) 13 (5) *European Journal of International Law* 1261-1284 (for a general overview of various published works dealing with the politics of international criminal justice.)

<sup>769</sup> Henkin (International Law) (*supra*) 1.

<sup>770</sup> Findlay M and Henham R *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (2005) Willan Publishing, Cullompton at xv.

## 6.2 The Values of International Criminal Justice

Earlier in the thesis, the notion of punishment as an act with expressive significance has been introduced.<sup>771</sup> Broadly speaking, the limitations on the international criminal justice system is an expression of state values, while ICL's repressive and normative functions are expression of human values and a consequence of ICL's brotherhood with human rights. International criminal norms project these values onto the international order and also onto states internally. Whether applied as hard law, or through the impact of "soft power", ICL may influence the behaviour of states and other actors.<sup>772</sup>

### 6.2.1 State Values

Since states are the primary subjects in the international legal system, the most important values of the international legal order have traditionally been those of states. Foremost among these is the notion of state sovereignty. It can be said that all other state values such as equality, autonomy and independence are derived from sovereignty. These represent the traditional values of the international legal order.

ICL as an expression of state values manifests most clearly through the constraints placed before it by the international order. The lack of a central enforcement authority and the critical importance of state cooperation emphasise the consent driven nature of the international legal order. Public international law generally aspires to facilitate voluntary state cooperation. This is reflected in ICL's sources, which are created either through multilateral treaty or through state practice backed by *opinio juris*.

State values often pose an obstacle to international criminal justice. This is evidenced by the relevance of sovereignty-based rules of international law such as exclusive criminal jurisdiction over territory and head of state immunity.

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<sup>771</sup> See Chapter 5 para 5.6.1 *supra*.

<sup>772</sup> Peskin (International Justice) (*supra*) 7 (Peskin notes that even though international criminal tribunals have no enforcement power they do employ strategies that affect the behaviour of states and other actors that interact with these the tribunals behind the scenes). See Chapter 1 para 1.5 (assumption2) *supra*.

## 6.2.2 Human Values (or, Values of the *Civitas Maxima*)

The rise of ICL embodies an encroachment on classical state sovereignty. As such, ICL is part of the body of cosmopolitan law which has developed since the end of the Second World War and has been described as:

“[...] a new form of law [that emerged] out of international law, a form of law that has a logic that transcends international law and is in some respects in contradiction to it. It seeks to limit state sovereignty, and lays down minimum standards for the treatment of human beings by states.”<sup>773</sup>

ICL, as a reflection of the social and moral norms of the international community, represents the foray of human values into what has traditionally been viewed as the exclusive prerogative of the state. International law is increasingly seeking to create an internal effect in states. The principles of sovereignty and non-intervention are increasingly losing ground to the vertical application of international rules to alter government conduct. Highly significant in this regard is the Responsibility to Protect (R2P), an emerging norm of international security and human rights that views sovereignty as a responsibility and not an absolute right.<sup>774</sup> Accordingly “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.<sup>775</sup> International law is moving beyond its traditional role of regulating interstate conduct to regulating the conduct of states towards their citizens.<sup>776</sup> To this end international law is increasingly “invasive, but also potentially transformative” and has as a result become increasingly intimidating to those states that still demand a high or absolute level of domestic autonomy.<sup>777</sup>

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<sup>773</sup> Hirsh (Law Against Genocide) (*supra*) 1. According to Hirsh “cosmopolitan law exists as an empirical fact, in institutions such as the International Criminal Tribunal for the former Yugoslavia as well as in treaties, conventions and charters that give ammunition and courage to those struggling against state tyranny”.

<sup>774</sup> UNGA Res 60(1) (2005) paras 138-139.

<sup>775</sup> UNGA Res 60(1) (2005) para 138.

<sup>776</sup> Slaughter AM and Burke-White W “The Future of International Law is Domestic (or, The European Way of Law)” (2006) 47(2) *Harvard Journal of International Law* 331.

<sup>777</sup> Slaughter and Burke-White (The Future of International Law is Domestic) (*supra*) 331.

The rules of international criminal law are primarily intended to protect the values of the international community or human values.<sup>778</sup> Although individuals still have a very limited form of international legal personality which is mostly filtered through the state, human beings are no longer indirect beneficiaries of international law in an absolute sense. The emergence of the human rights movement in the wake of the Second World War is a reflection of the rise of human values.<sup>779</sup> Individuals have gained a measure of formal international legal protection against state abuse. It may be said that the values of the international community are encapsulated in the most important international human rights instruments such as the UN Charter, the Universal Declaration of Human Rights, the ICCPR, and the ICESCR.<sup>780</sup> Other treaties such as the Genocide Convention and the Convention Against Torture bolster these values indirectly by criminalising conduct which infringes upon them.<sup>781</sup>

The close affiliation of ICL with human values is a result of two characteristics. Firstly, as a species of criminal law, ICL has developed to serve as a statement of types of conduct that the international community has deemed worthy of carrying the label of international crime. Criminal law is particularly expressive of social values and what a society deems to be offensive towards its shared values. In the international context, states and the international community are the primary driving forces of transformation. In accordance with one of the central themes of this thesis, international criminal justice is one of the mechanisms through which they may promote, export and entrench their values.

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<sup>778</sup> See for example, ICTR, *Prosecutor v Elizaphan and Ntakirutimana* (Trial Chamber I: Judgment and Sentence) Cases No. ICTR-96-10 and ICTR-96-17-T, 21 February 2003, para 881: “Both accused have been found guilty of genocide and crimes against humanity. These crimes are of an utmost gravity; they are shocking to the conscience of mankind, in view of the fundamental human values deliberately negated by their perpetrators and the sufferings inflicted. These crimes threaten not only the foundations of the society in which they are perpetrated but also those of the international community as a whole”.

<sup>779</sup> Henkin (International Law) (*supra*) 173.

<sup>780</sup> Cassese (International Criminal Law) (*supra*) 23.

<sup>781</sup> Cassese (International Criminal Law) (*supra*) 23.

Secondly, ICL is closely associated with human rights.<sup>782</sup> Protection of human rights represents liberal morality.<sup>783</sup> The interaction or “partnership” between ICL and human rights highlights the values that the prosecution of international crime is intended to protect.<sup>784</sup> These values are closely associated with basic human rights such as the right to life and the right to human dignity as well as rights that protect minorities and vulnerable groups and rights that are intended to protect against state sponsored abuse.

### 6.3 The Politics of International Criminal Justice

The concept of transformation is inextricably linked to politics.<sup>785</sup> Therefore, to understand ICL’s transformative value one must not only look to at the qualities of ICL that make it amenable to promoting transformation, but also to the political values that drive transformation through the use of ICL.

#### 6.3.1 (International) Law and Politics: Justice and Power in the International Order

The disciplines of law and politics are among the world’s great agents of change, consequently the term ‘transformation’ is often encountered in both these fields. Of the two, politics is the more powerful but also the more radical vehicle for social transformation. In the context of political violence and social upheaval, the demands of politics and those of international criminal justice often clash. History shows that change through radical politics comes with an unacceptable amount of damage to individual rights and the rule of law. Under a regime of radical politics, law becomes either politically tainted, as was the case in Nazi Germany and *apartheid* South Africa, or the state is plunged into lawlessness where the rule of law is marginalised and domestic courts become unwilling or unable to cope.

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<sup>782</sup> See Chapter 2 para 2.2.1 *supra* and Chapter 8 para 8.3.4.1 *infra*.

<sup>783</sup> Osiel (Why Prosecute?) (*supra*) 141.

<sup>784</sup> Cassese (International Criminal Law) (*supra*) 18.

<sup>785</sup> This is especially evident in the context of transitional justice where law is invoked to achieve change in a liberal and democratic direction, see Teitel (Transitional Justice) (*supra*).

According to Luban “[p]olitics is broad, partial and forward-looking”.<sup>786</sup> The nature of politics makes it an unstable vehicle for change when compared to the consistency and certainty of legal processes. On the other hand, law and legal process can provide change that is stable (although some would argue that this change is not always radical enough and allows for an unacceptable continuation of injustices). The perceived legitimacy and moral authority of international law has popularised the recourse to ICL during transformative periods. There seems to be a general perception that recourse to international law during such periods can provide greater stability and neutrality than tainted or overwhelmed domestic legal systems. Yet, deeper analysis reveals that state support of, and cooperation with, international criminal justice is a field of study that is both highly complex and essential to a proper understanding of modern ICL.<sup>787</sup>

In legal theory there is a body of opinion that law must be apolitical.<sup>788</sup> Law and politics can be formally and academically separated, but according to Henkin:

“[...] the distinction between law and politics is only a part truth. In a larger, deeper sense, law *is* politics. Law is made by political actors, through political procedures, for political ends. The law that emerges is the resultant of political forces; the influences of law on state behaviour are also determined by state behaviour.”<sup>789</sup>

Since there exists no central agency of power in the international order, international law is almost wholly dependent for its survival on its ability to entice political support.<sup>790</sup> The discipline of international relations theory is informative in this regard since it attempts to explain and predict state behaviour. Two of the most common approaches to international relations theory are realism (or political realism) and liberalism.<sup>791</sup>

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<sup>786</sup> Luban (Fairness to Rightness) (*supra*) 8.

<sup>787</sup> See for example, Krisch (International Law in Times of Hegemony) (*supra*); Bass (Stay the Hand of Vengeance) (*supra*); Peskin (International Justice) (*supra*)

<sup>788</sup> Shklar (Legalism) (*supra*) 111.

<sup>789</sup> Henkin (International Law) (*supra*) 4.

<sup>790</sup> Krisch (International Law in Times of Hegemony) (*supra*) 370.

<sup>791</sup> Slaughter AM “International Law in a World of Liberal States” (1995) 6 *European Journal of International Law* 506.



Realists argue that law is a mere by-product of the political processes that bring about social change.<sup>792</sup> According to realists, the law is always man-made and created through politics. Realism in international relations advances the notion that international law and idealism are irrelevant to the national interests of the monolithic state and to international politics.<sup>793</sup> Realist scholars of international relations, along with Marxist and critical legal scholars have attempted to show that “international law itself is instrumental to, and shaped by, power”.<sup>794</sup> Adherents of classic political realism in international relations theory hold that state interests are paramount to ideology in an anarchic, consent-driven world order composed of self-interested states. International law with its “dangerous moralism” is viewed as a luxury and either met with scepticism or disregarded by realists.<sup>795</sup>

A prominent assertion of the realist view of international criminal law finds expression in the criticism against international criminal courts as a means of dispensing victors’ justice. This critique has been raised by amongst others Wilhelm II after the First World War, Hermann Göring at the Nuremberg IMT in the wake of the Second World War and by indicted Serb military leaders at the ICTY following the conflict in the former Yugoslavia.<sup>796</sup> Realism also finds expression in the African critique of the ICC as a neo-liberal institution.<sup>797</sup>

International law must not be indisputably dismissed as an instrument of power and politics as realists would suggest. According to Krisch “[i]nternational law appears as either the nemesis of power or as its handmaiden”.<sup>798</sup> There is some evidence that contradicts the realist perspective and shows the influence of liberalism and idealism in the international order.<sup>799</sup> Firstly, international courts focus on persons who, although they may be perceived

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<sup>792</sup> Teitel (Transitional Justice) (*supra*) 3.

<sup>793</sup> Slaughter (International Law in a World of Liberal States) (*supra*) 507.

<sup>794</sup> Krisch (International Law in Times of Hegemony) (*supra*) 370.

<sup>795</sup> Slaughter (International Law in a World of Liberal States) (*supra*) 503; Bass (Stay the Hand of Vengeance) (*supra*) 9.

<sup>796</sup> Bass (Stay the Hand of Vengeance) (*supra*) 8-9.

<sup>797</sup> See Chapter 7 para 7.6.2.2 and 7.7.1.1 *infra*.

<sup>798</sup> Krisch (International Law in Times of Hegemony) (*supra*) 371.

<sup>799</sup> Bass (Stay the Hand of Vengeance) (*supra*) 12-16.

as political enemies, are put on trial because they have committed criminal acts, and not in order to purge them.<sup>800</sup> These trials are not merely show trials. It is not the defendants themselves who are stigmatised but the acts that they have committed. These acts in turn are deemed to be universally offensive through various modes of positive law such as international treaties, the statutes of international courts and in some states through domestic legislation. In modern international courts defendants may receive an acquittal if the case against them is not supported by evidential proof, if the trial is unfair towards the accused or botched somehow by the prosecution. From Nuremberg to the *ad hoc* tribunals there have been numerous acquittals to prove that the prospect of acquittal is not merely a theoretical possibility.

The emphasis on the criminal liability of the accused and on upholding the rule of law through punishment also appears in the Rome Statute. The preamble to the Rome Statute confirms the commitment of state parties to punish “perpetrators” of “the most serious crimes of concern to the international community”. The Rome Statute also includes various provisions which guarantee certain due process rights and that criminal law principles of fairness are to be applied in the trial of any accused. Yet realists may argue that for all its legal principle the Rome Statute is a ‘fig leaf’ masking the interests of those who back the ICC for political reasons.

Secondly, although states remain the dominant powers in the international order, idealism is pushed to the fore of international relations by the international community and non-state actors. Especially since the 1960’s, non-governmental organisations have been successful in applying pressure and persuading states in the direction of cooperation with international criminal justice efforts.<sup>801</sup> The human rights movement has also filtered its idealism through to the international order. Many international crimes, such as the distinct crime of torture and the crime of apartheid, exist as an attempt to ensure respect for basic human rights. Human rights idealism is also filtered into international criminal justice through more indirect means. Consider for example the requirement in article 21(3) of the Rome Statute that the law applied by the ICC “must be consistent with internationally recognised human rights”. Also, article 36(3)(b)(ii) of the Rome Statute provides that:

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<sup>800</sup> Bass (Stay the Hand of Vengeance) (*supra*) 12.

<sup>801</sup> Bass (Stay the Hand of Vengeance) (*supra*) 33.

“Every candidate for election to the Court shall ... Have established competence in relevant areas of international law such as international humanitarian law and *the law of human rights*, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.” (emphasis added)

Human rights groups are generally supportive of international criminal law and international criminal courts since the prosecution of international crimes such as torture and crimes against humanity are invariably linked to the transgression of human rights norms and aims to deter future human rights abuses.

Whether through the influence of politics, idealism or through its traditional consent-driven nature, international law may function in a way that is restrictive of power. The foundations of international law, such as equality of states and sovereignty, provide a counterweight to abuses of power. As a result, international law is “disinclined to grant formal recognition to structures of superiority”.<sup>802</sup> According to Krisch, international law is always in a precarious position where it mediates between the “demands of the powerful and the ideals of justice held by international society at any given moment”.<sup>803</sup> Accordingly, international law has a dual nature that appeals to both realists and idealists. It is “both an instrument of power and an obstacle to its exercise”.<sup>804</sup> Powerful states may endeavour to abuse the legitimacy of international law by using it as a smokescreen to hide unilateral interests. At other times international law presents states with “the hurdles of equality and stability”, in which case states are inclined to withdraw their support for international regulation.<sup>805</sup> This is illustrated by the United States of America’s (“USA”) ambiguous support of the ICC. Although the USA was supportive of the work of the ICC in Sudan and Libya via its permanent seat on the UNSC, the USA is not a party to the Rome Statute because it perceives the court as a threat to its military interests and national security, especially post-September 11, 2001.

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<sup>802</sup> Krisch (International Law in Times of Hegemony) (*supra*) 370.

<sup>803</sup> Krisch (International Law in Times of Hegemony) (*supra*) 408.

<sup>804</sup> Krisch (International Law in Times of Hegemony) (*supra*) 371.

<sup>805</sup> Krisch (International Law in Times of Hegemony) (*supra*) 371.

### 6.3.2 The Influence of Western Liberal Legalism

International criminal justice is clearly saturated with the values and legal principles of liberal legalism. In this section the goal is to define liberal legalism through the relationship between liberalism and legalism and their respective characteristics. It is submitted that the influence of liberal legalism is an important component of ICL's transformative value.<sup>806</sup>

#### 6.3.2.1 Defining Liberal Legalism

The word "liberal" is infamously ambiguous in its meanings.<sup>807</sup> As a political theory or philosophy, liberalism is founded upon respect for individual freedom and individual autonomy.<sup>808</sup> In theory, the main objective of the liberal state is to ensure liberty - the economic and personal freedom of individuals.<sup>809</sup> The liberal state is today the most prominent form of political society.<sup>810</sup> Liberal political philosophy owes much to the work of Hobbes and Locke. Their influence has created the foundation of the liberal view that "individuals possess certain natural rights that it is incumbent upon the state to protect, even in situations where violating these rights may turn out to be beneficial to the community".<sup>811</sup> Liberalism's attempt to maximise individual liberty against state power is closely associated with the human rights movement.<sup>812</sup>

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<sup>806</sup> See Chapter 8 paras 8.3.4.2 *infra*.

<sup>807</sup> Teson FR "The Kantian Theory of International Law" (1992) 92 (1) *Columbia Law Review* 53-102, 54 (footnote 4).

<sup>808</sup> Teson (Kantian theory) (*supra*) 54 (footnote 4).

<sup>809</sup> Henkin (International Law) (*supra*) 104 (for this reason liberal states interfere to a minimal extent and act primarily as "police officers").

<sup>810</sup> Henkin (International Law) (*supra*) 104 (the author notes that there have been few authentically liberal states).

<sup>811</sup> Fichtelberg A "Liberal Values in International Criminal Law: A Critique of Erdemović" (2008) 6 *Journal of International Criminal Justice* 3-19, 9.

<sup>812</sup> Clarke K "Rethinking Africa Through its Exclusions: The Politics of Naming Criminal Responsibility" (2010) 83 (3) *Anthropological Quarterly* 625-651, 627; Fagan A "Human Rights" *Internet Encyclopaedia of Philosophy* available at <http://www.iep.utm.edu/hum-rts/> (accessed 2011/08/23): "The philosophical ideas defended by the likes of Locke and Kant have come to be associated with the general Enlightenment project initiated during the 17<sup>th</sup> and 18<sup>th</sup> Centuries, the effects of which were to extend across the globe and

Liberalism may also be expressed as a theory of international relations. Liberal thinkers of the Enlightenment period are recognised for their contribution to the essence of modern liberal theory of governance and international co-operation. Modern liberalism's ideals are a reflection of especially Kant's work on democracy, peace, common humanity and co-operation among states in an increasingly integrated world.<sup>813</sup> The Kantian theory of international law has a (neo-) liberal basis and therefore also holds a foundational belief in the primary importance of the individual:

“Liberal theory [of international law] commits itself [...] to normative individualism, to the premise that the primary normative unit is the individual, not the state. The end of states and governments is to benefit, serve, and protect their components, human beings; and the end of international law must also be to benefit, serve, and protect human beings, and not its components, states and governments.”<sup>814</sup> (footnotes omitted)

In contrast to the state-centred focus of realism, liberalism assumes that individuals are the primary actors in the international system.<sup>815</sup>

Simpson distinguishes between two prevalent “strands” of liberalism or “two of the ways in which liberalism has supplied international law with a theory of political community among states”, namely classical liberalism (or “Charter liberalism”) and neo-liberalism (or “liberal anti-pluralism”).<sup>816</sup> As the earlier of the two varieties of liberalism in international law, classical liberalism equates states to individuals and treats them as equal and independent actors.<sup>817</sup> In line with traditional Westphalian sovereignty, the state is therefore the centre or primary subject of this form of liberalism. Classical liberalism is based on tolerance, non-interference and non-prescription in the domestic politics of a state. Many of these ideals are established principles of the international legal order and formally

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over ensuing centuries. Ideals such as natural rights, moral autonomy, human dignity and equality provided a normative bedrock for attempts at re-constituting political systems, for overthrowing formerly despotic regimes and seeking to replace them with forms of political authority capable of protecting and promoting these new emancipatory ideals”.

<sup>813</sup> Kemp (Individual Criminal Liability) (*supra*) 33-34.

<sup>814</sup> Teson (Kantian Theory) (*supra*) 54.

<sup>815</sup> Slaughter (International Law in a World of Liberal States) (*supra*) 508.

<sup>816</sup> Simpson G “Two Liberalisms” (2001) 12 (3) *European Journal of International Law* 537-571, 537.

<sup>817</sup> Simpson (Two Liberalisms) (*supra*) 540-541.

encapsulated in the UN Charter, hence Simpsons' reference to "Charter liberalism". A primary example of this is the principle of non-interference in the domestic affairs of states in article 2(7) of the UN Charter.<sup>818</sup> Diversity of political beliefs among states is accepted, making this form of liberalism inclusive and pluralistic in nature. As a result of this pluralism, classical liberalism ascribes to "agnosticism about moral truth".<sup>819</sup>

Neo-liberalism developed later than classical liberalism and "views liberalism as a comprehensive doctrine or a social good worth promoting".<sup>820</sup> Neo-liberalism is less tolerant of illiberal regimes and treats them in an exclusionary manner.<sup>821</sup> The internal characteristics of states determine their standing in the international order. Traditional sovereign equality becomes a qualified right:

"Respect for states is merely derivative of respect for persons. In this way, the notion of state sovereignty is redefined: the sovereignty of the state is dependent upon the state's domestic legitimacy; and therefore the principles of international justice must be congruent with the principles of internal justice."<sup>822</sup> (footnotes omitted)

Neo-liberalism does not embrace pluralism. Individual rights, human rights and the norm or emerging right of democracy lie at the heart of this form of liberalism.

Neo-liberalism has become increasingly more prevalent in the international legal order. This form of liberalism is encapsulated especially well in the works of John Rawls, Thomas Franck and Anne Marie Slaughter.<sup>823</sup> Slaughter defines liberalism as a theory of international relations that "permits, indeed mandates, a distinction among different types of States based on their domestic political structure and ideology".<sup>824</sup> Thus neo-liberalism begins by separating the liberal from the illiberal. In the criminal law context, liberalism is

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<sup>818</sup> Simpson (Two Liberalisms) (*supra*) 540-541.

<sup>819</sup> Simpson (Two Liberalisms) (*supra*) 539.

<sup>820</sup> Simpson (Two Liberalisms) (*supra*) 540.

<sup>821</sup> Slaughter (International Law in a World of Liberal States) (*supra*) 504.

<sup>822</sup> Teson (Kantian Theory) (*supra*) 54.

<sup>823</sup> See Rawls J *The Law of Peoples* (1999) Harvard University Press, Cambridge; Franck TM "The Emerging Right to Democratic Governance" (1992) 86 (1) *American Journal of International Law* 46-91; Slaughter (International Law in a World of Liberal States) (*supra*) 504.

<sup>824</sup> Slaughter (International Law in a World of Liberal States) (*supra*) 504.

reflected by an emphasis on individual rights, due process and principles of equality that protect individuals and counteract state abuse of power. States that do not respect the aforementioned liberal tenets and other liberal preferences such as democratic government may be labelled as illiberal. The neo-liberal distinction “between liberal democracies and other kinds of States, or more generally between liberal and non-liberal states, cannot be accommodated within the framework of classical international law” where states are equal sovereigns.<sup>825</sup>

The neo-liberalist influence on the international order exposes international law to the hegemonic critique.<sup>826</sup> However, classical liberalism must not be assumed to be preferable because it is “anti-hegemonic” or “less hegemonic”. Classical liberalism represents the “universal face” of liberalism, but it is still a political force that influences the prerogatives of the international order and the functioning of international law. Both strands of liberalism represent a form of imposed moralism. In neo-liberalism this imposition of moralism only manifests in a more pronounced and prominent form.

Across its various meanings, liberalism demonstrates a confidence in legalism. Shklar defines the legalist outlook as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”.<sup>827</sup> Elsewhere Shklar refers to legalism as a “social ethos [...] which gives rise to the political climate in which judicial and other legal institutions flourish [...]”.<sup>828</sup> Legalism is often expressed as a political ideology or “political preference”.<sup>829</sup> Others have suggested that legalism is “the ideological proposition that moral conduct is a matter of following rules”.<sup>830</sup> It is the belief that all human conduct, even individual conduct during collective violence, is within reach of legal rules. Peskin describes the manifestation of legalism in international

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<sup>825</sup> Slaughter (International Law in a World of Liberal States) (*supra*) 505.

<sup>826</sup> See para 6.3.3 *infra*.

<sup>827</sup> Shklar (Legalism) (*supra*) 1; see also Shklar (In Defense of Legalism) (*supra*) where legalism is similarly defined as “the belief that morality consists of following rules and that moral relationships are a matter of duties and rights assigned by rules”.

<sup>828</sup> Shklar (Legalism) (*supra*) 1, 8.

<sup>829</sup> Shklar (Legalism) (*supra*) 3-4, 111-220.

<sup>830</sup> West R “Reconsidering Legalism” (2003) 88 *Minnesota Law Review* 119-158, 119.

criminal justice as “the idea that there should be [international criminal] trials governed by principles of fairness and due process”.<sup>831</sup>

Legalism is by nature a conservative and rule-bound exercise, committed to preserving the past in an effort to maintain social expectations.<sup>832</sup> Accordingly, the principle of legality (including the rule against the retrospective application of law) is a primary value of legalism.<sup>833</sup> For this reason legalism often acts as a constraint to the transformative agenda of liberalism (especially neo-liberalism) that seeks to introduce new legal norms in societies that have not yet embraced them. Yet, to some extent legalism is an important aspect of the liberal transformative agenda. When liberal rules are willingly or unwillingly imported by transitional or post-conflict societies, the belief that these “new” rules are preferable and binding is based on both the perceived legitimacy of international law and faith in legalism. Legalism, if embraced by a society in this manner, is no conservative exercise similar to the legalist commitment to rule-following in stable domestic legal orders. In such a setting, legalism may not maintain social expectations but establish new ones. In the aforementioned context there is less ‘past’ to preserve, only new expectations to be created through the values and norms of the ‘liberal’ international legal order. A prominent example is punishing perpetrators of acts which may have been legal under the previous political order. In this way legalism provides legitimacy to such liberal transformative projects and is itself an important part of the transformative process. Thus, as part of transformation with an international element, legalism contradicts itself in favour of that which is believed to be in the interest of the greater good.

International criminal justice may be regarded as a convergence of liberalism and legalism. At the heart of liberalism lies the belief in legalism as a means of political and legal transformation, while at the heart of both liberalism and legalism lies respect for individualism that is expressed through legal rules.<sup>834</sup> Liberalism and legalism share a belief

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<sup>831</sup> Peskin (International Justice) (*supra*) 19.

<sup>832</sup> See Shklar (Legalism) (*supra*) 10: “[...] legalism with its concentration on specific cases and rules is, essentially, conservative”.

<sup>833</sup> Shklar (Legalism) (*supra*) 146.

<sup>834</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 238. Osiel describes the pre-eminent liberal virtue as “respect for the moral rights of individuals”.



in the value of the criminalisation of certain acts and the individualisation of guilt. Although distinct concepts, liberalism and legalism are so closely associated in the international (legal) order that they are often grouped together and referred to as 'liberal legalism'. In this thesis liberal legalism refers broadly to rules that create rights and obligations which are aligned with liberal political beliefs that attempts to protect individuals and the interests of liberal states. Liberal legalism is a legal and political ideology especially closely associated with a belief in human rights and democratisation.

### **6.3.2.2 The Ascendency of Liberal Legalism (and Political Realism) in International Criminal Law**

The liberal-legalist adversarial criminal trial is fast becoming "the idiom of international criminal law".<sup>835</sup> For example, the ICTY and ICTR have been held up by some as "new beacons for international legal liberalism".<sup>836</sup> Liberal criminal law principles and processes have become the template for endeavours of international justice.<sup>837</sup> According to Fichtelberg:

"Given that conventional (domestic) law can usually rely upon a constitution, or at a minimum, a set of communally shared values, to fill in the background of legal rules, it is initially unclear how a legal theory that is based on a domestic paradigm can apply to international criminal law with its overlapping legal and political traditions, and the diverse cultures over which international law must hold dominion. However, international law in general, and international criminal law in particular, displays a number of characteristics that are indicative of an underlying liberal political philosophy. In addition, the mandate of the ICTY essentially defines it as a liberal institution, embodying a number of procedural rules that would only be found in a liberal context. International criminal law represents in many ways, the ideals of a liberal society. Central concepts of humanitarian law and international criminal law - most importantly the recognition that individuals, even those accused of crimes,

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<sup>835</sup> Heller KJ "Deconstructing International Criminal Law: Review of Drumbl MA *Atrocities, Punishment, and International Law*" (2008) 106 *Michigan Law Review* 975-999, 978.

<sup>836</sup> Hagan, Levi and Ferrales (Swaying the Hand of Justice) (*supra*) 586.

<sup>837</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 5.

have a set of basic, procedural rights - indicate the strong influence of liberal traditions upon this legal regime.”<sup>838</sup>

The fact that international criminal tribunals are constrained by procedural and due process rights of the accused and by human rights in general, argues for a liberal conception of international criminal law.<sup>839</sup> Relying on Dworkin’s *Taking Rights Seriously*, Fichtelberg notes that ICL generally favours a ‘principled’ approach over a ‘policy’ approach.<sup>840</sup> Accordingly, he argues that rights and legal principles protecting the individual accused should be regarded as superior to the broader purposes (policy) of ICL.

This is not always the approach of judges at international criminal tribunals. In *Erdemović*, the ICTY Appeal Chamber ruled that the accused could not rely on the defence of duress since this would undermine the purpose for which the tribunal was created, namely to protect weak and vulnerable peoples.<sup>841</sup> Fichtelberg criticised the *Erdemović* judgment for deviating from the liberal values of ICL. He called the ruling an “inappropriate decision”, one which “undermined the moral and theoretical core of international humanitarian law” and “feeds the fires of those who equate the criminal tribunals with the exercise of victor’s justice”.<sup>842</sup>

Fichtelberg’s argument above is a solid one. Fichtelberg makes a convincing argument based on the influence of liberal political philosophy on ICL. It is submitted however that he failed to account for the influence of liberalism on international relations and the latter’s impact on ICL. The politicisation of ICL through neo-liberalism has infused it with liberal ideals and values which move ICL beyond the liberal-legalist belief in adherence to principle. These liberal purposes are a major driving force behind ICL, without which it would be hard for international criminal tribunals to garner the political support necessary to function effectively. International criminal courts are established for specific purposes and supported politically by those states who consider such purposes to be important. This importance may be based on the states internal beliefs or on self-interest. Although it cannot

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<sup>838</sup> Fichtelberg (Liberal Values) (*supra*) 11-12.

<sup>839</sup> Fichtelberg (Liberal Values) (*supra*) 12-13.

<sup>840</sup> Fichtelberg (Liberal Values) (*supra*) 6-9.

<sup>841</sup> ICTY, *Prosecutor v Erdemović* (Appeals Chamber: Judgment) Case No. IT-96-22-A, 7 October 1997.

<sup>842</sup> Fichtelberg (Liberal Values) (*supra*) 18.

be said that judges consider themselves bound to behind-the-scenes politics or political purposes, they are generally bound by those purposes mentioned in the statute of the court in which they serve and the constituting treaty or resolution establishing that court. International criminal tribunals are established among other things for utilitarian purposes such as reconciliation and deterrence that views punishment of the accused as a means to an end. The *Erdemović* decision may represent a confirmation of the fact that judges consider themselves legally bound to promote broader liberal purposes of international courts thereby at times subordinating the strict legalist approach. Legal scholars such as Fichtelberg will question the fairness of such an approach on the basis that it violates the traditional liberal state-individual dichotomy. Others will ask whether the traditional state-individual dichotomy should be applied strictly in international criminal courts and might suggest that exceptions can be made for international criminal justice because of the unique context in which it functions as well as the unique purposes for which it has been created.

But why is liberalism so dominant in international criminal justice? For international law generally, the overriding relevance of liberal political philosophy and liberal international relations theory lies in acceptance of the fact that “international law and international politics cohabit the same conceptual space”, namely the international system or international order.<sup>843</sup> One of the basic assumptions of ICL, that international crimes and collective violence can be addressed through criminal law that assigns individual criminal responsibility (and individual guilt), draws on Western liberalist thought and the belief in legalism which dominates the international system.<sup>844</sup> It has been suggested that this development might be viewed as a reflection of the internal values and principles of liberal states on the foreign policy level, which in turn brings domestic idealism into international affairs.<sup>845</sup> Bass argues that “liberal ideals make liberal states take up the cause of international justice”.<sup>846</sup> Thus, the acts criminalised under ICL and the doctrines of responsibility which determine the amount of individual guilt attributable to acts or omissions may be viewed as manifestations of dominant forces in the international moral and political order and the belief of those dominant forces in liberal idealism and legalism.

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<sup>843</sup> Slaughter (International Law in a World of Liberal States) (*supra*) 504.

<sup>844</sup> Clarke (Rethinking Africa Through its Exclusions) (*supra*) 627.

<sup>845</sup> Bass (Stay the Hand of Vengeance) (*supra*) 17.

<sup>846</sup> Bass (Stay the Hand of Vengeance) (*supra*) 18.

Furthermore, a belief in legalism underlies liberalism.<sup>847</sup> In colloquial terms, legalism is ‘part of the bargain’ of liberalism. Both concepts are politically motivated (or political preferences) and each finds its own way of expression in international (criminal) law. According to Gary Bass:

“[...] the serious pursuit of international justice rests on principled legalist beliefs held by only a few liberal governments. Liberal governments sometimes pursue war crimes trials; illiberal ones never have.”<sup>848</sup>

And:

“There are two strong pieces of evidence to support the liberal view of international relations. First, *every* international war crimes tribunal that I am aware of...has rested on the support of liberal states. Second, conversely, when illiberal states have fought each other, they have *never* established a bona fide war crimes tribunal.”<sup>849</sup>

ICL is only invoked following a regime change or political transition if it is expected to accelerate liberalisation, not impede it. This partially explains the existence of international criminal tribunals in the former Yugoslavia and Rwanda, but not in South Africa for example. Thus, depending on the context, the political belief in liberalisation may trump the ideal of criminal accountability.

It has been contended that criminal trials generally, condemn illiberal values and espouse liberal values such as respect for basic human rights.<sup>850</sup> A considerable body of academic work has emerged declaring that ICL is driven and legitimised by liberal states with a shared belief in legalism.<sup>851</sup> Although these works focus mostly on the *ad hoc* international

<sup>847</sup> Bass (Stay the Hand of Vengeance) (*supra*) 7: “Above all, legalism is a concept that seems only to spring from a particular kind of liberal domestic polity”.

<sup>848</sup> Bass (Stay the Hand of Vengeance) (*supra*) 8.

<sup>849</sup> Bass (Stay the Hand of Vengeance) (*supra*) 19. Also (at 20): “Liberal states are legalists: they put war criminals on trial in rough accordance with their domestic norms”.

<sup>850</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 67-68.

<sup>851</sup> See Megret (Politics of International Criminal Justice) (*supra*); Bass (Stay the Hand of Vengeance) (*supra*); Beigbeder Y *Judging War Criminals: The Politics of International Justice* (1999) St. Martin’s Press, New York; Scharf MP *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg* (1997) Carolina Academic Press, Durham.

criminal tribunals, they also consider international relations theory and attempt, in part, to decode the complex relationship between international (criminal) law and power in the international system.

The realist perspective leads to the conclusion that states support ICL only for self-interested motives and in order to legitimise state-centred goals.<sup>852</sup> On the other hand, liberal theorists and idealists look on international law as a means of constraining power within a framework of rules.<sup>853</sup> As such they afford international law greater recognition and respect and also a measure of credit. If, as in the idealist view, international courts may act independently and in a transformative manner, a number of questions become pertinent:

“[W]hy would states have created institutions that they cannot control and which might even turn against them? Is this a vindication of the liberal theory either in its purposive (liberal states willingly dish out bits of their sovereignty for the higher collective good) or providential (liberal states dish out bits of their sovereignty for liberally constructed interests, but in doing so end up creating a globally optimal result) variants? Or is the argument substantially complicated by factors that are not clearly amenable to liberalism’s categories”<sup>854</sup>

Megret observes that on the whole, modern international criminal justice seems to subsist as a mix of liberal legalism representative of idealism and liberal legalism representative of realist interest and power.<sup>855</sup>

It may not be easy to distinguish between what serves the interests of states and what serves the common good in the proposition above. As a very broad starting point, it may be said that projects of international criminal justice such as the *ad hoc* tribunals, which are *initiated* or *established* through state support also serve some political self-interests. The amount and manner of state cooperation may also be used to gauge the level of political interests involved. Once international criminal law institutions have been established however, they may take on a life of their own. This is because legalism as described above is also “the operative outlook of the legal profession, both bench and bar”.<sup>856</sup> Although the

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<sup>852</sup> Megret (Politics of International Criminal Justice) (*supra*) 1267.

<sup>853</sup> Kemp (Individual Criminal Liability) (*supra*) 33-34.

<sup>854</sup> Megret (Politics of International Criminal Justice) (*supra*) 1280.

<sup>855</sup> Megret (Politics of International Criminal Justice) (*supra*) 1281.

<sup>856</sup> Shklar (Legalism) (*supra*) 8.

politics of international criminal justice may create considerable restrictions on the work of ICTs, lawyers and judges have the occupational habit of performing their legal duty irrespective of possible political consequences. This brand of liberal legalism endeavours to constrain politics within legal boundaries.<sup>857</sup> This may be one reason for the idealism that sometimes surfaces in international criminal justice.

The establishment of the ICC as an institution to help fight impunity, represents a triumph for liberalism and legalism on the international scene. The ICC Statute serves as proof of liberalist legalist dominance in international criminal justice through the liberalist ideals that can be found in the Rome Statute. For instance, the Rome Statute adopts the principle of non-retroactivity and excludes jurisdiction over persons under the age of 18.<sup>858</sup>

### 6.3.3 The Real and Perceived Dangers of Hegemonic Dominance

Hegemonic policies towards international law “oscillate between two poles: instrumentalization and withdrawal”.<sup>859</sup> Instrumentalisation is viewed as the more odious form of hegemonic behaviour and denotes the active pursuit by states of the development and use of international law as a means to stabilise dominance, to improve a dominant position or as a means of regulation and pacification.<sup>860</sup> In his dissenting opinion at the IMTFE, Justice Radhabinod Pal raised concern over the skewed nature of the proceedings and criticised international law as “a project for stabilizing and securing existing power distributions within international society”.<sup>861</sup> Thus it appears that Justice Pal was accusing the victorious Allies of instrumentalisation of ICL. Justice Pal further declared that he “would hold that each and every one of the accused must be found not guilty of each and every one of the charges in the

<sup>857</sup> Martin Loughlin observed that legal-liberalism attempts to “confine politics to the straight-jacket of law”. See Tomkins A “In Defence of the Political Constitution” (2002) 22 (1) *Oxford Journal of Legal Studies* 157-175, 162.

<sup>858</sup> See Rome Statute of the ICC, articles 24 and 26.

<sup>859</sup> Krisch (International Law in Times of Hegemony) (*supra*) 381.

<sup>860</sup> Krisch (International Law in Times of Hegemony) (*supra*) 371 and 382. This was possibly the motivation for the USA’s early enthusiasm towards the ICC, which dwindled spectacularly after the attacks on the World Trade Centre and the Pentagon on 11 September 2001.

<sup>861</sup> Quoted in Gevers C and Du Plessis M “Another Stormy Year for the International Criminal Court and its Work in Africa” (2010) 35 *South African Yearbook of International Law* 163-180, 180.

indictment” and denounced the tribunal as a manifestation of victors’ justice.<sup>862</sup> The following comment from Hirsh seems to describe the hegemonic instrumentalisation of international law by states:

“...a strong state, particularly a hegemonic state, may be in a position to wield an overwhelming control over the content and functioning of international law. In that case, it has an interest in bolstering an international legal framework that it can influence both directly, through pressure, and indirectly, through using it to project its own world view and values.”<sup>863</sup>

Since the Nuremberg IMT and Tokyo IMTFE, renounced by many as “victors’ justice”, there has been concern that liberal legalism is facilitating the creation of a hegemonic legal culture in international law. This raises the possibility that the expressive function of ICL (punishment as representative of authoritative moral values) is a liberal-legalist tool in the struggle for political dominance in the international legal order.<sup>864</sup>

A second hegemonic strategy is that of withdrawal. Withdrawal is mostly encountered as a policy of non-compliance with international law.<sup>865</sup> This amounts to what may be viewed as a ‘hegemonic omission’ or a hegemonic ‘failure to act’ by dominant states. Dominant states may easily choose to violate international law, evade their international legal obligations or undermine international legal efforts. A good example of the latter is the USA’s efforts to undermine the ICC through entering into bilateral immunity agreements that limits the impact of the law of the Rome Statute on US citizens. It may also manifest as a policy of non-cooperation or of insufficient cooperation. Such a non-cooperative attitude

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<sup>862</sup> See Cryer R “PAL, Radhabinod” in Cassese (Oxford Companion) (*supra*) 449-450.

<sup>863</sup> Hirsh (Law Against Genocide) (*supra*) 18; see also Arnold J “Protection of Human Rights by Means of Criminal Law” in Kaleck *et al.* (International Prosecution of Human Rights Crimes) (*supra*) 7. The author provides the following postulate relating to the hegemonic abuse of criminal law (which seems to refer to the USA’s response to the September 11, 2001): “Over the past several decades, the classic, liberal, rule-of-law concept of criminal law has transformed into a tool for regulating globalization, risk, and information societies. This type of criminal law parades legislatively in the guise of security law, intervention law, and, most recently, in the development of a special criminal law solely applicable to the ‘enemy’ (*Feindstrafrecht*)”.

<sup>864</sup> See Kahan (The Secret Ambition of Deterrence) (*supra*) 421-424: “Punishment, the expressive theory tells us, conveys an authoritative schedule of moral values”.

<sup>865</sup> Krisch (International Law in Times of Hegemony) (*supra*) 385.

towards international criminal justice mechanisms occur when an international criminal tribunal might undermine other state interests or priorities. An example is the approach of western states towards the ICTY. Peskin notes that the West was careful not to press for the prosecution of Milošević since indictment by the ICTY could have been harmful to their diplomatic interests by excluding Milošević's participation in peace talks.<sup>866</sup> In this case US diplomatic interests and the interests of peace temporarily trumped the interests of international justice.

States that promote the values of liberal legalism have been criticised for using their ascendancy to subvert minority legal culture, further solidifying their dominance. Such hegemonic dominance in international law has contributed to ambivalence in decisions regarding the use of force and humanitarian intervention from the permanent members of the UN Security Council with close ties to liberal legal values. These policies have resulted in a lack of criminal accountability for international crimes in some conflicts and selective prosecutions depending on the political motivation and self-interest of the permanent member states.<sup>867</sup> Although formally cast as neutral and independent, ICL and the institutions associated with it are not immune to the influence of neo-liberalist anti-pluralism. In some circles there is the perception that these courts are politically tainted and constitutive of a new form of imperialism through which dominant states control weaker ones and impose their values.<sup>868</sup> In Africa there is growing concern over the ICC's prosecutorial strategy, selectivity

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<sup>866</sup> Peskin (International Justice) (*supra*) 39.

<sup>867</sup> "Assembly President Warns on Doctrine to Intervene on War Crimes, Atrocities" available at <http://www.un.org/apps/news/story.asp?NewsID=31562&Cr=right+to+protect&Cr1> (accessed 2009/09/14): "Mr. D'Escoto used the case of Iraq as an example of the lack of accountability for 'those who might abuse the right that [R2P] would give nation-States to resort to the use of force against other states.' He also questioned whether the adoption of [R2P] in the practice of collective security would undermine respect for international law, saying that the principle is 'applied selectively, in cases where public opinion in [the permanent members of the UNSC] supports intervention, as in Darfur, and not where it is opposed, as in Gaza'".

<sup>868</sup> For example, consider the following statement by Paul Kagame, President of the Republic of Rwanda: "Rwanda cannot be party to ICC for one simple reason ... with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries". See Kezio-Musoke D "Kagame tells why he is against ICC charging Bashir" *Daily Nation*, 3 August 2008, available



of prosecutions and the use (or abuse) of the ICC as a political tool for regime change.<sup>869</sup> Criminal trials, especially those that occur during societal transitions, are vulnerable to political exploitation. The greatest risk in such a scenario is injustice to the defendants and distortion of the historical record.<sup>870</sup> This is particularly dangerous in a deeply divided society where politically compromised criminal trials might serve only to further imbed the social antagonism which may lead to mass atrocity.

Various criticisms have been voiced in opposition to the ascendancy of liberal legalism and different schools of thought have raised some verifiable concerns over the abuse of liberal legal ideology in the international legal system. Leftist critics of liberal legalism site that its “reliance on law [to transform society] imbricates the left with the state in ways that thwart truly transformative change and cedes authority to the state to define and produce ‘the normal’”.<sup>871</sup> Marxist legal theory is critical of liberal criminal justice in general.<sup>872</sup> Firstly, Marxists argue that the liberal-legalist ideal of equality is nothing more than “an ideological fig leaf” masking real inequality and advancing the interests of the rich and powerful elites. Secondly, criminal law is a reflection of the interests of the dominant classes. Lastly, criminal justice primarily punishes crimes of poor or minority groups. The Marxist critique points to the fact that international law is instrumental to, and shaped, by power and politics.<sup>873</sup> This echoes concerns that, as the dominant force in international law, liberal legalism drives

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at <http://allafrica.com/stories/200808120157.html> (accessed 2009/05/15); see also Chapter 7 para 7.6.2.2 *infra*.

<sup>869</sup> All the cases currently before the court arise from conflicts on the African continent. It must be acknowledged however, that three of these cases (Uganda, the Democratic Republic of Congo and the Central African Republic) have been referred to the ICC by the concerned states themselves (see also Chapter 7 para 7.6.2.2 *infra*). Furthermore, upon submission of this thesis the ICC was conducting a preliminary inquiry into the situation in Mali on the basis of a self-referral.

<sup>870</sup> Osiel (Mass Atrocity, Collective Memory) (*supra*) 294.

<sup>871</sup> Hearst A “Review of Brown W and Halley J (eds.) *Left Legalism/Left Critique*” (2003) 13 (7) *Law and Politics Book Review* available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/brown-wendy.htm> (accessed on 2009/06/08).

<sup>872</sup> Beckett K “Criminal Law and Criminal Justice in Action: The Marxist Critique” available at <http://www.soc.washington.edu/users/kbeckett/The%20Marxist%20Critique.pdf> (accessed 2012/08/29).

<sup>873</sup> Krisch (International Law in Times of Hegemony) (*supra*) 370.

hegemonic legal culture by subverting minority legal culture through using its ascendancy to solidify its own dominance.

More criticism against the ascendancy of liberal legalism in international criminal justice is presented by cultural relativists. Cultural relativists contend that criminal justice differs from one state or region to the next. They argue that the ideals of international criminal justice and universal human rights are in reality the liberal legal ideals of dominant and mostly western states, imposed under the guise of universal ideals or international justice. The cultural relativist stresses contextual sensitivity and puts the emphasis back on the state as opposed to the individual.<sup>874</sup> This is in sharp contrast to liberal legalism's emphasis on universal rights for all individuals.

The realist school of thought believes that international law in general should not actively promote any form of social transformation or subscribe to any form of idealism. In their view international law should only play a role in those instances where states find cooperation to be in their own best interest.<sup>875</sup> They preach a multidisciplinary approach to ICL with more emphasis on political solutions and alternatives to criminal justice.

#### **6.3.4 The Importance of State Cooperation**

The rise of liberal international relations theory, prominent under the victorious Allies of the Second World War, has provided much room for international cooperation and institution building including cooperation in the realm of international law. However, the notion of an autonomous international criminal justice system is a fallacy. Treaties on international crime are negotiated while customary international crimes are the product of the will of states. International criminal courts are politically negotiated and -supported (or not). While the prosecutors of these courts may be formally independent, they won't be in a position to make much progress without receiving or somehow enticing state support and cooperation.

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<sup>874</sup> Wallace and Martin-Ortega (International Law) (*supra*) 236.

<sup>875</sup> Drumbl (Atrocity, Punishment and International Law) (*supra*) 10.

Bass contends that liberal states are the primary supporters of international criminal tribunals.<sup>876</sup> His contention is that liberal states are inclined to support international war crimes tribunals because of their belief in the universal value of legalism or as he puts it: “Liberal states are legalist: they put war criminals on trial in rough accordance with their domestic norms”.<sup>877</sup> Bass does however concede that the support of these “few liberal governments” sympathetic of war crimes tribunals will falter if the tribunal places the success of more important political matters such as peace negotiations at risk.<sup>878</sup>

In his book *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Peskin is critical of Bass’ theory above on the ground that he “leaves largely unexamined the complex interests and actions of illiberal states towards the tribunal”.<sup>879</sup> According to Peskin:

“[...] the pursuit of international justice does not belong to Western liberal states only. A state’s role in an armed conflict – whether it was, is, or may become a victim or perpetrator – may be a better predictor of its level of support for a tribunal than whether the state is liberal or illiberal.”<sup>880</sup>

Theoretically, international criminal tribunals are based on the principles of autonomy and neutrality. In contrast to their predecessors, modern international criminal tribunals are intended to function independently and to be truly international in character. Peskin illustrates that international criminal tribunals have in reality been forced to developed strategies to induce state cooperation without which the “independent” work of the tribunals would be significantly hampered. He distinguishes broadly between political activity on the issue of cooperation that occurs between tribunals, states and the international community and political activity that occurs within states.<sup>881</sup> These external and internal “virtual trials” ultimately determine the level of cooperation which an international criminal tribunal will receive from states.<sup>882</sup> The level of state cooperation which international criminal tribunals

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<sup>876</sup> Bass (Stay the Hand of Vengeance) (*supra*) 19.

<sup>877</sup> Bass (Stay the Hand of Vengeance) (*supra*) 20.

<sup>878</sup> Bass (Stay the Hand of Vengeance) (*supra*) 8.

<sup>879</sup> Peskin (International Justice) (*supra*) 20.

<sup>880</sup> Peskin (International Justice) (*supra*) 21.

<sup>881</sup> Peskin (International Justice) (*supra*) 6, 9-14.

<sup>882</sup> Peskin (International Justice) (*supra*) 9.

are able to ensure has a direct influence on the “nature and outcome” of the trial.<sup>883</sup> Peskin’s research relates mostly to the *ad hoc* tribunals, where he notes “trials of cooperation” take place behind the scenes and that:

“[t]hrough these trials of cooperation, the tribunals’ original mandate to focus solely on determining individual guilt [...] broadens, in effect, into determining the state guilt for the obstruction of the legal process.”<sup>884</sup>

Through state guilt, international tribunals use a strategy of “shaming” to encourage state cooperation. Shaming activates international pressure against a state, thereby increasing the political cost of non-cooperation in violation of legal obligations.<sup>885</sup>

Peskin’s work was based mainly on the importance of state cooperation at the ICTY and the ICTR. In contrast to the latter tribunals, the ICC is based on a multilateral treaty. The treaty-based origin of the ICC makes the court more representative among states and “gives it significant moral and political leverage in the inevitable “trials of cooperation” that the ICC will conduct with states.”<sup>886</sup> Peskin does however conclude that the ICC potentially faces even greater obstacles with regard to state cooperation than the *ad hoc* tribunals because it lacks support from powerful and populous states, notably that of the USA.<sup>887</sup>

What emerges ultimately from both Bass and Peskin’s work is the reality that international criminal justice may be subordinated to the interests of states. However, the

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<sup>883</sup> Peskin (International Justice) (*supra*) 9.

<sup>884</sup> Peskin (International Justice) (*supra*) 10. Also (at 170): “A ‘trial of cooperation’ refers to the battles fought between a tribunal and a targeted state over the terms and timing of that state’s cooperation with tribunal investigations and prosecutions”.

<sup>885</sup> Peskin (International Justice) (*supra*) 238; see also Johnson (Peace Without Justice) (*supra*) 185. The author describes another method used by the ICTY to promote its self-sufficiency, namely the use of sealed indictments: “The ICTY chided specific states and the international community in general for its lack of support. Some states have a clear self-interest in the failure of criminal justice and should not have been expected to cooperate with the Tribunals. By not publicizing in advance the existence of indictments, the Tribunals were able to marginally improve the problem of state and international community cooperation”.

<sup>886</sup> Peskin (International Justice) (*supra*) 251.

<sup>887</sup> Peskin (International Justice) (*supra*) 251-252; see also Clark (Peace, Justice and the International Criminal Court) (*supra*) 527-529.

feature of complementarity in the Rome Statute appears to alleviate the problem of state cooperation to some extent.<sup>888</sup> By interpreting the principle in conjunction with the purposes of the Rome Statute, Stigen cites that complementarity should ensure effective national investigations and prosecutions “partly by stimulating and partly by applying pressure” on states.<sup>889</sup> In turn the ICC benefits from a more appropriate selection of cases to adjudicate and greater effectiveness when states are “unable or unwilling” to prosecute. Since the creation of the ICC, uncooperative states face with the prospect of being labelled as “unwilling or unable” in accordance with the Rome Statute.<sup>890</sup> This unfavourable prospect together with the heightened political and media attention on international crime make it more likely that states will initiate national prosecutions on their own accord.<sup>891</sup>

#### 6.4 Concluding Remarks

This chapter began by investigating the values reflected in modern ICL. It was noted that the values which ICL promotes mirrors its dual character, or its repressive and normative characteristics respectively, to reflect the values of both individuals and states.<sup>892</sup> Furthermore, there appears to be elements of idealism in the predominantly realist international criminal justice system. Since the Nuremberg IMT, and under the “project” of cosmopolitan law, certain values are regarded as being universal in character.<sup>893</sup> These values have found expression in the norms of the human rights movement and international criminal justice. International consensus regarding these values can be seen through increased international legal cooperation, the establishment of various international legal institutions and a rapidly expanding body of substantive, procedural and institutional international law.

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<sup>888</sup> In addition to provisions on complementarity, the Rome Statute contains detailed provisions regarding state cooperation with the ICC. See Chapter 7 para 7.6.1.4 *infra*.

<sup>889</sup> Stigen (International Criminal Court and National Jurisdictions) (*supra*) 18.

<sup>890</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 1.

<sup>891</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 1.

<sup>892</sup> See also Chapter 2 para 2.2.1 *supra*.

<sup>893</sup> See Hirsh (Law Against Genocide) (*supra*) 20-22. Hirsh contends that cosmopolitan law can only achieve an independent existence as law once the principles and institutions of cosmopolitan law “attains sufficient authority, independence and power to threaten some of the interests that brought them into being” (at 21).

Despite evidence of idealism and cosmopolitanism in ICL, state cooperation remains crucial to the enforcement of international criminal justice. International criminal courts have no policing and enforcement powers of their own and are heavily reliant on the financial support they receive from states. Achieving the level of cooperation which makes the enforcement of ICL not only possible but also effective, comes at a price. Liberal states, which are the primary supporters of ICL according to Bass, take their pound of flesh through hegemonic or self-interested action towards international criminal justice when their interests are threatened. Furthermore, although ICL may be viewed as part of the substantive and formal law that encapsulates the values of the international community, it is largely modelled on liberalist-idealist and predominantly Western legal culture and legal fundamentals which can be referred to as *western liberal legalism*.

Traditionally, liberal legalism has embraced the concept of transformative law.<sup>894</sup> This latter consideration and the matter of liberal-legalist ascendancy in international criminal justice, holds important implications for the transformative value of ICL. As with ICL, liberal legalism has a strong attachment to human rights law and is concerned with effecting change in society. It seeks to transform society and empower individuals by embracing legal rights.<sup>895</sup> ICL through the lens of western liberal-legalist modality, human rights and other western ideals such as democracy are in close partnership with each other and are part of the cosmopolitan movement in international law away from Westphalian sovereignty. As a result of this symbiosis, the spread of human rights and democracy carries forward the ideals of western liberal legalism and transformation. Hirsh formulated the thesis that:

“...the great powers, for purposes of legitimation, have allowed cosmopolitan law to emerge and have allowed it a certain institutional existence; they have always attempted to keep control of it and prevent it from attaining an independent existence; they will not always succeed in thus controlling it because that to which they are forced to agree for purposes of legitimation is precisely that which makes it possible for cosmopolitan law and its institutions to gain a life of their own.”<sup>896</sup>

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<sup>894</sup> Reitz (Politics, Executive Dominance and Transformative Law) (*supra*) 31.

<sup>895</sup> Hearst (Review of Brown and Halley) (*supra*).

<sup>896</sup> Hirsh (Law Against Genocide) (*supra*) 152.

It appears that, through liberal legalism, sovereign powers have (perhaps inadvertently) created a realist-idealist brand of ICL and have merged in international criminal justice the self-interests of states with the common good (or the interests of humanity).

**PART III**  
**THE TRANSFORMATIVE INFLUENCE  
OF INTERNATIONAL CRIMINAL LAW  
IN DOMESTIC PERSPECTIVE**



## CHAPTER 7

### INTERNATIONAL CRIMINAL LAW IN SOUTH AFRICA

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#### 7.1 Introduction

The objective of Part III is to determine the transformative value of ICL from a domestic perspective. Firstly, I aim to investigate the practical ramifications of ICL obligations using South African law and society as a case study for the examination of the interaction between the norms and values of ICL and domestic legal systems. Secondly, with reference to relevant provisions in the Constitution, case law, the Implementation of the Rome Statute of the International Criminal Court Act (the “ICC Act”) and forthcoming legislation related to international criminal law, this chapter investigates South Africa’s ability to dynamically reflect developments in modern international criminal justice. The abovementioned aims require an investigation of South Africa’s ability and willingness to prosecute international crimes, its aptitude for aligning itself with ICL’s complementarity regime and the country’s stance on universal jurisdiction with an eye to the future of prosecution of international crimes through domestic courts. The value of the South African legal system being so enabled is considered throughout.<sup>897</sup> In this latter respect Part III partly draws on the findings in Part II regarding the transformative value of ICL in general.

The following additional reasons are advanced for the assessment of the transformative influence of ICL in South Africa under Part III:

- The post-apartheid ‘constitutionalisation’ of international law under sections 231-233 of the Constitution. As a result of this constitutional entrenchment, international (criminal) law forms part of the ‘supreme law’ of South Africa to the extent that it is compatible with the Constitution and acts of parliament.<sup>898</sup>

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<sup>897</sup> See also Chapter 8 paras 8.3.4.3 and 8.4.2 *infra*.

<sup>898</sup> See also para 7.4 *infra*.

- South Africa's unique international law history, with special reference to South Africa's transition from *apartheid* to constitutional democracy and the impact of this transition on international criminal justice in South Africa.
- The widely held view that "international problems have domestic roots" and that international criminal justice must evolve toward enforcement through national law systems in the future.<sup>899</sup> In this regard the research attempts to identify the shared characteristics of ICL's interaction with domestic legal- and criminal justice systems and general challenges associated with this interaction through investigation of one jurisdiction. Towards this end, the importance of contextual relativity must be duly noted. Every state's reception of international law is different.<sup>900</sup> The impact of ICL norms will be greater in a state taking juridical cognisance of international law generally than in states that view international law as subsidiary to domestic law or as non-binding. Therefore, the case study in question comes with a warning which is similar to the warning attached to the comparative law approach, to generalise with caution and with due recognition of the fact that law will always be contextually sensitive.<sup>901</sup>
- It must also be kept in mind that South Africa is potentially a lucrative destination for perpetrators of international crimes fleeing from prosecution, especially since at present most international crimes originate from conflicts in Africa.<sup>902</sup>
- In order to make a prognostic assessment of the future of ICL in South Africa. This is done in the hope of identifying issues and providing some guidance to other national law systems tasked with the future advancement of international criminal justice.

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<sup>899</sup> See Slaughter and Burke-White (The Future of International Law is Domestic) (*supra*) 328.

<sup>900</sup> Wallace and Martin-Ortega (International Law) (*supra*) 37-38.

<sup>901</sup> See *Sanderson v Attorney General, Eastern Cape* (1997) 12 BCLR 1675 (CC), para 26.

<sup>902</sup> See *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (North Gauteng High Court) Case No. 77150/09, 8 May 2012, para 12 (at 42). The applicants in this case contending that they brought the application for the review of the decision of the SAPS not to investigate Zimbabwean officials suspected of acts of torture committed as a crime against humanity in the public interest since, without prosecution of perpetrators of torture, "there is a risk of South Africa becoming a safe-haven for torturers who may travel here with impunity". See also Katz A and Du Plessis M "In the Matter of: Lieutenant-General Faustin Kayumba Nyamwasa's Presence in South Africa" *Briefing Paper* Prepared on Behalf of the Consortium for Refugees and Migrants in South Africa (CoRMSA) 2 July 2010, para 76.

- The distinctive eminence of transformative law in post-apartheid South African jurisprudence.
- South Africa's status as a leader on the African continent and African 'success story' makes its responsiveness to ICL important.<sup>903</sup> All of the cases and situations currently before the ICC originate from the African continent. This has led to friction between the ICC and the African Union which may potentially alter the behaviour of African states towards the ICC and towards its international law obligations.<sup>904</sup> Also, South Africa's reception of ICL in its domestic legal system might serve as a template for other African states.<sup>905</sup>

## 7.2 The History and Status of International Law in South Africa

This section moves from the broader international setting to the domestic and briefly traces the history and status of international law in South African municipal law. The impact of apartheid, the advent of constitutional democracy and the monist/dualist debate will be considered. Comprehension of the relationship between South African municipal law and public international law is required before considering the current status, influence and the prospects of ICL in the country.

Both courts and legal scholars have grappled with the relationship between international law and municipal law in the past. The importance of the relationship between international law and domestic law lies in the realisation that without adequate mechanisms of implementation and cooperation, international legal rules cannot be enforced by domestic courts.<sup>906</sup> According to Wallace, each state's reception of international law is uniquely regulated by that state's municipal law:

“There is no universal, uniform practice stipulating how States should incorporate international law into their domestic legal system and it is a State's perception of international

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<sup>903</sup> See Jessberger and Powell (Prosecuting Pinochets) (*supra*) 361.

<sup>904</sup> See paras 7.6.2.2 and 7.7.1.1 *infra*.

<sup>905</sup> Du Plessis M “South Africa's Implementation of the ICC Statute” (2007) 5 *Journal of International Criminal Justice* 460-479, 479.

<sup>906</sup> Stemmet A “The Influence of Recent Constitutional Development in South Africa on the Relationship between International Law and Municipal Law” (1999) 33 *International Lawyer (ABA)* 47.

law which determines the way in which international law becomes part of municipal law. In other words States differ in the way their national courts are either required or allowed to give effect to international obligations.”<sup>907</sup>

To understand the relationship between international law and municipal law on a practical level, one must first turn to the theories of the monistic and dualistic schools. This necessitates a consideration of the theory on the relationship of international law *vis-a-vis* municipal law and monist-dualist debate in the South African context.<sup>908</sup> The relationship between South African domestic law and international law is discussed under the pre- and post-apartheid eras to give the reader an understanding of the vast changes that have transpired in this relationship since the end of apartheid. The discussion also forms an introduction to Part III.

## 7.2.1 The Pre-1994 Period<sup>909</sup>

### 7.2.1.1 Apartheid and Isolation<sup>910</sup>

South Africa was a founding member of the United Nations at the time of its establishment in 1945. Under the leadership of General JC Smuts, South Africa played a prominent role in the

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<sup>907</sup> Wallace and Martin-Ortega (International Law) (*supra*) 37-38.

<sup>908</sup> See Chapter 3 para 3.2 *supra*. For a distinction between the monist and the dualist approach refer to Wallace D and Kalaitzidis A “The Monistic Goal of Overcoming the Divide between Domestic and International Law: Historical Lessons for 21<sup>st</sup> Century Globalization of the International Legal Community” Paper presented at the International Studies Association Annual Conference, New York City, February 2009, 2-3, available at [http://www.allacademic.com/one/www/research/index.php?click\\_key=3](http://www.allacademic.com/one/www/research/index.php?click_key=3) (Accessed 2009/07/02). See also Dugard (International Law) (*supra*) 42-43; Kemp (Individual Criminal Liability) (*supra*) 131-132.

<sup>909</sup> For the sake of brevity, this discussion is limited to the most important features of South Africa’s relationship with international law since the end of the Second World War.

<sup>910</sup> For a legal definition of apartheid see UNGA Resolution 3068 (XXVIII) (1973) (Convention on the Suppression and Punishment of the Crime of Apartheid) (see footnote 917 *infra*). In contrast to other systematic crimes, and despite the fact that capital offenses were committed or authorised by members of the apartheid administration, apartheid was an ‘administrative denial of human rights’ characterised especially by discrimination based on race rather than an ‘administrative massacre’.

creation of the organisation and the drafting of the United Nations Charter. For a period following the creation of the United Nations, South Africa's discriminatory racial policies were viewed with apprehension yet tolerated by most states.<sup>911</sup> Apartheid achieved international notoriety after the Sharpeville massacre on the 21<sup>st</sup> of March 1960 where South African policemen opened fire on peaceful protesters against apartheid pass laws for Africans, killing 69 people. After the Sharpeville massacre, the South African government received widespread condemnation from the international community. On the 1<sup>st</sup> of April 1960, the Security Council took its first action against South Africa by adopting resolution 134 deploring the policies and actions of the South African government and calling upon that government to abandon its policies of apartheid and racial discrimination.<sup>912</sup>

During apartheid, public international law had inferior status in the South African legal system.<sup>913</sup> The Apartheid government's lack of respect for international law resulted in multiple UN-backed sanctions against the state. Its racially discriminatory policies in particular violated the United Nations Charter as well as the international human rights norms of non-discrimination and self-determination.<sup>914</sup> Relying on the principle of state sovereignty, the South African government believed that its apartheid policies were an exclusively domestic matter beyond the sphere of influence of the United Nations and international legal norms.<sup>915</sup> As a result, South Africa became a pariah state among the post-world war international community with a developed culture of respect for human rights. This eventually culminated in its expulsion from the United Nations in 1974.

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<sup>911</sup> As early as 1946 the Indian Government requested that the issue of the treatment of Indians in the Union of South Africa be put on the agenda of the General Assembly.

<sup>912</sup> UNSC Resolution 134 (1960).

<sup>913</sup> Scholtz W "A Few Thoughts on Section 231 of the South African Constitution" (2004) 29 *South African Yearbook of International Law* 202.

<sup>914</sup> Dugard J "International Law and the South African Constitution" (1997) 1 *European Journal of International Law* 77.

<sup>915</sup> Kemp (Individual Criminal Liability) (*supra*) 14: "State sovereignty (states exercising exclusive power over their territories) has been the organizing principle of the modern international political and legal system since at least the Peace of Westphalia of 1648 [...]. Over time the principle of state sovereignty has become less absolute and gradually more prone to exceptions under international law. Individual criminal liability for international crimes is a prime example of this development.

Ironically, South Africa inadvertently contributed greatly toward the development of substantive international law during the apartheid years.<sup>916</sup> The racist social policy of successive South African governments single-handedly defined the international crime of apartheid.<sup>917</sup> Due to the fact that no person has ever been tried, let alone convicted, for the crime of apartheid at national or international level, the existence of the crime under

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<sup>916</sup> Dugard (International Law) (*supra*) 19.

<sup>917</sup> See UNGA Resolution 3068 (XXVIII) (1973) (Convention on the Suppression and Punishment of the Crime of Apartheid). Article II contains the definition of the crime of apartheid:

“For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
  - (i) By murder of members of a racial group or groups;
  - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
  - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
- (d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid”.

international law is placed in doubt.<sup>918</sup> It is therefore “remarkable” that apartheid was recognised as a crime against humanity in article 7(1)(j) of the Rome Statute.<sup>919</sup> Dugard distinguishes this negative contribution to international law of the South African state from the minimal positive contribution during this same period.<sup>920</sup> During the era spanning the end of the Second World War to the end of Apartheid, South Africa consistently undermined international law by refusing to accept numerous fundamental norms of the international legal order.<sup>921</sup> This resulted in political and legal isolation and the denial of benefits for individuals under international law.

### 7.2.1.2 The Status of International Law under South African Domestic Law in the Pre-1994 Period

The status of international law under South African law during this period must be approached from the perspective of its Roman-Dutch law and English law heritage.<sup>922</sup> Under Roman-Dutch law, customary international law formed part of national law as it was regarded as part of the same universal legal order with natural law as its foundation.<sup>923</sup> Grotius, who is widely regarded as the father of international law, expounded this approach in *De Jure Belli ac Pacis*, his influential treatise on international law.<sup>924</sup> Other Roman-Dutch law writers generally accepted Grotius’ view on the matter. English law, on which South Africa’s previous constitutional order was based, similarly regarded customary international law as part of municipal law.<sup>925</sup> Thus South African common law with its Roman-Dutch and English common law roots adopted the monist approach by regarding customary international law as part of South African law. Prior to 1993 South African courts “showed strong support

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<sup>918</sup> Zahar A “Apartheid as an International Crime” in Casesse A (ed.) *The Oxford Companion to International Criminal Justice* (2009) 245-246.

<sup>919</sup> Zahar (*supra*) in Casesse (Oxford Companion) (*supra*) 245-246.

<sup>920</sup> Dugard (International Law) (*supra*) 19.

<sup>921</sup> Examples include the right to self-determination and the prohibition of discrimination.

<sup>922</sup> Kemp (Individual Criminal Liability) (*supra*) 132.

<sup>923</sup> Kemp (Individual Criminal Liability) (*supra*) 132; Dugard (International Law) (*supra*) 43.

<sup>924</sup> Dugard (International Law) (*supra*) 43.

<sup>925</sup> Dugard (International Law) (*supra*) 45.

for the monist approach in respect of customary international law”.<sup>926</sup> In *Nduli and Another v Minister of Justice* the Appellate Division (now Supreme Court of Appeal) held that “it is obvious that international law is to be regarded as part of our law”.<sup>927</sup> South Africa followed the dualist approach with regard to the applicability of treaties in municipal courts. South Africa followed the English approach in this regard. The executive was fully responsible for negotiating, signing, ratifying and acceding to treaties. So as to prevent the executive from usurping the legislature’s law-making function, treaties did not form part of South African municipal law unless it was incorporated into municipal law by a legislative act.<sup>928</sup> The pre-1996 dualist approach was captured by Steyn CJ in the case of *Pan American World Airways Incorporated v SA Fire and Accident Fire Insurance Company Ltd*<sup>929</sup>:

“...in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law, except by legislative process...In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the right of the subject.”

Dugard points out that, despite the formal recognition of international law as part of South African municipal law prior to the new constitutional dispensation, international law was viewed mostly with mistrust by the political and legal community of South Africa:

“Although treaties were incorporated into municipal law, in accordance with the common law dualist approach, customary international law was treated as part of municipal law, unless inconsistent with legislation, the hostility of successive apartheid governments to the United Nations and international human rights conventions undoubtedly influenced the attitudes of legislators, judges and lawyers. International law received no constitutional recognition and was largely ignored by the courts and lawyers.”<sup>930</sup>

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<sup>926</sup> Dugard (International Law) (*supra*) 46; see also Stemmet (The Impact of Recent Constitutional Developments) (*supra*) 48: “International law was applied by South African courts in a series of cases dating to the previous century”.

<sup>927</sup> 1978 (1) SA 893 (A) at 906.

<sup>928</sup> Stemmet (The Impact of Recent Constitutional Developments) (*supra*) 50.

<sup>929</sup> *Pan American World Airways Incorporated v SA Fire and Accident Fire Insurance Company Ltd* 1965 (3) SA 150 (A) at 161 C – D.

<sup>930</sup> Dugard (International Law and the South African Constitution) (*supra*) 77.



## 7.2.2 The Post-1994 Period<sup>931</sup>

The advent of a constitutional legal order is the defining characteristic in the post-1994 period of South Africa's international law history. The new (interim) Constitution enshrined human rights including the right to equality and a prohibition on discrimination based on various grounds including race.

### 7.2.2.1 Transformative Constitutionalism

The twofold (and limited) relevance of transformative constitutionalism was discussed under Chapter 3.<sup>932</sup> In this chapter I turn to the potential impact of the transformative constitution on ICL in South Africa. The study of South African law in the post-1994 era is to a great extent the study of law in a transitional context and of a society and legal system in the midst of a deliberate process of transformation. In this context the following question arises: “[...] how are past injustices to be addressed so as to best transform the society into a just (and stable) society?”<sup>933</sup> The transitional and transformative project in South Africa was pursued through the TRC and continues through the “transformative” Constitution. As described by Klare, the South African Constitution embraces the concept of transformation.<sup>934</sup>

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<sup>931</sup> In this paragraph the discussion is limited to the effect of the Final Constitution (1996) on the status of international law in South Africa. The Interim Constitution (1993) and the Final Constitution have substantially differing provisions relating to international law. An analysis of these differences and the reasons for them is outside the scope of this thesis. For more information on the differences between the Interim Constitution and the Final Constitution's provisions relating to international law, see Stemmet (The Impact of Recent Constitutional Developments) (*supra*) 47-74.

<sup>932</sup> See also Chapter 3 para 3.4.1 *supra*.

<sup>933</sup> Roederer (Living Well is the Best Revenge) (*supra*) 79.

<sup>934</sup> Klare (Transformative Constitutionalism) (*supra*) 157. Klare describes transformative constitutionalism as “a long term project of constitutional enactment, interpretation, and enforcement committed [...] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”. See also Roederer (*supra*) in Roederer and Moellendorf (Jurisprudence) (*supra*) 623.

Transformative constitutionalism is a highly relevant and widely discussed topic in the modern South African constitutional law discourse.<sup>935</sup>

Roederer suggests that the transformative project in South Africa is supported not only by the constitutional text and the constitutional jurisprudence of South African courts, but also by “the entire socio-political history and set of practices that brought about the end of Apartheid”.<sup>936</sup> Also, it has been suggested that “each society’s transformation is in some sense a unique response to its unique past and present situation”.<sup>937</sup> Transformative constitutionalism and indeed the South African transition in general, places emphasis on forward-looking objectives that addresses the need to move away from the deeply ingrained social and systemic prejudices and inequalities. Amnesties were generally considered as a means to this end. Criminal accountability for gross human rights violations and criminal acts of the state and members of the state apparatus during apartheid has been an inferior objective of the South African transition and transformation.<sup>938</sup> These characteristics of the South African transformation may cause one to question whether international criminal justice can play a transformative role in South Africa. I will argue that the incorporation and application of ICL via the constitutionalisation of international law in the “transformative” constitution may, and should have transformative value.<sup>939</sup>

### **7.2.2.2 Re-emergence of South Africa as a Respected Member of the International Order and the Constitutionalisation of International Law**

According to Botha and Olivier, one of the most striking changes to the South African legal landscape in the new constitutional dispensation has occurred in the area of international

<sup>935</sup> See for example, Klare (Transformative Constitutionalism) (*supra*); Pieterse (What Do We Mean?) (*supra*); Langa (Transformative Constitutionalism) (*supra*).

<sup>936</sup> Roederer (*supra*) in Roederer and Moellendorf (Jurisprudence) (*supra*) 623.

<sup>937</sup> See Roederer (Living Well is the Best Revenge) (*supra*) 78.

<sup>938</sup> This was clearly illustrated in the case of *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC), para 17. The Constitutional Court ruled that amnesties were warranted by the constitution and demanded by the transition to “objectives fundamental to the ethos of a new constitutional order”.

<sup>939</sup> The main thrust of this argument is made under the concluding remarks of this chapter (see para 7.8 *infra*).

law.<sup>940</sup> South Africa moved from a cynical, defiant stance on international law to viewing international law as a pillar of constitutional democracy.<sup>941</sup> Under the new constitutional order there has been a radical change in the relationship between international law and South African municipal law. Generally, the South African government became more amenable to international law in its domestic and foreign policy.<sup>942</sup> During this period South Africa was readmitted to the General Assembly of the United Nations from which it had been expelled in 1974. This has been widely praised as a positive development.

South Africa's constitution now represents "the supreme law of the Republic" and any "law or conduct inconsistent with it is invalid".<sup>943</sup> Unlike South Africa's previous constitutions which made no reference to international law, both the Interim (1993) and Final (1996) Constitutions made specific reference to the applicability of international agreements and customary international law. These provisions are contained in sections 231-233 of the Final Constitution. South Africa's pre-1994 approach to international law treaties has not changed, but has been slightly altered by section 231 of the new constitution which introduced the concept of a self-executing treaty.<sup>944</sup> Section 232 endorses the old common law approach to the applicability of customary international law in the South Africa by providing that:

"Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

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<sup>940</sup> Botha N and Olivier M "Ten Years of International Law in the South African Courts: Reviewing the Past and Assessing the Future" (2004) 29 (3) *South African Yearbook of International Law* 42-77, 43.

<sup>941</sup> Dugard (International Law and the South African Constitution) (*supra*) 77.

<sup>942</sup> Bass (Stay the Hand of Vengeance) (*supra*) 17-18. According to Bass, "[t]here is an increasing body of evidence by political scientists suggesting that domestic preferences are reflected in a state's approach to international affairs". Bass also argues that "liberal ideals make liberal states take up the cause of international justice".

<sup>943</sup> Section 2 of the Constitution of the Republic of South Africa, 1996.

<sup>944</sup> See section 231(3): "An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time".

Furthermore, various provisions in Chapter 11 of the Constitution make the South African security forces subject to international law. Article 198 (c) provides that “[n]ational security must be pursued in compliance with [...] international law”. Members of the South African security services and the South African defence force are required to act in accordance with international law in terms of article 199(5) and 200(2) of the Constitution. Furthermore, under article 200(2) the defence force is explicitly bound to act “in accordance with [...] the principles of international law regulating the use of force”.

An international agreement that has not been incorporated into South African municipal law may still have an effect in the domestic legal sphere.<sup>945</sup> Section 39(1)(b) of the Constitution directs South African courts to consider international law when interpreting the Bill of Rights in the Constitution. Furthermore, South African courts must prefer an interpretation of domestic legislation that is consistent with international law over one that is inconsistent with international law.<sup>946</sup>

The landmark Constitutional Court case of *S v Makwanyane* can be viewed as the *locus classicus* on the use of international law for interpreting the Bill of Rights.<sup>947</sup> The case illustrated the new approach of South African courts to international law. The case concerned the constitutionality of the death penalty. According to Botha and Olivier, “[*S v Makwanyane*] was a case that lent itself to international influences and Chaskalson P seized the opportunity to make extensive and creative use of international law in his judgment”.<sup>948</sup> Chaskalson described the role of international law as follows:

“International agreements and international customary law accordingly provide a framework within which Chapter 3 can be evaluated and understood and for that purpose decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the

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<sup>945</sup> Scholtz (A Few Thoughts on Section 231) (*supra*) 213.

<sup>946</sup> Section 233.

<sup>947</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC); Botha and Olivier (Ten Years of International Law) (*supra*) 44.

<sup>948</sup> Botha and Olivier (Ten Years of International Law) (*supra*) 44.

international Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter 3.”<sup>949</sup>

Furthermore Chaskalson ruled that public international law, as referred to in section 35(1) of the Interim Constitution, referred to both binding and non-binding sources (soft law) of international law.

Dugard observes that one of the consequences of the status of international law under the 1996 Constitution is the incidence of cases involving an appeal to international law as a ‘higher law’.<sup>950</sup> This was illustrated in for example, *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* and *Kaunda and Others v President of the Republic of South Africa and Others*.<sup>951</sup>

All things considered, the position of international law in South Africa since 1994 seems to be a positive one.<sup>952</sup> On paper, South Africa is one of the most “international-law friendly” countries in the world.<sup>953</sup> The preamble to the Implementation of the Rome Statute of the International Criminal Court Act declares:

“The Republic of South Africa, with its own history of atrocities, has, since 1991, become an integral and accepted member of the community of nations.”

In the new constitutional dispensation South African courts have increasingly referred to and made use of international law.<sup>954</sup> According to Dugard the Constitution “seeks to ensure that

<sup>949</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC), para 35.

<sup>950</sup> Dugard (International Law) (*supra*) 22.

<sup>951</sup> *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) (this case is discussed at para 7.5.1 *infra*) and *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC).

<sup>952</sup> Dugard (International Law) (*supra*) 23: “South Africa’s new constitutional order, which requires courts to interpret all legislation, and particularly the Bill of Rights, to accord with international law, and the nation’s commitment to the rule of law and human rights, sets the scene for a renaissance of international law both in South African foreign policy and in the jurisprudence of its courts”.

<sup>953</sup> Botha and Olivier (Ten Years of International Law) (*supra*) 42.

<sup>954</sup> See Botha and Olivier (Ten Years of International Law) (*supra*); Sachs A “War, Violence, Human Rights, and the Overlap between National and International Law: Four Cases Before the South African Constitutional Court” (2004) 28 (2) *Fordham International Law Journal* 432-476.

South African law will evolve in accordance with international law”.<sup>955</sup> Up to this point, international law has been used most frequently in the context of section 39 of the Constitution (previously section 35 in the Interim Constitution) as an interpretive tool for developing South Africa’s human rights culture.<sup>956</sup> Yet it appears that still more time is needed for the courts to build a well-developed jurisprudence on the import and effect of international law on South African law.

Since the transition to democracy in 1994 the transformation of the South African criminal justice system has sought to place more emphasis on international co-operation and the fight against transnational crime.<sup>957</sup> The first decade of democracy evinced considerably more commitment from the South African state to the ideals of international criminal justice.<sup>958</sup> On executive, legislative and judicial level there has been increased awareness and activity relating to international criminal justice and international co-operation in criminal matters. South Africa faces many of the same menaces that represent a threat to the international community.<sup>959</sup> Certain of these threats have been regarded as so serious that they have elicited calls for international co-operation from the UNSC.<sup>960</sup> The phenomenon of

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<sup>955</sup> Dugard (International Law and the South African Constitution) (*supra*) 91.

<sup>956</sup> Botha and Olivier (Ten Years of International Law) (*supra*) 74.

<sup>957</sup> For a description of transnational crime one may turn to UNGA Resolution 55/383 (2000) (United Nations Convention against Transnational Organised Crime). Although the Convention targets organised crime, article 3(2) possibly contains a general description of the elements of an offense of a transnational nature, namely (a) the offense is committed in more than one state; (b) the offense is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) the offense is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state; or (d) the offense is committed in one state but has substantial effects in another state.

<sup>958</sup> Katz A “The Transformation of South Africa's Role in International Co-Operation in Criminal Matters” Paper delivered at Centre for the Study of Violence and Reconciliation, Criminal Justice Conference, 7-8 February 2005, available at <http://www.csvr.org.za/wits/confpaps/katz.htm> (accessed 2011/09/21).

<sup>959</sup> See Report of the Secretary-Generals High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, Part 2, 25.

<sup>960</sup> See UNSC Resolution 1373 (2001) (Threats to International Peace and Security Caused by Terrorist Acts) which calls for the suppression of the financing of terrorism and for international cooperation in this regard.

international crime and globalisation of crime has made international and regional cooperation in criminal matters an essential element in the fight against crime.<sup>961</sup>

Since it became a republic in 1961, South Africa entered into only a small number of extradition agreements as a result of its political isolation.<sup>962</sup> The Extradition Act 67 of 1962 was enacted to facilitate extradition to and from foreign states and remains in force today, subject to the amendments in the Extradition Amendment Act 77 of 1996. The latter act amended the Extradition Act to allow for extradition to countries “designated” by the President of the Republic without having to conclude an extradition agreement.<sup>963</sup> The advent of democratic governance, South Africa’s return to the community of nations and the abovementioned legislative developments have been positive developments from the perspective of cross-border criminal justice initiatives. As a result of these developments, various extradition treaties have been entered into up to date.<sup>964</sup> South Africa acceded to the European Convention on Extradition in 2003, thereby entering into extradition agreements with multiple European countries.<sup>965</sup>

The enactment of the International Co-operation in Criminal Matters Act 75 of 1996, further illustrates South Africa's willingness to facilitate international cooperation in criminal matters. The International Co-operation in Criminal Matters Act is the most important legislative instrument in the South African regime of co-operation in criminal justice.<sup>966</sup> The Act is aimed at creating a “global network of crime prevention/prosecution” for South

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<sup>961</sup> See Kemp G “Foreign Relations, International Co-operation in Criminal Matters and the Position of the Individual” (2003) 16 (3) *South African Journal of Criminal Justice* 368-392.

<sup>962</sup> See Van Zyl Smit D “Re-entering the International Community: South Africa and Extradition” (1995) 6 (2) *Criminal Law Forum* 367-377; see also Dugard (International Law) (*supra*) 215.

<sup>963</sup> See Extradition Act, article 3(2).

<sup>964</sup> For information of South Africa’s current extradition (and mutual legal assistance) agreements with foreign countries, see the website of the Department of Justice and Constitutional Development, available at <http://www.justice.gov.za/docs/emlatreaties.htm> (accessed 2011/09/22).

<sup>965</sup> See Katz A “The Incorporation of Extradition Agreements” 16 *South African Journal of Criminal Justice* (2003) 311-322, 314; see also Government Notice No. 666 in Government Gazette 24872 of 2003/05/13.

<sup>966</sup> Kemp (Foreign Relations, International Co-operation) (*supra*) 381.

Africa.<sup>967</sup> Furthermore, the Act is intended “to facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign States; and to provide for matters connected therewith”.<sup>968</sup>

Perhaps most significantly, South Africa became a party to the Rome Statute of the International Criminal Court. The provisions of the Rome Statute were transformed into domestic law through the Implementation of the Rome Statute of the International Criminal Court Act (the “ICC Act” hereafter) which I will return to in detail later on in this chapter.

### 7.2.2.3 *Ubuntu*

The African concept of *ubuntu* is not easily definable. It has been described as an African world view and a philosophy of life based on solidarity and common humanity that is encapsulated by the phrase “a person can only be a person through others”.<sup>969</sup>

The concept of *ubuntu* was recognised in the Interim Constitution, but omitted from the Final Constitution. Still, an *ubuntu*-based jurisprudence has emerged in the post-apartheid judiciary and particularly from the Constitutional Court. In *Afri-Forum v Julius Sello Malema and Others*, Lamont J lists 12 characteristics of *ubuntu*.<sup>970</sup> According to the judgment, *ubuntu* “is to be contracted with vengeance”, “favours restorative rather than retributive justice” and “promotes mutual understanding rather than punishment”.<sup>971</sup> This leads one to pose the question, how does the judicial cognisance of the notion of *ubuntu* in South Africa affect South Africa’s constitutional obligations towards international criminal justice and its

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<sup>967</sup> Botha N “The Post-Constitutional ‘Act of State’: The Need for Further Theoretical Refinement” (2002) 27 *South African Yearbook of International Law* 295-305, 296.

<sup>968</sup> Act 75 of 1996, preamble.

<sup>969</sup> Mokgoro JY “Ubuntu and the Law in South Africa” Paper delivered at the first Constitution and Law Colloquium held at Potchefstroom on 31 October 1997 available at <http://www.ajol.info/index.php/pelj/article/viewFile/43567/27090> (accessed 2012/02/16) 2.

<sup>970</sup> *Afri-Forum v Julius Sello Malema and Others* [2011] ZAEQC 2, Case No. 20968/2010, para 18. This case is discussed in more detail at para 7.7.4 *infra*.

<sup>971</sup> Para 18.



obligations towards the international community? International criminal justice pursues the ideal of accountability for perpetrators of international crimes. This retributive objective appears to be in direct conflict with the values of *ubuntu*.

It is submitted that this tension is mostly theoretical in nature and that in practice there should not arise a mutually adverse relationship between *ubuntu* and international criminal law in South Africa. *Ubuntu* is a notion that influences our courts in interpretation only. It is not law and as such cannot overrule criminal prosecutions carried out legally and based on domestic or international law in South Africa. While the concept may help to promote fairness towards the accused and may make the application of international criminal law more “South African”, it will not and cannot create a bar to the prosecution of perpetrators of international crime under domestic or international law.

### 7.3 Implementation and Application of International (Criminal) Law

#### 7.3.1 Incorporation and Transformation<sup>972</sup>

International law is increasingly shifting its focus away from inter-state relations towards the domestic sphere.<sup>973</sup> International criminal law has mirrored this development and is itself a consequence thereof. Domestic implementation of international law; the role of public international law in domestic legal systems and domestic international law obligations have become important aspects of the study of international law and constitutional law. In this regard, the debate between monists and dualists on the relationship between national and international law as well as the degree to which international law may be applied in national legal systems has become less relevant in practice.<sup>974</sup> State practice in this regard is often more complicated and nuanced than what can be conceptualised and explained under the monist and dualist theories.<sup>975</sup> As a result, the doctrinal approach has been abandoned in favour of a pragmatic approach. Therefore, to understand the contemporary relationship

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<sup>972</sup> For a distinction between incorporation and transformation, see Chapter 3 para 3.2 *supra*.

<sup>973</sup> Slaughter and Burke-White (The Future of International Law is Domestic) (*supra*) 328.

<sup>974</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 129. For a discussion of the monists and dualist theories see Chapter 3 para 3.2 *supra*.

<sup>975</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 130.

between international and domestic law, the “practical results” of implementation and application of international law must be investigated on a state-by-state basis.

Arguably the most important example of a treaty pertaining to ICL which has been transformed into South African law is the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (“ICC Act”). The ICC Act incorporated the Rome Statute into South African law and has been described as an “act of transformation”.<sup>976</sup> The ICC Act will be discussed further below.<sup>977</sup> The Implementation of the Geneva Conventions Act which criminalises contraventions of the Geneva Conventions will also be discussed. Furthermore, draft legislation relating to the distinct crime of torture (the Prevention and Combating of Torture of Persons Bill) under South African law is currently under consideration. This Bill will also be scrutinised further below.<sup>978</sup>

### 7.3.2 Direct and Indirect Application

The general rule posits that states are free to implement international law as they wish and that they may also discharge their international law obligations in a manner of their own choice.<sup>979</sup> Therefore, ICL is not directly applicable in domestic legal systems *per se*. Although the freedom of implementation rule is not controversial itself, the conditions and limits to the rule is subject to debate.<sup>980</sup>

Direct application (or direct validity) of ICL occurs when a national court applies a rule of international law (incorporated into domestic law) as binding law.<sup>981</sup> When international law has been transformed into domestic law by way of national legislation, indirect application takes place since strictly speaking the national law that mirrors (or has been modified from) an international rule is being applied. This is required for the so-called non self-executing treaty provisions, treaty provisions that do not become directly applicable

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<sup>976</sup> See Katz (An Act of Transformation) (*supra*).

<sup>977</sup> See para 7.6.1 *infra*.

<sup>978</sup> See para 7.7.2 *infra*.

<sup>979</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 132.

<sup>980</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 133-134.

<sup>981</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 8.

or enforceable in national courts upon ratification.<sup>982</sup> The doctrine of self-executing treaties is a manifestation of the general rule that states have freedom of implementation of international law as it represents a limitation on the domestic validity of international law.<sup>983</sup>

## **7.4 The Status of International (Criminal Law) in Democratic South Africa**

This section investigates the abovementioned constitutional provisions (sections 231-233) and illustrates the current position of international law in South African municipal law. Since ICL is a subspecies of international law, the status of international law in general in South Africa applies equally to ICL. The application of substantive ICL in South Africa depends firstly on the source from which the law is derived, either treaty or customary international law.<sup>984</sup>

### **7.4.1 Bilateral- and Multilateral Treaties or International Agreements: The Role of National Legislation**

For the Republic to be bound to an international agreement, the Constitution requires approval of that agreement by way of resolution in both the National Assembly and the National Council of Provinces.<sup>985</sup> This approval is required for all treaties except for ‘self-executing agreements’ as provided for in section 231(3).<sup>986</sup> This was a radical break from the

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<sup>982</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 9, 136-137.

<sup>983</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 136-137. Under the doctrine of self-executing treaties states “differentiate between treaty provisions that are directly applicable in national courts, or self-executing, and those that are not”.

<sup>984</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 349.

<sup>985</sup> Section 231(2).

<sup>986</sup> Section 231(3) states that international agreements of a “technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive” are exempted from the requirement of ratification. According to Scholtz it is not certain what exactly is meant by agreement of a ‘technical, administrative or executive nature’. See Scholtz (A Few Thoughts on Section 231) (*supra*) 215. Stemmet however, believes that sections 231(2) and 231(3) “effectively eradicates uncertainties created by section 231(2) of the Interim Constitution regarding questions whether parliamentary agreement to ratification of or accession to international agreements is obligatory, and whether all agreements should be subjected to this procedure.” Stemmet also recognises

pre-1994 position where the executive had sole control over the incorporation of treaties. To improve transparency and accountability, the executive retained the power to negotiate and sign treaties while parliament had to agree to ratification of, and accession to treaties.<sup>987</sup> A ratified agreement does not automatically lead to the incorporation of international law into domestic law, only that the Republic has an international law obligation and may incur liability under international law for failing to comply with the agreement or to meet its obligations under the agreement.

South Africa subscribes to the dualist theory on the relationship between international obligations and municipal law. Accordingly:

“...domestic courts may only apply international law, and specifically treaties if, and only if, those treaties have been transformed into municipal law by legislation.”<sup>988</sup>

Sections 231(2) and (4) of the Constitution also reflects this position. Stating that:

“An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of provinces [...]”

And:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

Section 231(4) coincides with the pre-constitutional dualist position in *Pan American World Airlines* above. A treaty becomes part of domestic law if enacted into law by national legislation. Section 239 of the Constitution states that ‘national legislation’ includes:

(a) subordinate legislation made in terms of an Act of Parliament; and

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that “it has not yet been established what characteristics identify a self-executing provision/agreement in South African law”. See Stemmet (The Impact of Recent Constitutional Developments) (*supra*) 59-60.

<sup>987</sup> See Section 231(1): “The negotiation and signing of all international agreements is the responsibility of the national executive”. See also Dugard (International Law and the South African Constitution) (*supra*) 81.

<sup>988</sup> Katz (An Act of Transformation) (*supra*) 26. For a distinction between the monist and the dualist approach refer to Wallace and Kalaitzidis (The Monistic Goal of Overcoming the Divide between Domestic and International Law) (*supra*) 2-3. See also Dugard (International Law) (*supra*) 53-56.

(b) legislation that was in force when the Constitution took effect and that is administered by the national government.

Any international agreement which has been signed and ratified but not transformed into national law, will not give rise to individual rights and obligations under South African law. In respect of such treaties South Africa may still incur responsibility towards other states under international law. Thus, a treaty or international agreement and the obligations arising from it only becomes part of South African municipal law following an act of constitutional ratification. This is to be distinguished from the meaning of ratification found in treaty law or international ratification:

“International ratification refers to the international process that brings the agreement into operation on the international plane through confirmation by the necessary state authority. Constitutional ratification refers to the procedure whereby the agreement receives approval of parliament and achieves municipal application. Constitutional ratification depends solely on the constitutional provisions of a state, while international ratification is an act in terms of international law where a deposit of the instrument of ratification takes place.”<sup>989</sup>

There are three ways in which the legislature transforms treaties into domestic law:

“In the first instance, the provisions of a treaty may be embodied in the text of an Act of Parliament; secondly, the treaty may be included as a schedule to a statute; and thirdly, an enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of proclamation or notice in the Government Gazette.”<sup>990</sup>

#### **7.4.2 Customary International (Criminal) Law**

Section 232 of the constitution contains the current position of customary international (criminal) law in South African law. It is a constitutional endorsement of South African common law in the pre-1993 period:

“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

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<sup>989</sup> Scholtz (A Few Thoughts on Section 231) (*supra*) 206.

<sup>990</sup> Dugard (International Law) (*supra*) 55.

According to Dugard, the constitutionalisation of the rule on the applicability of customary international law has given customary international law more weight under the new constitutional dispensation.<sup>991</sup> Accordingly, customary international law is superseded only by constitutional provisions and acts of parliament with which it is inconsistent.<sup>992</sup> Customary international law is therefore superior to the law of precedent and subordinate legislation.

Kemp points out the following regarding the application of customary international law in domestic legal systems:

“[...] the position of customary international law *vis-a-vis* domestic law is informed by national jurisprudential and constitutional developments.”<sup>993</sup>

Also, in relation to the enforcement of crimes under customary international law in domestic courts, Kemp states:

“[...] a distinction between (general) customary international law and customary international (criminal) law provide[s] further nuances relevant to the application of international criminal law in domestic courts.”<sup>994</sup>

Dugard observes that it is necessary to refer to judicial precedent to establish how customary international law rules are proven and which of these rules are to be applied.<sup>995</sup> This requires South African courts to turn to precedent from international (criminal) tribunals and foreign courts for guidance on the existence and application of a customary rule.<sup>996</sup> Here the court will attempt to establish both *usus* (settled state practice) and *opinio juris* (practice backed by a sense of obligation that the rule is binding) to confirm the existence of the rule in question.<sup>997</sup>

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<sup>991</sup> Dugard (International Law) (*supra*) 50.

<sup>992</sup> Dugard (International Law) (*supra*) 50-51.

<sup>993</sup> Kemp (Individual Criminal Liability) (*supra*) 133-134.

<sup>994</sup> Kemp (Individual Criminal Liability) (*supra*) 134.

<sup>995</sup> Dugard (International Law) (*supra*) 51-53.

<sup>996</sup> Dugard (International Law) (*supra*) 51-53.

<sup>997</sup> On the twin requirements for the existence of a customary international law rule, see Dugard (International Law) (*supra*) 26-30; Wallace and Martin-Ortega (International Law) (*supra*) 9 -20.

The constitutional recognition of customary international law and the fact that it is inferior in law only to the constitution and parliamentary legislation, has important repercussions for the conflict which potentially exists between the doctrine of *stare decisis* and newly developed rules of customary international law.<sup>998</sup> In *Trendex Trading Corporation v Central Bank of Nigeria*, it was famously stated that “international law knows no rule of *stare decisis*”.<sup>999</sup> The *Trendex*-principle was applied by Eksteen J in the South African case of *Kaffraria Property Co (Pty) v Government of the Republic of Zambia*.<sup>1000</sup> Since customary international law is not subsidiary to judicial pronouncements by South African courts, the doctrine of *stare decisis* is no obstacle to the application of a new rule of customary international law in a South African courtroom.<sup>1001</sup> This concurs with the approach in *Trendex* and can be viewed as an exception to the application of the doctrine of *stare decisis*.<sup>1002</sup>

As Du Plessis explains, the prosecution of international crime based on customary international (criminal) law in a South African court prior to the enactment of the ICC Act, was highly unlikely:

“Although customary international law forms part of South African law, a South African court confronted with the prosecution of a person accused of an international crime would have been hard pressed to convict, since the principle *nullum crimen sine lege* would probably have constituted a bar to any such prosecution.”<sup>1003</sup>

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<sup>998</sup> Dugard (International Law and the South African Constitution) (*supra*) 80.

<sup>999</sup> *Trendex Trading Corporation v Central Bank of Nigeria* 1977 QB 529 (CA) at 544. *In casu* the question was “whether the rules of precedent applying to rules of English law incorporating customary international law meant that any change in international law could only be recognized by the English Courts (in the absence of legislation) within the scope of the doctrine of *stare decisis*”. See Wallace and Martin-Ortega (International Law) (*supra*) 43.

<sup>1000</sup> *Kaffraria Property Co (Pty) v Government of the Republic of Zambia* 1980 (2) SA 709 (E) at 715.

<sup>1001</sup> Dugard (International Law) (*supra*) 50-51.

<sup>1002</sup> Wallace and Martin-Ortega (International Law) (*supra*) 43.

<sup>1003</sup> Du Plessis (South Africa’s Implementation of the ICC Statute) (*supra*) 461 (footnote 2); see also Jessberger and Powell (Prosecuting Pinochets) (*supra*) 350.

In *S v Basson* the Constitutional Court appeared to accept that Wouter Basson could be prosecuted for crimes against humanity and war crimes committed extraterritorially.<sup>1004</sup> In a separate opinion Sachs J specifically turned to the issue of South Africa's customary international law obligation under the rules of humanitarian law.<sup>1005</sup> Basson was alleged to have been involved in conduct amounting to war crimes committed outside South African territory during the Namibian border war. In his judgment Sachs J found that South Africa clearly has a customary international law obligation to prosecute war criminals and violators of humanitarian law:

“The rules of humanitarian law constitute an important ingredient of customary international law. As the International Court of Justice (the ICJ) has stated [in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)*], they are fundamental to the respect of the human person and ‘elementary considerations of humanity’. The rules of humanitarian law in armed conflicts are to be observed by all States whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law. The ICJ has also stressed that the obligation on all governments to respect the Geneva Conventions in all circumstances does not derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.”<sup>1006</sup>

Most crimes under customary international law are now contained in the Rome Statute or under treaties such as the Genocide Convention and the Convention Against Torture. As acknowledged in article 232 of the Constitution, this does not mean that customary international law has become irrelevant. The recognition of South Africa's customary international law obligations towards humanitarian law by Sachs J hinted at the possibility of using customary international law as a basis for the domestic prosecution of international crimes (not contained in a treaty or criminalised under domestic legislation) committed after section 232 came into force.<sup>1007</sup>

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<sup>1004</sup> Dugard (International Law) (*supra*) 155 footnote 54.

<sup>1005</sup> *S v Basson* 2004 (6) BCLR 620 (CC); see also para 7.5.2.3 *infra* for a detailed discussion of the *Basson* cases.

<sup>1006</sup> *S v Basson* 2004 (6) BCLR 620 (CC) at para 124.

<sup>1007</sup> See para 7.7.3 *infra*.



## 7.5 No Victory, No Justice? Amnesties and Accountability in Post-Apartheid South Africa

This section addresses various questions relating to the use of alternatives to criminal justice during the South African transition. Considering the international community's desire for accountability for perpetrators of international crime, what *ante facto* impact did the TRC and amnesties have on the South African legal system and on international criminal justice in South Africa? Also, what is the possible future impact of the recourse to amnesties over criminal prosecutions on South Africa's post-apartheid society? This enquiry proceeds against the background of the peace versus justice debate.

To a limited extent I attempt to isolate transformative value by using what might be deemed a reverse of my hypothesis, that is to say a "thinking-in" of transformative benefits of the prosecution of international crime as discussed in Chapter 5. Did the lack of criminal prosecutions create a deficit of justice or a denial of the purported transformative benefits of ICL in South Africa? Can a lack of individual criminal liability or the choice of amnesty over individual criminal liability for example, stigmatise a group for the crimes committed by its members or create a general lack of respect for the rule of law as some have suggested? The enquiry is largely theoretical in nature, since empirical proof in relation to the abovementioned questions are either absent or impossible to produce.

### 7.5.1 The Truth and Reconciliation Commission

It is widely believed that the transition to participatory democracy may not have been possible without the negotiated political compromise to grant amnesties to perpetrators of politically motivated human rights violations through the Truth and Reconciliation Commission ("TRC"). The idea of a truth commission in South Africa was produced as a pragmatic political compromise on the one hand, and as a product of the cultural values, religious beliefs and exceptional moral leadership prevalent in South Africa at the time on the other.<sup>1008</sup> It is as a result of these "special ingredients" that commentators often use the term

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<sup>1008</sup> Graybill (To Punish or Pardon) (*supra*) 3-18.

“the miracle of the new South Africa” when referring to the country’s relatively peaceful transition to democracy.

The Promotion of National Unity and Reconciliation Act 34 of 1995 provided for the establishment of the Truth and Reconciliation Committee (“TRC”). The TRC aspired towards truth-finding, victim empowerment and a measure of perpetrator accountability, but was also an important element of ensuring a peaceful political transition. The Amnesty Committee, a sub-committee of the TRC, was tasked with granting amnesty for perpetrators who fully disclosed the details of their politically motivated crimes committed under apartheid if the damage from such crime was found to be proportional to the political objective. Amnesties granted by the TRC exempted perpetrators from subsequent criminal and civil liability. The granting of amnesties was not the sole task of the TRC however. It was also created to “deepen [South Africa’s] factual and interpretive grasp of its terrible past, going back to 1960” and to act in the interest of victims.<sup>1009</sup>

Much has been written about alternatives to criminal justice in relation to the duty to prosecute.<sup>1010</sup> The legal issues surrounding post-conflict justice or the lack thereof, has received equal amounts of attention. A posterior determination of legality of amnesties in South Africa is beyond the scope of this paper. The unsuccessful challenge to the constitutionality of the TRC in *Azanian Peoples Organisation (AZAPO) v The President of the Republic of South Africa* can be regarded as sufficient for present purposes. From a contextual perspective, the case does however warrant a cursory amount of consideration. In the case the issue revolved around whether the amnesties granted to perpetrators of apartheid

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<sup>1009</sup> See section 3 and section 11 of the Promotion of National Unity and Reconciliation Act 34 of 1995; see also Asmal K “Truth, Reconciliation and Justice: The South African Experience in Perspective” (2000) 63 (1) *Modern Law Review* 1-24.

<sup>1010</sup> See for example, Dugard J “Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?” (1999) 12 *Leiden Journal of International Law* 1001-1015; Orentlicher (Settling Accounts) (*supra*); Edelenbos C “Human Rights Violations: A Duty to Prosecute?” (1994) 7 *Leiden Journal of International Law* 5-15.

crimes were consistent with the interim constitution and with international law norms.<sup>1011</sup> Particularly relevant was the weight that should be attached to the duty to prosecute pursuant to customary international law. Dugard notes that despite the evidence in favour of an international law obligation to prosecute, the Constitutional Court in *AZAPO* “[expressed] the view that international law not only fails to prohibit amnesty but rather encourages it”.<sup>1012</sup> The court relied on article 6(5) of Additional Protocol II of 1977 as an exception to the duty to prosecute.<sup>1013</sup> Article 6(5) states that authorities “shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict [...]”.

From a criminal justice perspective the court had to consider the competing considerations of restorative justice (in the interest of nation-building and reconciliation) and retributive justice (in the interest of the victims). In the end the court aligned with the concept of restorative justice and found that even though it may be to the detriment of the victims, amnesty was constitutionally justified due to the fact that it was conditional as well as the fact that it had been designed for the specific purpose of facilitating the transition to democracy:

“The amnesty contemplated is not a blanket amnesty against criminal prosecutions for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purpose of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflict of the past.”<sup>1014</sup>

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<sup>1011</sup> *Azanian Peoples Organisation (AZAPO) v The President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC). For a case overview, see Sachs (War, Violence, Human Rights, and the Overlap between National and International Law) (*supra*).

<sup>1012</sup> Dugard (Dealing with Crimes of a Past Regime) (*supra*) 1003-1004.

<sup>1013</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) 1125 UNTS 609.

<sup>1014</sup> Para 32.

The TRC released its Final Report on 21 March 2003. At the completion of its term, the TRC had filed 7127 amnesty applications.<sup>1015</sup> Only about 16% of applicants (+/- 1100 people) received amnesty.<sup>1016</sup> This is a relatively small number considering that during apartheid the country had a population of roughly 40-45 million people, that apartheid crimes were committed over a period of more 30 years and that members of government, the police force and the defence force were entangled in the maintenance of the apartheid regime.

### 7.5.2 Prosecution of Apartheid Crimes

In South Africa, the liberators (most prominent of which is the African National Congress) never achieved an outright military victory over their oppressors. Rather, these liberation movements secured the democratic transition through leveraged negotiations with the apartheid government, gaining concessions in the process. Consequently, Nuremberg-style criminal trials conducted by the victorious over the vanquished (or “victors’ justice” as it is often referred to in studies on post-conflict justice) was not an option.<sup>1017</sup> The establishment of an international criminal tribunal by the UNSC was also out of the question since South Africa did not represent a threat to international peace and security at the time.

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<sup>1015</sup> Namgalies C “Apartheid on Trial: Book Review of Nerlich V *Apartheidkriminalität vor Gericht*” (2004) 15 *Criminal Law Forum* 349-352, 350. For more statistics on the TRC, see Mallinder L “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) 143-145.

<sup>1016</sup> Graybill LS “Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods” (2004) 25 (6) *Third World Quarterly* 1117-1130, 1119.

<sup>1017</sup> Many prominent figures (including Desmond Tutu, Richard Goldstone and Senior Generals in the security forces) warned against the use of criminal trials during the democratic transition. These leaders feared that such trials would provoke violence from security forces and compromise political negotiations. See Allan K “Prosecution and Peace: The Role of Amnesty Before the ICC?” (2011) 39 *Denver Journal of International Law and Policy* 239-301, 284. See also Akhavan (The International Criminal Tribunal for Rwanda) (*supra*) 504. The Rwandan government’s support for the ICTR was partly a result of “the military defeat of the party responsible for the genocide, so that the successor government (a coalition dominated by the victorious Rwandese Patriotic Front) stood to benefit from the punishment and political isolation of its predecessor”.

Other characteristics of the South African transition impacted on the choice against extensive criminal prosecutions. Firstly, it was widely believed that insistence on criminal prosecutions would compromise the delicate negotiation process and the ultimate goal of establishing a democracy.<sup>1018</sup> Secondly, there were reservations about the capacity of the South African judiciary to cope with the magnitude of crimes committed in the course of an era spanning more than 40 years and often involving state complicity.<sup>1019</sup> South African courts were entangled in the system of apartheid and helped to enforce apartheid law. The legitimacy of the legal system was therefore regarded as circumspect by many and it was difficult to imagine these same courts making an about turn to punish their former “masters”.

This notwithstanding, criminal prosecutions were anticipated as an essential part of the amnesty process.<sup>1020</sup> Amnesty and prosecution were envisioned to function as respectively the “carrot” and the “stick” in the amnesty process. It was the risk of criminal prosecution and often prosecution already in progress, which persuaded many perpetrators to apply for amnesty. If state criminals and political offenders failed to submit to the amnesty process or did not meet the requirements for amnesty, justice had to run its normal course. As will be illustrated below, the “stick” aspect of South Africa’s transitional justice model seems to have fallen by the wayside.

The lack of significant criminal accountability in South Africa raises an important question. Can it really be said that the transitional justice model was successful if perpetrators who placed themselves outside the model are allowed impunity from their crimes? According to Mia Swart:

“Many believe that the integrity of the TRC process will depend on how firm the ANC government remains in its commitment to prosecute those who did not apply for amnesty.”<sup>1021</sup>

Kate Allan posed some interesting questions in relation to the long-term impact of amnesties in South Africa:

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<sup>1018</sup> McGregor L “Individual Accountability in South Africa: Cultural Optimum or Political Facade?” (2001) 95 *American Journal of International Law* 32-45, 35.

<sup>1019</sup> McGregor (Individual Accountability in South Africa) (*supra*) 36.

<sup>1020</sup> Namgalies (Apartheid on Trial) (*supra*) 352.

<sup>1021</sup> Swart M “The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg?” (2008) 68 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 209-226, 225.

“The success of amnesty must be considered in the current context of mass violent crime, not connected to conflict but to a range of political, social, and economic factors. Should some of the resources directed to the SATRC have been directed to building the NPA’s capacity to combat the conduct that has led to one of the highest crime rates in the world? Did impunity breed impunity? Such conclusions must be acknowledged as crude and unsophisticated. The TRC can be credited with assisting to prevent lapse into civil war and some individuals’ moves from helplessness and persecution to relative hope and equality. However the crudeness of the conclusion serves the point: do we really know what the long-term outcome and impact of amnesty is in South Africa? Can we really say it hasn’t led to impunity? Can we accept that those most responsible have walked free to live what may be comfortable lives without punishment?”<sup>1022</sup>

Since the end of the TRC’s term, the NPA seems to have been reluctant to pursue the prosecution of apartheid crimes.<sup>1023</sup> The South African government has not pressed the issue of impunity for apartheid crimes either. Former president Thabo Mbeki granted pardons to 33 apartheid freedom-fighters in 2002.<sup>1024</sup> Shortly after the TRC released its Final Report, Mbeki announced that remaining apartheid era crimes were to be dealt with by the National Prosecuting Authority (NPA) according to “normal practice”.<sup>1025</sup> Normal practice referring to the NPA’s ordinary prosecutorial discretion including the discretion to negotiate plea bargains with apartheid criminals.<sup>1026</sup> The TRC recommended the NPA to consider prosecution of apartheid crimes and handed a list of more than 300 names over to the

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<sup>1022</sup> Allan (Prosecution and Peace) (*supra*) 286-287.

<sup>1023</sup> Allan (Prosecution and Peace) (*supra*) 285.

<sup>1024</sup> Allan (Prosecution and Peace) (*supra*) 285-286.

<sup>1025</sup> Mbeki T “Statement to the National Houses of Parliament and the Nation at the Tabling of the Report of the Truth and Reconciliation Commission” (15 April 2003), available at <http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html> (accessed 2011/06/04).

<sup>1026</sup> “Prosecuting Apartheid-Era Crimes? A South African Dialogue on Justice” (2008) International Human Rights Clinic, Harvard Law School 40-41, available at [http://www.law.harvard.edu/news/spotlight/links/prosecuting\\_apartheid\\_era\\_crimes1.pdf](http://www.law.harvard.edu/news/spotlight/links/prosecuting_apartheid_era_crimes1.pdf) (accessed 2011/05/20). Section 105A of the Criminal Procedure Act 51 of 1977 provides that a legally represented accused may enter into a mutually acceptable plea and sentence agreement with the NPA. According to section 105A(3), the court shall not participate in the negotiation of such an agreement.

NPA.<sup>1027</sup> These were the names of suspected perpetrators who did not apply for amnesty or were denied amnesty and cases where the commission felt there were grounds for possible criminal prosecution.

### 7.5.2.1 Initial Prosecutions

One of the remarkable characteristics of the South African transition is the absence of a dedicated body or institution, inside or outside the criminal justice system, to investigate and prosecute the crimes committed under apartheid.<sup>1028</sup> Almost all of the country's efforts towards a successful transition were focused on the TRC. Some trials did however take place in the first few years subsequent to the end of apartheid. As the TRC commenced its work, two separate inquiries in Pretoria and Durban respectively were created to investigate political crimes committed during apartheid. The Pretoria Inquiry conducted an investigation into the use of "Death Squads" by the South African Police. It led to successful prosecutions for Eugene de Kock as well as Ferdinand Barnard and three former police officers for their involvement in the "Motherwell Four Bombing".<sup>1029</sup> These prosecutions were all based on violations of domestic criminal laws.

The most notorious of the abovementioned cases was that of Eugene de Kock, former commander of the infamous *Vlakplaas* "counter-insurgency" unit. De Kock was subsequently dubbed "Prime Evil" by the press. He faced capital offence charges as well as numerous other charges relating to fraud, theft and contraventions of arms regulations. De Kock was found guilty in respect of most of these charges, including six counts of murder and received a

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<sup>1027</sup> "NPA Prosecution Policy for Apartheid Crimes: State's Application for Leave to Appeal Dismissed" *Legal Resource Centre* (2009-05-04), available at <http://www.lrc.org.za/press-releases/943-2009-05-04-npa-prosecution-policy-for-apartheid-crimes-states-application-for-leave-to-appeal-dismissed> (accessed 2012/08/12).

<sup>1028</sup> Klaaren J and Varney H "A Second Bite at the Amnesty Cherry-Constitutional and Policy Issues Around Legislation for a Second Amnesty" (2000) 117 *South African Law Journal* 572-593, 575.

<sup>1029</sup> *S v Nieuwoudt en Vier Andere* (South Eastern Cape Local Division) Case No. 1/96 (unreported). After a successful appeal to the Cape High Court, three of these officers were granted amnesty by an *ad hoc* panel of the Amnesty Committee in 2005; see Mallinder (Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa) (*supra*) 107.

sentence of life imprisonment.<sup>1030</sup> Later, De Kock was granted amnesty in respect of all but one set of murders for which he had been convicted. It is widely believed that the successful prosecution of De Kock helped to persuade other members of the Apartheid security forces to apply for amnesty. The De Kock-trial is one of very few examples where “the stick” proved effective.

The case of former Minister of Defence Magnus Malan and the 19 other accused, was also conducted purely on the basis of domestic law.<sup>1031</sup> The accused were brought to trial on 13 charges of murder and conspiracy to commit murder allegedly committed by members of the Inkatha Freedom Party (IFP) during the 1987 massacre at the home of a United Democratic Front (UDF) activist in KwaMakhuta, in the former Natal. These IFP members were allegedly trained in the Caprivi Strip by the South African National Defence Force (SANDF). In October 1996 the case ended in a full acquittal for all the accused and raised serious doubts about the South African judiciary’s ability to deal with crimes committed under apartheid. Some commentators have argued that the outcome of the trial created a disincentive for perpetrators of apartheid crimes to apply for amnesty.<sup>1032</sup> In contrast to the De Kock-trial, this unsuccessful prosecution was therefore an instance where the “stick” mechanism was detrimental to the truth and reconciliation process.

### **7.5.2.2 The Amended Prosecuting Policy for Apartheid Crimes**

In 2005 the NPA produced amendments to its prosecuting policy. Among the amendments the NPA introduced guidelines and directives for prosecuting apartheid-era crimes. This was attached in Appendix A under the heading “Prosecution policy and directives relating to prosecution of criminal matters arising from conflicts of the past and which were committed

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<sup>1030</sup> *S v De Kock* (Transvaal Provincial Division) Case No. 266/94, 9 September 1996.

<sup>1031</sup> *S v Peter Msane and Nineteen Others* (Durban and Coast Local Division) Case No. 1/96, 10 October 1996. This case is often referred to as the “Malan-trial” since Magnus Malan was the most high profile defendant in the case.

<sup>1032</sup> Varney H and Sarkin J “Failing to Pierce the Hit Squad Fail: An Analysis of the Malan Trial” (1997) 10 *South African Journal of Criminal Justice* 141-161, 141.



on or before 11 May 1994”.<sup>1033</sup> These guidelines were intended to “reflect and attach due weight” to amongst other things human rights culture, the judgment of the Constitutional Court in the *AZAPO* case:

“[...] justifying the constitutionality of the above process [of transformation to democracy including the practice of granting amnesties], inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused”.

And also, the judgment of the Constitutional Court in *S v Wouter Basson*:

“[...] to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid”.

The introduction to the new directives contained an interesting contradiction. Firstly, the guidelines recognise that a continuation of the TRC process would be unconstitutional. Secondly, it provided:

“As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.”

In other words, the guidelines provided for normal prosecutorial discretion to be exercised in respect of apartheid crimes, including plea bargaining. If conditions specified in the act were met, the guidelines allow indemnities to be granted without publication and outside of court, even if a *prima facie* case has been established.

The new guidelines have influenced only a small number of prosecutions related to apartheid crimes. The first case was that of the so-called APLA Four in 2006.<sup>1034</sup> The case received surprisingly little coverage in the South African media. An Eastern Cape newspaper, the *Daily Dispatch*, published the sole article on the case.<sup>1035</sup>

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<sup>1033</sup> Prosecutions Policy and Directives Relating to Prosecution of Offences Emanating from Conflicts of the Past and Which Were Committed on or Before 11 May 1994, promulgated 1 December 2005.

<sup>1034</sup> *In the Matter between the State and Khwezi Ngoma et al.* (Transkei Division), Case No.125/04, Plea and Sentence Agreement, 2 May 2006.

<sup>1035</sup> (Prosecuting Apartheid-Era Crimes) (*supra*) 74.

The case concerned four former members of the Azanian People's Liberation Army (APLA), the military wing of an anti-apartheid political party, the Pan Africanist Congress (PAC), who entered into a plea agreement with the NPA pursuant to the amended prosecution policy for apartheid crimes.<sup>1036</sup> The APLA Four pleaded guilty to murder and attempted murder charges arising from the attempted raid of a police station. The purpose of the raid was to obtain weapons to use in the furtherance of the political objectives of the accused as members of APLA. For these crimes, and in terms of a plea agreement under the amended prosecuting policy, the accused received 28 years imprisonment suspended for 5 years.<sup>1037</sup>

In 2007, a similar case from the opposing side of the conflict would receive much more local and international attention. In *Van der Merwe et al.*, the five accused were drawn from the ranks of the state machinery of the apartheid government.<sup>1038</sup> Most prominent among the accused was Adriaan Vlok, the Minister of Law and Order from 1986 to 1991. Vlok had previously applied for amnesty, which he was granted. The TRC however expressed the belief that Vlok had not made a full disclosure of his involvement in political offenses before the commission.

The accused were charged with the attempted murder of Frank Chikane, the former head of the South African Council of Churches and an outspoken critic of the apartheid system. The accused pleaded guilty and conceded in terms of the plea agreement that they had "unlawfully and intentionally, in furtherance of a common purpose, attempted to murder the Reverend Frank Chikane".<sup>1039</sup> The accused received sentences of ten and five years imprisonment suspended for 5 years in each case. Lubbe and Feirreira take the view that in light of the NPA's acknowledgement of insufficient evidence against Vlok and Van der Merwe, it would have been difficult to obtain convictions for all of the accused without the

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<sup>1036</sup> (Prosecuting Apartheid-Era Crimes) (*supra*) 73-74.

<sup>1037</sup> Para 15.

<sup>1038</sup> *In the Matter between the State and In the Matter between the State and Johannes Velde van der Merwe et al.* (Transvaal Provincial Division), Plea and Sentence Agreement, 17 August 2007.

<sup>1039</sup> Para 49.

use of a plea and sentence agreement as provided for in terms of section 105A.<sup>1040</sup> Considering the seriousness of the crimes involved however, the sentences may be viewed as too lenient. To date, Adriaan Vlok is the only member of the apartheid government to be convicted of a crime committed in the furtherance of the policies of the apartheid regime.

In addition to these cases, the NPA's guidelines have been subjected to judicial review. In *Nkadimeng and Others v National Director of Public Prosecutions*, the applicants launched a constitutional challenge to the NPA's policy amendments on the prosecution of apartheid crimes.<sup>1041</sup> The applicants in *Nkadimeng* submitted that the guidelines allowed for prosecutorial indemnity (amnesties?) which violates the Constitution on various grounds including non-compliance with international law norms.<sup>1042</sup> Their submission was that the new guidelines would have the *effect* of creating a re-run of the TRC.<sup>1043</sup> Among the applicants in the case were the widows of victims of apartheid-era crimes (such as the Cradock Four) for which no amnesties had been granted and in relation to which no prosecutions had taken place. The other applicants were non-governmental organisations acting as interested parties in the protection of the Constitution.

One of the most contentious issues with regard to the amended prosecution policy was the substantial overlap between:

“[...] the criteria that guide the NPA's prosecutorial decision-making [in section C (a) – (h) of the new policy directives] and those contained in Section 20 of the TRC Act, which the Amnesty Committee used when assessing applications.”<sup>1044</sup>

With regards to this overlap, the following issues were identified by the court in *Nkadimeng*.<sup>1045</sup> Firstly, did the policy amendments allow for an amnesty, indemnity or a re-

<sup>1040</sup> See Lubbe HJ and Ferreira GM “The National Prosecuting Authority's Policy and Directives Relating to Post-Truth and Reconciliation Commission Prosecutions” (2008) 2 *South African Journal of Criminal Justice* 151-167, 166.

<sup>1041</sup> *Nkadimeng and Others v National Director of Public Prosecutions* (Transvaal Provincial Division) Case No. 32709/07, 12 December 2008.

<sup>1042</sup> Para 9.

<sup>1043</sup> Para 14.3.

<sup>1044</sup> (Prosecuting Apartheid-Era Crimes) (*supra*) 52.

<sup>1045</sup> Para 13.

run of the TRC? Secondly, would the policy amendments in relation to a decision not to prosecute have *the effect* of allowing for an amnesty or indemnity equivalent to a re-run of the TRC? The applicants contended that the new prosecuting guidelines provided for a type of “backdoor amnesty”. Furthermore, the new policy received opposition on the grounds that it violated the duty to prosecute gross human rights violations and to uphold the rule of law.

The court ruled that the policy amendments to the national prosecuting policy were “inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid”.<sup>1046</sup> According to the court:

“[...] paragraphs C 2 and C 3 [of the NPA’s new policy directives] state or suggest that the first respondent may still not prosecute, despite adequate evidence against a particular individual having committed an offence [on or before 11 May 1994]. Alternatively paragraphs C 2 and C 3 broadly interpreted confer such a power to the prosecution, contrary to its constitutional obligation. This is a real threat to the applicants’ constitutional rights.”<sup>1047</sup>

The international law aspects of the criticism against the new guidelines namely the customary international law duty to prosecute and the customary international law prohibition of amnesties, were not addressed by the court in *Nkadimeng*.<sup>1048</sup> This was unfortunate. By avoiding to attach due weight to these international law norms, the court missed a vital opportunity to reaffirm South Africa’s commitment to international criminal justice and its customary international law obligations. Such a gesture by our courts may have gone a long way to towards highlighting the exceptional nature of amnesties for international crimes. It may also have contributed towards fighting impunity for apartheid crimes in South Africa or towards ensuring that there is no risk of the country sliding into impunity.<sup>1049</sup> The TRC was

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<sup>1046</sup> Para 18.1.

<sup>1047</sup> Para 16.2.3.4.

<sup>1048</sup> With regards to the international law prohibition of amnesties, Kate Allan observes that “it is [...] difficult to avoid the conclusion that while customary law had not crystallized before the Rome Conference, international law is heading toward the prohibition of amnesties for international crimes”. See Allan (Prosecution and Peace) (*supra*) 242. International law appears to be moving in the direction of a prohibition of amnesty. This is evidenced by the fact that amnesty is not recognised as a defence in the Rome Statute of the ICC; see Dugard (Dealing with Crimes of the Past Regime) (*supra*) 1004.

<sup>1049</sup> See Sooka Y “In South Africa we have to be Careful not to Slide into Impunity” in (Prosecuting Apartheid-Era Crimes) (*supra*) 116-118.

undeniably the only choice to facilitate a successful transition to democracy in South Africa. As a result of the “necessity” of foregoing large-scale criminal prosecutions in the aftermath of apartheid and in order to build on the successes of the TRC, the long-term impact of the lack of criminal accountability in South Africa needs to be anticipated and addressed as far as possible. Both amnesty and accountability are part of the bridge to societal reconciliation and transformation.

### 7.5.2.3 The Prosecution of Wouter Basson

The prosecution of Wouter Basson was both unique and significant. It was unique in being the only case relating to apartheid crimes to make it to the South African Constitutional Court. Furthermore, due to the fact that Basson’s prosecution was based partly on the alleged abuse of a state sponsored chemical and biological warfare program, the case was the first of its kind.<sup>1050</sup> Similar to the *Malan*-trial above, prosecutorial efforts ended in a controversial acquittal of a former member of the SANDF for alleged crimes connected to the system of apartheid. Unlike the *Malan*-trial, the trial of Wouter Basson involved questions pursuant to international criminal law and provides some insight into the approach of the South African courts towards a criminal case involving international law and transnational elements.<sup>1051</sup>

In 1999 Basson was charged in the High Court on sixty seven counts including charges of murder, various human rights violations, fraud, conspiracy to commit murder and a myriad of drug related offences. Particularly relevant were the charges relating to Basson’s participation in crimes alleged to have been committed against members of the South West African Peoples Organisation (SWAPO), members of the ANC and individuals in the SANDF designated as security risks during the Namibian border war. The offenses were all allegedly committed outside the territorial borders of South Africa while Basson was employed as a medical scientist in the Special Forces of the SANDF. Mia Swart observed that the crimes of which Basson stood accused were “so grotesque, they almost seemed

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<sup>1050</sup> Burger M “The life, trial and hats of Wouter Basson” *The Sunday Independent* (2001/01/27), available at [http://www.iol.co.za/index.php?set\\_id=1&clickid=13&art\\_id=ct2001012717251320\\_B250961](http://www.iol.co.za/index.php?set_id=1&clickid=13&art_id=ct2001012717251320_B250961) (accessed 2009/06/22).

<sup>1051</sup> Swart (The Wouter Basson Prosecution) (*supra*) 209.

imaginary”.<sup>1052</sup> The innovative methods of murder in which Basson allegedly participated did indeed appear as something from a work of fiction. These included charges of murder by dropping political prisoners into the ocean from a helicopter after they had been administered an overdose of muscle relaxants, as well as the development of cigarettes contaminated with anthrax.

Amongst the other charges, Basson was charged with six counts of conspiracy to commit murder in terms of section 18(2) of the Riotous Assemblies Act 17 of 1956. Section 18(2) criminalises the act of conspiring to commit “any offense”. The prosecution’s view was that the alleged offenses were conspiracies hatched in Pretoria and thus within the jurisdiction of the South African courts. In terms of the Act the conspirator may be held liable for the same punishment which would be prescribed for the target offense, irrespective of whether the planned offense eventually took place.<sup>1053</sup> Since the murders in which Basson allegedly participated took place outside South African territory, Basson was charged with conspiracy to commit murder.

In the court of first instance the judge dismissed the charges relating to conspiracy, ruling that South African courts could not adjudicate over crimes committed in foreign countries.<sup>1054</sup> Section 18(2) was read restrictively and it was held that the Act did not apply to conspiracies with effects beyond South African borders. The judge also found that Basson was protected by the 1989 Namibian amnesty, which granted amnesty to all members of the South African security forces in Namibia. The state’s subsequent appeal to the Supreme Court of Appeal against the dismissal of the charges was rejected on various procedural and substantive grounds.<sup>1055</sup>

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<sup>1052</sup> Swart (The Wouter Basson Prosecution) (*supra*) 209.

<sup>1053</sup> Section 18 (2) provides: “Any person who – conspires with any other person to aid or procure the commission of or to commit; or incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a state or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable”. See also *S v Sibuyi* 1993 (1) SACR 235 (A) at 249 (e).

<sup>1054</sup> *S v Basson* 2000 (1) SACR 1 (T).

<sup>1055</sup> *S v Basson* 2004 (1) SA 246 (SCA).

The proceedings in the court of first instance started some years prior to the enactment of the ICC Act. Many of the offenses with which Basson was charged amounted to war crimes perpetrated during an armed conflict.<sup>1056</sup> This would have been of little importance however since the South African ICC Act prohibits retroactive prosecution. Since South Africa follows the dualist approach, the only option at the time was to revert to customary international law on the subject. In the High Court the prosecution did not seek to rely on international law as a basis for Basson's trial. At the time ICL was a novel concept in the South African judiciary and considered as "exotic" by South African lawyers.<sup>1057</sup> The prosecution could not have been certain that their case would have succeeded on the basis of customary international law.<sup>1058</sup> The position of international law in the new constitutional dispensation was unsettled, as it continues to be to some extent. Still, it is strange that so little attention was paid to the matter of international crime (war crimes) by the prosecution and judges of the High Court under South Africa's new constitutional dispensation, which specifically made customary international law binding on the Republic by way of a constitutional provision.<sup>1059</sup> It must however be mentioned that the Geneva Conventions and Protocols had been ratified by South Africa in 1952 and 1995 respectively (this was pointed out by the court in Basson) but were not yet implemented as required by section 231(4) of the Constitution by the time the case reached the court.<sup>1060</sup>

Only once the case had reached the Constitutional Court did the state rely on international law as a basis for prosecution. The state's case was partly based on customary international law (as part of South African municipal law) as a base for a South African court to apply the principle of universal jurisdiction. The Basson case came before the

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<sup>1056</sup> See Swart (The Wouter Basson Prosecution) (*supra*) 218: "The murders he was accused of conspiring to commit were committed in the context of the Namibian and South African liberation struggles and the associated armed conflicts between the South African security forces, on the one hand, and SWAPO and the ANC, on the other".

<sup>1057</sup> Swart (The Wouter Basson Prosecution) (*supra*) 213.

<sup>1058</sup> Swart (The Wouter Basson Prosecution) (*supra*) 213.

<sup>1059</sup> See section 232 of the Constitution, 1996.

<sup>1060</sup> In July 2012 the Implementation of the Geneva Conventions Act 8 of 2012 was enacted into law. The purpose of the Act is "[to] enact the Geneva Conventions and Protocols additional to those Conventions into law; to ensure prevention and punishment of grave breaches and other breaches of the Conventions and Protocols; and to provide for matters connected therewith". The Act is discussed at para 7.7.2.1 *infra*.

Constitutional Court in two hearings. The first case revolved around preliminary issues, the state applied for special leave to appeal against the judgment of the Supreme Court of Appeal and simultaneously for leave to appeal directly to the Constitutional Court against the judgment of the High Court.<sup>1061</sup> In a separate opinion, Sachs J concurred with the majority judgment but ventured further than his colleagues by dealing with “the question of the constitutional significance of conduct amounting to a war crime” as a supplementary matter.<sup>1062</sup> A specific reference to ICL such as this by a judge of the Constitutional Court can be regarded as significant. Regarding this issue, Sachs J abridged the problem in the context of post-apartheid South Africa rather well:

“The questions before us have to be determined in the complex historical and jurisprudential situation in which the South African State has moved from perpetrating grave breaches of international humanitarian law to providing constitutional protections against them.”<sup>1063</sup>

This brings us back to the complex interdisciplinary nature of ICL. It raises many questions as to South Africa’s international law obligations under the post-apartheid constitutional dispensation. Sachs considered firstly, whether Basson’s conduct could be characterised as war crimes and secondly, if this was the case, “whether and to what extent this could impose a special constitutional responsibility on the State to prosecute the respondent”.<sup>1064</sup> Thirdly, Sachs considered:

“...whether the quashing of the charges by the trial court followed by the refusal of the SCA to entertain an appeal against this decision, without reference to the fact that the prosecution of war crimes was involved, manifested a failure to give effect to South Africa’s international obligations as set out in the Constitution”.<sup>1065</sup>

After considering these three questions, Sachs found that Basson’s conduct did indeed amount to war crimes, and referring to section 232 of the Constitution noted that:

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<sup>1061</sup> *S v Basson* 2004 (6) BCLR 620 (CC)

<sup>1062</sup> Para 113.

<sup>1063</sup> Para 114.

<sup>1064</sup> Para 118.

<sup>1065</sup> Para 118.



“The rules of humanitarian law in armed conflicts are to be observed by all States whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law.”<sup>1066</sup>

Furthermore, Sachs opined that “enquiries into whether the SCA failed to give sufficient or any weight to the State’s obligations under international law, raise constitutional questions, properly before this Court”.<sup>1067</sup>

The second Constitutional Court case overturned the quashing of the charges relating to conspiracy.<sup>1068</sup> The states’ submission was that the High Court’s ruling amounted to an error in law.<sup>1069</sup> For this submission the prosecution relied on the extreme gravity of the charges and the “national and *international* need to have these issues properly adjudicated” (emphasis added).<sup>1070</sup> The Constitutional Court was not asked to pronounce upon the guilt of Basson. The proceeding were undertaken to establish whether fresh prosecutions could be initiated. The court ruled in favour of renewed prosecution. The court’s ruling was not made on the basis of customary international law however, but on consideration of the Riotous Assemblies Act and the Defence Act. The court nevertheless considered the charges in relation to South Africa’s international law obligations.<sup>1071</sup> The court ruled that the SCA had neglected to take into consideration South Africa’s customary international law obligations to uphold the principles of humanitarian law in relation to the quashed charges:

“[183] ... The quashed charges relate to the alleged use of poison and bacteria for offensive purposes to kill persons regarded as opponents of the then government. Although the most dramatic of the charges, and certainly the most heinous if true, are those that relate to the killing of hundreds of South-West Africa People’s Organisation (SWAPO) captives and the threat to infect the water supply with cholera, the four other charges are far from trivial. They allege murder by poison and the existence of an active link between Dr Basson and a programme of assassination conducted by the Civil Co-operation Bureau (CCB).

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<sup>1066</sup> Para 124.

<sup>1067</sup> Para 126.

<sup>1068</sup> *S v Basson* 2005 (12) BCLR 1192 (CC)

<sup>1069</sup> Para 124.

<sup>1070</sup> Para 184.

<sup>1071</sup> Paras 170-184.

[184] As was pointed out at Nuremburg, crimes against international law are committed by people, not by abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced. Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the State. Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges.”<sup>1072</sup>

The Constitutional Court ruling in favour of the state meant that the case against Basson could be re-opened based on the previously quashed conspiracy charges. However, the NPA decided not to re-indict Basson. The NPA reasoned that their charges could have been opposed by the defence of *autrefois acquit* since the new charges would overlap with charges over which Basson had already been acquitted.<sup>1073</sup>

To some, the unsuccessful prosecution of Wouter Basson only served to reaffirm the superiority of the TRC model over a prosecution based transitional justice model. Desmond Tutu remarked that “the case has shown clearly how inadequate the criminal justice system can be in exposing the full truth of, and establishing clear accountability for what happened in our country”.<sup>1074</sup> Proponents of criminal prosecution can only speculate on what the effects of more prosecutions for apartheid crimes might have been.

No other case better illustrates a failure in the South African transitional justice project. Wouter Basson did not apply for amnesty. Neither was he successfully prosecuted. The end result was that neither the first prize of the truth about Project Coast and apartheid crimes in the SANDF, nor the second prize of accountability was achieved. From an

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<sup>1072</sup> Paras 183-184.

<sup>1073</sup> See “Transitional Justice in the News”, 31 October 2005, available at <http://tj-forum.org/archives/001548.html> (accessed 2012/08/08).

<sup>1074</sup> Tutu D “Chairperson’s Foreword” in *Truth and Reconciliation Commission of South Africa Report* (2003) (Volume 6) 2, available at <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> (accessed 2012/08/15).

international law perspective, the trial represented a case of ‘too little too late’ on the part of the prosecution. It seems plausible that the prosecution opted for the safer route by relying on “clear” domestic law instead of “vague” international law. On top of all this, Mia Swart notes the Constitutional Court’s failure to use the case as a platform for asserting the importance of international law in the new South Africa:

“The Constitutional Court [...] missed a perfect opportunity to acknowledge the proper status of international humanitarian law and customary international law in South Africa.”<sup>1075</sup>

The Constitutional Court’s “awkward” approach to international law in the *Basson* case does not align with the status afforded to international law under the Final Constitution.<sup>1076</sup>

## 7.6 South Africa and the International Criminal Court

Unlike other treaties pertaining to ICL, the Rome Statute does not create a clear obligation on State Parties to incorporate new substantive criminal law provisions into domestic law through legislation that criminalises the offenses in article 5 of the Statute, neither to provide for universal- or extraterritorial jurisdiction over such crimes.<sup>1077</sup> The relationship between international law and domestic law is generally regulated by a state’s domestic law. A state such as South Africa following the dualist approach to international law, needs to criminalise “broadly equivalent offenses” to enable it to prosecute the forms of conduct outlawed by the Rome Statute.<sup>1078</sup> This has been the approach of most states party to the Rome Statute.

Furthermore, it has been theorised that the principle of complementarity in the Rome Statute creates a strong incentive for national implementation legislation.<sup>1079</sup> In the South African context this means the following: South Africa has signed a multilateral treaty and is bound by the principle *pacta servanda sunt*. The latter treaty obliges South Africa to prosecute genocide, war crimes and crimes against humanity (to be willing to prosecute such

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<sup>1075</sup> Swart (The Wouter Basson Prosecution) (*supra*) 226.

<sup>1076</sup> Swart (The Wouter Basson Prosecution) (*supra*) 225.

<sup>1077</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 348, 359; Kleffner (The Impact of Complementarity) (*supra*) 91.

<sup>1078</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 348.

<sup>1079</sup> See Kleffner (The Impact of Complementarity) (*supra*) 88-89; see also Chapter 2 para 2.2.8 and Chapter 5 para 5.6.3 *supra*.

crimes) and to take steps to actualise such obligation (enabling it to be able to prosecute the aforementioned crimes) or face the prospect of incurring state responsibility for non-compliance with its obligations under treaty law.

Whether as a result of the abovementioned dynamic or due to South Africa's re-emergence as a respected member of the international community of states, South Africa emerged as an early champion for the ICC in Africa. At the Rome Conference, South Africa was among those states campaigning for a strong and independent ICC.<sup>1080</sup> Thereafter, South Africa signed and ratified the Rome Statute on 17 July 1998 and in doing so became the 23<sup>rd</sup> State Party. Alignment between the South African legal system and the feature of complementarity under the Rome Statute is the first and foremost requirement for South Africa to competently discharge its obligations towards the ICC.

### 7.6.1 The ICC Act

To bring South Africa's substantive criminal law in line with the substantive criminal law contained in the Rome Statute and with the scheme of complementarity contained therein, South Africa has enacted implementation legislation in the form of the Implementation of the Rome Statute of the International Criminal Courts Act (the "ICC Act"). The South African Parliament passed the ICC Act on 18 July 2002, shortly after the Rome Statute entered into force. The swift enactment of implementation legislation reaffirmed the South African government's commitment to the ideals of international criminal justice. This commitment is expressed in the short title and preamble of the ICC Act. The preamble to the ICC Act describes South Africa as "an integral and accepted member of the community of nations" and requires the state to honour its international obligations by "bringing persons who commit such atrocities to justice". Through the ICC Act, South Africa became the first African State Party to pass legislation implementing the law of the Rome Statute.<sup>1081</sup>

The ICC Act creates a framework for implementing the Rome Statute and criminalises the most serious crimes of international concern as set out in the Rome Statute (genocide, crimes against humanity and war crimes) by creating substantive offences under

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<sup>1080</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 345.

<sup>1081</sup> Du Plessis (South Africa's Implementation of the ICC Statute) (*supra*) 461.

South African law with direct reference to the definitions of the crimes provided for in the Rome Statute.<sup>1082</sup> Although there was initially some criticism against the ICC Act, most commentators are pleased with it since it integrates the Rome Statute's definitions of the core crimes into South African domestic law and provides for a qualified form of universal jurisdiction with regard to those crimes.<sup>1083</sup>

### **7.6.1.1 Objectives of the ICC Act: Prosecuting Core Crimes Through National Legislation and South Africa's Complementarity Obligations**

The ICC Act aims to provide a structure for prosecuting core crimes nationally "in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances" and, "in the event of the national prosecuting authority declining or being unable to prosecute a person", for cooperation with the ICC.<sup>1084</sup> The ICC Act was clearly intended to bring South Africa in line with the complementarity regime of the Rome Statute and to prevent impunity through either direct or indirect enforcement of the Rome Statute. According to Du Plessis:

"[...] the act takes seriously the 'complementarity' obligation of South African courts to domestically investigate and prosecute the ICC offences of crimes against humanity, war crimes and genocide."<sup>1085</sup>

This is reinforced by the preamble to the ICC Act under which South Africa commits to bring "persons who commit such atrocities to justice [...] in a court of law of the Republic in terms of its domestic law where possible". The wording of the preamble to the ICC Act indicates a strong commitment from South Africa's parliament to the objectives of the Rome Statute. Through this the South African state has, even if only by way of implication, identified itself strongly with the values of the Rome Statute. The values of the Rome Statute have been described as the universal values of the international community, the ICC itself is an important consequence of the "move [in new and emerging international law] away from a

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<sup>1082</sup> Section 3 (a) and (c). This method of implementation is a variant of so-called static implementation of international criminal law. See Rikhof J "Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity" (2009) 20 *Criminal Law Forum* 1-51, 11-12.

<sup>1083</sup> Katz was critical of certain aspects of the Act prior to its amendment (see para 7.6.1.5 *infra*).

<sup>1084</sup> Section 3 (d) and (e).

<sup>1085</sup> Du Plessis (South Africa's Implementation of the ICC Statute) (*supra*) 461.

state-centric model of traditional international law based on the preservation of sovereignty, to one more concerned with humanity”.<sup>1086</sup> Through its adoption of the ICC Act, South Africa has formally demonstrated its support for this movement.

### 7.6.1.2 Jurisdiction under the ICC Act

The substantive jurisdiction under the ICC Act is derived entirely from the Rome Statute. The ICC Act incorporates the crimes in article 5 of the Rome Statute, namely genocide, war crimes and crimes against humanity. Prior to the criminalisation of the international crimes contained in the Rome Statute, similar acts may have been prosecuted as ‘ordinary’ domestic crimes such as murder, rape or robbery. The definitions for the ‘new’ international crimes were transplanted directly from the Rome Statute, which is attached as an annexure to the ICC Act. According to Du Plessis, the drafters of the ICC Act were aware of the benefits of the Rome Statute as “a codified statement of the elements that make up the crimes of genocide, war crimes and crimes against humanity” and incorporated the Rome Statute’s definitions of those crimes for precisely that reason.<sup>1087</sup>

The jurisdiction provided for in the ICC Act narrows the scope of universal jurisdiction on the one hand, and makes the system of complementarity more practical on the other.<sup>1088</sup> The type of universal jurisdiction provided for under the ICC Act (often referred to as “conditional universal jurisdiction”) recognises the territorial limits of South Africa’s enforcement jurisdiction, namely the general rule that a state may not enforce its criminal laws in the territory of another state.<sup>1089</sup> The latter form of universal jurisdiction has emerged

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<sup>1086</sup> Tladi D “The African Union and the International Criminal Court: The Battle for the Soul of International Law” (2009) 34 *South African Yearbook of International Law* 57-69, 62.

<sup>1087</sup> Du Plessis (South Africa’s Implementation of the ICC Statute) (*supra*) 463.

<sup>1088</sup> See Du Plessis (South Africa’s ICC Act) (*supra*) 4.

<sup>1089</sup> *France v Turkey* (The case of the S.S. Lotus) Publications of the Permanent Court of International Justice, Series A, No. 10, 7 September 1927 at 18: “Now the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention”. See also Kemp *et al.* (Criminal Law in South Africa) (*supra*) 561.

as a more pragmatic alternative to the exercise of absolute universal jurisdiction by states.<sup>1090</sup> This fits in well with the complementarity regime envisioned by the ICC. Accordingly, any state may prosecute individuals for certain international crimes provided that the individual is present in the state at the time.<sup>1091</sup> South Africa's ICC Act is an example of such a limitation of classical universal jurisdiction.<sup>1092</sup> The ICC Act does not however place any limitations on South Africa's prescriptive jurisdiction in respect of the core crimes in the Rome Statute.

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<sup>1090</sup> Conditional universal jurisdiction currently seems to have become the preferred way of invoking universal jurisdiction. Traditional, pure universal jurisdiction grants jurisdiction to any state "regardless of the *situs* of the offence and the nationalities of the offender and the offended" and such violations "can as such be prosecuted in any state on behalf of the international community" (see Randall (Universal Jurisdiction under International Law) (*supra*) 788); see also Van der Vyver (Universal Jurisdiction in International Criminal Law) (*supra*) 108; see also Swart M "Democratic Republic of the Congo versus Belgium: A Step Backward?" (2002) 17 *Suid-Afrikaanse Publiekreg/South African Public Law* 305–318, 312: "According to the principle of universal jurisdiction states can exercise jurisdiction over non-nationals for crimes committed in a third state"). In rare cases where the principle was invoked in other jurisdictions however, courts have been tentative and cautious with the interpretation of the principle. The *Democratic Republic of the Congo v Belgium* case involved the prosecution of a non-national (Mr. Yerodia) by Belgium for alleged war crimes and crimes against humanity committed in the Democratic Republic of the Congo ("DRC"). Mr. Yerodia was not present in Belgian territory at the time that the warrant for his arrest was issued. Nor were there allegations of these crimes having been committed against Belgian nationals. The Belgian authorities thus sought to invoke universal jurisdiction in its widest form since its legislation (Belgian War Crimes Act of 1993) included the principle of universal jurisdiction and non-recognition of immunities [See Art(s) 5 and 7 of the Belgian War Crimes Act of 1993; See also Swart (Democratic Republic of the Congo versus Belgium) (*supra*) 312 (These articles "[gave] Belgian courts almost unlimited jurisdiction")]. The Court found that the issue and circulation of an arrest warrant against an incumbent Minister of Foreign Affairs *in absentia* was a violation of international law. The judgment in the case prompted a legislative change to curtail the jurisdictional reach of the Belgian War Crimes Act. This judgment has also been met with plenty criticism however. It was regarded by many as a hefty blow to ICL, undoing the progress made by the House of Lords in the *Pinochet* case. In this regard the minority judgment of Van den Wyngaert has received some support.

<sup>1091</sup> Cassese A "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" (2003) 1 *Journal of International Criminal Justice* 589-595, 592.

<sup>1092</sup> See Du Plessis (South Africa's ICC Act) (*supra*) 4.

Prescriptive jurisdiction refers to a state's jurisdiction to prescribe (to extend its national laws extraterritorially) which is a by-product of its sovereignty.<sup>1093</sup>

Section 4(1) establishes jurisdiction for South African courts over ICC crimes committed in South African territory by providing that “despite anything to the contrary in any other law of the Republic, any person who commits a crime is guilty of an offence and is liable on conviction to a fine or imprisonment”. Section 4(1) appears to reaffirm the principle of territorial jurisdiction under which a state may prosecute any criminal conduct occurring within its territorial borders. According to Du Plessis, it is difficult to comprehend why the drafters of the ICC Act chose to create such jurisdiction only by way of implication.<sup>1094</sup> Nevertheless, this type of jurisdiction does not generate any significant controversy since it is a well-established basis for the exercise of criminal jurisdiction by a state.

Section 4(3) of the ICC Act provides four grounds of jurisdiction in order to try an individual for core crimes committed outside the territory of the Republic. A court in South Africa may try “any person who commits a crime contemplated in subsection (1) outside the territory of the Republic” if:

- (a) that person is a South African citizen;
- (b) that person is not a South African citizen but is ordinarily resident in the Republic;
- (c) that person, after the commission of the crime, is present in the territory of the Republic;
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

A crime committed outside the territory of South Africa under any of these four circumstances is regarded as having been committed in the territory of South Africa. Section 4(3) is of particular significance since it extends jurisdiction to persons who are not South African citizens but present in South African territory and non-South Africans who have committed core crimes against South African citizens. This is according to Du Plessis “a

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<sup>1093</sup> Werle (Principles of International Criminal Law) (*supra*) 66 footnote 375; Kemp *et al.* (Criminal Law in South Africa) (*supra*) 554; see also the discussion of the *SALC* case at para 7.7.1.2 *infra*.

<sup>1094</sup> Du Plessis M “Bringing the International Criminal Court Home” (2003) 16 *South African Journal of Criminal Justice* 1-16, 3.



progressive and potentially far-reaching aspect of South Africa's ICC Act".<sup>1095</sup> The ICC Act thus provides for a qualified extraterritorial jurisdiction in respect of crimes supplanted from the Rome Statute. The hereto unsuccessful attempts by states to invoke pure universal jurisdiction, provides supports to the legislative curtailment of universal jurisdiction in South Africa's ICC Act.<sup>1096</sup>

With regard to jurisdiction *ratione temporis*, the ICC Act emulates the Rome Statute and does not allow for retrospective prosecution.<sup>1097</sup> This is in line with section 35(3)(l) of the South African Constitution which guarantees that all persons have the right "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted".

In contemplating the jurisdictional reach of the ICC Act, diplomatic and head of state immunity as a bar to criminal prosecution must also be considered. Under article 27 of the Rome Statute, official capacity cannot exempt a person from criminal responsibility. The South African ICC Act contains a similar provision in section 4(2)(a):

"Despite any other law to the contrary, including customary and conventional international law, the fact that a person - (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official [...] is neither - (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."

However, foreign and international case law illustrates the enduring controversy over diplomatic or head of state immunity under customary international law as a bar to criminal prosecution in domestic courts. These cases serve as authority for asserting that the immunity

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<sup>1095</sup> Du Plessis (South Africa's Implementation of the ICC Statute) (*supra*) 463.

<sup>1096</sup> See ICJ, *Democratic Republic of the Congo v Belgium* (The "Arrest Warrant" case), Judgment, ICJ Reports 2002, 3; see also Bianchi (*supra*) in Cassese (Oxford Companion) (*supra*) 21-22: "Recent attempts, such as the Belgian legislation of 1993-1999 to codify the purest version of the [universality] principle in domestic legislation have caused extensive opposition and eventually led to a reconsideration of its content and of its scope of application" (at 22). See also footnote 1090 *supra*.

<sup>1097</sup> Rome Statute of the ICC, articles 11 and 24; ICC Act, section 5(2); see also Strydom H "South Africa and the International Criminal Court" (2002) 6 *Max Planck Yearbook of United Nations Law* 345-366, 356.

of acting heads of state and foreign diplomats cannot be trumped by domestic legislation for the purposes of prosecuting international crime on behalf of the international community.<sup>1098</sup> Because the ICC Act specifically disqualifies “any law to the contrary, including customary and conventional international law” and makes specific reference to *acting* heads of state and members of government, section 4(2)(a) can be regarded as a considerably bolder proclamation of the irrelevance of immunities for the prosecution of core crimes in comparison to article 27 of the Rome Statute. Du Plessis notes however that despite this proactive improvement in the ICC Act, it is difficult to predict the approach that a South African court will adopt in this regard and that a South African court “might find that [section 4(2)(a)] does not do away with personal head of state immunity”.<sup>1099</sup>

Section 4(2)(a) of the ICC Act is however supported by the provisions of the Constitution. According to article 232 of the Constitution, the customary international rules on diplomatic and head of state immunity form part of South African law, but only to the extent that it is consistent with the Constitution and acts of parliament. Therefore, domestic prosecutions of diplomats and current and former heads of state in terms of the South African ICC Act cannot be opposed on the customary international law right to diplomatic or head of state immunity. These rights are inconsistent with section 4(2)(a) of the ICC Act and if invoked, would undermine the purpose and object of the Act, namely to prosecute perpetrators of core crimes under national law or to ensure cooperation with the ICC in respect of such prosecutions.

### 7.6.1.3 Institution of Prosecution and Prosecutorial Discretion

The Priority Crimes Litigation Unit (PCLU) was established within the NPA as a specialised unit to investigate and prosecute crimes under the jurisdiction of the ICC Act. This unit is headed by the Special Director of Public Prosecutions (currently Adv. Anton Ackerman SC)

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<sup>1098</sup> Du Plessis M “Africa and the International Criminal Court”, available at <http://www.csvr.org.za/wits/confpaps/duplessis.htm> (accessed 2011/08/03). In the *Pinochet* case, the House of Lords held that the immunities afforded to acting heads of state under international law constitute a bar to prosecution before national courts (See *Pinochet I* at 938 and *Pinochet III* at 905H). In the *Arrest Warrant* case, the ICJ came to a similar conclusion (para 58).

<sup>1099</sup> Du Plessis (South Africa’s Implementation of the ICC Statute) (*supra*) 474.

appointed by the President by way of a proclamation in terms of section 13(1)(c) of the National Prosecuting Authority Act.<sup>1100</sup> Under the proclamation the Special Director is instructed “to manage and direct the investigation and prosecution of crimes contemplated in the [ICC Act]”.<sup>1101</sup>

In terms of the ICC Act, the consent of the National Director of Public Prosecutions (NDPP) must be obtained before any person may be prosecuted for crimes under the Act.<sup>1102</sup> In deciding whether or not to prosecute, the NDPP must:

“...give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in Article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime.”<sup>1103</sup>

In the event that the NDPP decides not to institute the prosecution, the he or she must in terms of section 5(5) provide full reasons to the Director-General of Justice and Constitutional Development, who in turn must relay such reasons to the ICC. According to Du Plessis:

“It is clear, however, that any decision by the National Director to refuse to institute a prosecution before a South African court must be carefully considered, especially since an

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<sup>1100</sup> Proclamation No. 46 of 2003 in Government Gazette 24876 of 2003-05-23.

<sup>1101</sup> Upon submission of this dissertation the PCLU was investigating allegations of crimes against humanity brought against former Madagascan president Marc Ravalomanana for his alleged role in the killing of demonstrators by his presidential guard during the civil unrest in Madagascar in 2009. Ravalomanana was subsequently convicted *in absentia* and is currently in exile in South Africa. According to reports, the NPA believes that there is “reasonable evidence” that crimes against humanity were committed (see “NPA investigates Ravalomanana” *News24* (2012/08/05), available at <http://www.news24.com/SouthAfrica/News/NPA-investigates-Ravalomanana-20120805> (accessed 2012/08/08)). South Africa has jurisdiction over the case on the basis of section 4(3)(c) of the ICC Act.

<sup>1102</sup> ICC Act, section 5(1). Such consent is not however required to initiate an investigation into the alleged commission of crimes under the ICC Act (see *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (North Gauteng High Court) Case No. 77150/09, 8 May 2012, para 21).

<sup>1103</sup> ICC Act, section 5(2).

unjustified refusal will lead to international responsibility of South Africa for its failure to comply with its obligations under the ICC Statute.”<sup>1104</sup>

In light of the seriousness of the crimes under the ICC Act and the constitutional endorsement of international law and customary international law in section 231-232 of the Constitution, the NDPP will in all probability have to provide compelling reasons not to prosecute.

Section 5(6) of the ICC Act reiterates article 17(1)(b) of the Rome Statute, by stating that any case which the NDPP refuses to prosecute is admissible before the ICC. Thus, the NDPP’s decision not to prosecute may represent “unwillingness” on the part of the South African state to prosecute for purposes of admissibility in the ICC.

#### **7.6.1.4 Cooperation with the ICC**

The modern system of international criminal justice requires efficient state cooperation for both direct and indirect enforcement of ICL. The role of domestic criminal law systems and the indirect enforcement of ICL have been pushed to the fore by the complementarity regime of the permanent ICC. However, domestic criminal law systems also have an essential role to play in the direct enforcement of ICL. On either front, domestic criminal justice systems are “vital to the functioning of the international system”.<sup>1105</sup> Close cooperation between international prosecuting and court officials as well as national criminal justice systems is needed to facilitate the collection of evidence, gathering of witnesses, the apprehension of alleged offenders, preparations for trial and incarceration of convicted persons.<sup>1106</sup>

The ICC possesses no enforcement mechanisms and relies heavily on cooperation with the national law enforcement systems.<sup>1107</sup> In principle, states party to the Rome Statute have an obligation to cooperate with the ICC.<sup>1108</sup> This is especially important since trials *in*

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<sup>1104</sup> Du Plessis (South Africa’s Implementation of the ICC Statute) (*supra*) 466.

<sup>1105</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 347.

<sup>1106</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 347.

<sup>1107</sup> Du Plessis (Bringing the ICC Home) (*supra*) 7.

<sup>1108</sup> Ambos K “Prosecuting International Crimes at the National and International Level” in Kaleck *et al.* (International Prosecution of Human Rights Crimes) (*supra*) 61. The author highlights the ICC’s “mixed regime of cooperation” which, because the duty to cooperate is based on a multilateral treaty, is less

*absentia* are prohibited under article 63(1) of the Rome Statute, which states that “the accused shall be present during the trial”. Part 9 of the Rome Statute, entitled “International Cooperation and Judicial Assistance”, further elucidates the cooperative obligations of State Parties. Under article 86 of the Rome Statute:

“States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”

Under article 93 of the Rome Statute the ICC can request various forms of assistance relating to investigations and prosecutions. This includes:

- Finding persons and items.<sup>1109</sup>
- Taking evidence (including testimony under oath).<sup>1110</sup>
- The service and provision of documents.<sup>1111</sup>
- The protection of witnesses and victims.<sup>1112</sup>
- “Any other type of assistance which is not prohibited by the law of the requested state”.<sup>1113</sup>

Part 4 of South Africa’s ICC Act deals with “cooperation with and assistance to [the ICC] in or outside South Africa”. The ICC Act contains detailed provisions on matters relating to the arrest and surrender of suspects (sections 8-13), judicial assistance in ICC investigations and prosecutions (sections 14-30) and the enforcement of sentences imposed by the ICC (sections 31-32).

#### **7.6.1.5 Initial Deficiencies in the ICC Act and Subsequent Legislative Amendments**

The notion of complementarity necessitates transformative legislation which clearly outlines the content and scope of application of the Rome Statute. Adequate national legislation is needed for South Africa to effectively discharge its complementarity obligations under the

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vertical in effect than that of the *ad hoc* tribunals yet also less meek than traditional horizontal cooperation based on mutual assistance.

<sup>1109</sup> Article 93 (1)(a).

<sup>1110</sup> Article 93 (1)(b).

<sup>1111</sup> Article 93 (1)(c) and (i).

<sup>1112</sup> Article 93 (1)(j).

<sup>1113</sup> Article 93 (1)(l).

Rome Statute. The initial deficiencies in South Africa's ICC Act illustrate the practical and procedural problems that may arise from inadequately drafted legislation.

According to section 9(1) the ICC Act, a request from the ICC for the provisional arrest of a suspect must be referred to the Director General of the Department of Justice who must immediately forward the request to the National Director of Public Prosecutions. Based on an affidavit attesting to factors such as the existence of the warrant and the presence or expected presence of the person concerned, the magistrate may issue a warrant for arrest of the person concerned. The matter is then brought before a magistrate "in whose area of jurisdiction he or she has been arrested or detained".<sup>1114</sup> The magistrate may only make an order of delivery after considering three issues. Firstly, that the person concerned is the suspect named in the ICC warrant.<sup>1115</sup> Secondly, that the person has been arrested in accordance with the procedures provided for under domestic law.<sup>1116</sup> And finally, whether the person's rights under Chapter 2 of the Constitution (to the extent to which it may be applicable) have been respected.<sup>1117</sup>

Anton Katz identified an initial deficiency in the ICC Act which may have resulted in South Africa being unable to discharge some of its obligations of cooperation and assistance under the Rome Statute.<sup>1118</sup> The defect resulted from discrepancies between section 10(5) and section 11(1) of the ICC Act. The old section 10(5) provided that if the magistrate is satisfied that the three requirements above have been met, the magistrate "must issue *an order committing that person to prison* pending his or her surrender to the court" (own italics). Section 11(1) contains the provision on the removal of persons and "refers to any person in respect of whom an order to be *surrendered* has been given under section 10(5)" (author's emphasis).<sup>1119</sup> Under the old section 10(5) there was no mention of *an order to be surrendered*, only *an order committing that person to prison*. According to Katz, the problem

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<sup>1114</sup> Section 10(1).

<sup>1115</sup> Section 10(1)(a).

<sup>1116</sup> Section 10(1)(b).

<sup>1117</sup> Section 10(1)(c).

<sup>1118</sup> Katz (An Act of Transformation) (*supra*).

<sup>1119</sup> Katz (An Act of Transformation) (*supra*) 28-29.

with the ICC Act's scheme of arrest and surrender had resulted from the fact that "[t]here [was] no provision for any competent authority [...] to issue an order of surrender".<sup>1120</sup>

In addition to the three issues that the magistrate needs to consider before issuing an order of delivery, section 10(5) of the ICC Act requires that the magistrate be satisfied that the person concerned be surrendered to the court for: (a) prosecution for the alleged crime; (b) imposition of a sentence by the court for the crime in respect of which the person has been convicted, or (c) serving a sentence already imposed by the court. There is uncertainty as to the level of proof required from the prosecution to prove these requirements. Du Plessis is of the opinion that these additional requirements can be "regarded as satisfied on the strength of the 'material supporting the request'".<sup>1121</sup> Section 89 of the Rome Statute provides that the "Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request" to a State Party. His argument is that this "onerous evidential burden" has, by the time the magistrate considers the warrant, already been discharged by the ICC Prosecutor before the Pre-Trial Chamber of the ICC and that the material supporting the request should be satisfactory proof for the South African magistrate considering the request.<sup>1122</sup>

To rectify the shortcomings in the ICC Act as identified by Katz and others, section 10(5) of the ICC Act was amended by the Judicial Matters Amendment Act 22 of 2005. Section 10(5) now reads as follows:

"[...] the magistrate must order that such person be surrendered to the Court and that he or she be committed to prison pending such surrender."

The new wording clearly gives magistrates the competence to issue an order of surrender or an order of incarceration pending the surrender of the person.

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<sup>1120</sup> Katz (An Act of Transformation) (*supra*) 29.

<sup>1121</sup> Du Plessis (Bringing the ICC Home) (*supra*) 10.

<sup>1122</sup> Du Plessis (Bringing the ICC Home) (*supra*) 10.

### 7.6.1.6 Article 98 Agreements

Article 98(2) of the Rome Statute provides that:

“The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”

In excess of 100 states have entered into such agreements with the USA.<sup>1123</sup> An agreement in terms of article 98(2) is referred to as Bilateral Immunity agreement (“BIA”) or an article 98 agreement. Signing such an agreement represents a commitment not to surrender any past or present US national, government official or military employee to the ICC. In turn, the United States makes a reciprocal commitment. Thus, it can be contended that BIA’s represent a political compromise in the Rome Statute which may adversely affect the Court’s mandate.

South Africa is one of only a few African states not to have signed a BIA with the United States of America.<sup>1124</sup> By choosing not to conclude such an agreement with the USA, the South African government sends out a clear signal of support for the ICC that gives normative goals primacy over a realist approach to international law, international relations and foreign policy.<sup>1125</sup> One might argue that the refusal of the South African government to enter into a BIA with the USA emphasises its belief in the value ICC and its commitment to the rule of law.<sup>1126</sup> South Africa’s refusal to enter into a BIA is certainly in line with the

<sup>1123</sup> See International Criminal Court: Article 98 Agreements Research Guide, Georgetown International Law Library, available at [http://www.ll.georgetown.edu/guides/article\\_98.cfm](http://www.ll.georgetown.edu/guides/article_98.cfm) (accessed 2012/04/10); Coalition for the International Criminal Court, Factsheet of BIAs, available at [http://www.iccnw.org/documents/CICCFS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf) (accessed 2012/04/10).

<sup>1124</sup> Cotton DH “The Magnificent Seven: Africa’s Response to US Article 98” *African Human Rights Law Journal* 1-34; see also International Criminal Court – Article 98 Agreements Research Guide, Georgetown International Law Library, available at [http://www.ll.georgetown.edu/guides/article\\_98.cfm](http://www.ll.georgetown.edu/guides/article_98.cfm) (accessed 2012/04/10); Coalition for the International Criminal Court, Factsheet of BIAs, available at [http://www.iccnw.org/documents/CICCFS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf) (accessed 2012/04/10).

<sup>1125</sup> See Kelley J “Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-Surrender Agreements” (2007) 101 (3) *American Political Science Review* 573-589.

<sup>1126</sup> See Kelley (Who Keeps International Commitments and Why?) (*supra*) 573-589.



values of the Constitution and existing international law obligations on the South African state.

Article 98 agreements could arguably be opposed in view of article 53 of the 1969 Vienna Convention on the Law of Treaties. Article 53 states that treaties which conflict with a peremptory norm of international law are void. BIA's have the potential to undermine the fundamental object and purpose of the Rome Statute to prosecute perpetrators of crimes which are widely accepted to represent *ius cogens* norms under international law. As a counterargument, the USA could rely on the principle *pacta tertiis nec nosent nec prosunt* which affirms that states are not bound by treaties to which they have not signed. Using this principle (also enshrined in the Vienna Convention) the USA can argue that the Rome Statute may not be enforced against their sovereignty and against USA nationals.

### 7.6.2 The Politics of International Criminal Justice from the Domestic Perspective

The South African Department of International Relations and Cooperation commits itself to the promotion of "South Africa's national interests and values, the African Renaissance and a better world for all".<sup>1127</sup> The department's strategic objectives are *inter alia* to "contribute to the formulation of international law and enhance respect for the provisions thereof" and to "promote multilateralism to secure a rules based international system".<sup>1128</sup> Elsewhere it has been said that:

"In international affairs South Africa is committed to the promotion of human rights, the application of international law, interaction with African countries as equal partners and the pursuit of friendly relations with peoples and nations of the world."<sup>1129</sup>

From the above it seems as if South African foreign policy is geared towards the advancement of national, regional and international well-being through *inter alia* endorsement of and contribution to the development of the international legal order.

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<sup>1127</sup> See Department of International Relations and Cooperation website, available at <http://www.dfa.gov.za/department/index.html> (accessed 2011/09/29).

<sup>1128</sup> See Department of International Relations and Cooperation website, available at <http://www.dfa.gov.za/department/index.html> (accessed 2011/09/29).

<sup>1129</sup> Affidavit of Mr NJ Makhubele (Director: International Affairs, Department of Justice) as quoted in *Thatcher v Minister of Justice and Constitutional Development and Others* 2005 (4) SA 543 (C) para 27.

Domestic, regional and international objectives are not always perfectly aligned however. The South African government may find itself constrained in the exercise of its international obligations by domestic or regional political factors. What happens when obligations owed to the international community in this regard conflict with the policies of the regional political organisation, such as the AU? South Africa faces exactly this type of friction as a result of the controversy over the ICC's arrest warrant for the Sudanese president, Omar Al-Bashir, and the prospect partly as a result of the latter conflict, of a regional court in Africa with international criminal jurisdiction. These considerations will be instrumental for the future of ICL in South Africa.

### **7.6.2.1 The United Nations Security Council and the ICC**

The ICC is not an organ of the UN, but a court founded on mutual consensus through a multilateral treaty. The UN is however supportive of the work of the ICC. The ICC compliments the UN's focus on human rights and international peace in many ways. An organ of the UN that does however have a direct influence over the functioning of the ICC is the UN's executive body, the UNSC. The UNSC plays an important role in the functioning of the ICC in two respects, referrals in terms of article 13(b) and deferrals in terms of article 16 of the Rome Statute. According to article 13(b) the ICC may exercise its jurisdiction if:

“A situation in which one or more of [the crimes in article 5] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”

An important consequence of such a referral is that the ICC may assert jurisdiction over acts committed in a state not party to the Rome Statute. Also very significant is the fact that an article 13(b) referral made under Chapter VII of the UN Charter to maintain international peace represents a decision by the UNSC which is binding on all member states of the UN. On 31 March 2005 the UNSC used its article 13(b) power for the first time and referred the situation in Darfur, Sudan to the ICC.<sup>1130</sup>

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<sup>1130</sup> See UNSC Resolution 1593 (2005).

Article 16 is another provision in the Rome Statute which provides the UNSC with important powers towards the functioning of the ICC. According to article 16, “Deferral of investigation or prosecution”:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

The referral by the UNSC of the situation in Darfur has led to the issue of an indictment for the president of Sudan, Omar al-Bashir, and others. This use of its power of referral along with the refusal to use its power of deferral in relation to the Darfur situation has provoked criticism from the African Union towards the UNSC and the ICC.

#### **7.6.2.2 The African Union and the ICC: A Stormy Relationship**

Regional political organisations are increasingly influential on state foreign policy regarding cooperation in matters of international criminal justice.<sup>1131</sup> The African Union has of late become critical of the ICC. There is currently a perception among African states that the Court’s exclusive focus on Africa is politically engineered rather than based on the demands of justice.<sup>1132</sup> A withdrawal of support from Africa, with its majority in the Assembly of State Parties, poses a serious threat to the overall legitimacy of the Court.

On 3 July 2009 the African Union opposed the ICC’s decision to issue an arrest warrant for Sudan’s President Omar Hassan Al Bashir by adopting a decision directing

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<sup>1131</sup> The African Union’s decision not to cooperate with the ICC’s arrest warrant for Omar al-Bashir can be sighted as an example in this regard. See Harper P “Ignoring ICC warrant is unconstitutional” *The Times* (2009/07/12) <http://www.lhr.org.za/news/2009/ignoring-icc-warrant%E2%80%98unconstitutional%E2%80%99-sunday-times> (accessed 2012/08/22).

<sup>1132</sup> Murithi T “Africa’s Relations with the ICC: A Need for Reorientation?” in *Perspectives: Political Analysis and Commentary from Africa* “A Fractured Relationship: Africa and the International Criminal Court” (2012) No. 1 published by the *Heinrich Böll Stiftung* 4-5.

African States not to assist the court in executing the indictment.<sup>1133</sup> As early as July 2008, the AU Peace and Security Council made an appeal to the UNSC to invoke article 16 of the Rome Statute to defer the prosecution of Bashir that had been initiated at the ICC on the grounds that the prosecution could undermine on-going peace efforts and may not be in the best interests of justice and victims.<sup>1134</sup> According to Tladi, there was also a secondary, underlying reason for the AU's decision:

“...an underlying reason is the notion that the ICC, as a western institution, should not exercise jurisdiction over African leaders – the idea that the arrest warrant smacks of imperialist arrogance. In the AU decision, there are hints of the attitude that African leaders ought not to be tried under non-African systems.”<sup>1135</sup>

The AU's request for deferral was not granted by the UNSC. The AU subsequently decided that “AU Member States shall not cooperate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al Bashir of The Sudan”.<sup>1136</sup> As a result of the AU's decision, Bashir has been able to travel to Chad, Kenya, Malawi and Djibouti despite these countries being signatories of the Rome Statute, and therefore under an obligation to give effect to the ICC arrest warrant.

Kenya in particular has experienced a “fall from grace” in its relationship with the ICC.<sup>1137</sup> Kenya has gone from a model state party and one of only a few states in Africa to

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<sup>1133</sup> See African Union, “Decisions and Declarations” Thirteenth Ordinary Session of the Assembly of Heads of State and Government, Assembly/AU/Dec 245(XIII) (Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court) Sirte, Libya, 1-3 July 2009, para 10.

<sup>1134</sup> AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) 21 July 2008, para 11(i).

<sup>1135</sup> Tladi (African Union and the International Criminal Court) (*supra*) 61.

<sup>1136</sup> Tladi (African Union and the International Criminal Court) (*supra*) 61. This decision was reiterated by the AU early in 2012, see African Union “Decisions, Resolutions and Declarations of the Assembly of the Union” Eighteenth Ordinary Session of the Assembly of Heads of State and Government, Assembly/AU/Dec. 397 (XVIII) (Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court) Addis Ababa, Ethiopia, 29-30 January 2012, para 8.

<sup>1137</sup> Gevers and Du Plessis (Another Stormy Year) (*supra*) 164.

promulgate implementation legislation, to a non-cooperative state.<sup>1138</sup> This is largely as a result of the ICC's self-initiated investigation into the post-election violence in Kenya during 2007/2008. The developments in the AU surrounding President Bashir's arrest warrant and the deterioration of the relationship between the ICC and Kenya provides evidence of a growing "anti-ICC sentiment within Africa".<sup>1139</sup>

The situation surrounding Bashir's ICC arrest warrant is illustrative of the political hurdles which the ICC faces in Africa, currently the sole continent in which it operates. It also illustrates the problems that states simultaneously party to the Rome Statute and a regional organisation may encounter. According to Tladi:

"[...] the [AU] decision raises questions about [...] the relationship between international organisations and their African member states *vis-à-vis* AU decisions. From a more normative perspective, the decision raises questions about the reality of a new value-based international law, centred on the protection of humanity and human rights and whether such a new international law can escape accusations of neo-imperialism."<sup>1140</sup>

The AU's defiant stance over the ICC's arrest warrant for Al-Bashir, places the purported universal moral authority of the ICC in question. From a broader perspective, the AU's defiance also raises questions over international criminal justice as an expression of the values of the international community.

The conflict between the AU and the ICC via the UNSC raises important questions with regards to South Africa's obligations towards the ICC and its international (criminal) law obligations in general. South African delegates at the AU meeting did not raise any objections to the decision not to cooperate with the ICC arrest warrant for Bashir. Although this is in line with South Africa's foreign policy aimed at establishing the African Renaissance and unity within Africa, it represents a serious waver in South Africa's

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<sup>1138</sup> See ICC, *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya* (Pre-Trial Chamber), ICC-02/05-01/09, 27 August 2010; see also Rome Statute of the ICC, article 87(7).

<sup>1139</sup> Gevers and Du Plessis (Another Stormy Year) (*supra*) 165; Kegoro G "On the Brink: Kenya and the International Criminal Court" in *Perspectives: Political Analysis and Commentary from Africa* (*supra*) 22 (noting that Kenya's stance towards the ICC has further deepened the rift between the AU and the ICC).

<sup>1140</sup> Tladi (African Union and the International Criminal Court) (*supra*) 58.

commitment towards the ICC.<sup>1141</sup> It could be argued however that this represents a violation of South Africa's obligations under international law, national legislation (the ICC Act) and the Constitution.<sup>1142</sup> For South Africa, the situation represented a clash between their legal obligations toward the ICC and its membership of, and political objectives within, the AU.<sup>1143</sup> On other occasions, South Africa has reiterated its commitment to fulfil its ICC obligations. In May 2009 (thus before the AU decision not to cooperate with the ICC over the arrest of Al-Bashir) the South African government warned president Omer Hassan Al-Bashir of Sudan that he would face apprehension and arrest if he were to attend the inauguration ceremony of South Africa's newly elected president Jacob Zuma in Pretoria.<sup>1144</sup> The decision to extend this warning to Al-Bashir appears to have been based on South Africa's legal obligations under national legislation (the ICC Act).

After the AU decision on 3 July 2009, the South Africa Foreign Affairs issued the following statement through a press conference held on 31 July 2009:

“South Africa is the State Party of the Rome Statute of the International Criminal Court and is therefore obliged to cooperate with the court in its investigation and prosecution of crimes within the jurisdiction of the court (Article 86) and hence also in the execution of arrest warrants. It is worth noting that Article 87(7) of the Statute provides that, when a state party fails to comply with a request to cooperate, the court may make a finding to that effect and refer the matter to the Assembly of States Parties, or in the case of a United Nations Security Council (UNSC) referral to the UNSC.

Article 27 of the Rome Statute provides that the official capacity as head of state or government of an accused provides no exemption from criminal responsibility. Furthermore, Section 4(1) of the South African implementation of the Rome Statute of the International Criminal Court Act also ousts the applicability of other domestic laws in respect of an accused, with the result that the immunity from prosecution that President El Bashir would

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<sup>1141</sup> See <http://www.dfa.gov.za/au.nepad/index.html> for an overview of the overarching objectives of the African Union and the New Partnership for African Development (NEPAD) (accessed 2011/09/29).

<sup>1142</sup> Harper (Ignoring ICC warrant is unconstitutional) (*supra*).

<sup>1143</sup> Tladi (African Union and the International Criminal Court) (*supra*) 57; see also Murithi (Africa's Relations with the ICC) (*supra*) 6 (according to the author South Africa is “caught between a rock and a hard place when it comes to the AU-ICC relationship”).

<sup>1144</sup> “Botswana says Sudan's Bashir will be arrested if he visits” *Sudan Tribune* (2009/06/11).

normally have enjoyed in terms of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), is not be (sic) applicable.

An international arrest warrant for President El Bashir has been received and endorsed by a magistrate. This means that if President El Bashir arrives on South African territory, he will be liable for arrest.”<sup>1145</sup>

In 2011, South Africa supported the UNSC’s referral of the situation in Libya to the ICC, thereby displaying support for the Court.<sup>1146</sup> Furthermore, it is interesting to note that in August 2011, former president and current Deputy President of South Africa, Kgalema Motlanthe, called for ICC investigations into war crimes committed by NATO during the conflict between the rebels and pro-Gaddafi forces in Libya.<sup>1147</sup> A request of this sort from such a high ranking members of executive government illustrates South Africa’s ambiguous approach to the ICC. On the one hand the call demonstrates, albeit indirectly, South African and African concerns over bias at the ICC or what could be deemed the AU or regional outlook. On the other hand it illustrated South Africa’s enduring belief in the ICC’s mandate to prosecute international crimes, the UN or international perspective.

The changing attitude of the South African government towards the ICC gives rise to a peculiar situation. It may be compared to a kind of pendulum effect where the South African state swings back and forth between normative interests as well as moral values and other political interests. As part of the collective of African states, South Africa has on occasion agreed albeit perhaps reluctantly, not to cooperate with the ICC. Unilaterally, through its foreign policy and as an independent state, it endeavours to some extent to uphold its obligations or at least those obligations created by national legislation. South Africa’s refusal to sign a BIA, the warning to Al-Bashir not to attend President Zuma’s inauguration and the endorsement of the UNSC referral of the Libyan situation to the ICC, serves as evidence for South Africa’s enduring commitment to the ICC.

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<sup>1145</sup> “Notes following the briefing of Department International Relations and Co-operation’s Director-General, Ayanda Ntsaluba”, available at <http://www.info.gov.za/speech/DynamicAction?Pageid=461&sid=3378&tid=3523> (accessed 2012/04/04).

<sup>1146</sup> South Africa was at that time a non-permanent member of the UNSC.

<sup>1147</sup> “ICC must probe NATO violations – SA” *SAPA* (2011/08/25), available at <http://www.news24.com/SouthAfrica/News/ICC-must-probe-Nato-violations-SA-20110825> (accessed 2012/04/11).

Although the abovementioned dichotomy is understandable in light of the nature of international law and politics in general, it is regrettable from an international criminal justice perspective. An ambiguous stance towards the ICC by South Africa, one of Africa's democratic superpowers, could be a huge setback for the ICC's work on the continent which arguably stands to gain the most from its effective functioning. Non-cooperation with the ICC may also tarnish South Africa's newly gained and hard earned international reputation as a liberal democracy in the international order.

## **7.7 Prognostic Assessments of Matters Related to International Criminal Justice in South Africa**

### **7.7.1 Prospects for the ICC in South Africa: Politics and Legal Commitments**

South African courts have not yet tried any persons for any of the acts criminalised in its ICC Act.<sup>1148</sup> Nor has South Africa surrendered any suspects to the ICC to stand trial. This is not particularly surprising. The ICC has only been in existence for 10 years. The first court proceedings were initiated as recently as January 2009 against former Congolese warlord Thomas Lubanga.<sup>1149</sup> The judgment was delivered in March 2012 and the sentencing judgment in July of the same year.<sup>1150</sup> Up to date there have been very few prosecutions based on the complementarity principle in domestic courts around the world. This is preferable for the time being since domestic courts will look to the ICC for guidance in applying its domestic legislation which would have been most probably, and as in the South African case, borrowed or directly transplanted from the ICC Statute. According to article 39(1)(b) of the Constitution "when interpreting the Bill of Rights, a court, tribunal or forum – must consider international law". In the long run, ICC jurisprudence may enrich domestic criminal justice through providing interpretive guidance to domestic courts.

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<sup>1148</sup> No. 27 of 2002.

<sup>1149</sup> Simmons M "International Court Begins First Trial" *The New York Times* (2009/01/26), available at <http://www.nytimes.com/2009/01/27/world/europe/27hague.html> (accessed 2009/06/23).

<sup>1150</sup> See ICC, *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Judgment) Case No. ICC-01/04-01/06, 14 March 2012; ICC, *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I: Decision on Sentence Pursuant to Article 76 of the Statute) Case No. ICC-01/04-01/06, 10 July 2012.



The international criminal justice system envisions a structure of international criminal law where domestic jurisdictions are primarily responsible for and capable of prosecuting international crime. The ICC cannot order state parties to investigate or prosecute international crimes under its jurisdiction, yet state parties have a duty to do so.<sup>1151</sup> Complementarity has emerged as one of the most important features of modern ICL. It is particularly important in relation to the transformative value of ICL because it has the potential to influence the lives of individuals at ‘ground level’ in domestic law systems.<sup>1152</sup> It encourages domestic criminalisation so that referral to international courts should only be necessary where domestic courts are unwilling or unable to prosecute. The ICC in particular is only “designed to be a backstop” or ‘fall net’ for extreme cases which cannot be handled by local courts.<sup>1153</sup> If the principle worked perfectly there would be little need for international or internationalised courts in the international criminal justice system.

Despite the observations above, many states have either not yet ratified the ICC Statute or are yet to implement legislation empowering the law of the Rome Statute on the domestic level.<sup>1154</sup> The ICC Statute in itself does not stipulate that a state party to it is under an obligation to enact legislation criminalising the core crimes.<sup>1155</sup> Whether such obligation arises as an indirect consequence of complementarity or from customary international law is an academic matter. What is certain is that it is essential for states to enact such legislation for international criminal norms to be effective.

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<sup>1151</sup> See ICC, *Prosecutor v Katanga and Chui, Judgement on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II on 12 June 2009 on the Admissibility of the Case* (Appeals Chamber) Case No. ICC-01/04-01/07-1497, 25 September 2009, paras 85-86.

<sup>1152</sup> See also Chapter 8 para 8.3.3 *infra*.

<sup>1153</sup> Du Plessis (South Africa’s ICC Act) (*supra*) 1. One may also content that the court is designed to be ‘an institution of last resort’.

<sup>1154</sup> Upon submission of this thesis “65 countries have enacted legislation containing either complementarity or cooperation provisions, or both, into their domestic law. Furthermore, 35 countries have some form of advanced draft implementing legislation”. See Coalition for the International Criminal Court, *Implementation of the Rome Statute*, available at <http://www.iccnw.org/?mod=romeimplementation> (accessed 2012/08/22).

<sup>1155</sup> “Importing Core International Crimes into National Criminal Law” Forum for International Criminal Justice and Conflict, Publications No. 1 (2007) 13, available at [www.pcio.no/Research-and-Publications/Publication/?oid=63310](http://www.pcio.no/Research-and-Publications/Publication/?oid=63310) (accessed 2009/07/30).

South Africa has shown good faith toward the ideal of an efficient international criminal justice system since the end of apartheid. Since the advent of democracy, South Africa has taken a number of positive steps evincing a desire to co-operate in various matters relating to international criminal justice.<sup>1156</sup> According to Anton Katz, this can be ascribed to *inter alia* two important factors. Firstly, South Africa's re-emergence as a respected nation-state on the international level and secondly, the increasing threat of criminal activity with an international or transnational element.<sup>1157</sup>

### 7.7.1.1 The Proposed 'African Criminal Court'

The AU has been investigating the possibility of expanding the jurisdiction of the proposed African Court of Justice and Human Rights (hereafter "African Court") to include jurisdiction over international crimes and have taken various steps towards this end.<sup>1158</sup> As a result of proceedings initiated against African leaders in the lower courts of various European countries as well as the furore over the ICC's arrest warrant for Omar al-Bashir, AU Member States have expressed concern over the possible abuse of the principle of universal jurisdiction.<sup>1159</sup> The AU concern over the abuse of universal jurisdiction is arguably closely related to African concerns over the ICC as a biased, imperialist institution. In the latter respect, Murungu surmises the intended benefit of a regional court with international criminal jurisdiction in Africa:

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<sup>1156</sup> Katz (Transformation of South Africa's Role in International Co-operation) (*supra*). Furthermore, in August 2012 the NPA announced that is investigating allegations of crimes against humanity against the former president of Madagascar, Marc Ravalomanana (see footnote 1101 *supra*).

<sup>1157</sup> Katz (Transformation of South Africa's Role in International Co-operation) (*supra*).

<sup>1158</sup> The Protocol on the Statute of the African Court of Justice and Human Rights was adopted by the AU in June 2008. The Protocol envisions a merger between the African Court on Human and Peoples' Rights with the African Court of Justice of the African Union. See Murungu CB "Towards a Criminal Chamber in the African Court of Justice and Human Rights" (2011) 9 (5) *Journal of International Criminal Justice* 1067-1088, 1067; Du Plessis M "Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes" (June 2012) Institute for Security Studies Paper No. 235, 1-3 (noting that the proposed African Court faces the prospect of "*in utero* adjustment").

<sup>1159</sup> Deya D "Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes" (2012) (2) *Open Space* 22-26, 22.

“The African states seem to contend that since the ICC is targeting African leaders, such as President Al-Bashir of Sudan, Colonel Muammar Gaddafi of Libya, the three Kenyan state officials charged before the ICC and Laurent Gbagbo of Ivory Coast, they would establish an African court as an alternative forum to try African individuals and thus prosecutions before the ICC. There is a perception that the prospective Criminal Chamber may work for Africa, at least hypothetically. It would serve as an African solution to African endemic problems of international crimes and gross violations of human rights.”<sup>1160</sup>

There are however, additional reasons for the AU’s call for a regional criminal court with the ability to exercise international criminal jurisdiction, namely:

“[...] the challenges with Senegal’s impending prosecution of the former President of Chad, Hissène Habré; and, the need to give effect to Article 25(5) of the African Charter on Democracy, Elections and Governance (ACDEG), which requires the AU to formulate a novel international crime of ‘unconstitutional change of government’.”<sup>1161</sup>

In May 2012 the draft protocol as previously amended to provide the Court with international criminal jurisdiction was approved and recommended to the AU Assembly for adoption.<sup>1162</sup> Apart from individual criminal liability over the crimes contained in the Rome Statute, various transnational crimes and the new crime of “unconstitutional change of government”, it has been proposed that the criminal jurisdiction of the African Court should include corporate criminal liability for such crimes.<sup>1163</sup> Currently the draft protocol provides for international criminal jurisdiction over 14 crimes.<sup>1164</sup> At the AU Summit in July 2012, the AU commissioned a report on the financial and structural implications of expanding the jurisdiction of the African Court and requested the AU Commission to submit a definition for

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<sup>1160</sup> Murungu (Towards a Criminal Chamber in the African Court) (*supra*) 1080.

<sup>1161</sup> Deya (Worth the Wait) (*supra*) 22.

<sup>1162</sup> See African Union, Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, 14 and 15 May 2012, Addis Ababa, Ethiopia.

<sup>1163</sup> Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7, 15 May 2012, article 46C.

<sup>1164</sup> These are genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression. See Draft Protocol (*supra*) article 28A.

the crime of unconstitutional change of government which will be considered at the next AU summit in January 2013.<sup>1165</sup> In the event that the current draft Protocol and Statute is adopted at the next AU summit, it will enter into force 30 days subsequent to its ratification by 15 AU Members States.<sup>1166</sup>

Deya appears (perhaps over-) optimistic about the broader range of crimes that could fall under the expanded jurisdiction of the proposed court:

“If passed, these crimes would introduce to the world of international law several innovations that were either ‘shot down’ during the Rome Statute negotiations or were not envisaged at that time. Potentially, it would expand the scope and reach of international law, and possibly trigger similar efforts in other regions or even at the ICC.”<sup>1167</sup>

Theoretically, the proposed court could enhance the current system of enforcement of international criminal law. According to Deya:

“The draft legal instrument enables a complementary and harmonious relationship with the ICJ, the ICC and other courts, in the same manner that the African Commission on Human and Peoples’ Rights co-exists harmoniously with the UN Human Rights Council, the UN Human Rights Committee and the Rapporteur System. This is also similar to how the AU Peace and Security Council co-exists with the UN Security Council.”<sup>1168</sup>

Also in theory, jurisdiction over an expanded range of crimes for a regional criminal court in Africa, the continent most affected by international crime, may constitute a progressive development for international criminal justice.

These purported benefits will only become a reality if the proposed court is able to discharge its mandate *effectively*. In a more pessimistic vein than Deya above, Murungu remarks that:

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<sup>1165</sup> African Union, “Decisions, Declarations, Resolution and Special Vote of Thanks” Nineteenth Ordinary Session of the Assembly of Heads of State and Government, Assembly/AU/Dec.427 (XIX) (Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court on Human and Peoples’ Rights) Addis Ababa, Ethiopia, 15-16 July 2012, paras 2-3.

<sup>1166</sup> Draft Protocol (*supra*) article 11(1).

<sup>1167</sup> Deya (Worth the Wait) (*supra*) 26.

<sup>1168</sup> Deya (Worth the Wait) (*supra*) 25.

“[...] it remains to be seen whether the prospective Criminal Chamber will work efficiently. Indeed, if it is necessary that Africa punishes perpetrators of international crimes in house, institutional frameworks in a form of the Criminal Chamber (footnote omitted) must be set up to do so, and the relevant court or Criminal Chamber should be enhanced both in terms of capacity and legal support. Judicial independence should be a prerequisite for the dispensation of justice in Africa. Even where the Criminal Chamber might be established, the political commitment of the AU is vital to achieve the demands of justice for Africans. Furthermore, to enforce and provide cooperation with the Criminal Chamber, the African Union should ideally adopt a treaty to guarantee its commitment to cooperate with the proposed Criminal Chamber.”<sup>1169</sup>

Du Plessis highlights various practical and legal issues regarding the expanded jurisdiction of the court as it is currently drafted. Firstly, Du Plessis argues that the court risks being overburdened by the long list of crimes currently provided for in the Draft Protocol:

“The scope of the court’s jurisdictional reach is breathtaking. Even before the International Criminal Law (ICL) Section was introduced, the court would have had its hands full. With the ICL section added, there must be legitimate questions about the capacity of the court to fulfil not only its newfound ICL obligations, but also about the effect that such stretching will have on the court’s ability to deal with its general and human rights obligations.”<sup>1170</sup>

And further:

“[...] the court is expected not only to try the established international crimes, but also to tackle a raft of other social ills that plague the continent. While in principle this is laudable, it is sobering to recall that it took almost a decade for the ICC – a court dedicated to the prosecution of international crimes, with a far more limited jurisdictional focus on just three of the crimes that the African Court will be expected to tackle – to complete its first trial in the Lubanga matter.”<sup>1171</sup>

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<sup>1169</sup> Murungu (Towards a Criminal Chamber in the African Court) (*supra*) 1080; Deya (Worth the Wait) (*supra*) 23-24.

<sup>1170</sup> Du Plessis (Implications of the AU Decision) (*supra*) 6.

<sup>1171</sup> Du Plessis (Implications of the AU Decision) (*supra*) 6.

Secondly, Du Plessis notes that beyond institutional capacity and political will, financial resources will be essential to the success of the court.<sup>1172</sup> This can potentially be very problematic. Even if the AU can somehow muster the human and financial resources required for an efficient court, such expenses may be redundant considering that 33 member states of the AU are party to the Rome Statute which is already aimed at the prosecution of “the most serious crimes of international concern”. This could be viewed as wasteful expenditure when considering that the ICC is already intended only to be an institution of last resort. Additionally, allocation of resources to an African Court may be a risky investment in light of the legal and practical difficulties foreseen as a result of the Court’s ambitious mandate. The cost of a single international criminal trial is estimated at approximately \$20 million, in the face of such exorbitant fiscal requirements it has been contended that “Africa does not need it, nor can afford it”.<sup>1173</sup>

Furthermore, the fear has been expressed that an ‘African Criminal Court’ could create a regional “gap” of impunity in existing international criminal justice system (including presumably the work of the ICC as an integral part of that system):

“Absent [...] a prohibitively costly and fundamental re-design, an extension of the jurisdiction of the Court would create a regional African exceptionalism to international criminal law and international justice, ultimately damaging the credibility and effectiveness of Africa’s regional human rights system. In the space between an African exceptionalism and an ineffectual regional system, an African impunity gap could become institutionalised, rendering

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<sup>1172</sup> Du Plessis (Implications of the AU Decision) (*supra*) 10-11. The AU has commissioned a report on the financial and structural implications of expanding the African Court’s jurisdiction (see footnote 1165 *supra*).

<sup>1173</sup> “Implications of the African Court of Human and Peoples’ Rights Being Empowered to Try International Crimes such as Genocide, Crimes Against Humanity, and War Crimes” An Opinion Submitted by Coalition for an Effective African Court on Human and Peoples’ Rights, CEAC Darfur Consortium; East African Law Society, EALS; International Criminal Law Centre, Open University of Tanzania; Open Society Justice Initiative; Pan-African Lawyers Union, PALU; Southern Africa Litigation Centre, SALC; and West African Bar Association, WABA, 17 December 2009, 16-17 and 22, available at [www.soros.org/initiatives/justice/news/africa.../africa\\_20091217.pdf](http://www.soros.org/initiatives/justice/news/africa.../africa_20091217.pdf) (accessed 2012/04/19).

international criminal law irrelevant to Africa. This outcome is both undesirable and avoidable.”<sup>1174</sup>

It goes without saying that the realisation of a regional court with international criminal jurisdiction will have repercussions for South Africa’s international criminal justice obligations. Avoiding negative repercussions in this regard will require a large measure of congruence between the law of the proposed ‘African Criminal Court’ and the existing law of the ICC, as well as detailed provisions regulating the jurisdictional overlap between the two courts. Surprisingly, the draft protocol does not mention the ICC nor does it provide any guidance as to the relationship between the two courts. Considering the strained relationship between the ICC and the AU, this seems to be more than a negligent oversight on the part of the AU, one which may yet cause a legal and political conundrum as well as considerable confusion for AU member states that still have a positive bearing towards the ICC.<sup>1175</sup> The problem is compounded further in those states that have enacted implementation legislation regarding the Rome Statute such as South Africa, which are not only under an international legal obligation to cooperate with the ICC, but also under a domestic legal obligation to do so.<sup>1176</sup> Furthermore, if South Africa ratifies the proposed Statute, national legislation (similar to the ICC Act) will be required to ensure that the regional criminal court can discharge its mandate effectively as well as to provide for miscellaneous matters such as cooperation and surrender. This will make it exceedingly difficult for states that have hereto opted for the middle ground in the ICC-AU debacle to continue doing so. Ultimately, an ‘African Criminal Court’ might deal a serious blow to international criminal justice on the continent that has hereto evinced the greatest need for it. The proposed ‘African Criminal Court’ could facilitate this undesirable result by deepening the existing AU-ICC rift or by creating a regional gap of impunity as noted above.

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<sup>1174</sup> (Implications of the African Court of Human and Peoples’ Rights Being Empowered to Try International Crimes) (*supra*) 18.

<sup>1175</sup> See Du Plessis (Implications of the AU Decision) (*supra*) 10-11: “[...] it is unfathomable that the draft protocol nowhere mentions the ICC, let alone attempts to set a path for African states that must navigate the relationship between these two institutions. Either this is a sign that the AU hopes its members will sidestep the ICC, or it is a case of irresponsible treaty making – forcing signatories to become party to an instrument that wilfully or negligently ignores the complicated relationship that will exist for states parties to the Rome Statute”.

<sup>1176</sup> See Du Plessis (Implications of the AU Decision) (*supra*) 10.

### 7.7.1.2 Recent Litigation Relating to South Africa's ICC Obligations

In 2008, the Southern African Litigation Centre (SALC) submitted a dossier (the “torture docket”) to the PCLU containing “comprehensive evidence” of the involvement of 18 Zimbabwean security officials in the perpetration of state-sanctioned torture.<sup>1177</sup> The torture docket contained 23 signed affidavits from persons attesting to acts of torture perpetrated against them while in police custody subsequent to a police raid that took place at the headquarters of the main opposition party in Zimbabwe, the Movement for Democratic Change (MDC) in March 2007. SALC argued that these acts of torture were committed in a widespread and systematic manner against the political opponents of the ruling Zimbabwe African National Union – Patriotic Front (ZANU-PF), therefore constituting crimes against humanity.<sup>1178</sup> Crimes against humanity are prosecutable on the basis of universal jurisdiction under section 4 of the ICC Act. Furthermore, according to the applicants the alleged perpetrators have been visitors to South Africa “from time to time”.<sup>1179</sup> This was accepted by the court.<sup>1180</sup>

In lieu of these facts, the applicants submitted that the state has a duty under international and domestic law to apprehend and prosecute these alleged perpetrators and that the NPA (the National Director of Public Prosecutions acting as first respondent) owed a duty

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<sup>1177</sup> See website of the Southern African Litigation Centre “Zimbabwe: Challenging the NPA's Refusal to Act in Terms of the Rome Statute Act”, available at [http://www.southernafricalitigationcentre.org/cases/item/Zimbabwe\\_Challenging\\_the\\_NPA\\_refusal\\_to\\_act\\_in\\_terms\\_of\\_the\\_Rome\\_Statue\\_Act](http://www.southernafricalitigationcentre.org/cases/item/Zimbabwe_Challenging_the_NPA_refusal_to_act_in_terms_of_the_Rome_Statue_Act) (accessed 2012/08/23).

<sup>1178</sup> See *South African Litigation Centre and Another v National Director of Public Prosecutions and Others* (North Gauteng High Court) Case No. 77150/09, 8 May 2012, para 1.13 (at 9); see also Coughlan G “Interview: South Africa - Zimbabwean prosecutions?” (2012/03/23), available at <http://www.rnw.nl/international-justice/article/interview-south-africa-zimbabwean-prosecutions> (accessed 2012/04/03). In this interview Nicole Fritz, Executive Director of SALC, stated that the applicants “made the case that torture was committed in a widespread and systematic way in Zimbabwe against political opponents of the ruling party ZANU PF – therefore, a crime against humanity”.

<sup>1179</sup> See para 1.13 (at 9); see also Coughlan (Interview: South Africa - Zimbabwean prosecutions?) (*supra*).

<sup>1180</sup> Para 11 (at 39).



to the state to take appropriate action in relation to the torture docket.<sup>1181</sup> The SAPS however refused to investigate the matter on the basis that:

- The docket contained insufficient evidence;
- It would be difficult to obtain further evidence;
- There was doubt as to whether section 4 of the ICC Act provided South African authorities with jurisdiction based on the “anticipated presence” of the perpetrators; and
- For political reasons, namely that “any investigation will in addition to negatively impacting on South Africa’s diplomatic initiatives in Zimbabwe, compromise the position of the SAPS when is (sic) assumes the chair of the Southern African Regional Police Chiefs Co-operation Organization (SARPCCO) [...]”.<sup>1182</sup>

These reasons were endorsed by the NPA. Subsequently, SALC and the Zimbabwean Exiles Forum (“ZEF”, the second applicant) approached the North Gauteng High Court for an order setting aside the NPA’s decision not to investigate (“the impugned decision”) on the basis that the decision was unlawful under administrative law and in violation of the rule of law.

The North Gauteng High Court’s ruling in *South African Litigation Centre and Another v National Director of Public Prosecutions and Others* is momentous for international criminal justice in South Africa.<sup>1183</sup> The case represents the first instance in which a South African court had been asked to interpret and delineate South Africa’s obligations under the Rome Statute, the ICC Act (in particular the scope of the jurisdiction provided for by the Act) and the Constitution in relation to the investigation and prosecution of international crime.<sup>1184</sup> Below, I consider those parts of the judgment which are relevant to the focus of this thesis and the current chapter. It is submitted that the judgment has established a positive and potentially transformative precedent for the judicial interpretation of the ICC Act. It seems to be the “wide-ranging, precedent setting judgement fitting of the inaugural judicial pronouncement on South Africa’s ICC Act” that the likes of Christopher

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<sup>1181</sup> Paras 1.13 (at 9).

<sup>1182</sup> Para 4 (at 25-26); Kemp *et al.* (Criminal Law in South Africa) (*supra*) 562.

<sup>1183</sup> (North Gauteng High Court) Case No. 77150/09, 8 May 2012.

<sup>1184</sup> Para 1.6 (c) (at 3).

Gevers had hoped for.<sup>1185</sup> The court did not shrink away from the difficult issues, as it may have been entitled to do in a review application of this nature where a single fault on the behalf of any of the respondents might have been enough for a successful challenge to the impugned decision.<sup>1186</sup>

The applicants' essential contention was that the respondents had a legal duty under international law (pursuant to South Africa's constitutional obligations towards international law) as well as under domestic law (the ICC Act) to investigate the allegations in the torture docket. In opposing the review, the SAPS (the National Commissioner of the South African Police Service, acting as the fourth respondent) contended *inter alia* that "investigation into allegations of torture by Zimbabwean officials in Zimbabwe [...] could be initiated only once the perpetrator was in [South Africa]".<sup>1187</sup> On behalf of the fourth respondent it was argued that section 4 of the ICC Act does not provide for jurisdiction over the "anticipated presence" of a perpetrator in South African territory, that this could not be *read into* the ICC Act and that therefore, any investigation to this end would be futile.<sup>1188</sup>

The court however agreed with the applicants' submission that this line of thought (speculation on behalf of the respondents as to the success of investigatory efforts) would result in an absurdity where an *investigation* under the ICC Act could only occur whilst a suspect is physically present in South African territory, and that any investigatory powers are suspended whenever the suspect is not present.<sup>1189</sup> The following passage from the judgment is illuminating in this regard:

"First Applicant's counsel pointed out that if Respondents' contentions were correct, nl, that the NDPP and PCLU have no investigatory powers under South African law, and that the SAPS cannot investigate crimes outside of South Africa, then the ICC Act's conferral of

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<sup>1185</sup> Gevers C "The Application of Universal Jurisdiction in South African Law" *European Journal of International Law Analysis*, 24/04/2012, available at <http://www.ejiltalk.org/universal-jurisdiction-in-south-africa/> (accessed 2012/05/08).

<sup>1186</sup> Gevers (The Application of Universal Jurisdiction in South African Law) (*supra*).

<sup>1187</sup> Mabuza E "'Not SAPS duty' to probe Zimbabwe torture claims" (2012/03/29), available at <http://www.businessday.co.za/articles/Content.aspx?id=168497> (accessed 2012/04/05).

<sup>1188</sup> Para 32 (at 90).

<sup>1189</sup> Para 32 (at 91).

jurisdiction on South African courts to try perpetrators of international crimes who are not South African, and who commit their crimes outside of South African borders, would be rendered meaningless. It would mean that South Africa would never be able to hold international criminals accountable because, according to the Respondents, they were paralysed to act. This was clearly not consistent with the purpose and object of the ICC Act. It is my view that in deciding whether it was “possible” to bring the perpetrators of international crimes to justice, the Respondents were required to determine whether or not the information before them was sufficient to initiate an investigation [...].”<sup>1190</sup>

To circumvent the absurdity raised by the applicants above, it appears that the court has confirmed that the ICC Act provides for a wide prescriptive jurisdiction which allows for investigations into crimes committed extraterritorially by non-nationals even when those persons are not in the country and South Africa is as a result unable to exercise enforcement jurisdiction under the ICC Act.<sup>1191</sup>

The NPA and SAPS further contended that even though there is a reasonable suspicion that crimes against humanity were committed in Zimbabwe during March 2007, prosecuting these crimes would be harmful to South Africa’s relations with Zimbabwe.<sup>1192</sup> The court did not agree with this view, stating that:

“First and Fourth Respondents’ view was [...] affected by irrelevant political considerations having regard to their duties. Their attitude trivialised the evidence. Diplomatic considerations were also not the business of Fourth Respondent, to put it bluntly.”<sup>1193</sup>

And further:

“In the present context it was the duty of the First, Second and Fourth Respondents to investigate the docket. It contained sufficient information for purposes of such an investigation, in the context of the Rome Statute. *At that stage*, it was not their obligation to take political or policy considerations into account. These change in any event from time to time, whilst a proper jurisprudence remains a concrete basis for a stable society living under the twinkling but stern eyes of the Rule of Law. Any such considerations would affectively destroy the efficacy of the ICC Act. Respondents were required to act independently. In the

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<sup>1190</sup> Para 31 (at 88-89).

<sup>1191</sup> Kemp *et al.* (Criminal Law in South Africa) (*supra*) 562-563.

<sup>1192</sup> Para 28.

<sup>1193</sup> Para 28 (at 84).

present context, and in the light of the request for an investigation of the torture docket, they had to appreciate the nature and ambit of their duties, and act accordingly.”<sup>1194</sup> (emphasis added)

The court ultimately ruled in favour of the applicants and set aside the decision of the first, second and fourth respondents not to investigate allegations of torture committed as a crime against humanity in Zimbabwe by certain identified persons as “unlawful, inconsistent with the Constitution and therefore invalid”.<sup>1195</sup> The court ordered the PCLU to “do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket”.<sup>1196</sup>

As mentioned, the court’s decision is a positive development from an international criminal justice perspective, especially from the perspective of anyone in support of a liberal interpretation of the ICC Act. The court ruled that political considerations were taken into account at the wrong “stage” (see emphasis above) and directed that the PCLU will, upon the mandatory completion of the investigation, decide whether or not to prosecute. According to the judgment, an investigation under the ICC Act must proceed if there is a “reasonable basis” to do so. Moreover, concerns over insufficient evidence and political considerations are irrelevant factors for purposes of the decision to investigate under the ICC Act.<sup>1197</sup> It must however be kept in mind that the final discretion over *prosecution* lies with the NPA in terms of section 5(1) of the ICC Act.<sup>1198</sup> Although the abovementioned considerations were rejected by the court in the *SALC* case, they may be taken into account in the exercise of prosecutorial discretion by the NPA.<sup>1199</sup> Such decision will also however be subject to judicial review and, if the precedent in *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* is anything to go by, the NPA will have to provide convincing reasons for a decision not to prosecute in the light of South Africa’s international and domestic law duties towards the prosecution of international crimes in the Rome Statute. In the event that the NPA declines to prosecute and if the judicial review of such a decision

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<sup>1194</sup> Para 29 (at 86).

<sup>1195</sup> Para 33.

<sup>1196</sup> Para 33.

<sup>1197</sup> Paras 28 and 31.

<sup>1198</sup> See para 7.6.1.3 *supra*.

<sup>1199</sup> Para 31.

fails or does not take place, the feature of complementarity provides that the ICC may assert jurisdiction based on South Africa's unwillingness to prosecute.<sup>1200</sup>

Another positive aspect of the case is the judge's approach to the *locus standi* of the applicants. In bringing the application, the applicants (both civil society organisations) relied on sections 38(a)-(d) of the Constitution to assert that they were acting in their own interests (section 38(a)); in the interests of the victims (section 38(b) and (c)); and in the public interest (section 38(d)).<sup>1201</sup> Applicants relied on "[...] the degree of vulnerability of the people affected, the nature of the rights said to be infringed, the consequences of the infringement of those rights, and the egregiousness of the conduct complained of [...]"<sup>1202</sup>

The fourth respondent contended that the Bill of Rights cannot be applied extraterritorially since the real bearers of interests and rights (the alleged victims) were all foreigners, not in South African territory. For this submission respondents relied on the decision in *Kaunda and Others v President of the Republic of South Africa and Others* in which it was held that the rights enshrined in the Bill of Rights do not attach to nationals when they are outside South Africa.<sup>1203</sup>

However, the court ruled that the applicants, the victims and the public have an interest in the challenge brought against the impugned decision.<sup>1204</sup> The decision in favour of the applicants constitutes an empowering precedent to civil society organisations. In future it may provide encouragement for such civil society organisations which may seek to utilise the ICC Act in their own interests, in the interest of victims and in the interests of the public. In this way the judgment has broadened the potential scope of application of the ICC Act.

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<sup>1200</sup> In the event of a decision not to prosecute, the ICC Act stipulates that the Registrar of the ICC must be informed of the decision as well as provided with the reasons for the decision (Rome Statute of the ICC, section 5(5)).

<sup>1201</sup> Para 12.1 (at 41).

<sup>1202</sup> Para 12.1 (at 43).

<sup>1203</sup> 2005 (4) SA 235 (CC) para 32.

<sup>1204</sup> The significance of this aspect of the SALC-case will be discussed more fully under Chapter 8 para 8.4.2 *infra*.

### 7.7.1.3 A Final Word on Prospects for the ICC in South Africa

In principle, South Africa is committed to its obligations under the Rome Statute and the ICC Act. In reality this commitment seems to be somewhat less than sincere. Although the judgment in *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* may be regarded as a highly positive development for ICL in South Africa, external political considerations have, and will continue to influence South Africa's commitment to international criminal justice in general, especially in light of the looming prospect of an 'African Criminal Court'. For better or worse, these political considerations will have a decisive impact on South Africa's willingness to discharge its international criminal justice obligations.

As illustrated by the situation surrounding the arrest warrant for Al-Bashir, the prosecution of international crimes involves complex legal and political issues. Although courts may decipher the legal issues, politics may yet have the final word. Gevers observes that "[a]lthough the obligations imposed by law on our institutions are clear and weighty, how those obligations are carried out inevitably involves policy choices".<sup>1205</sup> It is hoped that these matter will be addressed and settled in a manner compatible with constitutional- and internationally recognised obligations towards international criminal justice and human rights by South African decision makers and courts in the not too distant future.

## 7.7.2 Other Relevant Legislative Developments

### 7.7.2.1 The Implementation of the Geneva Conventions Act

Parliament enacted the Implementation of the Geneva Conventions Act (hereafter the "Geneva Conventions Act") in July 2012. South Africa is party to the Geneva Conventions and Additional Protocols, which it ratified in 1952 and 1995 respectively. The delay in transforming the Law of Geneva into national law is surprising, even when taking the

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<sup>1205</sup> Gevers C "Gaza docket: SA must tighten policies on international criminal justice" *Business Day* (2009/08/20), available at <http://www.businessday.co.za/Articles/Content.aspx?id=79073> (accessed 2012/04/04).

Apartheid government's disregard for international law into consideration. Nonetheless, the act represents a significant development for international criminal justice in South Africa.<sup>1206</sup>

The object of the act is "to enact the Conventions into law as is required by section 231(4) of the Constitution; to ensure that the Republic complies with the Conventions; and to ensure prevention of, and punishment for, breaches of the Conventions".<sup>1207</sup> Section 5 of the Act provides:

"(1) Any person who, whether within or outside the Republic, commits a grave breach of the Conventions, is guilty of an offence.

(2) For the purposes of subsection (1), "a grave breach" means-

(a) a grave breach referred to in Article 50 of the First Convention;

(b) a grave breach referred to in Article 51 of the Second Convention;

(c) a grave breach referred to in Article 130 of the Third Convention;

(d) a grave breach referred to in Article 147 of the Fourth Convention; or

(e) a grave breach referred to in Article II or 85 of Protocol I.

(3) Any person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence.

(4) Any citizen of the Republic who outside the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence.

(5) A person convicted of an offence contemplated in subsection (1), (3) or (4) is liable to a fine or to imprisonment, including imprisonment for life, or to such imprisonment without the option of a fine or to both a fine and such imprisonment."

Grave breaches of the Geneva Conventions and Additional Protocol I apply only to international armed conflicts. In contrast to the ICC Act which provides for a qualified form of universal jurisdiction over war crimes committed during any 'armed conflict', the Geneva Conventions Act criminalises only grave breaches and therefore only provides for universal jurisdiction if it can be shown that the accused is guilty of serious war crimes committed

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<sup>1206</sup> The significance thereof lies in the fact that the transformation of international crimes into domestic law makes the prosecution of such crimes by national courts more viable, see para 7.8 and Chapter 8 para 8.3.4.3 *infra*.

<sup>1207</sup> Implementation of the Geneva Conventions Act, section 2 (a)-(c).

during an *international* armed conflict.<sup>1208</sup> Section 5(3) and section 5(4) endorses jurisdiction based on the principles territoriality and (active) nationality respectively, providing for such jurisdiction over ‘other breaches’ of the Conventions and Additional Protocols.

Similar to the method of incorporation of the substantive crimes of the Rome Statute used in the ICC Act, the Geneva Conventions Act contains a number of schedules which incorporate the substantive law of the four Geneva Conventions and Additional Protocols “as is”. Jurisdiction under the act is further regulated by section 7 and provides that:

“Any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic.”<sup>1209</sup>

And:

“Whenever this Act is enforced outside the Republic, any finding, sentence, penalty, fine or order made, pronounced or imposed in terms of its provisions is as valid and effectual, and must be carried into effect, as if it had been made, pronounced or imposed in the Republic.”<sup>1210</sup>

The act thus provides for extraterritorial jurisdiction and extraterritorial enforcement of punishment in respect of the offences mentioned above.

Furthermore, the Geneva Conventions Act leaves the ICC Act unaltered in its scope and function by providing that:

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<sup>1208</sup> An international armed conflict can be defined as a clash between the armed forces (or parts thereof) of two or more states, even if one of the states party to the conflict refuses to acknowledge the existence of a state of war. See common article 2 to the Geneva Conventions of 1949, according to which the Geneva Conventions “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”. See also ICTY, *Prosecutor v Tadić* (Appeals Chamber: Jurisdiction) Case No. IT-94-1-AR, 2 October 1995, para 70: “[...] an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state”.

<sup>1209</sup> Section 7 (1).

<sup>1210</sup> Section 7 (3).



“The provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act.”<sup>1211</sup>

Thus the Geneva Conventions Act is intended as a supplementary measure to ensure constitutional compliance with regard to South Africa’s obligations towards international criminal justice, particularly breaches of humanitarian law.

### **7.7.2.2 Prevention and Combating of Torture of Persons Bill, 2012**

The South African parliament was, at the time of writing, considering a bill which will provide for the distinct crime of torture (as opposed to torture as a crime against humanity which is already criminalised under the ICC Act) under South African law. The proposed Prevention and Combating of Torture of Persons Bill (the “Torture Bill”) is intended to give effect to the right to freedom and security of persons in section 12(1)(d) of the Constitution and South Africa’s obligations under the United Nations Convention Against Torture.<sup>1212</sup> Furthermore, the purposes of the Torture Bill are to make the distinct crime of torture a prosecutable offense and to promote universal respect for human rights and human dignity in doing so.<sup>1213</sup> Under section 3 of the Bill, torture is defined as:

“any act or omission, by which severe pain or suffering, whether physical or mental, is intentionally inflicted by a public official on a person—

(a) in order to—

- (i) obtain information or a confession from him or her or a third person;
- (ii) punish him or her for an act he or she or a third person has committed, is suspected of having committed or is planning to commit; or
- (iii) intimidate or coerce him or her or a third person to do, or to refrain from doing, anything;

or

(b) for any reason based on unfair discrimination,

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<sup>1211</sup> Section 20.

<sup>1212</sup> See Prevention and Combating of Torture of Persons Bill, B21-2012, preamble.

<sup>1213</sup> Section 2.

but 'torture' does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.”

Unlike the ICC Act and the Geneva Conventions Bill, the Torture Bill does not incorporate the definition of a crime *mutatis mutandis* from a corresponding international instrument. Nonetheless, the wording of the definition of torture in the Torture Bill agrees strongly with wording in article 1 of the Convention Against Torture.<sup>1214</sup>

The Bill provides for extraterritorial jurisdiction over acts of torture on grounds of jurisdiction similar to those provided for in the ICC Act. According to section 6(1):

“A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence under section 4(1) or (2) had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the person to be charged—

(a) is a citizen of the Republic;

(b) is ordinarily resident in the Republic;

(c) is, after the commission of the offence, lawfully present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic and that person is not extradited pursuant to Article 8 of the Convention; or

(d) has committed the offence against a South African citizen or against a person who is ordinarily resident in the Republic.”

The Bill therefore also provides for a qualified form of universal jurisdiction.<sup>1215</sup> For the prosecution of acts of torture committed outside South African territory, section 6(2) requires the written authority of the NDPP. In this respect, the Torture Bill differs from the ICC Act. Under section 5(1) of the ICC Act the NDPP must consent before *any prosecution* under the Act may take place. Under the Torture Bill such consent is only required for the prosecution

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<sup>1214</sup> Under the Convention Against Torture, torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.

<sup>1215</sup> See para 7.6.1.2 *supra*.

of acts of torture committed *outside* the territory of South Africa. It would seem that the legislature has intended for more freedom in the exercise of prosecutorial discretion regarding acts of torture committed within South Africa than in respect of crimes under the ICC Act.

Under section 4(3)(a) and 4(3)(b) of the Bill, defences based on the immunity of current and former heads of state and government officials and obedience to superior orders are excluded for purposes of determining criminal liability and the determination of an appropriate sentence in relation to acts of torture. Under section 4(4) the prohibition of torture is entrenched as non-derogable law, even in the event of “a state of war, threat of war, internal political instability or any other public emergency”. Therefore, by the express intent of the legislature, it would seem that a justifiable limitation of the prohibition of torture in terms of section 36 of the Constitution is virtually impossible.

Section 8 is a noteworthy aspect of the Bill. Section 8(1) places a duty on the State “to promote awareness of the prohibition against torture aimed at the prevention and combating of torture”. Furthermore, section 8(2) enjoins the President to designate members of Cabinet to facilitate the development of programmes to educate and inform the general public as well as public officials on the prohibition of torture, also to provide assistance to victims of torture. Section 8 may be viewed as a purposively prevention-orientated provision in the Bill. It is submitted that such a pro-active approach to international crime is a welcome development which supports the values and forward-looking purposes of ICL in general.

### **7.7.3 The Prosecution of Crimes under Customary International Law under Section 232 of the Constitution and the Duty of Third States to Prosecute**

It goes without saying that since the implementation of the ICC Act and the Geneva Conventions Act, and if the requirements for the exercise of jurisdiction are met, South Africa need not turn to customary international law under section 232 of the Constitution to prosecute any of the crimes under customary international law provided for in the Rome Statute and the Geneva Conventions respectively. Since customary international (criminal) law is now only subject to constitutional and legislative constraints, the degree to which customary international criminal law obligations can be observed by South African courts

must be determined. In this section, I address the question of the possible role of customary international law as a basis for national prosecutions in South Africa.<sup>1216</sup>

Strydom's dictum below serves to illustrate the possible future relevance of these considerations to the South African legal system:

“What should be noted is that the national prosecution of persons for war crimes or crimes against humanity with reference to customary international law has relevance beyond the question of *apartheid* crimes. War time atrocities on the African continent did not begin or end with the *apartheid* regime or the Rwanda genocide, and it seems valid to consider the future role of customary international law in this regard, especially in view of the low rate of ratifications of the ICC Statute by African countries and the tendency among certain governing elites on the continent to see political solidarity as a greater virtue than justice.”<sup>1217</sup>

It is well established that the crimes contained in the Rome Statute are crimes under customary international law.<sup>1218</sup> The substantive jurisdiction of Rome Statute was purposely restricted to only the most serious crimes of international concern under customary international law.<sup>1219</sup> As Kleffner has observed, the rules of customary international law remain intact despite the near codification of certain customary international crimes in the Rome Statute:

“It has to be acknowledged at the outset that numerous crimes that are embodied in the Rome Statute, as much as some of the general principles and jurisdictional regimes applicable to them, had been recognised under international law prior to the adoption and entry into force of the Statute. For some of them, a clear obligation to adopt the necessary legislation derives from treaties, and customary law may impose such an obligation for others. The Statute leaves such existing rules of international law intact.”<sup>1220</sup>

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<sup>1216</sup> For example, could the NPA rely on common law (via section 232 of the Constitution) to prosecute customary international law crimes which have not been transformed into national law or customary international law crimes committed before the enactment of such legislation?

<sup>1217</sup> Strydom (South Africa and the International Criminal Court) (*supra*) 357.

<sup>1218</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 59; Jessberger and Powell (Prosecuting Pinochets) (*supra*) 350.

<sup>1219</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 350.

<sup>1220</sup> Kleffner (The Impact of Complementarity) (*supra*) 90.

Historically, national courts have been wary of the direct application of customary international criminal law.<sup>1221</sup> In this regard, South African courts are no exception. The principle of legality, particularly the principle *nullum crimen sine lege*, poses the biggest legal obstacle to the domestic prosecution of crimes under customary international law. In relation to this friction, the most important provisions of the Constitution are section 232 and section 35(3)(l). Under section 232 of the South African Constitution, customary international law applies directly in South Africa. According to section 35(3)(l):

“Every accused person has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under *either national or international law* at the time it was committed or omitted.” (emphasis added)

Read together, these two provisions constitute a ground for prosecuting customary international law crimes under common law provided that the existence of such an offence under international law at the time of the commission can be proved.<sup>1222</sup> The emphasised section in section 35(3)(l) above seems to provide specifically for this possibility.<sup>1223</sup> Despite a natural “hesitance” in terms of the principle of legality to prosecute international crime solely on the basis of section 232, Kemp *et al.* note that:

“The advantage of prosecutions through the direct application of customary international law is that it is not subject to the same temporal limitations as [...] statutory regimes [...]. This is because the presumption against retroactivity is applicable only in instances in which a new offence is created. Its observance is therefore subject to the qualification that offences that

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<sup>1221</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 350.

<sup>1222</sup> Kemp *et al.* (Criminal Law in South Africa) (*supra*) 564-565. Those seeking prosecution will therefore have to discharge the burden of proving that the relevant offenses were crimes under customary international law at the relevant time.

<sup>1223</sup> According to the separate opinion of Chaskalson J in *S v Basson* [2004 (6) BCLR 620 (CC)], the Constitution cannot serve as a means for the retrospective criminalisation of conduct committed prior to its enactment: “If the conduct with which the accused was charged did not constitute an offence under South African law at the time it was committed, then in the light of [*Du Plessis and Others v De Klerk and Another*] the State cannot contend that it has become an offence because of the provisions of the Constitution” (at para 97). However, the wording of section 35(3)(l) makes it clear that if it can be shown that conduct was already criminalised under customary international law by the time that the Constitution was adopted, there is no infringement of the right under section 35(3)(l).

were, at the time of their commission, unlawful under international law and criminalised at a later date will not offend section 35(3)(l) of the Constitution.”<sup>1224</sup>

This is confirmed by section 6(4) of the Geneva Conventions Act, which provides that “[nothing] in this act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect”.

Common law prosecutions based on section 232 of the Constitution may at best be considered as a hypothetical possibility.<sup>1225</sup> The controversy over Lieutenant-General Faustin Kayumba Nyamwasa’s presence in South Africa offers a concrete illustration of some of the difficulties that may arise in this regard however. A Rwandan national and former senior military official in the Rwandan Patriotic Front (RPF), Nyamwasa fled Rwanda in February 2010 following allegations of corruption, embezzlement and terrorism against him. In addition to being sought by the Rwandan government, Nyamwasa is the subject of two indictments issued by Spanish and French judges respectively. The Spanish indictment contains charges of war crimes, crimes against humanity and the murder of Spanish nationals attributed to Nyamwasa personally and through his subordinates under the doctrine of command responsibility. The French indictment arose from Nyamwasa’s alleged involvement in shooting down of the plane carrying Rwandan President Juvénal Habyarimana as well as a number of French nationals in 1994. Furthermore, Nyamwasa is allegedly connected with grave human rights violations committed in north-west Rwanda and the Democratic Republic of Congo (DRC) between 1994 and 1998.<sup>1226</sup>

While in South Africa, Nyamwasa survived after being shot in the stomach in what seemed to have been an assassination attempt. The suspicious circumstances surrounding the attempt on his life and the current political climate in Rwanda suggested that Nyamwasa’s extradition to Rwanda would expose him to political persecution and that such extradition would violate South Africa’s domestic and international legal obligations. On 24 June 2010,

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<sup>1224</sup> Kemp *et al.* (Criminal Law in South Africa) (*supra*) 564.

<sup>1225</sup> Kemp *et al.* (Criminal Law in South Africa) (*supra*) 564.

<sup>1226</sup> Katz and Du Plessis (Briefing Paper) (*supra*) paras 4 and 5.

the South African Department of Home Affairs confirmed that Nyamwasa had been granted asylum (refugee status) in South Africa.<sup>1227</sup>

The international crimes (war crimes and crimes against humanity) for which Nyamwasa stands accused were committed before the Rome Statute came into effect. Both these crimes are widely recognised as crimes under customary international law and subject to universal jurisdiction. Thus, South Africa has the *authority* to prosecute Nyamwasa for the crimes of which he stands accused.<sup>1228</sup> Furthermore, no form of immunity attaches to Nyamwasa to potentially complicate his prosecution in a South African court.

Although South Africa has the authority to prosecute crimes subject to universal jurisdiction, it is less clear whether international law places a *duty* on third states to prosecute such crimes. According to Werle the duty to prosecute persons for crimes committed extraterritorially and by foreign-nationals has hereto been universally recognised only in respect of perpetrators of war crimes committed during an international armed conflict.<sup>1229</sup> It is not however universally accepted that third states have a duty under customary international law to prosecute persons for the crimes of genocide and crimes against humanity.<sup>1230</sup> Although international law seems to be moving towards recognition of a general obligation on states to prosecute perpetrators of core crimes present within their

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<sup>1227</sup> According to Katz and Du Plessis, Nyamwasa's refugee status was granted in terms of a legal error: "There is reason to believe that Nyamwasa was involved in crimes against humanity and war crimes and thus Nyamwasa is an excluded person for purposes of section 4 of the Refugees Act [130 of 1998] and is not eligible for refugee status" and furthermore, "in light of the political climate in Rwanda, and in compliance with the principle of non-refoulement, South Africa should not extradite Nyamwasa to Rwanda if Nyamwasa is able to demonstrate that he has a well-founded fear that he faces a reasonable possibility of persecution or ill-treatment in Rwanda". See Katz and Du Plessis (Briefing Paper) (*supra*) para 106.

<sup>1228</sup> Werle (Principles of International Criminal Law) (*supra*) 70; Katz and Du Plessis (Briefing Paper) (*supra*) para 77.

<sup>1229</sup> Werle (Principles of International Criminal Law) (*supra*) 70.

<sup>1230</sup> Werle (Principles of International Criminal Law) (*supra*) 71; see also Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 193; Karavias M "Duty to Punish" in Cassese (Oxford Companion) (*supra*) 306 (citing Werle with approval and noting that the question over the existence of such a general obligation "remains unresolved").

territory, there is not yet sufficient state practice to serve as conclusive evidence of the existence of a rule of customary international law.<sup>1231</sup>

Nyamwasa's refugee status, the indictments against him and his alleged involvement in gross human rights violations gave rise to a number of practical and legal questions which may shed some light on South Africa's ability to stay abreast of the development of the international criminal justice system. Nyamwasa's presence in South Africa raises pertinent questions as to the ambit of South Africa's customary international law obligations towards combating impunity and towards a foreign-national allegedly implicated in international crimes committed extraterritorially.<sup>1232</sup> For their part Katz and Du Plessis have argued that, in the face of credible evidence of an individual's involvement in war crimes and crimes against humanity, South Africa has a legal obligation to either prosecute such an individual (Nyamwasa in particular) or to cooperate with foreign state(s) through the surrender or extradition of the accused to such foreign state for prosecution.<sup>1233</sup> Thus, with the exception of grave breaches of the Geneva Conventions and Additional Protocol I (committed during an international armed conflict), the prosecution of a perpetrator of core crimes committed before the enactment of the Rome Statute who is present in South African territory presents the NPA with the arduous task of proving the crystallisation of a general duty to prosecute such crimes under international law at the time that the crime was committed.

Upon submission of this thesis, Nyamwasa still had refugee status in South Africa. Although it is complicated by the refugee status which he has been afforded, the Nyamwasa

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<sup>1231</sup> Ferdinandusse (Direct Application of International Criminal Law) (*supra*) 193. This question was avoided by the ICJ in *Belgium v Senegal (Questions Relating to the Obligation to Prosecute or Extradite)* (Judgment) 12 July 2012, para 54: "[...] the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems".

<sup>1232</sup> Katz and Du Plessis (Briefing Paper) (*supra*) para 7.

<sup>1233</sup> Katz and Du Plessis (Briefing Paper) (*supra*) paras 73-97. The authors cite the preamble of the Rome Statute according to which "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes" (at para 88). According to Werle however, this provision in the Rome Statute "only reinforces the duty to punish crimes committed on a state's own territory", see Werle (Principles of International Criminal Law) (*supra*) 71.



situation casts a shadow of doubt over the NPA's future reliance on customary international law as a basis for prosecution. The prospect seems to be an unlikely one. It is unclear how, if at all, the international law duty to prosecute will influence the NPA's prosecutorial discretion over international crimes.<sup>1234</sup> The questions over universal jurisdiction, the duty to prosecute and customary international law as a basis for prosecuting international crime under common law was left open by the Constitutional Court in *S v Basson*.<sup>1235</sup> These uncertainties underscore the importance of national legislation to incorporate international crimes into South African criminal law. Through the ICC Act, the Geneva Conventions Act and the Torture Bill, South Africa has taken significant legislative steps to reduce the gap of impunity for perpetrators of international crime who may venture here in the future.

#### **7.7.4 Prognosis on Reconciliation and Lasting Peace in South Africa**

The positive aspects of the TRC process have been widely publicised. Although not without criticism, the TRC was praised as a great success story and as a model worthy of being emulated in other post-conflict societies. It must be submitted that much of the praise for the TRC is well deserved. Even those who point out the TRC's imperfections admit that it was the only viable option at the time.<sup>1236</sup> Still, no mechanism of transitional justice, regardless of its measure of success, can be viewed as perfect. The peace versus justice debate rages on whilst the fight against impunity, arguments in favour of accountability, the international rule of law and the rights of victims of gross human rights violations cannot be easily ignored.

Can it be said that a deficit of justice was created by a lack of accountability for apartheid crimes in South Africa? If so, will it lead to some sort of revenge on the "perpetrator" group? Or, will it undermine the rule of law in the long run? No one knows for certain. Preventing private vengeance and enhancing respect for the rule of law are after all two of the most widely acknowledged purposes behind retributive punishment. Wilson cites evidence to suggest that a lack of accountability for human rights violations in South Africa

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<sup>1234</sup> Swart (The Wouter Basson Prosecution) (*supra*) 223.

<sup>1235</sup> 2005 (12) BCLR 1192 (CC) at footnote 147; see also the discussion of the Basson-cases at para 7.5.2.3 *supra*.

<sup>1236</sup> See Rakate PK "Reconciling Amnesties with Universal Jurisdiction in South Africa: A Response to Garth Meintjies and Juan Mendez" (2001) 3 *International Law Forum du Droit International* 42-46, 42.

is the cause of the high crime statistics and “wild justice” in some places.<sup>1237</sup> According to Kiss:

“Just as wounds fester when they are not exposed to open air, so unacknowledged injustice can poison societies and produce the cycles of distrust, hatred, and violence that we have witnessed in many parts of the world.”<sup>1238</sup>

Kate Allan observes that it is yet to be seen whether the South African transitional justice model will make “a real and lasting contribution in combating impunity in South Africa”.<sup>1239</sup> Continuing in this vein, the potential long-term negative impact of TRC and Amnesties deserves some attention. Roht-Arriaze has speculated of the possible long-term impact of a lack of criminal prosecution in a post-conflict society:

“...a blanket amnesty and silence from the new government perpetuate the existence of a separate class to whom the rule of law does not apply.”<sup>1240</sup>

It is widely believed that a lack of criminal accountability for individual perpetrators within a group may cause the victims to impute the criminality to the larger group over time.<sup>1241</sup> This would be a particularly dangerous situation in South Africa since the previous white oppressor class constitute a small minority of the South African population. It might be argued that the vulnerability of this group is enhanced by the fact that the white minority have retained a large degree of economic power and are still the predominant landowners in South Africa. Although it takes a stretch of the imagination and a more than average helping of paranoia, some suggest similarities between modern day South Africa and Rwanda before the

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<sup>1237</sup> Wilson RA *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (2001) Cambridge University Press, Cambridge 310.

<sup>1238</sup> Kiss E “Moral Ambition Within and Beyond Political Constraints” in Rothberg RI and Thompson D (eds.) *Truth v. Justice: The Morality of Truth Commissions* (2000) Princeton University Press, Princeton 68-98.

<sup>1239</sup> Allan (Prosecution and Peace) (*supra*) 285.

<sup>1240</sup> Roht-Arriaza N (ed.) *Impunity and Human Rights in International Law and Practice* (1995) Oxford University Press, Oxford 4.

<sup>1241</sup> Farer TJ “Restraining the Barbarians: Can International Criminal Law Help?” (2000) 22 (1) *Human Rights Quarterly* 90-117, 92.

genocide.<sup>1242</sup> The continental setting is also slightly foreboding. Africa remains the continent most prone to strife, civil war and compromised democracy.

Moreover, it has been suggested that prosecutions may serve as a symbolic act which may lessen the imposition of collective guilt on the perpetrator group.<sup>1243</sup> Through the trial, the individualisation of guilt and through punishment, the perpetrators become symbols of the prior evil or injustice. This serves to separate the individual perpetrators from the perpetrator group, thereby diverting guilt towards the actual leaders and architects of mass violence. Such symbolic trials may become a historical point of reference for the identity of a transforming society.<sup>1244</sup> If we assume that these benefits are more than theoretical in nature, they have largely not been obtained in South Africa.

The arguments in opposition to the use of truth-telling and conditional amnesties above should however be scrutinised relative to the specific context against which one purports to test it. First of all, the South African amnesty was a conditional amnesty. Conditional amnesties have generally garnered more support from the international community than blanket amnesties. Secondly, criminal prosecutions for apartheid crimes could proceed in the event of a denial of amnesty or for perpetrators who did not come forward to the TRC.

There are those who would argue that the imputation of accountability to the group has been counteracted by the effect of reconciliation through the TRC. This also remains to be seen. There have been many voices speaking out against the reconciliatory approach as a superficial quick fix. Others bemoan the TRC as a mechanism in which real reconciliation was compromised in favour of the demands to *realpolitik*. The fact that the TRC was created through political compromise does not necessarily lead to the conclusion that it was

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<sup>1242</sup> There has been an increasing use of the term “genocide” by Afrikaners since 1994, especially in relation to farm murders and the signing of struggle anthems by members of the ANC. See for example <http://afrikaner-genocide-archives.blogspot.com/>. See also however, footnote 1245 *infra*.

<sup>1243</sup> See Goldstone R “Justice as a Tool for Peace-Making: Truth Commissions and the International Criminal Tribunals” in Heyns C and Steffiszyn K (eds.) *Human Rights, Peace and Justice in Africa: A Reader* (2006) Pretoria University Law Press, Pretoria 370.

<sup>1244</sup> See Chapter 4 paras 4.3.2 and 4.3.4 *supra*.

politically compromised as a whole. The TRC itself was established as an independently functioning body.

Unfortunately, there is no magic crystal ball for predicting the final outcome of the use of the TRC in South Africa. The high crime rate and remaining social, economic, and racial divisions serve as preliminary warning signs of what *might* transpire. Despite its sociological complexity, international crime is not entirely unpredictable. There were early warnings of the Rwandan genocide for example. Rather, international crime is hard to prevent and to halt once it escalates, especially in the case of state complicity or an internal conflict. According to Genocide Watch, Afrikaans-speaking white South African farmers (or “*boers*”) are currently a vulnerable group in respect of the crime of genocide:

“This Genocide Watch is to *raise an alert* concerning the number of Boer farmers slain since the end of apartheid in South Africa. The threat of destruction of a group *must not be ignored* because its numbers are small or its members disfavoured because they have acted in discriminatory ways in the past. A critical factor in this analysis is the total remaining number of Boer farmers. The total number of ethno-European farmers in South Africa has been estimated at approximately 40,000 to 45,000. The majority of ethno-European farmers are Boers. In world context, this may seem to be a small number of people. But such absolute numbers are biased against recognition of threats to the survival of minorities. The smaller the minority the more severe this bias.”<sup>1245</sup>

In September 2011, South Africa was moved to stage 6 “Preparation” on Genocide Watch’s “Countries at Risk Chart”, because of “evidence of organized incitement to violence against white people”. In February 2012, South Africa was moved back to stage 5 “Polarisation”. The main reason for this was steps taken to curtail the political power of the radical leader of the ANC Youth league, Julius Malema.

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<sup>1245</sup> “Over 1000 Boer Farmers have been murdered in South Africa since 1991” *Genocide Watch Report* (2002), available at <http://www.genocidewatch.org/images/SAfrica2002Over1000BoerFarmersInSouthAfricaHaveBeenMurderedSince1991.pdf> (accessed 2012/02/06). As indicated by the emphasised words in the quoted text, Genocide Watch’s statement must be viewed as a statement by a ‘watchdog’ organisation with the specific aim of raising awareness of conditions *potentially* conducive to genocide. Thus, there is at present no conclusive legal proof of a ‘Boer genocide’ in South Africa.

Despite the foreboding picture which emerges from the preceding paragraph, it is important to draw attention to the specific form of intent (*dolus specialis*) required for the crime of genocide, namely the “intent to *destroy*, in whole or in part, a national, ethnic, racial or religious group, *as such*” (emphasis added).<sup>1246</sup> Thus, when members of a group are targeted due to their membership of that group, even if the offender’s intent is discriminatory in nature, it is not sufficient to warrant a conviction for genocide as the offender did not intend for his or her *actus reus* to contribute to the *destruction* of a protected group.<sup>1247</sup>

In general, caution should be applied to the determination of the existence of genocidal intent. The crime of genocide has developed as one of the few crimes which are viewed as so egregious that it offends humanity as a whole. As was noted by the ICTY Appeals Chamber in *Krstić*, “[the] gravity [of the crime of genocide] is reflected in the stringent requirements of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established”.<sup>1248</sup> A failure to uphold the distinction between criminal acts intentionally perpetrated against members of a group and criminal acts perpetrated with the intent to contribute to the destruction of a protected group (or, the strict threshold of genocidal intent), may lead to the exploitation of the label of genocide and will ultimately detract from the moral resonance reflected in the definition of the crime of genocide.

Aside from the cautious approach mentioned above, it is submitted that in general a preventative approach to genocide is warranted. Incitement to commit genocide must be

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<sup>1246</sup> See Rome Statute of the ICC, article 6.

<sup>1247</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, para 187; see also Kemp *et al.* (Criminal Law in South Africa) (*supra*) 531-533; Werle (Principles of International Criminal Law) (*supra*) 276.

<sup>1248</sup> ICTY, *Prosecutor v Krstić* (Appeals Chamber: Judgment) Case No. IT-98-33-A, 19 April 2004, para 134; see also ICTY, *Prosecutor v Krstić* (Trial Chamber: Judgment) Case No. IT-98-33, 2 August 2001, para 700: “It can [...] be argued [...] that genocide is the most serious crime because of its requirement of the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. In this sense, even though the criminal acts themselves involved in a genocide may not vary from those in a crime against humanity or a crime against the laws and customs of war, the convicted person is, because of his specific intent, deemed to be more blameworthy”.

smothered since, in the way that small sparks may cause a runaway fire under the right conditions, the momentum of genocide may become overwhelming and cause great devastation in a relatively short time. This applies to the other core crimes as well. The nature of these crimes and the extraordinary context in which they often occur, merits a pro-active approach from states and their legal systems. Giving too little attention to these matters has led to mass atrocity in the past and pleads for an acknowledgement of the failures of history. When it comes to international crimes, particularly those crimes contained in the Rome Statute and in relation to the words or actions of authority figures or populists, any governmental or judicial emphasis on the rights of minorities and crimes that protect (at least partially) minority or collective rights are to be applauded. For this reason it is essential that states formally acknowledge the seriousness of international crime as well as empower their lawyers and legal systems with effective incorporation of international criminal laws.

A heartening approach in this regard comes from the judgment of the South African equality court in *Afri-Forum and Another v Julius Sello Malema and Others*.<sup>1249</sup> At issue was whether utterances chanted, sung or recited in public by the respondent (Malema) and translated to mean “*shoot the Boer/farmer*”, “*shoot the Boers/farmers they are rapists/robbers*” constitutes hate speech under South African law. These utterances raise concern especially over the use of the memory of apartheid as a weapon of radical politics in South Africa. In his judgment, Lamont J referred specifically to the court’s international law obligations under the Constitution and a number of treaties applicable to the issue.<sup>1250</sup> He lists the Convention on the Prevention and Punishment of the Crime of Genocide (1948) “which should be read with the Rome Statute of the International Criminal Court”, the Convention on the Elimination of All Forms of Racial Discrimination (1965) and section 20 of the ICCPR.<sup>1251</sup> Furthermore, the judge underlined the vulnerability of minority groups stating that “[t]he Court has a clear duty to come to the assistance of such affected people”.<sup>1252</sup> The judge found that hate speech is prohibited so as to “prevent both visible exclusion of minority groups that would deny them equal opportunities and benefits of [...] society and invisibly

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<sup>1249</sup> [2011] ZAEQC 2, Case No. 20968/2010.

<sup>1250</sup> Paras 16 and 27.

<sup>1251</sup> Para 27.

<sup>1252</sup> Paras 27 and 35.

exclude their acceptance as equals”.<sup>1253</sup> The judge ordered that the song and words at issue constituted hate speech and that the respondents are restrained from singing the song *Dubula Ibhunu* at any public or private meeting. The judgment illustrates the value of the recourse to the norms and values of international law to attempt to resolve a domestic social conflict.

Lastly, it must be noted that just as the legacy of transformative criminal trials has changed over time, the legacy of the TRC may become a powerful point of reference for the values of the new South Africa.<sup>1254</sup> Douglas notes of the Nuremberg IMT:

“At the time of its staging, the Nuremberg trial aroused indifference in the majority of Germans. In the 1950s, Germans viewed the trial with contempt, as an exercise in victor’s justice.<sup>12</sup> In particular; they vilified Nuremberg for treating ‘aggressive war’ as an international crime. Now, however, the trial is generally viewed in Germany with respect – both as an event that prodded Germans to a collective reckoning with their troubled past, and as a vital contribution to the developing body of international law.”<sup>1255</sup>

Thus, there is every chance that the TRC as a response to apartheid and means to facilitate transition and transformation will be vindicated in future years. It may prove to be a positive contribution to the South African collective memory. Such a development would negate any *real* (current or future) negative effects which may be directly attributable to a lack of criminal accountability for apartheid era (international) crimes.

South Africa remains a deeply divided society. Although many initiatives have been launched to attempt to reverse apartheid, its main legacy of socio-economic inequality between black and white South Africans is still a reality of everyday South African life. Crime levels have skyrocketed since the early 1990’s.<sup>1256</sup> Furthermore, according to the 2010 Reconciliation Barometer Survey Report, 22% of South Africans feel that government should have done more to prosecute perpetrators of apartheid crimes, while 39% feel that

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<sup>1253</sup> Para 29.

<sup>1254</sup> See Chapter 4 *supra* on the legacies of the Nuremberg IMT and the Eichmann trial respectively.

<sup>1255</sup> Douglas (*supra*) 520.

<sup>1256</sup> See Snyman (Criminal Law) (*supra*) 21-23. In light of the exponential increase in crime since the 1990’s, Snyman describes the South African criminal justice system as “dysfunctional”.

government has not done enough to support the victims of apartheid crimes.<sup>1257</sup> These realities coupled with the potential negative after-effects which *might* transpire from the lack of criminal accountability in the immediate aftermath of apartheid, paints what seems to be an ominous picture for the future. Is it possible that due to a general lack of retribution and symbolic criminal trials, collective memory can be turned into a political weapon in South Africa? When focusing on these objective factors alone, one might predict some sort of violent backlash or cyclical revenge attributable to the “failures” of the South African transition. Yet, the miracle of the South African transition endures. The lasting value of the TRC process is in many respects undeniable. In spite of South Africa’s ailing democracy, the rainbow nations’ rainbow remains *mostly* intact.

## 7.8 Concluding Remarks

The increased production of international criminal justice norms by the international community is one of the most significant developments in modern international law. These norms place legal obligations on the inter- and intra-State conduct of governments and on individuals. The modes through which the international community produces these norms (treaties or the rules of customary international law) are designed to permeate domestic legal systems through implementation legislation and/or application in domestic courts. Anne-Marie Slaughter describes the importance of the role of domestic courts in this regard:

“National courts are the vehicles through which international treaties and customary law that have not been independently incorporated into domestic statutes enter domestic systems.”<sup>1258</sup>

In addition to voluntarily incorporated international law norms, some international norms have developed to achieve a status of higher law from which no derogation is allowed. These

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<sup>1257</sup> Since it is not mentioned in the survey report, it is assumed that the 22% figure relates to perpetrators of apartheid crimes which had not participated in the TRC process. See Lefko-Everett K, Lekalake R, Penfold E and Rais S “2010 SA Reconciliation Barometer Survey Report”, Published by the Institute for Justice and Reconciliation 32. It must be mentioned that this report is in many respects also positive towards reconciliation in South Africa.

<sup>1258</sup> Slaughter A “Judicial Globalization” (1999-2000) 40 *Virginia Journal of International Law* 1103.



peremptory norms of international law also have a persuasive or de-legitimising effect on inter-State conduct and the conduct of states towards their citizens.<sup>1259</sup>

Since the end of apartheid, the South African legal system is open to the influence of diverse legal sources including international law.<sup>1260</sup> The constitutionalisation of international law specifically gives international law more weight and influence in the post-apartheid South African legal system. Furthermore, it has become evident that the South African Constitution embraces the concept of transformation. The Constitution is intended to “heal the divisions of the past and [establish] a society based on democratic values, social justice and fundamental human rights”.<sup>1261</sup> This constitutional commitment is intended to address real problems which, although largely the result of South Africa’s history of oppression and the high levels of poverty and inequality still rampant in the country, might also be a consequence of failures during South Africa’s transition, namely a lack of true reconciliation between ethnic groups and a lack of respect for the rule of law.

The constitutional entrenchment of international law may be viewed as an important element of the post-apartheid “legal revolution” and the broader project of transformation in South Africa.<sup>1262</sup> The Constitutional Court’s approach in *S v Makwanyane* illustrates the significance of international law in the new South Africa.<sup>1263</sup> In February 2012, the South African Department of Justice and Constitutional Development published a document on the transformation of the judicial system and the role of the judiciary in the developmental South African state. According to this document, transformation should be aligned with international imperatives since South Africa, as “an important member of the global

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<sup>1259</sup> ICTY, *Prosecutor v Furundžija* (Trial Chamber: Judgment) Case No. IT-95-17/1-T10, 10 December 1998, para 155.

<sup>1260</sup> Roederer (*supra*) in Roederer and Moellendorf (Jurisprudence) (*supra*) 623: “South Africa is [...] unique in being anti-exceptionalist, anti-isolationist, in its openness or permeability when it comes to multiple legal traditions and the models that accompany them. This is illustrated not only by the intermingling of customary law, English and Roman Dutch law, and their various underlying principles and approaches to legal problems, but also through the recognized influences of international law, comparative law, and the thinking of scholars from other traditions”.

<sup>1261</sup> Preamble to the Constitution of the Republic of South Africa, 1996.

<sup>1262</sup> Roederer (*supra*) in Roederer and Moellendorf (Jurisprudence) (*supra*) 623.

<sup>1263</sup> See para 7.2.2.2 *supra*.

community and an active campaigner for human rights”, has a responsibility to go “beyond the minimum expectations of complying with international norms, standards, and state obligations, and to be a driver of social change within the South African Development Community (SADC) and the continent”.<sup>1264</sup>

From this perspective it is clear that South African courts must as far as possible endeavour to interpret and apply international law in a transformative manner to the same degree as other “transformative” provisions in the Constitution. Considering the latter statement, the influence of past injustices on South Africa’s constitutional values and commitments as well as the importance of national courts in the realisation of the objectives of international criminal justice, it is submitted that the transformation of ICL into national law through incorporation legislation and the application and interpretation of ICL in domestic courts must be viewed as a part of the larger, forward-looking project of constitutional transformation and the institutionalisation of international human rights in post-apartheid South Africa. A serious commitment to international human rights cannot be regarded as genuine without a concomitant commitment to the cause of international criminal justice. Denying South Africans of the mutual benefit of ICL must be viewed as contrary to constitutional values. Such a denial disconnects individuals from value-driven norms related to their well-being which are not only domestically endorsed via the Constitution, but also universal in nature.

In a dualist state such as South Africa, the application of ICL in domestic courts requires above all ratification (or accession) and incorporation of treaties related to international criminal justice. Apart from political will, the incorporation of ICL does not require anything beyond the existing framework for the voluntary incorporation of international law. It is hoped that South African courts will be placed in a position not only to take full benefit of the transformative value of ICL, but also to interpret international (criminal) law obligations in a manner that promotes a transformative social influence. Up to this point South African courts have had limited opportunities to do this. The judgments in the *Afri-Forum and Another v Julius Sello Malema and Others* and *Southern African*

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<sup>1264</sup> “Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State” Published by the South African Department of Justice and Constitutional Development, February 2012, 3.

*Litigation Centre and Another v National Director of Public Prosecutions and Others*, constitute positive developments in this regard. Even though the *Malema*-case did not involve the application of ICL, the reference made by the Equality court to the Genocide Convention and the Rome Statute shows a penetration of ICL values into the domestic sphere. In contrast, the *Basson* and *Nkadimeng* cases and the situation surrounding Faustin Nyamwasa represent missed opportunities for bringing South Africa in line with the values of the international community and the objective to end impunity for serious international crime.

It may be submitted that due to its acceptance of liberal democracy and as a consequence of the constitutionalisation of international law, South Africa can generally be expected to support ICL as a matter of internal- and foreign policy.<sup>1265</sup> This expectation is underscored by evidence of cosmopolitanism and idealism in the international order, the influence of which creates a brand of international law that functions in a way that contradicts the traditional regulatory function of international law where it is viewed as inferior to state interests and exclusively reliant on state consent. Yet, it appears that the anticipated permeation of international legal norms into the South African legal system has not been entirely forthcoming. South Africa's general hesitancy of relying on international law in criminal matters may be ascribed to two factors.<sup>1266</sup> Firstly, due to South Africa's isolation in the apartheid-era, the South Africa judiciary has only relatively recently started to engage with international law. Time is needed for the acquisition and development of legal knowledge, awareness and experience. Secondly, South African lawyers are not well-schooled in the application of international law (especially customary international law) and may until recently have found international law too exotic to be used in legal proceedings.<sup>1267</sup> Beyond this general reluctance to rely on international criminal law, there is also the difficulty of proving the existence and applicability of customary international law rules in a country following the dualist approach. This difficulty is not confined to South Africa and has been illustrated in a number of cases worldwide, notably the *Pinochet* case in the United Kingdom.<sup>1268</sup>

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<sup>1265</sup> See Chapter 6 para 6.3.2.2 *supra*; see Bass (*Stay the Hand of Vengeance*) (*supra*).

<sup>1266</sup> Jessberger and Powell (*Prosecuting Pinochets*) (*supra*) 361.

<sup>1267</sup> Swart (*The Wouter Basson Prosecution*) (*supra*) 213.

<sup>1268</sup> See footnote 1098 *supra*.

It must however be recognised that international legal norms do not operate in a vacuum. Political pressures are exerted on South Africa and its legal system from international- and regional organisations such as the United Nations and the African Union. The international order and the international criminal justice system are based on dependencies and interdependencies of various sorts, which add further nuances to the politics of ICL. The ICC for example is highly dependent on state cooperation, while states are politically, economically and diplomatically interdependent among each other.<sup>1269</sup> In this chapter, it was illustrated how for example the decision of a political body, the UNSC referral of the situation in Darfur to the ICC, has resulted in an impact via the AU on South Africa's stance towards the ICC. These types of problems are endemic to the "marriage" between ICL and politics.<sup>1270</sup> It is furthermore a consequence of the difficulties of the enforcement of international law in general. The reality is that the greater part of international law is still based on voluntary compliance by states. In the absence of such voluntary compliance, very limited enforcement measures are available for use against states in breach of international law.

In conclusion to this chapter, it appears that the political and legal characteristics of a state may have a crucial impact on its ability to dynamically reflect modern international criminal justice and consequently also the transformative potential of ICL within states. From the analysis of the impact of ICL in South Africa, it is submitted that the following aspects are crucial to the transformative value of ICL in any domestic legal system:

- Constitutional- or some other form of legal entrenchment of international law in general.

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<sup>1269</sup> See "Sudan: Malawi President Asks to Ban Bashir from Summit" (2012/05/06), available at <http://allafrica.com/stories/201205070110.html> (accessed 2012/05/08). In this article it is reported that President Banda of Malawi had requested the AU not to allow President Omar al-Bashir of Sudan to attend the AU summit in Malawi during July 2012 since she believed this would have negative "economic repercussions". See also the argument of the respondents in *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (North Gauteng High Court) Case No. 77150/09, 8 May 2012, para 4 (at 25-26) (the respondents argued that an investigation into allegations of crimes against humanity would impact negatively on South Africa's diplomatic relations with Zimbabwe).

<sup>1270</sup> See Chapter 4 para 4.2.3.3 *supra*.

- The incorporation of treaties pertaining to ICL into national law through legislation, most important of which is legislation incorporating the Rome Statute of the ICC.
- The measure to which ICL can be applied and adjudicated on in domestic courts. In this regard the following may be beneficial: awareness and knowledge among domestic lawyers and civil society of the nature and value of ICL domestically as well as impartiality and independence in the judiciary and the prosecuting authority.
- The international and regional political affiliations of the state and the *positive or negative influence* of these affiliations on domestic legal obligations towards international criminal justice.

**PART IV**  
**ADDRESSING THE RESEARCH  
QUESTION**

## CHAPTER 8

### CONCLUSION AND SUBMISSIONS

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#### 8.1 Foreword

A multitude of studies have dealt with the contribution and limitations of the use of ICL in transitions to democracy, in the wake of mass atrocity and in post-conflict situations.<sup>1271</sup> In this thesis I have followed a somewhat different approach. Although parts of the thesis has to some extent overlapped with the aforementioned studies, the thesis as a whole provides a broader perspective that goes beyond these traditional areas of investigation in order to examine specifically the transformative contribution as well as the potential for such a contribution by the international criminal justice system in a more holistic manner. The concept of transformation remains fluid and elusive, owing to the different meanings which may be afforded to it in law, politics and in situations (such as during political transitions) where law often becomes politicised. Consequently, I have sought to conceptualise transformative value broadly, but also in line with its ordinary grammatical meaning to convey it as *change that may be beneficial to the civitas maxima*.<sup>1272</sup> The question I have sought to address is whether or not ICL can achieve or help to achieve this type of change generally, and in South Africa specifically.

#### 8.2 General Conclusion

In light of the facts and issues considered in the preceding chapters, it is my conclusion that ICL has some ability and potential to advance transformation. This ability is however partly a

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<sup>1271</sup> See for example Teitel (Transitional Justice) (*supra*); De Lange (*supra*) in Villa-Vicencio and Verwoerd (Looking Back Reaching Forward) (*supra*). On the limits of ICL and the institutions of ICL as a response to mass atrocity see Drumbl (Atrocity, Punishment, and International Law) (*supra*). See also Osiel (Mass Atrocity, Collective Memory) (*supra*).

<sup>1272</sup> See Chapter 3 para 3.5 *supra*. In this chapter many of the criteria of “transformative value” formulated under Chapter 3 are applied to ICL (see paras 8.3.1, 8.3.2, 8.3.4.1 and 8.3.4.2 *infra*).

result of broader global trends of transformation of which ICL is an element. That is to say that ICL's transformative value is to an extent reliant on what I refer to below as 'transformative synergies'. Furthermore, ICL's transformative ability is subjected to a number of practical limitations and often susceptible to disruptive political influences.

While punishment under ICL is for the most part a backward-looking exercise in the tradition of domestic criminal law retributivism, ICL is to an extent removed from this paradigm as a body of law that is historically and ontologically purpose- and value-driven. In other words, ICL is also normative and forward-looking in various respects. Furthermore, the research provides some scope for asserting that ICL could have transformative value and potential that goes beyond its application in international criminal trials and beyond the context of mass atrocity. ICL's transformative impact is not confined to the "hard" impact of the application of substantive ICL in international and domestic courts on perpetrators, victims, societies, states and the international community directly or indirectly involved with international criminal justice processes. The international criminal justice system as a whole also creates a more elusive "soft" impact.<sup>1273</sup> This is the gradual normative impact that ICL creates through its continued existence, the upward trajectory of its development, its moral resonance and through a purpose-driven association with certain international values and structures of political power.

ICL reflects an idealistic version of how the world *should be*, even though it is itself constantly under the influence of how the world *is*. A place in which power often trumps justice and where massive crimes are often met with impunity. Neither transformation, nor international criminal justice operates in a vacuum. For better or worse, ICL's transformative value and potential is affected by the political will of states.

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<sup>1273</sup> See Chapter 1 para 1.5 (assumption 2) *supra*.



## 8.3 Main Arguments

The following arguments are presented in support of the general conclusion above:

### 8.3.1 International Criminal Law as Purpose- and Value-Driven

ICL is formally restricted to the narrow function of holding individual perpetrators of international crime accountable through the determination of guilt and punishment. Yet beyond this formal function, ICL serves a much larger normative purpose. The history, rationale, and the underlying assumptions for the use of ICL indicate that it pursues many objectives which are forward-looking and utilitarian in character. From a broad perspective, ICL may therefore be viewed as a body of law intended to have a transformative social function. ICL exists on the assumption that a supranational framework of criminal law can address the problems of state and mass violence, as well as play a role in the future deterrence of these phenomena. Furthermore, international crimes exist to protect the interest of the international community and project shared universal values in situations where national criminal justice systems have been historically unwilling or unable to fulfil this function.

Punishment for international crimes is based on more or less the same rationale as punishment of domestic crime. It is a regulated sanction with a broader expressive significance. International criminal norms may be viewed as an authoritative expression of the international community's outrage over certain acts as harmful and contrary to their collective values. The legal threat of international criminalisation is partly intended to function as an instrument of social change which aims to re-orientate the values of perpetrators of international crime and also to project these values into the future in the hope of deterring similar acts.<sup>1274</sup> Viewed collectively, the assumptions that underlie the international criminal justice regime are tantamount to a belief in legalism and to a more limited extent, utilitarianism.<sup>1275</sup> Legalism is the belief that all human conduct, including state criminality and individual conduct during collective violence, is within reach of legal

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<sup>1274</sup> Zimring F and Hawkins G "The Legal Threat as an Instrument of Social Change" in Tapp JL and Levine FJ (eds.) *Law, Justice and the Individual in Society: Psychological and Legal Issues* (1977) Holt, Rinehart and Winston, New York 60-61.

<sup>1275</sup> See Chapter 5 para 5.3 *supra*.

rules.<sup>1276</sup> The utilitarian belief suggests that the application of these rules may secure some social benefit.<sup>1277</sup> International crimes are collectively a legalistic expression of the values of the international community. As such, the existence and enforcement of international criminal norms may be viewed as an effort to *protect* the values of the international community as well as to *project* these values onto groups of individuals (perpetrators of international crime) which have not yet embraced such values, as it is believed that this would be to the benefit of all.

International crimes, especially the core crimes, find significant moral resonance within the international community.<sup>1278</sup> The normative value of ICL is largely derived from this moral significance. These crimes are an expression of what humanity deems to be universally offensive. The moral resonance of international crime gives punishment at the international level an enhanced expressive potency. The defendants put on trial are often high-profile state and military leaders viewed by the public as symbols of the past conflict. Furthermore, whether the offender featured in the events as an architect of mass violence or as a foot soldier acting under ‘manifestly unlawful’ orders, these defendants are viewed by the international community as *hostis humani generis* because of the nature of their crimes.

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<sup>1276</sup> Shklar defines the legalist outlook as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules” (see Shklar (Legalism) (*supra*) 1); Shklar (In Defense of Legalism) (*supra*) where legalism is similarly defined as “the belief that morality consists of following rules and that moral relationships are a matter of duties and rights assigned by rules”; see also West (Reconsidering Legalism) (*supra*).

<sup>1277</sup> In general, and if it does not amount to disproportionate punishment for the perpetrator, the forward-looking punishment theories are morally justified because they contain a long-term utilitarian benefit (See Metz T “Legal Punishment” in Roederer and Moellendorf (eds.) *Jurisprudence* (2004) 556).

<sup>1278</sup> The moral resonance of serious international crime, and its universal illegality, must be distinguished from the *realpolitik* of its enforcement. Most of the criticism against international criminal justice proceeds not from the moral justifiability of prosecuting serious international crimes but from the institutionalisation, manner or timing of prosecution. There is less agreement in the international community on the ‘who, where and how’ of international criminal justice than there is over the ‘why’. Thus, while the AU members may dispute the arrest warrant issued by the ICC in Sudan, they do not do so on the ground that the warrant is immoral, but primarily on the ground that the warrant conflicts with or undermines another legitimate extra-legal interest of the AU, namely regional strategies for a peaceful resolution to the conflict in Sudan (see Chapter 7 para 7.6.2.2 *supra*). See also Tladi (The African Union and the International Criminal Court) (*supra*); Deya (Worth the Wait) (*supra*).

All these defendants must answer for their crimes in a court of law in the same manner that an ‘ordinary’ criminal would. It is extraordinary justice meted out in a conventional way. Beyond its function to provide a mechanism for applying the law, the trial itself is a symbol of unflinching justice and of the supremacy of the rule of law.

Not only substantive ICL is morally significant. Another aspect of ICL that resonates morally is the manner in which the law is enforced. International criminal justice is confined in its enforcement to ‘ordinary’ modes of punishment found in domestic criminal justice systems and restrained by human rights law as well as certain established legal principles. ICL recognises that the accused are to be afforded the same fair trial rights under international human rights law as those which would offer protection to accused persons in national courts.<sup>1279</sup> Without exception, the statutes of various international criminal courts guarantee the accused the right to a fair trial.<sup>1280</sup> This acts as a counterweight to the retributive impulses engendered by serious international crimes. By constraining its application to the parameters of internationally accepted due process rights and procedural fairness, ICL gains a measure of moral superiority in the fight against the scourge of international crime. This creates a lasting legacy of fairness and justice beyond the trial and the impact created by the act of punishment itself. For all its faults, the Nuremberg IMT has left behind a legacy that is the primary example of this.<sup>1281</sup>

### **8.3.2 ICL as Historically Self-Conscious: The *Back to the Future*-metaphor**

The primary justification for punishment under any species of criminal law is backward-looking retribution. This is endorsed through the sentencing jurisprudence of international criminal tribunals. ICL is largely a retributive and repressive response to egregious criminal acts. As outlined under the previous heading however, ICL is also normative and forward-looking through the fact of its being driven by its ontological purposes and underlying values. International criminal justice, as part of a transitional justice response in particular, also

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<sup>1279</sup> See the ICCPR, articles 9 and article 14.

<sup>1280</sup> See the Rome Statute of the ICC, article 67 (rights of the accused) and article 85 (right to compensation for unjust arrest or conviction).

<sup>1281</sup> See Chapter 4 para 4.2 *supra*.

aspires in part towards “forward looking goals of social transformation”.<sup>1282</sup> Deterrence is a prominent example of a forward-looking utilitarian goal of punishment which has been endorsed by international criminal tribunals. Many of the lesser ‘judicially-recognised’ and subsidiary objectives of ICL such as creating a historical record, reconciliation, the interests of victims and ending the culture of impunity are forward-looking utilitarian objectives which unlike deterrence, are mostly alien to domestic criminal law punishment theory.<sup>1283</sup> These objectives originate from past events that still haunt humanity’s collective consciousness, events for which many initiatives exist to ensure that they are not repeated. ICL is one such initiative.

As illustrated in Chapter 3, a major characteristic of transformation is that it is a forward and backward-looking exercise.<sup>1284</sup> In Chapter 3, transformation was described as a goal-orientated, yet historically self-conscious process of change. The injustice, mass atrocities and universally offensive behaviour that ICL is self-conscious of are well known and well documented. International crimes have developed out of a shared historical awareness in the international community, specifically to address and prevent the phenomena of gross human rights violations, collective violence and transgressions related to armed conflict which has victimised millions and shocked the universal consciousness of mankind. Furthermore, ICL aims to end the historical impunity for architects and perpetrators of the abovementioned phenomena. These phenomena are not confined to the past. There is at present still plenty of it to go around. In the years since the Second World War the nature of conflict has changed and may change again. Neither has the tide been turned in respect of impunity. One needs only to turn to the ICC’s list of outstanding arrest warrants to note that accountability for international crimes is still far from guaranteed. The likes of Joseph Kony and Omar Al-Bashir continue to thwart the administration of international criminal justice. Quite simply, the wrongs that ICL is constantly and historically mindful of are also the wrongs which it seeks to remedy and eliminate from this world.<sup>1285</sup> The project of ICL is

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<sup>1282</sup> See Goldbraith (The Pace of International Criminal Justice) (*supra*) 90-94.

<sup>1283</sup> Luban (Fairness to Rightness) (*supra*) 8.

<sup>1284</sup> See Chapter 3 para 3.4.3 *supra*.

<sup>1285</sup> The South African Torture Bill serves as a good example in this regard. In the preamble of the Bill reference is made to the fact that South Africa “has a shameful history of gross human rights abuses, including the torture of persons and other cruel, inhuman or degrading treatment or punishment of many of

founded on the belief that criminalisation of certain acts may help to bring justice and peace to the world. This goal represents the alternative to the present, or the ideal towards which ICL is geared through its purposes and values, even though it is almost certainly unattainable.

The historical self-consciousness of ICL explains the fact that international criminal trials have tended to be somewhat flexible in respect of their objectives. They are flexible in the sense that they are to some degree tailored (or, some may contend, manipulated) to address *sui generis* needs in a specific context in an effort to prevent a repeat of past events.<sup>1286</sup> At the Nuremberg IMT the focus was mostly on retribution. Much effort was however made to establish the tribunal as a historical and symbolic break from the past.<sup>1287</sup> For the prosecutors in *Eichmann*, the trial represented an opportunity to shape the identity of the young state of Israel and of the many Jewish victims of Nazi atrocities.<sup>1288</sup> In the 1990's, with the changing nature of conflict and the rise of international human rights, the *ad hoc* tribunals shifted the focus of international criminal justice towards the new objectives of truth-finding and reconciliation, which are more specific to the needs of post-conflict societies.<sup>1289</sup> More recently, the ICC seeks to combat crime which threatens the peace, security and well-being of the world and also emphasises the interests of victims of international crime.<sup>1290</sup>

The simultaneously forward- and backward-looking nature of the objectives of ICL presents further justification for the argument that ICL has transformative value. ICL represents a means of holding perpetrators to account and of dealing with past injustices. This is not done exclusively to rectify the past, but is also forward-looking in that it aims to create

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its citizens and inhabitants". Having taken cognisance of this fact, the Bill provides for measures both to combat and prevent acts of torture. See Chapter 7 para 7.7.2.2 *supra*.

<sup>1286</sup> In Chapter 3 it was submitted that "transformative change is determined by, and contingent upon, the nature of prior injustices". See Chapter 3 para 3.4.3 *supra*.

<sup>1287</sup> See Chapter 4 para 4.2.3.3 *supra*.

<sup>1288</sup> See Chapter 4 paras 4.3.2 and 4.3.4 *supra*.

<sup>1289</sup> See Chapter 5 paras 5.6.5.1 and 5.6.5.2 *supra*.

<sup>1290</sup> Beyond those objectives which receive express and tacit recognition in the Rome Statute, it is yet to be seen whether the Court will interpret its purpose narrowly or broadly in future. In the ICC's first sentencing judgment, the court confined itself to the purposes expressly provided for in the preamble of the Rome Statute (see Chapter 5 para 5.5.3 *supra*).

new social and legal expectations. ICL punishes crime in an effort to prevent its future occurrence. Theoretically, there is a positive association between the repressive, backward-looking functions of criminal punishment and the previously outlined normative function of international criminal justice. There is a belief that punishment will effect social change in the long term through establishing and solidifying new social values as well as through expressive condemnation and general deterrence. Some international criminal trials may serve to imprint a history lesson onto the collective consciousness, creating a pedagogical effect through retrospective judgment which may enhance the social solidarity of the international community with regard to certain egregious forms of conduct.<sup>1291</sup> At the heart of ICL lies the international community's value-based desire for the long-term maintenance of international peace and security through the suppression of conduct that poses a serious threat to peaceful human co-existence.<sup>1292</sup> The golden thread running through ICL's many backward- and forward-looking objectives is the ideal of injecting new values into societies and projecting such values onto those members of the international community who have not yet accepted the values of international peace and security as universal and mutually beneficial. It is hard to imagine a means of suppressing the types of conduct which threatens world peace and security in a manner that is universally intelligible, yet also within the parameters of basic human rights (also important values of the international community) other than through the *ex post facto* punishment of such conduct based on both global authority and a firm commitment to respect individual rights as well as legal principles of fairness.

The saying, 'there can be no peace without justice', has become the near unbridled mantra of international criminal justice. There can however be no peace through the subsidiary goals of peace (reconciliation, general deterrence and respect for the rule of law are prominent examples) unless the fundamental values that underlie the punishment representative of justice in the abovementioned mantra, are successfully communicated to and accepted by the individuals and population groups which represent the target of expressive punishment. If anything, this thesis has highlighted the fact that although ICL may

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<sup>1291</sup> See Chapter 5 para 5.6.2 *supra*.

<sup>1292</sup> Werle (Principles of International Criminal Law) (*supra*) 31-32. Threats to world peace are interpreted broadly to include serious human rights violations which occur within a state. See also Chapter 8 para 8.3.4.1 (footnote 1303) *infra*.

serve to project shared human values, the process of ensuring real and lasting acceptance of, and compliance with, these values represents the main challenge to the project of international criminal justice moving forward.

### 8.3.3 ICL as a Mediator between the Interests of Power and Justice

International law is caught between state values and human values, between the interests of almost 200 states and the needs of more than seven billion individual human beings.<sup>1293</sup> ICL is at the centre of this tension between the state and the individual, between Westphalian sovereignty and an emerging cosmopolitanism, where it acts as an autonomous body of substantive international law, but also as a mediator of sorts between the aforementioned extremes. Currently there is a belief that international criminal justice evolved and exists as “a phenomenon anchored in power yet simultaneously capable of transcending it”.<sup>1294</sup> ICL must balance divergent interests - accountability against fairness, international crime control against due process and punishment that reflects the new international moral consciousness against the established rules of the principle of legality – in order to project human values (or the interests of individuals) in an international legal system which traditionally reflects only state values and interests. In the words of Luban, “[international] criminal law stands for the proposition that crime is crime regardless of its political trappings”.<sup>1295</sup>

The institutions of ICL are illustrative of its ability to mediate between divergent interests. Although dependent on political support, these institutions also receive the clout that is necessary for wielding an independent influence which promotes human interests through the political support that they are able to induce by way of their moral resonance, as a

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<sup>1293</sup> Henkin (International Law) (*supra*) 279.

<sup>1294</sup> Megret (Politics of International Criminal Justice) (*supra*) 1264; see also Teitel (Transitional Justice) (*supra*) 213. This resonates with Krisch’s assertion that “international law is both an instrument of power and an obstacle to its exercise”. See Krisch (International Law in Times of Hegemony) (*supra*) 371.

<sup>1295</sup> Luban (Fairness to Rightness) (*supra*) 9-10. Luban also contends that: “The decision not to stage criminal trials is no less an expressive act than the creation of tribunals; and the expressive contents associated with impunity or summary punishment are unacceptable: both are assertions that political crime lies outside the law. *The point of trials backed by punishment is to assert the realm of law against the claims of politics*” (emphasis added).

matter of international policy and through other means such as the political cost of non-cooperation. Through objective application of the law (based on a deep devotion to the value of legalism) subsequent to its political creation, these institutions obtain the ability to discharge a mandate based on internationally accepted norms which promote human values. By facilitating this fragile balance between politics and law, ICL has been able to appease states and the international community and to promote overlapping political (state) and legal (human) values.

In the ICC-era of international criminal justice, the Rome Statute's feature of complementarity is arguably the most important mechanisms attempting to mediate between state and human interests in the prosecution of serious international crimes. Accordingly, states retain their sovereign right to punish perpetrators of serious international crimes with jurisdictional links to their territory via the locus of the crime, the victim or the offender. The prosecution of serious international crime is also in the interest of the international community however, regardless of where the prosecution takes place and provided the proceedings are not undertaken for the purpose of shielding the perpetrator from criminal responsibility, the proceedings are not unjustifiably delayed, proceedings are conducted independently and impartially, and that the national justice system is not unable to carry out proceedings against the accused due to total or partial collapse.<sup>1296</sup> Complementarity therefore represents a mechanism which consists of a hybrid of human and state values. States are presented with the option of being party to the Rome Statute, but not at the expense of their sovereign right to exercise exclusive criminal jurisdiction within their territory. In this regard member states are offered a choice to exercise such jurisdiction and also provided with a double incentive to do so. Firstly, states are incentivised to protect their sovereign right to exercise criminal jurisdiction over crimes committed and over persons present in their territory. Secondly, they are incentivised to take measures to avoid any unwillingness or inability that would cast the state in an unfavourable light in the eyes of the international community. Non-cooperation with the ICC and non-compliance with ICC obligations sends out a damaging foreign policy message. Whether state parties are unwilling or unable to prosecute international crimes under the Rome Statute, "any intervention by the ICC will

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<sup>1296</sup> See Rome Statute of the ICC, articles 17(2) and 17(3).



communicate that the quality of domestic law and the willingness to fight human rights abuses in the states concerned is questionable”.<sup>1297</sup>

This thesis has shown that ICL is a branch of law which, although it may be disrupted in its transformative ability, is to some extent able to achieve the transformative goals associated with the larger project of international law generally and with dominant political goals of the international order such as democratisation. ICL is both politicised and in the sense that it is applied impartially and objectively, mechanically legalistic once institutionalised and sustained through the will of states.<sup>1298</sup> Liberalism creates a transformative drive through legal means which builds on political momentum, while legalism provides both real and perceived legitimacy to the project and offers some restraint to the imposition of western values on non-western societies. The ability of ICL to function contrary to the expectations of those who seek to abuse it, is also the very characteristic that enables it to cultivate the kind of change that is transformative.

#### **8.3.4 Transformative Synergies – The Interdependencies of Transformation**

In theory, a body of laws may provide a vehicle of change towards new values by instilling nascent social norms as legal rules. To achieve these goals in practice, such law requires the ability to authoritatively communicate values. It is submitted that a moral- and political authority, represented by the international community and the liberal states respectively, not only drives the body of law that is ICL but is also constitutive of the qualities (discussed above) and dynamics (discussed in this section) that make ICL transformative.

In addition, as social transformation is not the exclusive prerogative of criminal law, other legal and extra-legal movements or mechanisms of transformation may have a positive impact on (or a positive interaction with) ICL’s ability to achieve *beneficial change* as it has

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<sup>1297</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 360.

<sup>1298</sup> It has been suggested that legalism is “the operative outlook of the legal profession, both bench and bar”. See Shklar (Legalism) (*supra*) 8. This explains why lawyers tend to go about the business of international criminal justice in a very principled and “rule-obsessed” way which may be insensitive to political realities and which is not based on empirical proof of the utility (in the traditional or ‘domestic’ sense) of the prosecution of international crimes. See Bass (Stay the Hand of Vengeance) (*supra*) 6.

been formulated above.<sup>1299</sup> ICL is an interdependent part of these movements to the extent that it constitutes a movement *within* or *alongside* other supranational movements of transformation. ICL's ability to advance a transformative agenda is to a large extent based on its positive association or -interaction with other legal developments (human rights); dominant politics (liberalism); domestic legal systems (through incorporation and application) and its use in conjunction with alternatives to criminal justice. I refer to these interactions and associations as 'transformative synergies'.

### 8.3.4.1 International Criminal Law and International Human Rights

ICL and international human rights exist together in a close, deep-rooted relationship. These legal disciplines have emerged alongside each other and share the Second World War as catalyst for their prominence in the modern international legal system. They are often referred to as "two sides of the same coin" and also as the 'sword' and the 'shield' of international justice respectively.<sup>1300</sup> ICL is a powerful expression of the importance which the international community attaches to universal respect for basic human dignity.<sup>1301</sup> Much of what falls under ICL is a deliberative effort to protect against serious- and wide scale violations of fundamental human rights.<sup>1302</sup> On the other side of the aforementioned 'coin',

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<sup>1299</sup> Socio-economic rights discourse and transformative constitutionalism (in the South African context) represent arguably the areas of legal research most prominently concerned with the use of law to advance social transformation. See, for example, Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) Juta, Cape Town; Klare (Transformative Constitutionalism) (*supra*); see also Lutz E and Reiger C (eds.) *Prosecuting Heads of State* (2009) Cambridge University Press, New York 291 (noting that the surge in prosecutions of heads of state and -government since the 1980's (frequently on the basis of transgressions of ICL) has occurred alongside a broader "normatively grounded" global transformation towards the values of democracy, the rule of law and human rights).

<sup>1300</sup> Werle (Principles of International Criminal Law) (*supra*) 45.

<sup>1301</sup> Arnold (*supra*) in Kaleck *et al.* (International Prosecution of Human Rights Crimes) (*supra*) 9-10.

<sup>1302</sup> Werle (Principles of International Criminal Law) (*supra*) 45-46. Werle highlights crimes against humanity as particularly illustrative of ICL's function to protect fundamental human rights. Furthermore, according to Werle, "[t]he development of international criminal law [...] has an impact on the substance and the status of human rights guarantees. International criminal law thus contributes significantly to strengthening and further developing the protection of human rights" (at 47).

“[h]uman rights are at the core of international criminal justice proceedings”.<sup>1303</sup> ICL is also confined in its enforcement and application to the rules and boundaries of human rights jurisprudence.<sup>1304</sup>

ICL and international human rights are at the heart of the movement to achieve greater recognition for individual rights in international law. ICL and international human rights represent interdependent justice-based movements (cosmopolitan movements) that have developed out of the atrocities committed during the Second World War.<sup>1305</sup> ICL is aimed at individual perpetrators and increasingly on the interests of the victims. Viewed from the perspective of its partnership with international human rights however, ICL not only targets these categories of individuals but also through its expressive function, *all* individuals. In the traditional narrative originating from the Nuremberg IMT, the international community’s desire for accountability for human rights abuses lies at the centre of an emerging regime which prioritises human values over state values. From this perspective ICL is a mechanism for a natural progression towards global governance by *the people*. Consequently, ICL’s transformative value is closely affiliated with a broader revolution of individual rights that is driven by cosmopolitan developments in international law and by the international human rights movement especially. The international human rights movement is at the forefront of international legal developments which are increasingly looking to pierce the veil of state sovereignty. It may be argued that the creation of a strong human rights culture is a critical part of any transformative process. ICL benefits in this regard through its close historical and ontological relationship with the international human rights

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<sup>1303</sup> Zappala S “Respect for Human Rights in International Criminal Proceedings” in Cassese (Oxford Companion) (*supra*) 489; Knoops (Theory and Practice of International and Internationalized Criminal Proceedings) (*supra*) 15-19.

<sup>1304</sup> See for example the recurring references to the defendant’s right to a fair and impartial trial in ICTY, *Prosecutor v Furundžija* (Appeals Chamber: Judgment) Case No. IT-95-17/1-A, 21 July 2000, para 177; see also art 36(3)(b)(ii) of the Rome Statute: “Every candidate for election to the Court shall: (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court”. For a general overview of the human rights protection in international criminal proceedings, see Zappala (*supra*) in Cassese (Oxford Companion) (*supra*) 489-490; see also Werle (International Law) (*supra*) 47-48.

<sup>1305</sup> See Chapter 2 para 2.1 *supra*.

movement.<sup>1306</sup> As a result of this relationship, ICL achieves a level of legitimacy which empowers it to be more transformative and less regulative.<sup>1307</sup> ICL's potential to transform is a repercussion of the progress that has been made towards the vertical application of those international laws which are primarily in the interests of the individual.<sup>1308</sup>

Moreover, international law incentivises states towards achieving a good reputation within the international community, or at least incentivises states to act in a way in which they may avoid disapproval from the international community.<sup>1309</sup> With the possible exception of the permanent member states on the UNSC, states which aspire to a favourable standing in the international community, are increasingly required to show a serious commitment in domestic and foreign policy to the cause of human rights. The close, deep-rooted relationship between human rights and international criminal law reinforces the notion that states can hardly show a serious commitment to human rights without an accompanying

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<sup>1306</sup> Consider for example, the following remarks by Ferdinandusse: "Criminal prosecutions of international crimes, in whatever court they take place, interact with various other legal proceedings, as well as with quasi-legal institutions like truth commissions. Perhaps one of the most direct interactions takes place with human rights courts. These not only inform criminal courts on all levels of due process standards and contribute to the clarification of shared concepts like torture and rape, but also regulate with increasing precision the extent to which serious human rights violations require criminal prosecution. This can lead to a direct dialogue between human rights courts and criminal courts, as can be seen in the *Barrios Altos* case, where a judgment of the Inter-American Court of Human Rights prompted the Peruvian courts to prosecute army personnel for the killing of civilians, despite national amnesty laws". See Ferdinandusse W "The Interaction of National and International Approaches in the Repression of International Crime" (2004) 15 (5) *European Journal of International Law* 1041-1053, 1046-1047.

<sup>1307</sup> Stolle and Singelstein (*supra*) in Kaleck *et al.* (International Prosecution of Human Rights Crimes) (*supra*) 49.

<sup>1308</sup> Up to this point ICL has most commonly been evoked during political transitions or as a response to gross human rights violations in times of armed conflict, as well as during instances of mass atrocity. Starr argues that this "might amount to a transitional stage in this young and evolving field" and that, since war and mass atrocity are the historical catalysts for transformative legal responses, ICL might eventually play an important role in regulating the relationship between the state, individuals, and the international community in times of peace similar to how international human rights have now gained global acclaim. The establishment of the ICC (and especially the feature of complementarity) represents a purposive step in this direction. See Starr (Extraordinary Crimes at Ordinary Times) (*supra*) 1259, 1307-1311.

<sup>1309</sup> Slaughter and Burke-White (The Future of International Law is Domestic) (*supra*) 334.

commitment to the cause of international criminal justice<sup>1310</sup> Compliance with international human rights and cooperation with regards to international criminal justice are among the most important determinants of the international image of any state. As a consequence of this ‘package deal’, ICL has some leverage to ensure compliance over the incorporation and enforcement of ICL norms as well as matters requiring interstate cooperation in the fight against crime with an international or transnational element. Significantly and partly as a result of this leverage, a majority of states in the international community are now party to the Rome Statute.<sup>1311</sup> The bearing of most states towards the ICC and international criminal justice in general is no longer a simple ‘use it or don’t use it’ choice.

#### 8.3.4.2 International Criminal Law and Liberal Politics

As a branch of international law, ICL not only reflects the politics and values dominant in the international order, but is to an extent also a manifestation of these dominant politics and values. As evinced during the Cold War, international criminal justice is unfeasible without the support of states, especially the permanent members of the UNSC. The creation and functioning of the *ad hoc* tribunals serves as an example of the political will required for the operationalisation of international criminal justice.<sup>1312</sup> The political realist perspective based on power and control, locates ICL as a central element in a forced progression *by states* towards an emerging regime of global governance. Such a regime would presumably be based on core unifying values, notably human rights, supported by democracy and the rule of

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<sup>1310</sup> As the South African situation illustrates, the transitional justice context and the option of recourse to truth commissions may be a possible exception to this. In transitional periods the demands of international criminal justice may be disrupted by pragmatic and political factors. Beyond the transitional context however, no democratic state will succeed in an effort to undermine the project of international criminal justice without a backlash from the international community.

<sup>1311</sup> By becoming a state party to the Rome Statute, states are not only signalling their commitment to the values espoused in the Statute, but arguably also their unwillingness to stand outside the faction of liberal states who endorse the ICC. There is also an increased emphasis on bringing domestic politics in line with international laws. Mostly only powerful states can afford to be outside the ICC “club”.

<sup>1312</sup> See Peskin (International Justice) (*supra*); Clark (Peace, Justice and the International Criminal Court) (*supra*) 527-529; see also Chapter 6 para 6.3.4 *supra*.

law.<sup>1313</sup> From this perspective, the emphasis falls on the role of states in the development of the international criminal law regime, in order to advance goals that are based on internal and external policy considerations.

From a realist perspective, ICL has emerged and continues to develop due to the political support of states that are ‘like-minded’ in their ideological worldview. The concepts underlying to ICL such as legalism and utilitarianism, also often find expression as a political ideology (or “political preference”).<sup>1314</sup> If there is a transformative value to ICL, as I argue that there is, then such transformative value is by and large a by-product of international (criminal) law’s affiliation with the politics and values of liberalism and liberalism’s confidence in the value of legalism. Liberalism prescribes to ICL not only its procedures but also its objectives, driving it through the backing of a coalition of liberal states towards achieving goals of social change. Whether in its classical or anti-pluralist manifestation, liberalism is concerned with the condition of the individual.<sup>1315</sup> The focus of ICL on individuals as not only targets of punishment but also benefactors of the objectives of punishment is largely due to the dominance of liberal legalism in ICL. Because the individual is of central importance to both liberalism and legalism, liberal-legalist dominance in ICL ensures more effective filtering of utilitarian benefits of punishment to individuals directly or indirectly affected by international crime.

Due to growing neo-liberal tendencies in the international order, powerful liberal states project their values onto the international legal and political order, notably democratic beliefs.<sup>1316</sup> Because of these influences, the interactions between international law and domestic law give rise to legal mimicry which allow for “visions of liberal legalism [to] seep into national jurisdictions” and reshape societies on legal and social levels.<sup>1317</sup> While it is a

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<sup>1313</sup> See Lamb H “Our Global Neighbourhood: A Summary Analysis of Report of the Commission on Global Governance” (January/February 1996) *Eco-logic*, available at <http://sovereignty.net/p/gov/gganalysis.htm> (accessed 2011/08/18).

<sup>1314</sup> “Legalism is a concept that seems only to spring from a particular kind of liberal domestic polity”. See Bass (Stay the Hand of Vengeance) (*supra*) 7; see also Shklar (Legalism) (*supra*) 3-4 and 111-220.

<sup>1315</sup> See Chapter 6 para 6.3.2.1 *supra*.

<sup>1316</sup> See Chapter 6 para 6.3.2 *supra*.

<sup>1317</sup> See Drumbl (Atrocity, Punishment, and International Law) (*supra*) Chapter 5.

bone of contention to non-western states and pro-pluralist factions, the ascendancy of liberal legalism in ICL is an important medium for transformation around the globe. For law to be transformative and work towards the objective of social change, it must be politicised without becoming usurped by politics. A delicate balance must be found. Political usurpation of the law leads to problems of legitimacy such as selectivity of justice and hegemonic dominance which cannot be truly transformative in a culturally diverse international community. Effective transformation occurs where human values overlap with dominant political values. This is the space in which ICL, through its associations (transformative synergies) with human rights and liberal-legalist modalities of justice, may achieve transformation.

#### **8.3.4.3 International Criminal Law via Domestic Legal Systems**

The ability of a state to apply ICL directly through domestic courts is vital to the transformative value of ICL for states. It is also crucial to the transformative value of ICL in general. The most effective way in which the values of the international community may find expression is through the domestic incorporation of international criminal norms and the subsequent application thereof in domestic courts. This is what brings the objectives, values and benefits of ICL “home” to individuals.<sup>1318</sup> Domestic courts can be viewed as the “engine rooms” of transformative change which ICL may be able to mediate. Effectively incorporated ICL transforms into domestic criminal law and benefits from the existing intrastate mechanisms for the enforcement of criminal justice. Domestic criminalisation also removes some of the legal obstacles such as the rule against retroactive punishment, which may arise when ICL is applied as new law after the fact. Much depends on the status of international law in the domestic legal systems of states. The contemporary South African legal order serves as a good example, especially when compared to the status of international law during the apartheid era. Although many international laws were crimes under South African law since the adoption of the Interim Constitution (which incorporated customary international criminal law), prosecution of such crimes on the basis purely of its illegality under customary international law was unlikely.<sup>1319</sup> Since the transformation of the law of the Rome Statute

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<sup>1318</sup> See Du Plessis (Bringing the ICC Home) (*supra*) 1-16.

<sup>1319</sup> See Stemmet (Influence of Recent Constitutional Developments in South Africa) (*supra*) 52-54. The Interim Constitutions provided in section 231(4) that “rules of customary international law” form part of the law of the Republic unless it is inconsistent with the Constitution or an act of parliament. In the Final

into domestic law, domestic prosecution (or cooperation with the ICC with regards to the prosecution) of many of the same customary international law crimes is not only more probable (the *SALC*-case may be referred to as a good omen in this regard) but it is also foreseen that fewer legal obstacles may hinder such prosecution.

In Chapter 7 it was highlighted however that a number of ‘characteristics’ are crucial to the ability of domestic legal systems to reflect the benefits of international criminal justice for individuals.<sup>1320</sup> Instead of playing a passive role, states can regard international criminal justice as a means of acquiring the benefits of justice for its own citizens as part of the greater *civitas maxima* and as an indispensable aspect of the institutionalisation of human rights. Domestic implementation legislation is not necessarily a part of the international criminal justice system. If ICL can be effectively implemented, it is an important part of domestic legal systems. For example, the ICC must be viewed not as a *substitute for* but a *supplement to* domestic criminal law systems faced with certain categories of crime.<sup>1321</sup>

#### 8.3.4.4 International Criminal Law and Alternatives to Criminal Justice

The context in which ICL is invoked is crucial to its viability and transformative value. The prosecution of prominent political and military figures may disturb fragile diplomatic and political efforts at keeping the peace. Others have highlighted how international tribunals may exasperate the domestic crisis and decrease political stability.<sup>1322</sup> It is trite to say that realistically speaking, and also in order to optimise its value within a specific situation, ICL must always be invoked in a way that is sensitive to the specific realities of the context of its

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Constitution, section 232 provides that “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act or Parliament”. According to Stemmet the omission of the word “rules” in section 232 of the Final Constitution brought “no change in the meaning or scope of application” of section 231(4) of the Interim Constitution. See also Chapter 7 paras 7.4.1-7.4.2 *supra*.

<sup>1320</sup> See Chapter 7 para 7.8 *supra*.

<sup>1321</sup> Jessberger and Powell (Prosecuting Pinochets) (*supra*) 348; Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 127.

<sup>1322</sup> See Peskin (International Justice) (*supra*) 9. In reference to the ICTY, Peskin observes that “indictments of top-level Serbian and Croatian military and political leaders have bitterly split government coalitions, and during certain periods undermined the democratic transitions in Belgrade and Zagreb”.



use. In sensitive contexts, ICL must be applied in conjunction with other legal and extra-legal mechanisms to promote transformative change in the most holistic manner possible.

It must also be remembered throughout that the rationales for the use of alternatives to criminal justice in the transitional context or as a response to mass atrocity casts a critical light on the justifications for the use of criminal prosecutions in these situations.<sup>1323</sup> Alternatives to criminal justice such as the South African TRC's use of the truth and public apology, may be a valuable means of facilitating the process of authoritative communication and acceptance of values to society which is crucial to the transformative project.<sup>1324</sup> Equating 'accountability' and 'justice' with criminal prosecutions is unrealistic and not the true vision of international criminal justice left by the Nuremberg IMT.<sup>1325</sup> Nevertheless, even with the renewed emphasis on alternative justice mechanisms and pluralistic and reconciliatory modes of justice, the international community and in particular victims and directly affected communities, instinctively require retribution for serious international crimes.<sup>1326</sup> There is always this tension between the hereto unattainable ideals of peace and justice. Focusing the international criminal justice debate on a choice between the opposing goals of reconciliation and accountability or peace and justice is an oversimplification of the matter since these ideals are not mutually exclusive in the long-run. They may in fact complement each other. If correctly invoked in a balanced and contextually sensitive manner alongside alternative justice mechanisms, ICL can contribute to the pursuit of all the ideals mentioned above. Finding this balance will significantly enhance ICL's transformative synergy and must be viewed as the vital challenge to any society in transition.

### 8.3.5 The Double-Edged Sword of Politics

Above it has been shown that liberal politics impels ICL towards transformative objectives. Yet, it must be recognised that judging by history, a clash of political interests might also produce hindrances to the development and solidification of the emerging regime of

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<sup>1323</sup> Alvarez (*supra*) in Cassese (Oxford Companion) (*supra*) 37.

<sup>1324</sup> For example, the South African TRC helped to popularise the notion of *ubuntu* in South African social, political and legal culture.

<sup>1325</sup> Alvarez (*supra*) in Cassese (Oxford Companion) (*supra*) 38.

<sup>1326</sup> De Lange (*supra*) in Villa-Vicencio and Verwoerd (Looking Back Reaching Forward) (*supra*) 28.

international criminal justice.<sup>1327</sup> Although it has been submitted that ICL derives transformative value from liberal politics, politics is a double-edged sword in that the transformative potential of ICL might also be disrupted by a lack of political will or the abuse thereof.<sup>1328</sup> This is a repercussion of an endemic political influence in international criminal justice.

Broadly, politics may disrupt the project of international criminal justice in two ways. Firstly, politics may bring efforts to deliver international criminal justice to a halt or severely limit such efforts through the hegemonic strategy of withdrawal. This typically occurs when sovereign interests come into conflict with the interests of the international community. The USA's signing and subsequent 'un-signing' of the Rome Statute due to national security concerns post-9/11, is a manifestation of this form of political disruption.

Secondly, although political support is a major driving force behind ICL's transformative efforts, it may push ICL over the threshold between politicised law that promotes mutual interests and politicised law that is, or may be perceived as, an instrument of hegemonic abuse. This creates legitimacy concerns which hinder ICL's functioning and consequently also its transformative mandate. The non-cooperation of various African states over the arrest of President Al-Bashir due to concerns over ideological bias is illustrative of this kind of disruptive influence.<sup>1329</sup> Concerns over political influence have plagued international criminal justice from the first moments of it gaining prominence in the international order. This critique has its origins in the denouncement of the Nuremberg IMT as "victors' justice". Although ICL and later international criminal trials have undoubtedly been successful in addressing many of shortcomings of the Nuremberg precedent, there remain to be concerns over the political nature of international criminal courts and selective prosecution. At the ICTY for example, former head of state Slobodan Milošević's defence was based upon the tribunal being "simply political".<sup>1330</sup>

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<sup>1327</sup> The lack of sufficient political will to apply the law of Nuremberg during the Cold War years can be sighted as an historical example. See Chapter 2 para 2.1 *supra*.

<sup>1328</sup> On criticism regarding the hegemonic abuse of law, see Chapter 6 para 6.3.3 *supra*.

<sup>1329</sup> See Chapter 7 para 7.6.2.2 *supra*.

<sup>1330</sup> Hagan, Levi and Ferrales (Swaying the Hand of Justice) (*supra*) 589.

In spite of the progress that has been made by individual-centred and justice based movements (much of which was itself made possible through the support of liberal states), *realpolitik* and state sovereignty still wield a powerful and unpredictable influence in the international order which may at times adversely affect ICL. Even though ICL is in many ways a contradiction to the classical model of international law, it cannot entirely escape from the endemic (political) confines of the international legal system. The politicisation of international criminal law is inevitable and might have a negative effect on its ability to transform by adversely affecting its integrity or moral authority. Without a measure of politicisation and value-infusion however, the transformative value of ICL is significantly diminished. An over-idealistic system of international criminal justice will most probably lack the political support and level of state cooperation required for efficacy.<sup>1331</sup>

## 8.4 Application of the Central Thesis

The following section aims to test the practical application of the central thesis using two particular circumstances in which it has been suggested that ICL may have transformative value as examples for how the thesis may be applied. These are the use of ICL in the wake of mass atrocity and ICL as interpreted and applied in domestic legal systems.

### 8.4.1 ICL as a Response to Mass Atrocity: Comments on the Work of Mark Drumbl

Among international criminal tribunals there is a certain amount of faith in the transformative ability of international law and international criminal law.<sup>1332</sup> International courts have been

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<sup>1331</sup> See Damaska (What is the Point of International Criminal Justice?) (*supra*) 36: “[...] overly ambitious attempts by courts to impose monocacy on the volatile world of international politics may induce powerful actors in the political arena to withdraw their support from the fledgling institutions of international criminal justice”; see also Ambos (*supra*) in Kaleck *et al.* (International Prosecution of Human Rights Crimes) (*supra*) 68.

<sup>1332</sup> Keeping in mind the various criticism which have been raised throughout this thesis, there is evidence of, and an enduring believe in, the transformative value of international criminal tribunals in the following areas:

a. Creating a ‘voice’ for the international community through which it can express its indignation and condemnation of gross human rights violations (this may be referred to as expressive retribution).

portrayed “not only as instruments of justice and morality, but indispensable tools for conflict resolution and prevention as well as nation building”.<sup>1333</sup> Outside the international criminal tribunals this faith is not so widely shared. One of the assumptions underlying international criminal justice (that macro crime can be addressed through substantive criminal law and international criminal tribunals) remains disputed.

In his critically acclaimed book *Atrocity, Punishment, and International Law*, Mark Drumbl provides a convincing argument against the transformative potential of international criminal law in the wake of mass atrocity.<sup>1334</sup> Amid his contentions, Drumbl suggests that the complexity and contextual sensitivity of atrocity and international crime necessitates an equally diverse international criminal justice system. Drumbl advocates the implementation of additional horizontal mechanisms to deal with mass atrocity alongside the adversarial trial as, in his view, “international punishing institutions [...] are insufficiently attuned to the national and local”.<sup>1335</sup> He highlights for example the value of restorative justice mechanisms in Rwanda (the *gacaca* courts) for addressing the retributive shortfall of the ICTR in the wake of the Rwandan genocide.

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b. Putting an end to the global and historical ‘culture of impunity’. In this regard the complementarity-based ICC may be highlighted for its role of incentivising states to empower their domestic courts with regards to the prosecution of core crimes (see Chapter 5 para 5.6.3 and para 8.3.3 *supra*).

c. Enriching international law and national criminal justice systems on the material, institutional and procedural level by setting standards for impartiality, judicial independence, legitimacy, fair trial rights and human rights of both victims and offenders (see Mugwanya GW “Criminal Justice through International Criminal Tribunals: Reflections on some Lessons for National Criminal Justice Systems” (2006) *African Human Rights Law Journal* 28).

d. Advancing the rule of law globally.

<sup>1333</sup> Peskin (International Justice) (*supra*) 9.

<sup>1334</sup> See Henham R “Book Review: Drumbl MA *Atrocity, Punishment and International Law*” (2007) *Melbourne Journal of International Law* 477-489; Parmentier S “Book Review: Drumbl MA *Atrocity, Punishment and International Law*” (2007) 5 (5) *Journal of International Criminal Justice* 1215-1218; Heller (Deconstructing International Criminal Law) (*supra*) 975.

<sup>1335</sup> Drumbl (*Atrocity, Punishment and International Law*) (*supra*) 125.

According to Heller, “it is hard to imagine that anyone who reads the book will still be able to believe that liberal-legalist criminal trials, however well-intentioned, are capable with dealing with the collective nature of mass atrocity”.<sup>1336</sup> Permantier contends that:

“Drumbl raises very serious questions about the fact that international criminal justice has been strongly imbued with a western conception of justice, which is liberal and legalistic, and may not be the only model to deal with these ‘extraordinary’ crimes that involve many victims, many perpetrators, a large group of bystanders – and all of these within a political context.”<sup>1337</sup>

Drumbl’s work centres on the institutions of ICL (international and internationalised criminal courts) created in the wake of mass atrocity and the punishment dispensed by such institutions. It is necessary to examine and respond to certain aspects of Drumbl’s critique of the transformative potential of ICL as a response to mass atrocity as well as the manner in which ICL is enforced and institutionalised in such situations.<sup>1338</sup>

According to Drumbl, one of the ICL’s shortcomings as a response to mass atrocity is its inability to hold bystanders and indirect beneficiaries of mass atrocity criminally liable.<sup>1339</sup> These bystanders, who may well constitute the largest “perpetrator” group in the wake of mass atrocity, are indeed beyond the immediate reach of not only ICL but also criminal law in general.<sup>1340</sup> As a general rule, no criminal liability results from a person’s failure to act without the existence of a legal duty to the contrary. Thus, from a domestic criminal law perspective, the bystanders, onlookers and non-objectors during episodes of mass atrocity are beyond the reach of criminal law. In the wake of mass atrocity it is the collective mind-set of this often numerically dominant group which becomes essential in the quest for successful general deterrence, social reconciliation and the process of transformation in general. In Chapter 3 it was noted that transformation entails a process of changing the values of individuals and groups.<sup>1341</sup> Because of this, the manner in which the ideological beliefs and prejudices which are shared between the actual perpetrators and the bystander group and

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<sup>1336</sup> Heller (Deconstructing International Criminal Law) (*supra*) 998.

<sup>1337</sup> Parmentier (Review of Drumbl) (*supra*) 1216.

<sup>1338</sup> Drumbl’s work has featured throughout the thesis, especially in Chapter 5.

<sup>1339</sup> See also Fletcher and Weinstein (Violence and Social Repair) (*supra*) 580.

<sup>1340</sup> See Chapter 5 para 5.2.5 (5) *supra*.

<sup>1341</sup> See Chapter 3 para 3.4.6 *supra*.

which gave rise to or perpetuated the widespread incidence of violence, are affected is crucial to a successful transformation.

Historically, ICL sets its sights on the “big fish” or the top level perpetrators of international crime. If international criminal laws are unable to hold bystanders and indirect beneficiaries liable for their inaction, does this mean that ICL is of little value to the transformative project (particularly toward reconciliation) in the wake of mass atrocity? In my opinion, this is not the case. Firstly, although members of the bystander group cannot be held liable under ICL, this group (in particular those who are blameworthy in the moral but not the criminal sense) is the target of the expressive function of international criminal trials, of punishment in the wake of mass atrocity, but also of the developed and developing international criminal justice system in its entirety. The entire system, trials and the punishment dispensed for those who are found to be criminally liable, seeks to protect the interests of the international community and to project their values on the authority of the mutually beneficial nature of such values. Through supranational institutions, through symbolic trials of the “big fish” and through regulated punishment (an authoritative message of right and wrong), internationally accepted values are communicated to the affected civilian population at large (including the bystander group). The defendants, often the leaders and architects of the policies that lead to violence, are discredited along with the policies and propaganda under which their leadership had come to represent the domestic ‘right’ and which had come into conflict with the more morally authoritative international ‘right’. Although bystanders are not held criminally liable and cannot appear on the stand in person, the values which the bystanders may have shared with the actual perpetrators, values which were tacitly condoned by the bystander group, are put on trial. Through the criminal trial process and the public, binary conflict which it entails, these values are dissected, condemned and discredited along with the individual perpetrator.

Secondly, since the bystander group may constitute a large section of the post-conflict population, it is important for purposes of reconciliation to avoid the group being labelled as collectively guilty. There is a risk that the group as a whole may be stigmatised by former victims. This in turn, could renew the cycle of mass violence. Criminal law may play a positive role in this regard. By publicly punishing those “most guilty” of atrocities, the victims’ desire for retribution is publicly expressed and focused on those who bear the brunt of the responsibility for the past injustices. Importantly, if they can achieve the necessary

balance of political support and independence, these trials are not mere show trials. They are trials under the laws of the international community, the latter which communicates as much about international standards of fairness and the supremacy of the rule of law as it does about the international community's moral outrage over acts which are deemed to be universally offensive. A limited amount of retributive punishment may not placate those victims most directly affected by mass violence. Yet, as we have seen in Germany, Rwanda and elsewhere - the greater the scale of violence, the less practical it becomes to prosecute all those involved in the perpetration of crime. With this practical limitation in mind (not to mention the shortages of resources which have been experienced by international criminal tribunals), a public, formal, and historic trial addressing the core issues of the conflict and the culpability of high profile personae in that conflict may have effects that go beyond the directly affected parties to appease the victim group in general and also to prevent the social stigmatisation of the bystander group.

International criminal trials have repercussions for justice that go beyond the application of positive law, the trial and the immediately affected parties. The gravity and symbolism that attaches to international criminal trials provides them with a dimension of influence which is supplementary to the traditionally accepted goals of punishment. ICL's transformative value therefore is not confined to the courtroom.<sup>1342</sup> Some trials, especially transitional trials and political trials may provide an enduring transformative legacy or become symbolic of transformative values. Through punishment, the public debate they engender and through their expressive and symbolic effect, these trials serve as vehicles to transform the consciousness of individuals and communities.<sup>1343</sup> Famous international criminal trials such as the Nuremberg IMT and the Eichmann trial have shown that the greater symbolic value and the messaging value of trials of historical importance can be equally significant and endure even long after the close of the proceedings.

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<sup>1342</sup> Stahn C "The Future of International Criminal Justice" (October 2009) 2, available at [http://www.issafrika.org/anij/uploads/Stahn\\_The\\_Future\\_of\\_IJ.pdf](http://www.issafrika.org/anij/uploads/Stahn_The_Future_of_IJ.pdf) (accessed 2012/06/15): "[...] the effects of justice cannot be measured only by what is actually going on in the Court room, but by their impact internationally and domestically".

<sup>1343</sup> Bilsky (Transformative Justice) (*supra*) 3; See Chapter 4 para 4.3.4 *supra*.

Punishment and trial, sentence and fairness, the impact sought by international criminal justice appears to address past and present wrongs and also, in a more intrinsic manner, the underlying causes of such wrongs. ICL as a whole thus speaks to the future and to the international community, and promotes the notion of the law's global transcendence. Therefore, even if ICL is less able of attaining any of the punishment objectives associated with domestic criminal sanctions as Drumbl suggests, it still holds value for the *civitas maxima*, both of the present and future.<sup>1344</sup>

#### **8.4.2 ICL in Domestic Legal Systems: Comments on *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others***

The recent South African case *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* provides an opportunity for testing the central thesis, especially aspects of the thesis which relate to the transformative synergy between ICL and domestic legal systems.<sup>1345</sup> The case is a good example of how the interpretation of domestic obligations towards international criminal justice can serve to promote international values and in so doing, go beyond that which could be achieved through domestic criminal laws.

In this case, the court directed the SAPS to conduct an investigation into the perpetration of torture as a crime against humanity committed by non-nationals in foreign territory (although these non-nationals visit South Africa “from time to time”).<sup>1346</sup> Torture as a crime against humanity is criminalised through the South African ICC Act which incorporates the substantive crimes in the Rome Statute. Whether as a distinct crime or (as in

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<sup>1344</sup> See Chapter 5 para 5.6 *supra* on the *sui generis* objectives of ICL. See also Tallgren (Sensibility and Sense) (*supra*) 561-595. Tallgren develops the thesis that the “rational and utilitarian purpose of international criminal law could partly lie elsewhere than in the prevention and suppression of criminality”. Also, at 591-592: “Were the international criminal justice system stripped of its utility and rationality, what would be left? One option would be to think that its main function would be to serve as a symbol and as a model, showing the way for the national jurisdictions”. And further: “This could mean special roles for international criminal law: as the loudspeaker echoing the values of the international community, as a tool in negotiations, as the message preceding or following military intervention”.

<sup>1345</sup> For a detailed discussion of the case, see Chapter 7 para 7.7.1.2 *supra*.

<sup>1346</sup> Para 1.13 (at 9).



the *SALC*-case) as a crime against humanity, torture is subject to “a clear and absolute prohibition [...] in international law” and outlawed through a multitude of international legal instruments.<sup>1347</sup> As such, it is a clear manifestation of what the *civitas maxima* deems to be morally offensive behaviour which transgresses their values.<sup>1348</sup> The international prohibition of torture is a value-driven norm that exists for the purpose of punishing torturers as *hostis humani generis* wherever they may have committed the act of torture and through such punishment, to entrench the values for which the prohibition exists. Furthermore, like other international crimes, the crime of torture is part of a supranational framework of criminal law that represents an effort to address those crimes which domestic criminal justice systems are often incapable of dealing with.

In the *SALC*-case the applicants seemed to assert the fact that because its jurisdiction is not limited to crimes committed in South Africa or by South African citizens, the ICC Act is part of this supranational framework and that it was aimed at insuring accountability over international crimes (the commission of which was based on substantial evidence) in any country where the prospect of accountability is low due to the collapse of the rule of law or due to state complicity in the commission of the crimes.<sup>1349</sup> In this regard, the judgment in the *SALC*-case has some messaging value which speaks not only to South African citizens but also to the international community. The judgment reiterates South Africa’s position as a cooperative and principle-bound member in the international community of states. Simultaneously, South Africa is publicly and symbolically distinguished from its more lawless and uncooperative neighbour to the north.

As a consequence of its post-apartheid openness towards international law and its own history of systematic oppression, South Africa has acceded to the purpose- and value-driven

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<sup>1347</sup> Cryer *et al.* (International Criminal Law and Procedure) (*supra*) 294. Torture is prohibited as a distinct crime in the Universal Declaration of Human Rights, the ICCPR, the Convention Against Torture and as a crime against humanity in the Rome Statute of the International Criminal Court, article 1(f).

<sup>1348</sup> See para 27 (at 81-82). The court, having been referred to the *Basson*-cases by the applicants, highlights “an *international consensus* on the *normative desirability of prosecuting [perpetrators of crimes against humanity]* and [that], by necessary implication, a proper investigation had to be done in all such instances” (emphasis added).

<sup>1349</sup> Para 1.9 (at 7).

project of international criminal justice, criminalising torture and other international crimes indirectly by way of section 232 of the Constitution and also more directly through national legislation such as the ICC Act and the Geneva Conventions Act.<sup>1350</sup> As is illustrated by the interpretation of the duty to investigate under the ICC Act in the judgment, South Africa has broadened the scope of application of its domestic criminal justice system for the purpose of benefitting both its own citizens and the international community. The court's assertion that not only the victims of international crime and those representing the victims have an interest in the prosecution of suspected perpetrators, but that such prosecution is also in the public interest is highly significant. The *locus standi* of the applicants to force a review of a state decision not to proceed with what is essentially a criminal investigation is a development for criminal justice in South Africa without precedent. It resonates well with the notion of international crime (especially the core crimes in the Rome Statute) as an expression of the will of all persons in the international community.

Furthermore, the decision aligns well with the view of the majority of Pre-Trial Chamber II of the ICC in *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*.<sup>1351</sup> The latter case and the *SALC* case are similar in some respects. Both cases concern the regulation of investigations related to crimes against humanity. In both cases a court was asked to determine whether such investigations could (or should have) proceed(ed). In relation to the post-election violence in Kenya in 2007, the Pre-Trial Chamber authorised the prosecutor to proceed with an investigation under the *proprio motu* powers afforded to him under article 15 of the Rome Statute by taking a generous approach to the definitional requirement of crimes against humanity in article 7(2)(a) of the Rome Statute that the *actus reus* must be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack". The OTP was allowed to investigate notwithstanding the view held by the majority that "there was no evidence of a policy on the part of the Government of Kenya to attack a civilian

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<sup>1350</sup> See also Chapter 7 para 7.7.2.2 *supra* on the Prevention and Combating of Torture of Person Bill.

<sup>1351</sup> See ICC, *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (Pre-Trial Chamber) Case No. ICC-01/09-19, 31 March 2010.

population”.<sup>1352</sup> The Pre-Trial Chamber held that “organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population” but that this must be judged on a case by case basis.<sup>1353</sup> *In casu*, the majority of the Pre-Trial Chamber found that:

“[...] the violence was not a mere accumulation of spontaneous or isolated acts. Rather, a number of the attacks were planned, directed or organized by various groups including local leaders, businessmen and politicians associated with the two leading political parties, as well as by members of the police force.”<sup>1354</sup>

According to Du Plessis, the majority’s approach may be viewed as a positive development:

“The majority view, which flows from a generous interpretation of the Rome Statute’s provisions, is one which enlarges the scope for justice mechanisms like the ICC. Such a generous approach to the evidence of organizational capacity – as opposed to the minority’s re(strict)ive interpretation – does not appear inappropriate at the preliminary phase where the Prosecutor of the ICC is asking the Pre-Trial Chamber to authorize the very first phase of an investigation into ICC crimes.”<sup>1355</sup>

The decision in the *SALC* case has similarly enlarged the scope for international criminal justice in South Africa and potentially also the reach of the ICC via indirect application of the law of the Rome Statute in South African courtrooms.

In light of the abovementioned aspects of the *SALC* case, the case appears to illustrate the type of *change to the benefit of individuals or the civitas maxima* (the transformative value) which may be achieved by international criminal norms via domestic legal systems. The transformation of international crimes into domestic law presents a practical means of channelling international values to individuals via the domestic legal systems of states. Thus, ICL represents a means of bringing international values “home” to individuals where legal avenues for the protection of such values are more accessible, for example, via civil society

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<sup>1352</sup> Du Plessis M “International Criminal Law (Recent Cases)” (2010) 2 *South African Journal of Criminal Justice* 317-325, 321.

<sup>1353</sup> Paras 92-93. At para 93, the Pre-Trial Chamber mentions considerations which may be borne in mind for purposes of determining whether a group constitutes an ‘organization’ under the Statute.

<sup>1354</sup> Para 117.

<sup>1355</sup> Du Plessis (International Criminal Law, Recent Cases) (*supra*) 321.

organisations such as SALC and ZEF acting on behalf of the victims of international crime.<sup>1356</sup>

## 8.5 Submissions

Based on the general conclusion, the main arguments and the application of the central thesis above, I provide the following two submissions:

### 8.5.1 Broadening of the Conceptualisation of the Purposes of International Criminal Justice

There appears to be a discrepancy between ICL's historical self-consciousness, its fundamental purpose- and value driven nature and the justifications of punishment that have been expressed through the jurisprudence of international criminal tribunals. These tribunals have rightly highlighted retribution and deterrence as the main objectives of punishment for perpetrators of international crime. However, in spite of the undeniable forward-looking values and purposes underlying to ICL in general, utilitarian objectives have been recognised as subsidiary goals to a very limited extent only. Based on the unique foundational and historical mandate of ICL as well as the unique types of criminality and social evil for which it exists, I propose that greater recognition of what I have hereto referred to as the *sui generis* objectives of ICL in conjunction with the objectives of retribution and deterrence:

1. Is justified because it decreases the abovementioned discrepancy; and
2. Counteracts some of the rationales for the argument that ICL is an unsuitable response to mass criminality (thereby defending ICL as a response to mass atrocity).

With respect to the second submission, I believe that recognition of the larger purpose of ICL and *sui generis* punishment objectives provides a more convincing answer to the why-question ('why turn to ICL as a response to mass atrocity?') which in turn justifies the 'how'

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<sup>1356</sup> Since the victim of crime is not traditionally a central participant in the South African criminal justice system, this is a positive development in that it brings South Africa's criminal justice system (especially in relation to international crime) nearer to the law of the Rome Statute which provides for victim participation. See Burchell (Principles of Criminal Law) (*supra*) 11-12; Rome Statute of the ICC, article 68. For an overview of the rights of victims under the Rome Statute, see Chapter 5 para 5.6.5.3 *supra*. With regards to the "home"-metaphor, see Du Plessis (Bringing the ICC Home) (*supra*).

(the use of a *sui generis* and supranational species of criminal law) and placates some of the criticism against the use of ICL in the wake of mass atrocity.

When it comes to punishment, ICL faces the conundrum of ordinary punishment for extraordinary crime. In Arendt's view for example, although punishment was "essential" in the aftermath of the Second World War, the crimes committed by the Nazi Germans were so heinous that they could not be adequately punished whatsoever by any existing legal systems.<sup>1357</sup> As a further restraint to 'punishment that fits the crime', sentences in international courts cannot disregard international human right standards. The harshest form of punishment, long-term incarceration, does not match the severity of many of the offenses committed during mass violence. Thus it would seem that punishment will rarely fit the crime in international criminal justice. This must be accepted. It is submitted however that broadening the understanding of the justifications and purposes of international criminal justice beyond the traditional penological purposes of criminal law will counteract the imbalance of justice created by ordinary punishment for extraordinary crime. Although seemingly "ordinary", punishment of international crime recognised for its role in the effort to attain broader forward-looking social purposes related to punishment as the expression of values, is generally more amenable than punishment aimed at producing effects which are purposely limited to those purposes which can be achieved through criminal sanctions in the domestic criminal law analogy.

The proposed broader approach also speaks to a fundamental paradox found in many situations where international crime has been committed, namely that extraordinary crimes are often committed not by *hostis humani generis* (enemies of mankind), but by ordinary citizens that have in a sense themselves become "victims" of ideology, propaganda and extraordinary circumstance. Most international crimes are as much a consequence of social evil as individual evil. In fact, many mid- and low level perpetrators during collective violence believe that their acts are right or justified. It is not always clear whether these

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<sup>1357</sup> Arendt H/Jaspers K *Correspondence 1926-1969* (Cited in Osiel (Why Prosecute?) (*supra*) 128) 54: "The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes no punishment is severe enough. It may well be essential to hang Göring, but it is totally inadequate. That is, his guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems".

perpetrators committed crimes following a cost-benefit analysis which made them believe that they would get away with it. More likely, they either believed that what they were doing was right or that they would not get away with refusing to do what was expected of them, what many others were doing or what they were ordered to do. This phenomenon is beyond the criminology for which domestic criminal law punishment exists. As a consequence the domestic criminal law paradigm is of limited value for addressing this problem. For this reason, a forward-looking approach which attempts to address the broader social evils which perpetuate mass violence may be justified. A conceptualisation of ICL which fosters greater cognisance of the *sui generis* trial and punishment objectives of ICL may offer a certain degree of succour to the current ontology of international criminal justice which takes a more narrow view of the transformative role that criminal justice may play. Acknowledging these objectives will also address those problems associated with the disparities between crime, accountability and punishment which typically follow the perpetration of international crimes. Taken collectively, the conventional and *sui generis* objectives of ICL address not only independent criminality, but through a sustained normative influence also the roots of criminal conduct which is universally offensive and the social evils which produce mass violence and egregious crime.

To suggest that a species of criminal law should be conceptualised in a manner that allows for the recognition of more ambitious objectives will indubitably prompt opposition. In her work on the Eichmann trial, Hannah Arendt put forward that the sole purpose of the criminal trial is to make a finding on the guilt or innocence of the accused and to impose a sentence in the case of a guilty verdict.<sup>1358</sup> It has been almost 50 years since the publication of *Eichmann in Jerusalem*. Yet Arendt's view has been reiterated or positively endorsed by many over subsequent years.<sup>1359</sup> It remains an enduring and powerful point of critique. By putting criminal justice's ability to effect social change into question, it strikes close to what I believe constitutes the beating heart of the project of international criminal justice.

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<sup>1358</sup> Arendt (*Eichmann in Jerusalem*) (*supra*) 253.

<sup>1359</sup> See, for example, Douglas (*The Didactic Trial*) (*supra*); Galbraith (*The Pace of International Criminal Justice*) (*supra*).

### 8.5.2 Alternative Outlook on the Role of International Criminal Justice in Transformation

Can ICL achieve broader social purposes? Based on the arguments above, and subject to constraints which must be duly considered, it is submitted that this is a realistic possibility in the long term. The foundational rationales of ICL guide it beyond the objective of determining and punishing individual guilt toward ideals and objectives that have a socially transformative impact. ICL is driven by values and purposes which exempts it from the traditional paradigm of criminal law objectives which leans heavily towards retribution. Although the establishment of individual guilt is the primary focus under both domestic criminal law and ICL, punishment under ICL and by international tribunals reaches beyond the individual perpetrator and further than the retributive function of punishment to goals that have a broader social utility. ICL's value and influence is furthermore not confined to expression by way of judgments and punishment. The international criminal justice system *as a whole* produces forward-looking effects that may influence the decisions and actions of various actors.<sup>1360</sup> The question should not be whether ICL is justified to pursue such objectives, but how these objectives can be reached by ICL in conjunction with the many other movements which aim to transform the world into a better place.

This thesis has not purported to bestow some type of supernatural value on ICL. Nor have I tried to prove what might be deemed 'the radical assertion' that ICL's fledgling exterior belies great transformative potential. The thesis presents a more realistic evaluation of ICL's transformative value and potential from a broad perspective by taking cognisance of the abovementioned possibilities and also to offer an alternative outlook on ICL's role in transformation as well as the value it may hold in the long run. Much of this thesis has indicated that there are challenges to ICL as a socially transformative device as well as dependencies and interdependencies which are crucial to its ability to fulfil its existential mandate. Perhaps it may be argued that the proponents of international criminal justice have been both overly protective of the legal sanctity of the project and under-appreciative of the

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<sup>1360</sup> See Chapter 1 para 1.5 (assumption 2) *supra*. It is submitted that the influence of ICL on the decision-making may present a fertile ground for further study.

impact of power on international criminal justice.<sup>1361</sup> Rather than taking the view (as legal purist may do) of politics as an insurmountable obstacle to international criminal justice, politics must be acknowledged as an asset to the broader transformative purpose of ICL. The negative influences of politics on international criminal justice must be regarded as areas of awareness and concern deserving the attention of anyone with a genuine interest in a fair and balanced system of international criminal justice.

It is prudent to say that the general picture of international criminal justice is much less blurry today than it was in the aftermath of the Second World War. The core crimes and their elements have achieved a measure of permanence in the Rome Statute while the substance of ICL has been developed by various international, hybrid and domestic courts which have applied it to a more or less uniform degree. Modern ICL has reached the point in its development where it exists as an independent species of international law. Yet, as in the past, the dual characteristics and unique nature of ICL (the fact that it is backward- and forward-looking, repressive and normative and politicised) creates conflict within the field and clashes with the classical rubric on the accepted principles, functioning and role of criminal law. This conflict has been the point of focus for ICL's objective critics and ideological opponents alike. However, as ICL continues to gain legitimacy and enters what can arguably be referred to as its post-ontological era, it may become possible to approach ICL not from the viewpoint of internal conflicts, but from the viewpoint of the possible benefits of these dual characteristics in light of its *sui generis* nature.

## 8.6 Final Remarks

In spite of the diverging arguments which I have forwarded hereto, it must be acknowledged that as a species of criminal law, ICL remains largely retributive in character. The primary purposes of international criminal trials and the domestic prosecution of international crime is to hold perpetrators accountable for having transgressed the norms of the international community. ICL's ambitious mandate of transformation is mostly precipitated by the application of substantive criminal law in a formal criminal trial. Moreover, the act of punishment remains the primary effect-producing mechanism of criminal law. These general

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<sup>1361</sup> For an analysis of various works regarding the politics of international criminal justice, see Megret (Politics of International Criminal Justice) (*supra*) 1263-1264.



boundaries of criminal law are perhaps the most fundamental practical restrictions on ICL as an instrument of social change.

However, I am only partially in agreement with those supporters of Hannah Arendt who assert that a trial's exclusive purpose is to render justice to the offender. There are grounds for asserting that ICL is somewhat exempt from this narrow social function. The formal application of *sui generis* criminal law in *sui generis* situations may have effects that go well beyond the courtroom walls and beyond the immediately affected parties. Ultimately, law exists in response to social problems and, to reiterate Snyman's opening observation, "a tree is known by its fruit".<sup>1362</sup> International criminal justice is by exception a collection of laws which is intended to apply in and over situations where the very limits of the law's ability to create a better world (to 'bear fruit') is put to the sword and pushed to the extreme. When the international community is watching, international criminal law norms and the trials through which they are interpreted and applied, tap into larger issues and questions affecting humanity in general. Whether by design or through coincidence (or both), this gives unique educative, normative and symbolic dimensions to international criminal justice and allows international criminal justice to enter into the moral dimension of values, of right and wrong and of human interconnectedness. This is the territory of the likes of Aristotle, Kant, Bentham and Mill, where international criminal justice becomes a projection of what the world is, what it might be and what it ought to be as part of an on-going process to progress from an imperfect reality to an imagined alternative. This is a long-term, perhaps never ending project, in which the role of criminal trials are historically unequalled and in which the international criminal justice system as a whole might yet play a transformative role.

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<sup>1362</sup> Snyman (Criminal Law) (*supra*) 23-24; see Chapter 1 para 1.1 (footnote 1) *supra*.

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