Integrating Restorative Justice into the ICC's Legal Framework

Possibility and Necessity

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Abstract

Integrating Restorative Justice into the ICC's Legal Framework: Possibility and Necessity

The International Criminal Court (ICC) is the only permanent international court that has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The ICC is a young international organisation, and is now facing many difficulties when dealing with international crimes. One criticism towards the ICC is that its legal mechanism cannot well balance peace and justice, and has not shown enough attention to victims' need. It has been argued that the justice at the ICC needs to be more restorative.

This research firstly clarifies the real issues for the ICC to maintain peace and achieve justice. It also provides an answer to what restorative justice should mean to international criminal justice. In addition, the case studies on the situations at the ICC and at some other international criminal tribunals have been carefully analysed to prove that the separate utilisation of pure restorative justice approach and the formal criminal procedure mechanism cannot bring peace and justice together. They must be combined to improve the impact of international criminal justice.

This research goes deeper to the meaning of justice for international criminal justice and the ICC, and displays the pitfalls in achieving the targets. It is concluded that for better delivering justice to the stakeholders in international crimes and the damaged society, the ICC needs to empower victims and encourage the effective communication between victims and perpetrators, and make the justice at the ICC reach local communities, rather than setting justice as merely symbol.

Keywords: International Criminal Court, justice, peace, restorative justice

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Contents

Chapter 1: Introduction

The International Criminal Court (the ICC or the Court) is the first permanent international court in human history that has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The ICC is now facing many difficulties when prosecuting the perpetrators of international crimes, especially under the circumstance of on-going conflicts. One way to improve the ICC's work, as it has been argued, is to make international criminal justice more "restorative justice".[1]

The concept of "restorative justice" is relatively new to lawyers and criminologist, though many believe that it has deep roots in human history.[2] It sees the commission of crime as damaging the social relationship among individuals, and emphasises the effective and genuine communication between the victim and offender in resolving the consequences of crimes. The idea of restorative justice is very different from the justice mechanism in most international criminal tribunals, which are based on modern legal systems used in domestic courts. Hence, whether it is necessary and possible to integrate restorative justice into the International Criminal Court still needs to be clarified. This study will focus on three research questions below, to examine the necessity and possibility to combine restorative justice and the ICC:

1. What are the issues between maintaining peace and delivering justice in the ICC's work?
2. What are the theoretical problems behind the tension between justice and peace

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[1] See for example, Charles Villa-Vicencio, 'Why perpetrators should not always be prosecuted: Where the International Criminal Court and truth commissions meet' (2000) 49 *Emory Law Journal* 205; Carrie J. N. Eisnaugle, 'An International Truth Commission: Utilizing Restorative Justice as an Alternative to Retribution' (2003) 36 *Vanderbilt Journal of Transnational Law* 209; Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) *Journal of Law and Society* 411.

[2] For example, see Elmar G. M. Weitekamp, 'The History of Restorative Justice' in G Bazamore and L Walgrave(eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press 1999).

in the ICC's legal mechanism?

3. Whether and how can the idea of restorative justice make improvements to the ICC's work?

1. A brief introduction of the International Criminal Court

The ICC began to function on 1 July 2002 after the *Rome Statute of the International Criminal Court* (the Rome Statute) was ratified by 60 countries. Therefore, the Rome Statute, along with other legal texts such as the *Rules of Procedure and Evidence* and the *Elements of Crime*, forms the legal basis of the ICC and codifies the fundamental principles and values in international law.

The establishment of the ICC was strongly backed by a number of countries for its favourable purposes. Many States Parties of the ICC have suffered from different levels of internal armed conflicts and serious human rights violations. One of the original expectations toward the ICC globally was that such an organisation would play a new and even revolutionary role in bringing peace and justice to the international community.[3] In fact, the plan of establishing an independent, treaty-based international criminal court had been an on-going effort, following a series of criminal tribunals that were established to try heinous criminals of the Second World War. These efforts could be seen as the continuing work of The Hague Conferences of 1899 and 1907. In 1989 the General Assembly of the United Nations requested that the International Law Commission start handling the question of establishing an international criminal court.[4] After the end of the Cold War, especially after witnessing the gross human rights violations in the former Yugoslavia and Rwanda, the desire to establish such a

[3] See Roy S. Lee, 'The Rome Conference and its Contribution to International Law' in Roy S. K. Lee (ed.), *International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (Kluwer International Law 1999), at pp. 1-5.

[4] UN Doc A/RES/44/39.

permanent court became more urgent.

At the Diplomatic Conference on the establishment of an international criminal court, in 1998, several States showed a preference to prosecute international crimes in compliance in domestic courts, without conceding national sovereignty to an international jurisdiction.[5] The question on complementarity of the ICC proceeded in very serious debates, which involved in whether a State should take responsibility, or enjoy the priority, to prosecute international crimes. Because the issue related to the core values, principles, and legal technical problems of the ICC, the discussions around all topics had to be considered carefully within different social cultures, legal traditions and through several languages.

That situation inevitably increased the difficulty of adopting a generally accepted code. In spite of the challenges, the need of enforcing international law to protect humanity, prevent gross human rights violations and punish the perpetrators responsible for international crimes, shined as the determinative factor to ensure the creation of a permanent international criminal court. The Rome Statute was finally adopted by most of the States at the Rome Diplomatic Conference and no more *ad hoc* tribunals would have to be organised for each occasion of serious human rights violations. The International Criminal Court had carried great hope for countries and people that suffered and/or are still suffering tremendous pain from serious crimes and for international law academics and political activists who, for generations, dreamed of such a court. The complement role of the ICC in prosecuting international crimes has kept a practical balance between the Court and States Parties.

The principle of complementarity, which was described as one “key feature” of

[5] See John T. Holmes, ‘The Principle of Complementarity’ in Roy S. K. Lee (ed.), *International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (Kluwer International Law 1999), at pp. 41-42.

the ICC,[6] may have be seen as an issue of "jurisdiction-sharing" in dealing international crimes. Yet another effect of the principle of complementarity does not draw as much attention as it should be. The complement role of the ICC, in fact, admits that international crimes have a very special feature compared with ordinary domestic crimes. International crimes influence both the people's life in the States where the crimes have been committed, and the conscience of all humanity. As a result, prosecuting perpetrators of international crimes must consider the need of local people and the feeling of the international community. It may not be proper to resolve the consequences of international crimes by follow the same way of thinking in dealing domestic criminal cases.

The special feature of international crimes has caused the ICC many difficulties because the ICC could not provide a satisfactory answer to balance the need of victims and the values of international law. After the first few years of its early work in preparation to face the most difficult situations of the first cases, the role and the impact of the ICC in relation to the original purposes had been noticeably questioned. The young ICC was forced to face one of the biggest challenges: how to achieve peace and justice under the circumstances of an on-going conflict. Unfortunately, the ICC's interference in some earlier cases resulted in questioning its capability to maintaining peace and deliver justice, and to a degree, had shaken people's trust and confidence in the ICC's work. It showed that the contribution of the ICC to peace in the world is not evident or effective. Instead, there have been complaints that the ICC potentially brings more complexities to achieving peace in situations of international crimes.[7] In addition,

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[6] See Mauro Politi, 'Reflections on Complementarity at the Rome Conference and beyond' in Carsten Stahn and Mohamed M. El Zeidy (eds.) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011), at pp. 142-149.

[7] See United Nations Economic and Social Council, *Report on the work of the Office of the High Commissioner for Human Rights in Uganda, Addendum*, UN Doc. E/CN.4/2006/10/Add.2 (2 March 2006), para. 11. Also see African Union, *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan*, Assembly/AU/Dec.221(XII), para. 1-2.

the work on the protection of rights and reparation for victims done by the ICC cannot be considered as fully adequate.[8]

Despite the fact that certain facilities, such as the Trust Fund for Victims and the Office of Public Counsel for Victims, have been established for years for the purpose of serving victim protection and reparation, the supportive events to victims at the ICC still needs to get some improvements. The lessons and experience on the ICC's role have, in many aspects, reshaped the way people may regard the spirit of peace, the meaning of justice, and the role of victims, and have emphasised the necessity to re-consider the legal mechanism in the ICC's justice proceedings.

2. The idea of restorative justice

The implication of restorative justice

Restorative justice emerged in judicial practice in many countries as a means to address criminal justice issues involving indigenous peoples.[9] It was utilised to address the internal problems of a country in the first place. Then it was mutually influenced with crime victims' movements.[10] Restorative justice differs from the adversarial model of criminal justice or any other mode of justice in which prosecutorial actions are practiced. Sometimes it is linked to certain ideas in civil rights litigation, such as compensation. It is a criminal procedure that includes alternative dispute resolutions.

[8] For example, the ICC awarded each victim of the situation of the Democratic Republic of the Congo only 250 US dollars as symbolic reparation, which covers housing, education aid, and psychological support.

[9] See Elmar G.M. Weitekamp, 'The History of Restorative Justice' in G. Bazamore and L. Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press, New York 1999). Also see Moana Jackson, *Maori and the Criminal Justice System: A New Perspective, He Whaipaanga Hou* (Policy and Research Division, Department of Justice, New Zealand 1987).

[10] See Daniel W. Van Ness, *Crime and Its Victims: What We Can Do* (InterVersity Press 1986). Also see Marlene Young and John Stein, 'The History of the Crime Victims' Movement in the United States' (2004), National Criminal Justice Reference Service, US < https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pdf/historyofcrime.pdf> accessed 2 February 2015.

Researchers in this area have different understandings about what restorative justice is.

In John Braithwaite's opinion, restorative justice is

> "[A] process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have inflicted the harm must be central to the process".[11]

This definition highlights the importance of interactions between victim and offender. The distinctive feature in restorative justice compared with modern criminal justice, as Braithwaite stated, is that the way to repair the harm caused by crime can be discussed and decided by the stakeholders.

Tony Marshall defined restorative justice in a well-renowned report to the UK Home Office as "a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies."[12] In this definition, restorative justice is a "problem-solving approach", which implies that restorative justice is firstly distinct with formal criminal justice in ways of practice. It means such approaches must focus on how to solve the problems arising in real criminal cases rather than pure theoretical discussion. Marshall's opinion was upheld by many other academics. For example, Menkel-Meadow states in one study that

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[11] John Braithwaite, 'Restorative Justice and De-Professionalization' (2004) 13(1) *The Good Society* 28, at pp. 28.

[12] Tony Marshall, *Restorative Justice: An Overview* (Home Office Research Development and Statistics Directorate, London 1999), at pp. 5.

> "Restorative justice is the name given to a variety of different practices, including apologies, restitution, and acknowledgments of harm and injury, as well as to other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment."[13]

In this definition, Menkel-Meadow does not only point out that the nature of restorative justice rests on its practices, but also list some typical approaches for healing. The emphasis on healing, or restoration, to the stakeholders of crimes may have suggest that the commission of crime is not simple a violation of criminal law.

Different from formal criminal justice, which underlines the legal responsibility of the prosecution and the defence, the proponents of restorative justice see crimes as being personal. Doak and O'Mahony believe crime is not only an illegal conduct but also an issue between individuals. They confirm the valuable role of restorative justice in connecting all parties when solving the dispute in a criminal case that

> "[R]estorative justice views crime primarily as a breakdown between private relationships. Ownership is thus devolved to a broader range of stakeholders, including the victim, the offender and the community."[14]

The opinions above sketch a general impression about restorative justice, and display three dimensions which can define restorative justice. Firstly, restorative justice contains some special formats that are different from formal criminal justice. Secondly, the purpose of restorative justice is to heal, rather than to punish. Thirdly, crime is an

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[13] Carrie Menkel-Meadow, 'Restorative Justice: What is it and Does it Work?' (2007) 3 *Annual Review of Law and Social Science* 161, at pp. 162.

[14] Jonathan Doak and David O'Mahony, ''In Search of Legitimacy: Restorative Youth Conferencing in Northern Ireland' (2011) 31(2) *Legal Studies* 305, at pp. 315.

issue between individuals, therefore, the damaged relationship must be restored.

Although advocates of restorative justice concur that crime shall be deemed as a personal issue, they view restorative justice from two different angles. Some researchers prefer to considering restorative justice as an alternative practice to formal criminal justice to resolve the problems caused by crimes. This branch is called a "purist" view on restorative justice.[15] Some others uphold that the key factor of restorative justice is that it aims at healing and repairing, regardless whether special practices have been involved in criminal justice.[16] This is the "maximalist" view of restorative justice. The "maximalist" view of restorative justice emphasises the importance of aiming at restoration,[17] the "purist" view underlines the voluntary cooperation of victims, offenders and the affected community in the process without coercion or punishment.[18] Both views provide some convincing points in demonstrating the definition, activities, and principles of restorative justice. The difficulty of defining restorative justice has been recognised by most of criminologists.

Restorative justice may include many aspects which are beyond the idea and principles of criminal law, or even beyond all legal principles. That is because restorative justice concentrates on reality and adjusts its concrete practices accordingly. From this standpoint, there could be ultimate possible practices in restorative justice as long as those practices are able to reach the end of restoration. That is the reason why it is hard to agree upon a definition of restorative justice and an exhaustive list of restorative justice practices. Hence, some researchers turn to describe restorative justice

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[15] Paul McCold, 'Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model' (2000) 3(4) *Contemporary Justice Review* 357.

[16] Lode Walgrave, 'How Pure Can a Maximalist Approach to Restorative Justice Remain? Or Can a Purist Model of Restorative Justice Become Maximalist?' (2000) 3(4) *Contemporary Justice Review* 415.

[17] Lode Walgrave, *Restorative Justice, Self-interest and Responsible Citizenship* (Willian Publishing 2008), at pp. 20.

[18] Paul McCold, 'Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model' (2000) 3(4) *Contemporary Justice Review* 357, at pp. 369.

in other ways[19]. For example, Howard Zehr, one of the earliest scholar studying restorative justice, tries to figure out what restorative justice is not about,[20] rather than describing how restorative justice should be formulated. He further emphasises that "[r]estorative justice is a compass, not a map" [21], indicating that there may not be a constant pattern for approaching or practicing restorative justice.

Kathleen Daly contests the idea that restorative justice may not be clearly defined. Based on "purist" view, professor Daly argued that restorative justice must be "be defined concretely" as "a justice mechanism" for the purpose of satisfying the "empirical inquiry".[22] She reviewed different theories on the definition and context of restorative justice, and specifically pointed out that formal criminal justice, which is often regarded as "retributive justice", is not contrary to "restorative justice" because both retributive justice and restorative justice, "as a coherent system or type of justice, [do] not exist."[23] Restorative justice, in Daly's opinion, shall be included in the concept of "innovative justice" which does not solely rely on legal processes but also other forms of participation and interaction.[24] In other words, she believes that an ideal justice mechanism must focus on the forms it intends to include and shall extend its processes to solve real problems, and that restorative justice, like formal criminal justice, is simply one part of such an "umbrella term".[25] As a conclusion, Daly states that

"Restorative justice is a contemporary justice mechanism to address

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[19] Burt Galaway and Joe Hudson, *Restorative Justice: International Perspectives* (Willow Tree Press 1996). Also see Daniel. W. Van Ness and Karen H. Strong, *Restoring Justice: An Introduction to Restorative Justice* (5th ed., Anderson Publishing 2015).

[20] Howard Zehr, *The Little Book of Restorative Justice* (Skyhorse Publishing, Inc. 2015).

[21] Ibid, at pp. 8.

[22] Kathleen Daly, 'What is Restorative Justice? A Fresh Answer to a Vexed Question' (2016) 11 *Victims and Offenders* 9, at pp. 11.

[23] Ibid, at pp. 15.

[24] Ibid, at pp. 18.

[25] Ibid, at pp. 19.

> crime, disputes, and bounded community conflict. The mechanism is a meeting (or several meetings) of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process- prearrest, diversion from court, presentence, and postsentence- as well as for offending or conflicts not reported to the police. Specific practices will vary, depending on context, but are guided by rules and procedures that align with what is appropriate in the context of the crime, dispute, or bounded conflict."[26]

This study does not intend to develop a new definition of restorative justice, or challenge professor Daly's conclusion on the definition of restorative justice. One reason is that this study will utilise the restorative justice idea to examine the issues that exist in the legal mechanisms of the ICC, rather than discuss what is the very core of restorative justice. Further analysis of the definition of restorative justice is not necessary for this study. The second reason is that Daly's idea may have provided some thoughts on the technical issues in inter-merging restorative justice and formal criminal justice, but does not clearly answer why restorative justice is needed. The purpose of making improvements to formal criminal justice system is not to introduce innovations into justice. The real purpose for doing justice shall be restoring the damage caused by crime to individuals and to the society.

The final reason why professor Daly's opinion will not be fully examined is that although she aimed to provide a concrete definition of restorative justice, the definition she gave was not that "concrete"- there was no clear list of all the practices in restorative justice, or a guide about the timing to trigger restorative justice in formal criminal justice, or any specific rules which restorative justice must coordinate with. In other words, Daly's effort to create a clearer definition of restorative justice is not very clear

[26] Ibid, at pp. 21.

itself. Nevertheless, professor Daly's intention was to highlight the importance that the effects of restorative justice must be actually recorded and assessed, rather than be evaluated by the theoretical concept of "victims' satisfaction".[27] This statement suggests that her research on the definition of restorative justice aims to ensure the achievability of restoration in restorative justice. This idea in fact resonates the main theme of this study that international criminal justice must work for the people who were harmed by the crimes.

This study holds an opinion close to the "maximalist" view of restorative justice, because it primarily values the core of restorative justice in "oriented toward doing justice by repairing the harm that has been caused by crime"[28] and does not exclude necessary coercion and punishment to criminal offenders, which needs to be accented in international criminal justice.

The "purist" view of restorative justice lacks the adequate attention to the significance of "restoration". There could be two reasons why the "purist" view of restorative justice does not intend to highlight the meaning of restoration in dealing criminal cases. Either, the "purist" view believes that "restoration" is not important; or, it insists that exercising the special practices will eventually achieve "restoration". The former assumption ignores the fact that without the focal on "restoration", criminal justice will become detached from the stakeholders in a criminal case. The latter, on the other hand, has been proved wrong in some empirical studies.[29] If certain practices are not carefully guided by the purpose to achieve restoration to victims, offenders, and other stakeholders, the participants of restorative justice may be hurt another time. The

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[27] Kathleen Daly, 'What is Restorative Justice? A Fresh Answer to a Vexed Question' (2016) 11 *Victims and Offenders* 9, at pp. 22.

[28] Gordon Bazemore and Lode Walgrave, 'Restorative juvenile justice: In search of fundamentals and an outline for systemic reform' in in G. Bazemore and L. Walgrave (eds) *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Lynne Rienner Publisher 1999) 45, at pp. 48.

[29] See Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4(1) *Punishment and Society* 55.

risk is particularly high for victims when offenders do not show enough respect or refuse to recognise the consequences of the crime.

In international crimes, the harm for victims and the community is often too huge to be ignore. Many post-conflict States targeted on bringing restoration to local people for keeping peace and delivering the desired justice. However, because of following the view of "purist" on restorative justice, the function of repairing (or restoring) has been often misunderstood as simply launching certain approaches in many domestic legal processes in transitional countries, that many victims were forced to accept reparation through "victim participation". Blindly believing that carrying on some practise in the name of restorative justice will only exacerbate the injustice upon the victims. This position will be explained in chapter 3.

In short, restorative justice is very flexible and practical and it should not be confined into any unchangeable frame. Describing restorative justice as a "practice" or an "approach" is intended to indicate the inclusiveness of the core of restorative justice theory, but may not be a good way to define restorative justice. The core value of restorative justice, restoration, decides the form and the way of the practices. But the practices could not change the core. Restorative justice is a comprehensive system in which the spirit and value of restoration are expressed in the form of praxis. In other words, restorative justice shall be understood as a system where many approaches are guided by the idea of restoration. It shall be interpreted as an idea that must be practical in real-life problems. The form of restorative justice is less important than its core value.

The factors of restorative justice

The development of study on restorative justice has become international. Researches based on every State's experience is abundant, and it is impossible to go all the details. For the convenience of further discussion, the *Handbook on Restorative*

Justice Programs (the "RJ handbook") which is published by the United Nations Office on Drugs and Crime (UNODC) will be referred to as the main resource. Furthermore, many studies have identified restorative justice as practices/approaches with the value of restoration. This study will challenge such acknowledgement. The form that restorative justice takes does not matter that much, as long as the value of restoration is ensured. The nature of restorative justice can be understood not as practice but as an idea, because the practices of restorative justice are diverse but they all recognise the value of restoration.[30] For example, restoration is the first principle of restorative justice practices in the UK.[31] With restoration being placed at the centre of restorative justice, restorative justice can be practiced in real life, and the influence of restorative justice can be assessed in accordance with such value.

In the RJ Handbook, the key factors of restorative justice are not introduced directly. Rather, it is described as being combined with the word "program". A restorative justice program is any program that uses restorative justice processes to achieve outcomes of restoration. The restorative justice process is

> "[A]ny process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator."[32]

The description of restorative justice may appear a "purist" view. According to this statement, even after narrowing restorative justice into a "process", one may still feel confused because it seems that restorative justice is a huge "blanket" justice idea, rather

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[30] Different types of restorative justice practices can be seen in Belinda Hopkins, *Just Schools: A Whole School Approach to Restorative Justice* (Jessica Kingsley Publisher 2003); Durham County Council, 'Restorative Approaches', Children and Young People's Services, 2009.

[31] UK Restorative Justice Council, 'Principles of Restorative Justice Practices' (2015).

[32] UNODC, *Handbook on Restorative Justice Progremmes* (Criminal Justice Handbook Series 2006), at pp.6.

than any specific mode. The wording “any process” and “any individuals” leaves the operators of restorative justice a very wide range of discretion to decide which form of practice to apply. We may get some clue on how to use restorative justice by knowing what restorative justice process is, as it is demonstrated in both John Braithwaite’s discussion and the RJ handbook’s statement. But there is no clear description on what factors restorative justice shall cover. Additionally, restorative justice in real life may not function in the form of “justice”. In many countries, such as Canada, New Zealand, UK and US, restorative justice does not follow invariant patterns. The ways of using restorative justice relies on different cultures, and has to adjust itself to the ever-changing reality. This is why the restorative justice programs in different countries may share many similarities, but it is very hard to find any absolutely identical path to carry on the programs.

There may not be a certain guideline for practicing restorative justice, but it is possible to list several goals that restorative justice tries to achieve. In the RJ handbook, the goals of restorative justice include:

> “Victims who agree to be involved in the process can do so safely and come out of it satisfied;
>
> Offenders understand how their action has affected the victim and other people, assume responsibility for the consequences of their action and commit to making reparation;
>
> Flexible measures are agreed upon by the parties which emphasize repairing the harm done and, wherever possible, also address the reasons for the offence;
>
> Offenders live up to their commitment to repair the harm done and attempt to address the factors that led to their behaviour; and,

> The victim and the offender both understand the dynamic that led to the specific incident, gain a sense of closure and are reintegrated into the community."[33]

The goals enumerated above suggest that restorative justice is not simply a system of practices, but also needs be to undertaken with just intention. It implies a "maximalist" view of restorative justice. However, it is not clear whether those goals are mandatory when using restorative justice approaches. It is also unknown whether restorative justice should achieve all of the goals or if it only needs to focus on certain goals. This study believes that those goals should not be mandatory, and cannot be imposed. Restorative justice is different from formal criminal justice which is regulated by criminal law and criminal procedural law. In formal criminal justice, prosecuting criminals and rendering judgement is a legal duty and thus there must be a result in all criminal cases. Restorative justice, however, depends on voluntary participation in which people willingly come forward to resolve the issue through collective intellect and wisdom. Certain results or goals are not necessary because restorative justice procedure itself can be of great effect on all the participants. In other words, the participation of all who are involved in the restorative justice process usually transmits the value of restoration. If there is any certain goal being forced upon those who take part in the process, restorative justice will lose the value of restoration. Also, it may not be realistic to achieve all the goals within one process.

However, it is also possible that offenders may not have any interest in repairing the harm caused by their criminal acts[34]. In such a circumstance, it is acceptable to coerce the offenders to be present in restorative justice process to listen to the stories of

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[33] UNODC, *Handbook on Restorative Justice Progremmes* (2006), Criminal Justice Handbook Series, at pp. 9.

[34] Kathleen Daly, 'Making Variation a Virtue: Evaluating the Potential and Limits of Restorative Justice' in Elmar G. M. Weitekamp and Hans-Jurgen Kerner (eds.), *Restorative Justice in Context: International Practice and Directions* (Willian Publishing 2003).

victims. So, the participation of offenders can be voluntary if they are willing to show their regret and respect to victims, and it can also be compulsory if they don't want to. But it is difficult to ask them to actively promise anything to repair the harm to victims. More importantly, sometimes restorative justice achieves nothing tangible or visible in short term. Such result is not necessarily a failure, because the presence of both offenders and victims, and the story-telling from victims and other stakeholders could be meaningful. Restorative justice may have symbolic meaning which encourages all the parties to figure out a proper way to resolve the issues, and then provides more useful information to formal criminal justice.

The core idea of restorative justice is "restoration", therefore "knowing each other's stories" among the involved people is one basic step toward this idea. In addition, forgiveness and reconciliation are the encouraged targets rather than the obliged outcome. That is the reason why restorative justice sometimes has to be described in the form of "process", because it is easier for people to have clear views on what to do systematically. To emphasise again, restorative justice, which has been fervently discussed by many academics, should not be confined as a non-changeable process. There are many approaches to practice restorative justice, such as community conferencing, family conferences, victim-offender mediation, and so on[35]. But there is no specific guideline which must be followed to operate restorative justice process. Consequently, when using the term restorative justice, it is proper to recognise it as an idea that centres on the value of restoration and applies different approaches based on reality.

Based on the discussions above, it can be concluded that there are three core factors in restorative justice. The first factor is "wide-ranging involvement", or

[35] The Crown Prosecution Service, 'Types of RJ in England and Wales' < http://www.cps.gov.uk/legal/p_to_r/restorative_justice/#an03 > accessed on 12 March 2015.

engagement of stakeholders. In theory, restorative justice process can include all the persons who were affected by criminal acts, whereas in formal criminal justice it is only the offenders who are able to truly actively participate in the proceedings as the defendant side. The other stakeholders, such as victims, the families of victims, and the families of the offenders as well as all the other people who may have been affected by the crime, may be in the court as witnesses or audiences. They don't really get involved in criminal justice because they are not given the opportunity to properly express their ideas and feelings toward the offenders and the crime. In practice, victims and offenders are positioned at the central part of the process in restorative justice, sharing information about the crime and feelings about the consequences.

Formal criminal justice usually lacks such mechanism. Studies and surveys have discovered that victims of criminal conducts are significantly concerned about their security in the community and in society[36] but they are not granted a chance to speak out in court. Moreover, in formal criminal justice, the whole process can be seen as a "competition" between the defendant and the prosecutor or between the authorities and the individuals, trying to persuade the judges to acknowledge their points, rather than endeavouring to make clear what really happened in the past.

The second factor is "flexibility", or adaptation to realistic needs. The whole process of restorative justice can be "discussed" and "decided" by all the participants, rather than being "disputed" by the "game players" and "judged" by the "non-stakeholders" of the crime. As Menkel-Meadow describes, even the form of punishment

[36] See Jan Van Dijk, John Van Kesteren and Paul Smith, *Criminal Victimisation in International Perspective: Key Findings from the 2004-2005 ICVS and EU ICS* (Boom Juridische Uitgevers 2007); UN Interregional Crime and Justice Research Institute, 'Improving Urban Security through Environmental Design' (18 April 2011); United Nations Development Program, 'Caribbean Human Development Report 2012: Human Development and the Shift to Better Citizen Security' (8 February 2012); Davis M. Vetter, Kaizô I. Beltrão and Rosa M. R. Massena, 'The Impact of the Sense of Security from Crime on Residential Property Values in Brazilian Metropolitan Areas' (21 January 2013) Working Paper, *The Cost of Crime and Violence in Latin America and the Caribbean* (RG-K1109 and RG-K1198).

can be negotiated through discussions by victims and offenders.[37] This is the flexibility in the result of the restorative justice, that as long as the process is being kept on the route to the restoration of victims, offenders and the affected community, the resolution to the crime does not need to be locked to pure criminal punishment. The procedure of restorative justice is also quite flexible. In restorative justice, all the participants will not be named or labelled with unchangeable roles in the court. From the angle of the crime itself, there are victims, offenders, and observers; with respect to the restorative justice process itself, there are participants and assistants. Everyone in restorative justice process has many different roles. This helps the participants to better understand what really happened to both the victims and the offenders, as well as other persons in the community who have been affected by the crime. What is meaningful in restorative justice is that the wrong-doers are not simply treated as offenders whose aim is to defend the accusations. They are encouraged to express their real feelings and even sufferings about the crime, and to confess to the victims and other people from the affected community. In formal criminal justice, however, everyone has a certain and constant position throughout the whole procedure. Their main concern is how to play their roles better but not to understand the problems of the crime better.

The third factor of restorative justice which is different from formal criminal justice is the "symbol of restoration", or the true meaning of justice that is sought-after. The aim of the restorative justice is to repair the harm caused by crime. The purpose of the approaches in restorative justice is to heal the harmed participants and the damaged social relationships. Punishment is not excluded from restorative justice, because a certain level of punishment functions in the process of "repairing" and "healing" in certain circumstance. The deprivation of rights of the convicted persons in punishment is not the necessary result of the restorative justice process. Some forms of punishment,

[37] Carrie Menkel-Meadow, 'Restorative Justice: What is it and Does it Work?' (2007) 3 *Annual Review of Law and Social Science* 161.

such as monetary compensation, apologies, and community services, which contain symbolic meaning to heal, are crucial components of restorative justice. The variety of options in restorative justice offer different possibilities to the whole process. These options must serve the purpose of restoration. In formal criminal justice, there are foreseeable results as the solution of the case at hand. The defendant may "win" the competition, and consequently the judgment of the court will pronounce that there is no punishment. If the prosecution "defeats" the defendant in court, certain forms of penalty will be the conclusion of the judgement. Formal criminal justice focuses mainly on the elements in relation to "punishment", including the reasons to inflict punishment and for proper sort of punishment. Perhaps formal criminal justice pays attention to "restoration" as well, if one regards "sentencing" as restoring law and order. However, such "restoration" aims at protecting the dignity of the authority, not the interests of individuals who are affected by the crime.

Finally, from these three factors it can be concluded that restorative justice provides all participants with a chance to "accept" and "acknowledge" the occurrence of crime, and the responsibility thereof respectively to each person. This is the view of accountability in restorative justice. The basis of restorative justice is that all parties in the process should be engaged with consciousness in the holistic picture of the crime. Offenders recognise the crime committed by them and the harm that the criminal act has caused. As well, victims can express true feelings about the crime and that the other participants review the whole case and share their experience. Regret, forgiveness, and reconciliation are also non-compulsory but important targets. Hence, "acknowledgement" will be the key point throughout the whole restorative justice process. In formal criminal justice, however, the nature of the judicial process is "confrontation". It is not easy for defendants to accept that they have committed crime because by doing so they face certain criminal penalties. Normally, they will make the best use of all the evidence and their procedural rights to prove that they are "innocent",

even though in many cases there is sound evidence for their guilt. The right of "denial" which is bestowed by the law makes it difficult to access truth through criminal procedure. The denial itself by the offender is not helpful in providing comfort to either the victims or the offenders because they always treat each other as enemies. In addition, the fracture of their relationship may be further deteriorated in the course of the criminal procedure, since they stand on opposite sides and do not intend to move closer. When a case concludes, the court may feel that the "job" has been "done", but it can hardly assert that the issues arising from the crime have been "resolved".

Restorative justice and transitional justice

The concept of restorative justice discussed above mainly focuses on the usage at the national level. Usually, restorative justice is studied by researchers who work towards making an amelioration or improvement to the criminal justice system in a country. In other words, the main purpose of studying restorative justice is to help the national judiciary to have a better understanding of crimes and criminal statistics, to try and find other paths to solve the problems that formal criminal justice is unable to, or has difficulties handling. Restorative justice, in most cases, needs to be subject to domestic law, or at least must find itself an appropriate position in the whole framework of criminal justice without causing unnecessary conflicts with criminal law. Restorative justice under these circumstances is carefully designed for crimes without international characteristics.

However, typical restorative justice may not be directly applicable to solving international crimes. In international crimes, the victims are usually the people of a whole group, or even the majority population of a State. International crimes can also be committed across the territory of different countries, causing jurisdictional conflicts among several States. For achieving restoration in post-conflict States, there needs nationally wide reconciliation programs to bring restorative justice.

Restorative justice in dealing international crimes is usually seen as one part of transitional justice.[38] Transitional justice and restorative justice are often wrongly understood as the same in certain situations. Transitional justice is used in countries that have experienced democratic transitions primarily following armed conflict, for example in Latin American countries[39] and former Soviet countries. A very early formulation of this term is found in the book *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*[40], published in 1995. The term "transitional justice" was used to describe the transformation of the government and the political systems from autocracy to democracy in States during the time of "transition".[41] However, the definition was not fully discussed in that book. On the website of the International Centre for Transitional Justice (ICTJ), transitional justice is defined as

> "[T]he set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms."[42]

In one report of the United Nations Secretary-General (UNSG) in 2004,

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[38] One example is the transition in Uganda. See International Center for Transitional Justice, 'Confronting the Past: Truth Telling and Reconciliation in Uganda' (2012); Michael Otim and Kasande Sarah Kihika, 'On the Path to Vindicate Victims' Rights in Uganda: Reflections on the Transitional Justice Process Since Juba' (ICTJ 2015). Also see Joanna R. Quinn, 'Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice' (2007) 8(4) *Human Rights Review* 389; Jackee Budesta Batanda, 'The Role of Civil Society in Advocating for Transitional Justice in Uganda' (2009), *Institute for Justice and Reconciliation*, South Africa; 'Towards A Comprehensive and Holistic Transitional Justice Policy for Uganda: Exploring linkages between transitional justice mechanisms' (2013) *Avocats Sans Frontières (ASF)*.

[39] See Norberto Bobbio, *The Future of Democracy: A Defence of the Rules of the Game* (University of Minnesota Press 1987). Also see Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991); Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31(2) *Human Rights Quarterly* 321.

[40] See Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (US Institute of Peace 1995).

[41] Ruti G. Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69.

[42] See ICTJ, 'What is Transitional Justice?' < https://www.ictj.org/about/transitional-justice> accessed 5 June 2014.

transitional justice is described as

> "[T]he full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[43]

Those two expressions are very similar to each other, both underlining the central point of redressing the "legacies of large-scale of human rights abuses". It is not emphasised in the UNSG' expression that transitional justice consists of both formal legal justice and alternative ways. Rather, the ultimate goals of transitional justice have been strongly linked with accountability, justice, and reconciliation, which suggests that transitional justice practices are not limited to judicial measures. The definition given by the ICTJ sets equal importance to judicial and non-judicial measures, and specifically notes that transitional justice practices may vary according to different countries' situation. Nevertheless, non-judicial measures are often included in transitional justice to achieve reconciliation, thus, being restorative is the outstanding characteristic of transitional justice.

Transitional justice shares two main similarities with restorative justice. They both accept the goal of restoration. The noteworthy aspect of this similarity is that they emphasise the significance of inclusive and non-adversarial frameworks which seek to prevent past acts from being recommitted.[44] The other similarity is that they both agree that multiple measures, rather than pure legal procedure, are essential for achieving the goals. Compared with formal criminal justice, transitional justice and restorative justice accept the form of dialogue between victims and the perpetrators, something that will

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[43] UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616.

[44] Rodrigo Uprimny and Maria Saffon, *Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Columbian Case* (National University of Colombiam 2006).

not be considered in a punitive punishment-allocating exercise.[45]

In fact, since both judicial approaches and non-judicial methods are available to transitional justice, restorative justice can be deemed as one component of transitional justice. In transitional justice, approaches like truth-telling, reconciliation of victims and perpetrators as well as reparations are practices featuring "restorative justice"; institutional reformation and rebuilding of law are methods to recover the authority of the state; indictment and prosecution (including both domestic prosecution and international prosecution) of criminals are the processes of formal criminal justice. The paradigm of transitional justice also consists of historical justice, reparatory justice, administrative justice, and constitutional justice[46]. With the effort of internal institutes and the assistance from external supports, the country under transition could take judicial and non-judicial processes into its mechanism to make progress in rebuilding democracy.

Furthermore, transitional justice should also carefully handle the causes of conflicts from their roots, and take human rights values into account.[47] In other words, exercising transitional justice is in no way easier than establishing a new country. The truth is that it may be even more complicated than building up a new country, usually because it has to settle the scattering dark clouds of the past in the first place and then make a blueprint for the future. Transitional justice must manage all the factors holistically in order to bring about a promising result. In this sense, restorative programs are needed to solve the problems that legal justice cannot handle.

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[45] Ruti G. Teitel, 'Transitional Historical Justice' in Lukas H. Meyer (ed.), *Justice in Time: Responding to Historical Injustice* (Nomos Verlagsgesellschaft, Baden-Baden 2004), at pp.80.

[46] See Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2000).

[47] UN Secretary-General, *Guidance Note of the Secretary-General*: *United Nations Approach to Transitional Justice* < https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf> accessed 11 February 2015.

This can also explain why restorative justice is often confused with transitional justice. To most people, formal legal justice is more familiar than restorative justice and transitional justice. When speaking of justice, the common impression among people is that criminal cases shall go through a system which consists of police, prosecutorial procedure, and criminal trial. It seems as if only restorative justice represents the core of transitional justice because it differentiates itself from formal criminal justice. And because formal criminal justice is so well known to the public, the restorative feature of transitional justice turns out to be more noticeable for its uncommonness. This common recognition about criminal justice leads to a confusion between transitional justice and restorative justice.

As a result, it must be pointed out that restorative justice is similar to, but different from, transitional justice. For restorative justice, the goal of achieving restoration is at the centre. For transitional justice, restoration is one of the many goals that transitional justice aims at. The pivotal goal of transitional justice is to address "legacies of large-scale human rights abuses". Transitional justice requests that restorative approaches must be contributory to this goal. It means that if restoration is deemed as an obstacle to the goal of transitional justice, albeit it is not observed yet in many cases, then in principle it has to be changed or even rejected. Restorative justice can play a vital role in helping countries that are in a period of transition, if all the necessary conditions have been provided. But it is also possible that restorative justice has a negative impact on the transition process. For example, there is a voice to the Truth and Reconciliation Commission in South Africa that it did not achieve genuine forgiveness and restoration. Because the restorative process in South Africa was only used as the "method" rather than the "purpose", forgiveness and reconciliation may have not been successfully reached.[48]

[48] See Deborah Posel, 'The TRC Report: What Kind of History? What Kind of Truth?' (University of Witwatersrand 1999); Jennifer J. Llewellyn and Robert Howse, 'Institutions for Restorative Justice: The South

Restorative justice and transitional justice also have different scopes. Restorative justice pursues holistic harmony for order and relationship between individuals inside the community. It contributes to re-build the social bond between people within a certain area where common values and ideas are shared. But its impact may not be great between the people to whom the core social values are significantly different. Consequently, restorative justice may not always work to ensure a just settlement of the disputes. And it is where formal criminal justice plays a better role. The truth is, for many academics, restorative justice is one substitute for formal criminal justice system, when formal criminal justice does not work well, but not a trigger of reformation or reconstruction of the entire criminal justice.[49]

Transitional justice is used to redress the conflicts between different political factions, cultural and religious groups, and even States. In many examples, such as South Africa, Rwanda, Uganda, Democratic Republic of the Congo, where transitional justice is required or is being applied in reality, the approaches of restorative justice function as part of the transitional justice process. Within the bigger plan, restorative justice does not generally operate outside the context of transitional justice in post-conflict situations. Normally, restorative justice, along with other judicial proceedings, contributes to transitional justice. That is why many transitional justice is often characterised with restoration but does not appear a pure restorative justice forum. From this standpoint, restorative justice is associated with transitional justice but the two are

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African Truth and Reconciliation Commission' (1999) 49(3) *The University of Toronto Law Journal* 355; Paul Van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52(2) Journal of International Affairs 647; Debra Kaminer, Dan J. Stein, Irene Mbanga and Nompumelelo Zungu-Dirwayi, 'The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses' (2001) 178(4) *The British Journal of Psychiatry* 373; Milmot Jamnes and Linda Van De Vijer, *After the TRC: Reflections on Truth and Reconciliation in South Africa* (Ohio University Press 2001); Mahmood Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)' (2002) 32(3-4) *Diacritics* 33; Audrey R. Chapman and Hugo Van Der Merwe (eds.), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania 2008).

[49] Thomas Trenzck, 'Within or outside the System? Restorative Justice Attempts and the Penal System' in Elmar G. M. Weitekamp and Hans-Jurgen Kerner (eds), *Restorative Justice in Context: International practice and Directions* (Willian Publishing 2003).

not the same.

The other difference between restorative justice and transitional justice lies in its influence upon the people involved. Restorative justice focuses largely on individual accountability of all offenders. Only when as many offenders as possible are involved, will the efforts to despite the whole scenario of the crime be meaningful. Offenders, together with victims, express their feelings from different angles. Words from both sides can be crucial to achieving the goal of restoration through revealing the truth and together revisiting the stories of the past.[50] It is important for all the parties to understand the holistic view of the committed crime before they start to communicate with each other. And only when all participants enjoy the same status in the process will such communication reach a positive result. However, for transitional justice, getting all offenders involved may not be an option. It is uneasy and unrealistic to expect the powerful perpetrators to participate in a transition process in the same way as other normal persons. As a result, there may not be a equalised position for all the participants in the transitional justice process. In countries that have experienced democratic transition, the primary phase of transitional justice is not to discover the whole situation of human rights violations in the past, but to reform the national institutions and to make sure that transitional justice is able to continue.[51] The perpetrators of international crimes may be needed for the national transition.

For example, in Argentina, after the return to democracy in 1983, the former military leaders still remained in power, making it very difficult to take personal

[50] Richard J. Goldstone, 'Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals' (1995-1996) 28(3) *New York University Journal of International Law and Politics* 485; The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)' (2 October 1997) UN Doc E/CN.4/Sub.2/1997/20/Rev.1; The UN Human Rights Council, 'Right to Truth' (18 September 2008) UN Doc A/HRC/RES 9/11; Eduardo González and Howard Varney (eds), *Truth Seeking: Elements of Creating An Effective Truth Commission* (ICTJ 2013), at pp. 4.

[51] There appears a diversity in transitional justice of different countries. But the process of institutionalisation is usually the first mission. See Elin Skaar, Camila Gianell Malca and Trine Eide, *After Violence: Transitional Justice, Peace and Democracy* (Routledge 2015).

accountabilities of them and their minions. In such circumstances, getting involved in the processes of transitional justice of the people who are in charge of great power of a country would not be a safe choice. In short, transitional justice depends upon political changes, so there may not be equal status for normal citizens and political leaders in taking part in transitional justice. Whereas restorative justice requires equal conversations between all participants, regardless of some people's special position in society.

It is also argued that the meaning and value of restorative justice are not totally the same as transitional justice.[52] Restorative justice is not limited to mass-scale conflicts between groups of people. Instead, in respect of conflict, it focuses more on the nature and causes of the conflicts between individuals. Transitional justice process usually pays attention to bigger issues that involve group interests, collective remedies, and political transition of a state, in which both victims and offenders get involved to the processes on the behalf of their group. In restorative justice, the personal feelings and the chance to express through participating the process is pivotal. In transitional justice, the role of individual feeling and participation sometimes can be shadowed by decisions made by the group or political interests. Hence, despite that restorative justice is often one component in the whole transitional justice of a state, it can still achieve something beyond the scope of transitional justice, particularly the sense of restoration at individual level. Where the participants of transitional justice may have to take the collective reparation without a chance to express personal feelings, restorative justice can function as a supplemental part. Restorative justice concentrates on individual feelings. By contrast, transitional justice highlights the importance of social stability.

[52] See Charles Villa-Vicencio, 'Transitional Justice, Restoration and Prosecution' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice* (Routledge 2006), at pp. 369; Rodrigo Uprimny and Maria Paula Saffon, 'Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case' (National University of Colombia 2006), *'Coming to Terms' with Reconciliation - Working Paper Library*; Kerry Clamp and Jonathan Doak, 'More than Words: Restorative Justice Concepts in Transitional Justice Settings' (2012) 12 *International Criminal Law Review* 339.

This means that transitional justice involves more forms of practices, and restorative justice applies to more occasions.

3. The scope and limit of this study

Integrating restorative justice can be understood in two directions that are guided by the "purist" view or "maximalist" view. It can be discussed in the meaning to apply restorative justice practices to the justice mechanism at the ICC and create a new mechanism. Or, it can be considered as combining the idea of restorative justice with the ICC's justice procedure, and reshape the meaning of justice into an ideology beyond legalism. This study will not discuss the way to purely apply restorative justice practices to the ICC's legal mechanisms, or the method to replace the existing format of justice at the ICC. These are the matters that are essentially technical in nature. Introducing restorative justice practices into formal criminal justice is still in progress in most of the countries. The major format of criminal justice has not been altered globally. In the area of international criminal law, the synergetic combination of these two different mechanisms may not come true in the coming future.

Even the technical issues in legislation can be overcome, the reality does not allow fundamental changes to the substantive law or the procedural law at the ICC. One reason is that the ICC is always seen as the precious heritage of the international tribunals against the crimes during the World War II, particularly the International Military Tribunal at Nuremberg (the Nuremberg Trials).[53] The core and the special status of the ICC in the field of international criminal justice has decided that the rudimental rules, which relate to both the procedure and the structure of the court at the ICC, are hardly to be changed. Another reason is that in practice, both the formal

[53] Philippe Kirsch, 'From Nuremberg to The Hague', at The Nuremberg Heritage: A Series of Events Commemorating the Beginning of the Nuremberg Trials (Nuremberg 19 November 2015).

criminal justice at the ICC and restorative justice mechanism are designed to address the issues relating to the personal responsibility in the prosecuted crime with limited number of parties concerned. The procedure of formal criminal justice and the approaches in restorative justice, ordinarily, are not prepared for atrocities like mass violence. That is why international criminal justice is frequently supplemented by state activities, such as national reconciliation and memorial, and restorative justice is often imbedded into transitional justice. There exists no precedent of an international criminal tribunal which has replaced the formal legal procedure with restorative justice mechanism. The ICC is not likely to be the frontier of such attempt.

As a consequence, this study will only focus on integrating restorative justice idea into the ICC's work. It is not to ask the ICC to abandon the existing legal procedures, but to encourage it to adopt some new thoughts on justice. One significant thought in restorative justice is that severe crimes cause grave harm and therefore should require sincere restoration. There exists a direct correlation between the severity of the crime and the need for restoration. If this thought is sound and logic, the ICC needs to learn from restorative justice idea because international crimes within the jurisdiction of the ICC are the most serious crimes for humanity and the whole world.

To integrate restorative justice idea to the ICC's work includes many aspects. This study aims at the difficulties in achieving justice and peace into the societies suffering from mass violence, which urges a creative mode of justice, and examine the possibilities and necessities to combine restorative justice and formal criminal justice together at the ICC in attaining a more productive resolution of international crimes. By learning from restorative justice idea, the meaning of justice in ICC law will be enriched.

Not many studies have gone deep into this question. What is even less researched is the provision of a blueprint to make the legal proceedings at the ICC more restorative.

Nancy A. Combs suggests in her study on guilty pleas in different international trials that restorative justice, values and principles have been included with or without special intention in some aspects of international criminal justice, such as truth-telling, victim participation at trial, and reparations to victims and harmed communities. The contribution of her research helps to discover the existing clues of the application of restorative justice in modern international criminal justice. In her conclusion she expresses her disappointment in international criminal law in paying insufficient attention to victims and the life in post-conflict states, and implicitly criticises the obstinate compliance of the international community with legalism as the price of sacrificing victims' interests. Recalling Article 21(1)(c) of the Rome Statute, which states that the Court may apply national laws and even legal principles of the concerned state, provided that such laws or principles do not constitute a violation of recognised international laws and other norms in the Rome Statute, the views in her study provide a remarkably improved lens for considering the potential of restorative justice in international legal mechanisms.[54]

Another study which addresses how to apply restorative justice ideas in the ICC's legal proceedings concentrates on the retributive aspect of the ICC's justice and the benefits of introducing more restorative values into it. Mark Findlay and Ralph Henham compared the two most predominant modes of trial, the British mode and the Italian mode, the Common law system and the Roman Law system, and pointed out that the different forms of the two systems in criminal justice do not make either of them better than another; rather, it is the cultural elements behind the trials that decide the effectiveness and consequences of justice. They mainly consider restorative justice as a form of victim participation, and state that the conceptualisation of sentencing in formal criminal justice, including the proceedings at the ICC, must scrutinise the

[54] Nancy A. Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford University Press 2007).

influence of the idea of victim rights. The authors themselves admit that they do not offer any concrete plan for the ICC on how to integrate restorative justice. Rather, they outline several general parts that need to be improved to include more victim participation and more functional roles for communities.[55]

There is a wide range of topics relating to restorative justice and the ICC, such as whether the ICC is political, how the ICC is dependent on the UN Security Council, and how to understand the principle of "complementarity" of the ICC. These questions also cause many problems to the work and to the validity of the ICC's intervention. However, these topics do not necessarily connect to the possible improvements that restorative justice can make to the ICC. In the contrary, some of those topics, such as the "complementarity" issue in the ICC's work, pose restorative justice and the ICC on two opposite side and expose the ICC to the risk of being marginalised. That is because in those topics restorative justice is viewed differently from the position of this study, and the restorative justice approaches discussed in researches on those topics are designed and managed in domestic programs, not in the ICC's work. It is unreasonable to consider the discussions about restorative justice in the topics where restorative justice has not been examined as one part of the Justice at the ICC. The purpose of this study is not to accomplish an "encyclopaedia", discussing all the details of restorative justice and the issues restorative justice in dealing with international criminal cases. It is only essential to examine the political issues, the problem of complementarity, and the impartiality of the ICC when they are closely related to restorative justice, and fall into the themes of peace, justice, and the need of victims.

For example, the issues related to complementarity of the ICC involve the discussions on restorative justice, but not all its discussions are relevant to the themes

[55] Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Routledge 2011).

of this study. The principle of complementarity indicates the basic order of domestic courts and the ICC to take the perpetrators of international crimes into account. Article 1 of the Rome Statute regulates that the ICC "shall be complementary to national criminal jurisdictions". This article is one legal basis of complementarity. Generally speaking, according to Article 17 of the Rome Statute, the complementary role of the ICC will be triggered when national justice is unable or unwilling to deal with the international crime[56]. The number of studies particularly on the theory and practice of complementarity of the ICC has been quite abundant. [57] But studies on complementarity either focus on whether the ICC also needs to remain complementary to the restorative justice processes of a State or, the political impartiality of the ICC in dealing different situations. The former, as it has pointed early in this chapter, does not consider the possible effect of restorative justice within the ICC's work The experience in relation to utilising restorative justice outside the ICC shall be learned as a guidance, not a tool to weaken the role of the ICC.

The latter aspect of the complementarity issue marks the influence on the ICC from other political power. As for the issue of political influence, several studies express concerns about the ICC, pointing to its association with the Ugandan government, and its targeting of rebel groups rather than both sides in the conflict.[58] Similar debate has also been seen in studies of other international criminal tribunals.[59] The "bias" of the

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[56] See William W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49(1) *Harvard International Law Journal* 53.

[57] For example, see Jann K. Kleffner and Gerben Kor (eds), *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (T.M.C Asser Press 2006); Mohamed M. El Zeidy, *Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff 2007); Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011); Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013).

[58] Sarah M. H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21(4) *The European Journal of International Law* 941.

[59] See Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International

ICC has been attributed to political influences.[60] Studies have shown that external political influence on the ICC derives mainly from international politics and is almost evitable, which can be witnessed in almost every aspect of the ICC's work.[61] Perhaps the reasons why the ICC cannot isolate itself from politics are that international laws is inherently political to an extent, and that international law is not powerful enough to overcome the motivation of states to show the citizens and the outside world that the government is able to solve its problem in the state's own ways.[62] The will of States to achieve justice in their own ways may relate to political considerations, but also urges for restorative justice in making peace and justice for victims, since restorative justice practices are not often regarded as a "typical" legal justice of the West. Therefore, although it is not the focus for this study to examine the external political influence to the ICC, the reasons inside the influence that are in relation to restorative justice will be discussed.

4. Methodology and the original contribution

The common research methods in legal study are used as the main methodology. Firstly, this study will rely on theoretical analysis in the major body. The analyses provide necessary theoretical basis for the discussions in all the chapters. Secondly, case study and historical analysis are utilised in chapter 2 and 4, as well as the making of different international rules, to clarify the lessons that must be learned from different

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Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 *Journal of Human Rights* 213.

[60] See Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (Torkel Opsahl Academic EPublisher 2015).

[61] See David Bosco, *Rough Justice: The International Criminal Justice in a World of Power Politics* (Oxford University Press 2014).

[62] See Francis Anthony Boyle, *World Politics and International Law* (Duke University Press 1985); Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004); Jack L. Goldsmith and Eric A. Posner, *Limits of International Law* (Oxford University Press 2005); Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press 2008).

situations under the jurisdiction of the ICC. These analyses enable the discussions with enough details in real cases so that it will be more meaningful in considering the impact of restorative justice to the ICC. Thirdly, this study uses many comparative analyses to prove that restorative justice is both possible and necessary for the ICC to consider in order to make improvements in its work and to avoid to be marginalised in fighting international crimes. Fourthly, this study deeply analyses international law and its legislative processes to understand the original purpose and the logic behind the legislation. Relevant quantitative and qualitative studies are referred in almost all chapters and support necessary inform to the discussions and analyses in this study.

A literature review is not confined to one single chapter because this study combines international criminal law with restorative justice, which requires materials in both legal studies and criminology. Rather, the existing research materials, including academic articles, legal provisions, and relevant books, will be assessed or analysed in every chapter for developing the discussions.

In general, the original contribution of this study can be summarised into three points. First of all, this study innovatively explores the topic of combining restorative justice idea and international criminal justice in one organisation. The role of restorative justice in fighting against international crimes has increasingly drawn attention from academics, which means that the idea of restorative justice would become a noteworthy option in this area. However, the growing interests in international criminal justice on restorative justice may have covered some crucial issues. Restorative justice has currently been practiced by national institutions in many countries to deal with the large scale violence and serious human rights, but it has not been used in any international legal organisation. The significant reason for such reality is that the mechanism of restorative justice has been supported for criminal justice renovation or even

alternation,[63] which, in suggestion, is not quite compatible to formal criminal procedures. In domestic legislation, albeit restorative justice has gained popularity among criminologists and politicians aiming at crime reduction, it has not been fully imbedded into formal criminal justice in many countries. For example, in UK (the United Kingdom), more specifically in England and Wales, Part2 of Schedule 16 in the Crime and Courts Act 2013, which came into force in December 2013, introduces criminal courts the power to trigger restorative justice activities when certain requirements are met.[64] But the legal provisions in this new schedule does not provide enough details for applying restorative justice, and only associates with the pose-sentencing proceeding, not the whole procedure. On international level, restorative justice practices are specifically seen in transitional justice. The most renowned example of restorative justice utilised in post-violence transition is the practices in the Truth and Reconciliation Commission (the TRC) in South Africa,[65] which is still encouraging scholars to assess the effects in several aspects. The *Gacaca* courts in Rwanda, which is another example, combined restorative justice with local traditions. But those practices, successful or not, have not made restorative justice applicable at the international level. The distance between restorative justice and international criminal justice needs to be shortened. This study analyses the possibility and necessity of utilising restorative justice at an international organisation, the International Criminal Court, a subject that has not been addressed in detail by researchers.

The second original contribution of this study is that it manages to discover the connections between restorative justice and the ICC's legal framework. In most studies, restorative justice has been juxtaposed with international criminal justice as they are

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[63] See in John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002).

[64] Part 2, Schedule 16, Crime and Courts Act 2013.

[65] Gerry Johnstone, 'The Agendas of the Restorative Justice Movements' in H. V. Miller (ed.), *Restorative Justice: From Theory to Practice* (Emerald Group 2008) 59, at pp. 69.

mutually contradictory because of the reality that is discussed in the last paragraph. Usually, restorative justice represents "peace", and international criminal justice stands for "justice". The ICC's role in delivering justice has been considered as sacrificing the right to peace for local people, which has been debated in the situation of Uganda and other situations. However, the relation between restorative justice and peace is not fully discussed, and the influence of the justice at the ICC to peace awaits a deeper analysis, since it is widely asserted that the ICC is not concerned with promoting peace. The President and the Prosecutor of the ICC have claimed that the ICC's work is important to maintaining peace and it has been admitted that the "peace" shall be understood as "sustainable peace",[66] This study opines that the "common/social bond" between people shall be the core of peace, and shall link the ICC with restorative justice. In addition, many studies have discussed the meaning of justice at the ICC and the ways to achieve international justice, but little attention has been devoted to factors in setting the penalty and the purposes of punishment. The justice mechanism at the ICC concentrates on giving convicted perpetrators proper deserts and achieving deterrence. There are serious problems with both aims, but this has not been explored by researchers. This study points out the existing and potential problems for the ICC in delivering justice to victims and the international community after comparing different cases, historical elements and cultural diversity, and suggests that by using restorative justice the ICC can make improvements in these areas. In short, this study connects the ICC and restorative justice in both the spirit of peace and the meaning of justice.

Thirdly, it carefully examines the most noteworthy features of international crimes, and explains the role of restorative justice in making improvements to the ICC's work. There has been a great attention paid to the impact of the ICC in international criminal

[66] See the Deputy Prosecutor of the ICC, 'Transitional Justice in Colombia and the Role of the International Criminal Court" (13 May 2015) and the President of the ICC, "10 years after the Nuremberg Declaration on Peace and Justice: 'The Fight against Impunity at a Crossroad'" (20 October 2017).

cases and restorative justice processes at domestic level separately, suggesting to utilise the two on parallel tracks rather than to conjoin them. However, because restorative justice is usually practiced according to the local values and traditions, such suggestion means that the ICC needs to manage to weigh every tradition and choice within the meaning of the complementarity principle that is established in the Rome Statute of the ICC. This argument will marginalise the role of the ICC in fighting against international crimes since restorative justice is often linked to granting amnesty which will make less effective the effort of taking the personal accountability of the perpetrators of international crimes.[67] In addition, although restorative justice may have occurred in the processes dealing with international crimes in many cases, the idea of restorative justice may have been misinterpreted. Criminologists understand restorative justice in two ways, which either focuses on the core or highlights the form. But they have not carefully considered what restorative justice means to international criminal justice. That is because there are so many differences between domestic crimes and international crimes. One difference is that domestic crimes do not cause damage as huge and terrifying as international crimes do. Another difference is that when facing international crimes, judges must ponder the very complicated background of historical and cultural elements, which is not normally the case in domestic courts. Consequently, the gap between understanding restorative justice and international criminal justice has not been narrowed yet. This study attempts to confront this gap and to figure out the correct way to overcome such a pitfall.

5. Summary

This chapter is an introduction to the research topic. It briefly introduces the International Criminal Court and the argument of improving its work through

[67] See Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Law Review* 69.

restorative justice in academy. Different opinions on the definition of restorative justice have been discussed. It concludes that the “maximalist” view of restorative justice, which focuses on the core value of restoration, will be the utilised in this study. The chapter also compares restorative justice and transitional justice, and clarifies the scope of restorative justice that will be guiding the discussion in following chapters.

Chapter 2: Unfolding the Criticism toward the ICC

The first chapter has introduced the difficulties for the ICC to maintain peace and achieve justice. In fact, the argument- peace versus justice- has been long haunting international criminal justice. This chapter selects three situations where the ICC has initiated its work, and two situations in which *ad hoc* tribunals took the role of delivering justice. All the selected situations have undergone transitional justice, and restorative justice approaches have been utilised in some aspects of the national transitions. In all the situations, formal justice process at international courts has been operated as a separated platform from the restorative justice process which has been practiced in domestic justice programs.

The situations in Uganda, Sudan and DRC all have their own special features and generally reflect relationship between the justice at the ICC and domestic approaches. The three ICC situations will be examined to expose the current problems in ICC's work, especially those in relation to peace, justice, and the need of victims. The situations in Rwanda and in Sierra Leone are the selected as the situations being dealt at *ad hoc* tribunals. The two situations that are outside of the ICC's jurisdiction are analysed as the comparative examples to the ICC, because they also managed to balance the work of formal criminal justice and restorative justice in facing the most serious crimes for humanity. Albeit the latter two situation are not about the ICC or the restorative justice in the territory of the States where the ICC involved, they provide precious lessons for the ICC to consider the proper way to react to the claim of supporting restorative justice in international criminal case and to interact with restorative justice idea.

1. The situation in Uganda and the critiques

The tragedy of the Ugandan civil war and the intervention of the ICC

Uganda is one of the earliest States that joined the ICC. It signed the Rome Statute on 17 March 1999, and deposited its instrument of ratification of the Rome Statute with the Secretary-General of the United Nations (the "UN") on 14 June 2002. Given the history of the Ugandan civil war, Uganda's early supportive attitude to the ICC clearly demonstrated that the government had a strong will to cooperate with the ICC and to solve the issues caused by armed conflicts with international law. One of the reasons for such steady support might be that the whole state had been ruined by a series of armed and non-armed conflicts subsequent to its attaining independence. Ugandan people, as well as the Government, needed a peaceful time and environment to recover from the pain and develop their country. What had been expected by the Ugandan people was not only to survive the civil war, but also an opportunity to achieve a stable environment in order for them to possess a better future. The desire to solve the internal problems resulting from gross violations of human rights and to bring peace and justice was the one of the original motivations for Uganda and its people to ratify the Rome Statute and become a State Party of the ICC[68], which is also "a concern to the international community as a whole"[69] as stated in the *Draft Statute for an International Criminal Court* which was completed by and adopted at the International Law Commission (ILC) in 1994. Another reason, apart from the good will and hope, could be the reality that the Ugandan government at that time was not able to effectively deal with its internal intense turmoil, in particular the conflict in northern Uganda with

[68] See the statement of Mr. Kirabokyamaria, representative of Uganda, in 'Summary Records of the 8th Plenary Meeting' (18 June 1998) UN Doc A/CONF.183/2/Add.l and Corr.l in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records,* vol. II, UN Doc A/CONF.183/13.

[69] ILC, 'Draft Statute for an International Criminal Court with Commentaries' in *Yearbook of the International Law Commission, 1994*, vol. II, Part 2, pp. 27.

the Lord's Residence Army (LRA).

A series of conflicts between the Ugandan government and the LRA was probably the most tremendous aspect in the Ugandan civil war. The LRA, all of whose members the Ugandan government considered as rebels, was then organised by Joseph Kony, the Commander-in-Chief of the LRA who claimed himself to be a "spirit medium". At its early stage, the group was immature in both its organisation and its military force, and appeared nameless. Joseph Kony first gathered a large number of followers through means of spiritual control. The mind-control made the followers obey any order without hesitation, and imitate the activities of other groups which were not satisfied with the Government's policies and actions. For most of his followers, the appearance of the so-called "Holy Spirit" was convincing enough for them to abide by his words and comply with his commands. Soon they were trained by some top leaders of the LRA and were transformed from normal civilians into soldiers, and then sent to fight against the Ugandan government army. Then Joseph Kony realised that the name "Holy Spirit" itself would not be powerful enough to win a political position, and he aligned himself with other military and/or spiritual groups, so that he would not be singled out by the Government as the main target. On the other hand, he slowly recruited some soldiers who belonged to other groups that had been defeated by government forces. Furthermore, since the mid-1990s, he received political and military support from the Sudanese Government for fighting against the Ugandan government at that time. And finally in 1998, Joseph Kony changed the name of his group into the "Lord's Resistance Army" which is the name known to all. Still, neither its number of soldiers was enough to fight against the government army nor its warring equipment was compatible to that of the government's. Therefore, the LRA decided to take other actions to further strengthen its force, which included the abduction of children. It is believed that by 2004, more than 20,000 children had been abducted by the LRA to serve in military

force in different forms.[70] After being trained through many ways, these children were forced to fire at the people who stood in their way, including those who came from the same communities where the child soldiers grew up.

Another problem for the Ugandan government to end the conflict with the LRA by military force was that the LRA used guerrilla assaults as the main strategy to execute its purposes by hiding in the bushes in the northern part of Uganda. In 1991, the Ugandan government started a military action called "Operation North", aiming at suppressing the rebellions in the northern part of Uganda. If everything had gone on as planned by the Ugandan government, this military action would have completed its mission within a short time. The Ugandan army was always trying to have a face-to-face fight with the LRA. However, the LRA soldiers did not come out from the bushes and for head-on confrontation with the government army. They used the clever tactics which had been proven effective and efficient for weaker military groups to fight against those stronger. The form of guerrilla warfare made it hard for the Ugandan government to finalise the war quickly. And the "Operation North" eventually failed by 1992.

The LRA's advantage in the conflict with the Ugandan government at the early stages was that the local people, mainly the Acholi, supported the LRA and antagonised the government forces. The turmoil was not simply caused by economic reasons. Instead, the hatred between "northerners" and "southerners" was one key reason behind that civil war, which fits the characteristics of the conflicts that start from ethnical issues and then develop into geographical campaigns. In addition, the dominant party of the Ugandan government and its military force was renowned for its brutality and violence in both armed conflict and retaliation against the civilian population who were accused

[70] Will Ross, 'Forgiveness for Uganda's Former Rebels', *BBC News* (Uganda, 25 October 2004) < http://news.bbc.co.uk/1/hi/programs/from_our_own_correspondent/3951277.stm > accessed 22 March 2014.

of assisting rebel groups. As a consequence, the civilian population in Uganda, especially in the north part, were not keen to offer any active support to the Government. The Government was composed of perpetrators of international crimes just like the LRA. The immediate solution for the conflict with the LRA was not a possible option at that time for the Ugandan government. However, while the conflict continued, the LRA rebels started to use violence toward the people who took part in local defence. The astonishing crimes committed by the LRA rebels against local people included mutilations and brutal killings. Since the Ugandan government could not end the civil war quickly, and the Ugandan people in the northern part were suffering from grave violence, there had to be another way to terminate the atrocities and protect the hope for peace and justice.

The first effort was through a peace agreement between the Government and the rebel groups. During 1993 and 1994, a series of peace talks were organised between the LRA, other rebel groups, and the Ugandan government. During the negotiations, amnesty to the LRA rebels was required by the LRA leaders. After committing those atrocities , Joseph Kony justified the violence by asserting that the people, who had taken defence actions, had to be blamed for misinterpreting the "commandments" in the Bible[71]. The attempts of all negotiating parties behind the cease-fire in this peace process were not for the better future of the country or for a peaceful life of the people. The Government, ruled by President Yoweri Museveni, already considered the predominant political power, hoped the peace talks could further strengthen its advantage over the other parties. Other parties, all equipped with weaponry and military force, wanted to weaken the ruling party's control over the Government so that they could share some benefits brought to them by political means. Because they had no

[71] Balam Nyeko and Okello Lucima, 'Profiles of the Parties to the Conflict' (2011) < http://www.c-r.org/downloads/Accord%2011_3Profiles%20of%20the%20parties%20to%20the%20conflict_2002_ENG.pdf > accessed 18 May 2014.

desire to make compromises, the peace talks moved arduously, and the whole situation became more and more complicated. In February 1994, the negotiations broke down, and the mutual attacks among the different parties brought them back to their old trajectory. The subsequent conflicts lasted for at least another ten years, and thousands of innocent people were displaced, seriously injured, and hundreds of children were abducted as a result. The Ugandan government, while trying to disarm the captured rebels, continued to increase attacks against other military groups.[72] It sought help from international authorities, turning to another endeavour, realistically and politically. The Ugandan government actively communicated with the then Prosecutor of the ICC, and explained its "motivation" as

> "Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise to global justice. Uganda pledges its full cooperation to the Prosecutor in the investigation and prosecution of LRA crimes, achievement of which is vital not only for the future progression of the nation, but also for the suppression of the most serious crimes of concern to the international community as a whole."[73]

Consequently, in December 2003, President Yoweri Museveni of Uganda decided to refer the crimes committed by the LRA to the Prosecutor of the ICC. President Museveni had a meeting with the Prosecutor in London, and negotiated the pattern for co-operation between the ICC and Uganda in the future. Thus, with the support and mediation of European powers, the Ugandan situation became the first referral case to the ICC. The Decision by the Prosecutor to open an investigation in this situation was

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[72] The US Department of Justice, 'Armed Conflicts Report: Uganda (1987-first combat death)' (updated in January 2009).

[73] Government of Uganda, 'Referral of the Situation Concerning the Lord's Resistance Army', Kampala, December 2003, para. 6. Cited in Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21(2) *Ethics and International Affairs* 179.

made on 29 July 2004, slightly later than the opening of the investigation in the Democratic Republic of Congo (DRC). Partly owing to the supportive attitude to the ICC's initial work and the special symbolic meaning of this situation, as Uganda was the first state that referred its own situation to the ICC, after careful consideration and investigation, Pre-Trial Chamber II of the ICC issued five warrants of arrest for the top leaders of the LRA on 8 July 2005, including the Commander-in-Chief, Joseph Kony, and the Vice-Chairman and the Second-in-Command, Vincent Otti, and the only suspect who appeared at the ICC, Mr. Dominic Ongwen.[74]

The issuance of arrest warrants against those leaders by the ICC eventually caught the attention of the top leaders of the LRA, and brought them back to the table of negotiation for a peace treaty with the Ugandan government. The LRA promised the Ugandan government to make an effort to put an end to the war and to achieve peace, in the condition that the Ugandan government should grant all the leaders and soldiers of the LRA amnesty and the ICC must cease all the judicial proceedings against them. With the desire to put an end to the conflicts as soon as possible and to establish a positive image of the Government as well as of President Museveni himself to both the Ugandan people and the international community, the Ugandan government agreed on the requirement, and consequently hoped that the ICC would terminate the process of investigation and revoke those warrants of arrest. After the LRA expressed the intention to come back to the negotiations with the Ugandan government, in 2006, a peace program of restorative justice called "Juba[75] Peace Talks" was initiated, even though the ICC did not accept the request of amnesty, asked by both the Ugandan government and the LRA. The Juba Peace Talks, and many other peace processes in other regions

[74] Two of the warrant of arrests, respectively against Raska Lukwiya and Okot Odhiambo, were terminated on 11 July 2007 and 10 September 2015 respectively for the reason of their passing.

[75] Juba is the capital city of Southern Sudan, not in the territory of Uganda.

like Acholi and Gulu, were organised under the legal frame of the *Amnesty Act of 2006* in Uganda, which was specifically prepared by the Government and was enacted at the Ugandan People's Congress for peacefully de-mobilising those armed groups.

This act was the result of the amendments of the *Amnesty Act of 2000* for the purpose of better fulfilling the international obligations, especially the legal requirements in the Rome Statute. However, even after the amendments, the act still gave quite an ambiguous answer to the question whether the leaders who were ordered to appear in front of the ICC would be granted amnesty at domestic level. The passing of this act in Uganda after the issuance of arrest warrants from the ICC indicated that the Ugandan government's will to assist the ICC to capture and arrest Joseph Kony and other LRA leaders had now began to go to blur. Perhaps the Ugandan government had gained confidence to end the guerrilla warfare by military methods considering that the Ugandan army managed to kill one of the accused LRA leaders on 12 August 2006[76], almost a month after the commencement of the *Amnesty Act of 2006,* which entered into force on 19 July. Such victory could have inspired the ruling party in Uganda to capture the indictees in its own way rather than relying on an international organisation like the ICC. In response to the request for amnesty, the former Prosecutor of the ICC insisted on the investigation of the accused LRA leaders, and refused the Ugandan government's aspiration. It is widely believed that the warrants of arrest against the LRA leaders in the end drove Joseph Kony and other leaders, as well as most of the LRA soldiers, away from the table of peace negotiations and back to hostility.

In May 2008, a domestic criminal court assigned to deal with the war crimes committed by the LRA was set up in Uganda. It was the last effort made by the Government to convince the ICC to revoke its arrest warrants against those LRA leaders.

[76] 'Uganda Army "Kills Senior Rebel"' *BBC News* (13 August 2006) < http://news.bbc.co.uk/1/hi/world/africa/4788657.stm > accessed 5 January 2015.

This last effort was shattered because many people, including the Prosecutor of the ICC, worried that the domestic court would eventually promise amnesty or other forms of impunity to the perpetrators. The failure of yet a second attempt to achieve peace in Uganda was attributed to the ICC's uncompromising stand. Since then, the peace process and restorative justice in Uganda has become much more difficult.[77]

The ICC's intervention has been criticised by many researchers, lawyers, politicians. Its attitude to the Amnesty Act of Uganda has been blamed by a wide range of international NGOs, mediators, activists, and particularly, people living in north Uganda. It is argued that the ICC should have taken serious consideration on amnesty and restorative justice and a broader inclusion of non-punitive approaches in transitional justice.[78] Notwithstanding the fact that a number of human rights organisations and activists enthusiastically advocated the Prosecutor's announcement of investigation in the beginning, many of them later became critical of the way in which the ICC dealt with the precious opportunity to end the twenty-year-lasting Ugandan civil war. The criticism continued to grow and eventually became a predominant tendency. The opinion flared out that the ICC was the one bringing continuous pain to the Ugandan people and thus it was a "peace-breaker" rather than a "peace-bringer". In addition, it is argued that the ICC did not show enough respect to the local people's traditional concept of justice on criminal cases.

For the Ugandan people, including those in northern Uganda regions, such as the Acholi and the Kakwa, the traditional response to crime and criminals would be that of restorative or healing form, rather than that of retributive and punitive form. The

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[77] See Kasaija Phillip Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' (2006) 4(1) *Journal of International Criminal Justice* 179; H. Abigail Moy, 'The International Criminal Court Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity' (2006) 19 *Harvard Human Rights Journal* 267.

[78] See Cecily Rose, 'Looking beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-telling and Reparations (2008) 28 *Boston College Third World Law Journal* 345.

mechanism of criminal procedure at the ICC may not be commonly acknowledged by all people. The failure to increase the opportunity for peace, as well as the emotional distance to the Ugandan people's concept of justice and peace, evolved into a major opinion that the ICC should have honoured Uganda's choice, or at least allied carefully with restorative justice.[79]

The critiques against the ICC's intervention

Because the Ugandan situation was one of the earliest situations at the ICC, its valuable but painful experience provided large space for fervid discussion. The impact of the ICC drew much disappointment inside Uganda. One noticeable study (known as the "ICC Statement 2004") on the ICC's announcement of the formal investigation to the LRA, which was made in the Refugee Law Project at the largest national university in Uganda, proclaimed an opposite attitude to the involvement of the ICC. The position paper appreciates restorative justice over formal criminal justice at the ICC by listing four negative consequences[80] and one potential danger for the Ugandan people.

The first negative consequence is that the ICC's investigation would continue the "cycle of violence". Armed conflicts always cause a large scale of injury and death, and usually bring fear and hatred to civilian populations. In fact, the serious violations of human rights committed by the LRA, for example the kidnapping of children and training them into child soldiers, were globally noticed[81] as part of its military activities

[79] Terry Beitzel and Tammy Castle, 'Achieving Justice through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative Justice a Better Approach?' (2013) 17 *International Criminal Justice Review* 41.

[80] See the Refugee Law Project, 'The Refugee Law Project' s Position Paper on the Announcement of Formal Investigations of the Lord' s Resistance Army by the Chief Prosecutor of the International Criminal Court and Its Implications on the Search for Peaceful Solutions to the War in Northern Uganda' (2004).

[81] See the Office of the Prosecutor, 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005', *situation in Uganda*, Pre-Trial Chamber II, ICC-02/04-01/05; see also United Nations, *Uganda: Child Soldier at Centre of Mounting Humanitarian Crisis* < http://www.un.org/events/tenstories/06/story.asp?storyID=100> accessed 12 March 2014.

against the Ugandan government. The parents of the abducted children, as well as the whole community where they had lived, felt a huge loss, terror, and pain because of that. In addition, the leaders of the LRA would not hesitate to give orders to those child soldiers to attack innocent people or loot other communities whenever it was considered "necessary". These actions exposed the children to extreme dangers. The violence committed by the LRA soldiers was so brutal that it caused unimaginable damage to the local people and to the child soldiers themselves. According to the information shown by the International Centre for Transitional Justice (the ICTJ), the criminal activities of the LRA soldiers have been widely documented, ranging from murders, abductions, and forced marriages to horrific mutilations against the civilian population.[82]

What should be also noted also is that the longer did the abducted children stay in the LRA, the more violent crimes would they commit, and the more difficult could they reintegrate into a normal life. The continued violence attributed to the LRA had created an undesirable process. The child soldiers of the LRA had committed some crimes that would isolate them from a normal life and deepen the emotional hatred between them and the innocent people. In turn, those they attacked were obliged to defend themselves using similar means of violence.[83] Such reactions would not be tolerated by the soldiers, who in return drew more fierce attacks. The peace negotiations between the LRA and the Government could have ended this cycle of violence. Therefore, the ICC was under the obligation to choose between burying the cycle of violence in Uganda into history or upholding its legal process, thus ruining such an opportunity.

The attacks of the LRA did not only influence Uganda, but also caused disruption

[82] ICTJ, *Submission to the Universal Periodic Review of the United Nations Human Rights Council*, 12th Session, October 2011.

[83] The Prosecutor of the ICC, 'Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005' ICC-02/04-01/05 (27 September 2005).

in neighbouring countries, such as Central African Republic (CAR), Democratic Republic of Congo (DRC), and South Sudan. In the report to the United Nations Security Council (the UNSC or the Security Council) by the Secretary-General in 2006, the LRA had caused serious humanitarian crisis to the States above, and

> "Although its forces are believed to have diminished over the past years, LRA remains active in the border regions between the Democratic Republic of the Congo, Uganda and southern Sudan."[84]

Given that peace and security are so desired to these countries and the people therein, the hostilities of the LRA have already become an inter-regional problem. In respect to this situation, the ICC's "interference" with Uganda's peace negotiations troubled those countries and their civilians too, as it caused the LRA to turn its back to peace, re-investing instead its efforts to new attacks. Sadly, this was the consequence of the ICC's insistence on criminal prosecution. In a special report in December 2009, the United Nations Office of the High Commissioner for Human Rights (the OHCHR) revealed that the series of attacks launched by the LRA in DRC from September to November 2008, after the collapse of the "Juba Peace Talks", caused the death of at least 76 people and the displacement of over 50,000 people. It seemed, therefore, that to end the violence was far more important and desirable than to proceed formal criminal prosecution.

The second claimed result is the damage to the peace-building process. If the conflicts between the LRA and the Ugandan government army continue, the seed of living without fear of any military threats is not likely to grow to a strong and fruitful tree. Viewing the facts from this perspective, it is understandable to describe the ICC's proceedings as one of the biggest problems in the collapse of the efforts for peace. On

[84] UN Secretary-General, 'Report of the Secretary-General Pursuant to Resolutions 1653 (2006) and 1663 (2006)' (29 June 2006) UN Doc. S/2006/478, at pp. 2.

the one hand the LRA was requested to a cease fire against the Ugandan army and the innocent local people, but on the other hand, its requirement of cancelling the arrest warrants against its leaders was not fulfilled. After all, the Ugandan government was notified by the LRA that the only impediment to achieving peace negotiations was the possible prosecution of the LRA leaders, which meant that the involvement of the ICC would certainly cause them to carry on the fight. The number of attacks launched by the LRA subsequent to the breaking of peace talks clearly indicates that the issuance of warrants of arrest at the ICC against them was the main contributor. The LRA leaders would not easily give up the fighting if they still faced the risk of prosecution and criminal punishment. The continuation of the cycle of violence had been proved to be linked to the involvement of the ICC. Consequently, the peace negotiations between the LRA and the Ugandan government had not re-appeared since its second break.

Although after 2005, the region where the LRA rebels mainly took military activities was not Uganda, there were still reports of sporadic assaults by the LRA in Ugandan territory. For example, during Christmas time of 2009 and 2010, the LRA's military attack killed hundreds of villagers, as a reprisal action against the military operation launched by the Ugandan government.[85] The ICC now has become the archenemy of the LRA top leaders, and with the ICC's involvement, peace negotiations will not be an option for the LRA soldiers. In 2016, the Office of the Prosecutor of the ICC announced that stable information indicates that the ICC was described as one place where people would be either imprisoned or tortured or killed.[86] The image of the ICC passed to the LRA soldiers was undoubtedly wrong, but it clearly conveys one message that peace between the LRA and the Ugandan government would not be

[85] UN Secretary-General, 'Letter Dated 25 June 2012 from the Secretary-General Addressed to the President of the Security Council' (25 June 2012) UN Doc. S/2012/481, at pp. 3.

[86] The Office of the Prosecutor of the ICC, 'Message from the Prosecutor of the International Criminal Court, Fatou Bensouda, calling for defection by LRA fighters' (1 April 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=160401-otp-stat> accessed on 23 March 2017.

achieved if the ICC continued its formal criminal procedure.

The third one is that the ICC's proceedings would "undermine" the power and effectiveness of national law in Uganda, namely, the Amnesty Act. As it was previously mentioned, the Ugandan government had put much effort to end the long-lasting war, an end anticipated by the Ugandan people as well as by the international community. The peace-building process significantly depended on the Amnesty Act. The Amnesty Act had already entered into force in Uganda in 2000 before Uganda ratified the Rome Statute. The investigation by the ICC Prosecutor of the Ugandan situation was opened in July 2004 as the result of the referral of the case by the Ugandan government in early 2004. This led to quite a problematic dilemma that was faced by both the ICC and the Ugandan government: either to choose a national legal framework which would weaken the legitimacy of the ICC, or to execute an international obligation and neglect the internal needs and reality.

The solution of this conflict between the Rome Statute of the ICC and the Amnesty Act of Uganda should not be simplified as a conflict of law or jurisdiction, because it relates to the authoritativeness of both sides. In temporal effect, the rules in the Amnesty Act in Uganda should be respected by the ICC. However, since the Ugandan government itself referred the situation to the ICC, it was suggested that the Ugandan government had admitted that it was unable or unwilling to carry out a proper investigation or prosecution against the crimes, as is required in the principle of "complementarity" in article 17 of the Rome Statute.[87] In the Ugandan situation, with the Amnesty Act there was hope that at long last the Ugandan people would peacefully solve the armed conflict. Instead, the ICC "won" the jurisdiction over the serious crimes committed by the LRA. The involvement of the ICC brought more uncertainties to the

[87] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), at pp. 336-344.

Ugandan people's hopes and aspirations that the conflict would end in a short time, especially considering that the LRA's trust in the peace negotiations lays on amnesty.[88] The amnesty processes in Uganda could not move forward because the Rome Statute does not provide any space for amnesty. The disappointment of the local people in the Government's incapability of bringing peace and to the ICC's role of ruining the precious opportunity for peace talks increased as the LRA withdrew from the negotiations. This gradually led the people to question whether the Ugandan government was sincere in keeping its promise of amnesty and peace.[89]

The last consequence stated in that position paper is that the ICC did not show enough respect for the local notion of justice, nor for the traditional way of solving conflicts. Local people supported the Amnesty Act because it resembled the traditional principles in local cultural views of crime and criminals. The undermining of the Amnesty Act by the involvement of the ICC presented an omission to the local people's will. Formal criminal justice, represented by the ICC in the Ugandan situation, is sometimes shaped by many academics as the "occidental value" amongst post-colonial African countries and the shadow of European nationalism.[90] Restorative justice, to the contrary, is deemed a "non-western way" of justice. This statement in fact elevated the collision between formal criminal justice and restorative justice, putting them on to a level of an intense ideology conflict, an opinion which is not only seen in studies of international law. To many renowned academics in the field of criminology, this collision forms a fundamental pillar for the research on restorative justice[91], especially

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[88] H. Abigail Moy, 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity' (2006) 19 *Harvard Human Rights Journal* 267, at pp. 270.

[89] Adam Branch, 'International Justice, Local Injustice' (2004) 51(3) *Dissent* 22.

[90] See Ernest Gellner, *Nations and Nationalism: New Perspectives on the Past* (Blackwell 1983).

[91] See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002). Also see Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990); Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan Publishing 2002).

for those encouraging the practice of traditional and restorative justice to indigenous people as a replacement for the formal criminal justice procedure. Such an opinion may be helpful to advocate the practice of restorative justice in real life, however, it is undoubtedly unsupportive to the problem between the ICC and the Ugandan government.

The paper also exposed one highly possible risk to the safety of victims and witnesses. This risk to safety does not relate to the damage and violence which may inevitably result from armed conflict. Instead, such risk comes from the fact that victims will be seen as the potential threat to the accused LRA leaders if the ICC maintains the investigation and accusation against them. That is because the work of the ICC, especially the prosecutorial work, largely depends on information gathered from the local people. The importance of the local people to the situation has two sides. For the ICC Prosecutor, local people are the witnesses of the alleged crimes and the narrators of the committed violence. But for the LRA leaders, the local people are the big threat. As a result, the ICC should exhaust all measures to protect the victims. But the LRA would do anything possible to cleanse the "blood stains" of their crimes by making prosecution at the ICC against them more difficult or even infeasible. In other words, the LRA would react to the ICC's involvement that victims, particularly the direct witnesses, would suffer extra damage because of the ICC's investigation. Therefore, it is understandable why the concern about the ICC's investigation arose:

> "[T]he announcement of initiation of investigations might drastically increase the incentive for the top leadership of the LRA to fight, evade arrest and destroy evidence. In wars such as the one in northern Uganda, the primary evidence is the people themselves".[92]

[92] Tim Allen, 'War and Justice in North Uganda: An Assessment of the International Criminal Court's Intervention' (February 2005) Crisis States Research Centre, London School of Economics and Political Science,

Criticism of the failure of the ICC to recognise the possible danger and needs of victims, which are acknowledged in the Rome Statute[93], extends the argument to what the proper way to pursue justice could be: that local traditional justice is preferable to the formal justice procedure at the ICC in dealing with the situation in Uganda and other similar situations. The application of local traditional justice has been often understood as restorative justice in studies on ongoing armed conflicts and post conflict transitions.[94] On this view, the restorative justice approach has been highlighted to indicate that the formal mechanism at the ICC would be inadequate to achieve peace and bring justice to Africa's cases, especially to the ongoing conflicts, under the presumption that the LRA keep pressure onto the Ugandan government to stop the cooperation with the ICC for an exchange of peace talks.[95]

It is clear that the problem of the ICC's intervention in the Uganda situation was that its mechanism for the interest of justice did not satisfy the anticipation of the Ugandan people and the international community that peace should be considered to be more important than justice. The idea that peace must go prior to justice was upheld by many persons working for both the Ugandan government and the LRA, and human rights activists in both Uganda and other states. The LRA had made its position very clear to the ICC investigation that there would be no peace agreement signed as long as the arrest warrants against its leaders still remained in force. The Ugandan government also hoped that the ICC could agree to cease exercising jurisdiction over the crimes and

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at pp. 10.

[93] For example, Article 53 of the Rome Statute requires that the Prosecutor must take the interests of victims into account to make decisions on whether to initiate an investigation to a situation. In addition, victims and witnesses must be carefully protected in participating legal proceedings at the ICC as is stipulated in Article 68.

[94] See Caitlin Reiger, 'Hybrid Attempts at Accountability for Serious Crimes in Timor Leste' and Timothy Longman, 'Justice at the Grassroots? Gacaca Trials in Rwanda' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth and Justice* (Cambridge University Press 2006).

[95] Chris Ocowun and Denis Ojwee, 'Suspend Arrest Wrrants, Say LRA Team' *New Vision* (7 November 2007).

allow the local courts to take over the cases. The LRA did not want any involvement of international jurisdiction, nor were its top leaders willing to serve any punishment sentenced by the ICC. In effect, the LRA rebels utilised the "conflict" between peace and international justice to divert the focus of the international community to the role of the ICC in the Uganda situation so that there would be a higher rate for the LRA leaders to go unpunished.

The Ugandan government held a very complicated attitude to the ICC's jurisdiction over the intrastate armed conflict. On the one hand, the government of Uganda needed the ICC's indictment against the LRA's leaders to increase the chance of temporary or permanent cease fire between all the military forces, especially between the Government and the LRA. On the other hand, in the calculation of the government of Uganda, ICC's intervention could be restrained to a certain degree that allowed the Government to be in the dominant positon in the negotiation with LRA leaders without pushing them away. It was not expected that all the efforts toward peace would be ruined by the ICC's involvement. The pressure from the ICC on the LRA was important, but the best situation for the Ugandan government was that the ICC would only keep putting pressure on the LRA to make LRA disarm, rather than really take any further action in criminal procedure. In other words, the ICC might have been a good "tool" to achieve political targets for the Ugandan government.

It was a miscalculation. The ICC did not take back the indictments against the LRA leaders. "[T]he [establishment of the] ICC reminds governments that realpolitik, which sacrifices justice at the altar of political settlements, is no longer accepted."[96] In the warrant of arrest against Joseph Kony issued by Pre-Trial Chamber II, the Chamber recalled the self-referral of the Ugandan government of the situation, which admitted

[96] The Statement of Professor M. Cherif Bassiouni at the Ceremony for the Opening for Signature of the Convention on the Establishment of an International Criminal Court (18 July 1998). Cited in M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd ed., Kluwer Law International 1999), at pp. 555.

that the Government of Uganda was unable to arrest the most responsible persons, and had not taken proper national judicial action and had no intention to conduct any judicial action against those persons.[97] The rationales in Joseph Kony's warrant of arrest were seen in all the warrants of arrest for the other four indicted persons, leaving no space for national judicial process to deal with the indicted persons in the situation of Uganda.

Some observers opposed the involvement of the ICC in Uganda even before the issuance of the arrest warrants against the LRA top leaders. As "outsiders", some researchers examined the negative role of the ICC. They favoured amnesty, which was seen as the underpinning factor to convincing all warring parties to conclude a peace agreement.[98] Other researchers suspected that the impact of the ICC had been over-stated by challenging two points: the indictment of the LRA leaders would put pressure on the Sudanese government, preventing it from providing assistance to the LRA rebels[99]; and the arrest warrants of the LRA leaders would isolate them from their fighters and eventually expose them to justice.[100] The first point seemed to underestimate the "determination" of the Sudanese government, because it had already been under the pressure because of its human rights violations in Darfur[101]; the second point was simply disproved by reality itself, since there is no convincing evidence to show that the arrest warrants had weakened the authority of the LRA leaders within the rebel group. Therefore, many believed that the involvement of the ICC would only

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[97] 'Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (27 September 2005) ICC-02/04-01/05-53, situation in Uganda, Pre-Trial Chamber II, para. 37.

[98] Kimberly Hanlon, 'Peace or Justice: Now that Peace is Being Negotiated in Uganda, will the ICC still Pursue Justice?' (2006-2007) 14 *Tulsa Journal of Comparative and International Law* 295.

[99] Leslie Vinjamuri and Jack Snyder, 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice' (2004) 7 *Annual Review of Political Science* 352.

[100] The Prosecutor of the ICC, 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants' (14 October 2005), at pp. 7.

[101] See Katherine Southwick, 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court' (2005) 1 *Yale Journal of International Affairs* 105.

cause more complications and obstacles to achieving peace.[102] It has been emphasised that seeking justice during the on-going conflicts would endanger the opportunity for both peace and justice; this is because judicial procedure alone is powerless to build up a peaceful solution when facing such a conflict.[103] As underscored by the study from the Refugee Law Project that is referred in the early section and also upheld by many activists and political leaders in Uganda[104], peace is more desirable than justice.

The impact of the ICC on the on-going conflict in Northern Uganda was also criticised by local people, according to some field studies. The criticism was concentrated on the negative influence that the ICC actions would have in ending violence and promoting the peace process. For example, in one study, a local council officer was reported to have said the following in an interview:

> "I feel this ceasefire should be there, so that the children in the bush are not killed. And about the ICC, the rebels should not be taken to court. If they are taken to court it should be after the war. If they issue arrest warrants while they are still in the bush, the rebels will be discouraged to come back. They will take revenge and kill us in the camp here … The soldiers are trying to protect us, but if you move a distance away you get them [the LRA]. It makes it difficult to get food."[105]

Such concerns related to individual interests respecting peace and violence, rather than the metaphysical form of justice that is often the central idea of formal criminal justice,

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[102] Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21(2) *Ethics and International Affairs* 179.

[103] Maggie Gardner, 'In Uncharted Waters: Seeking Justice before Atrocities Have Stopped: The International Criminal Court in Uganda and Democratic Republic of Congo' (June 2004) *Citizens for Global Solutions.*

[104] See Tim Allen, 'War and Justice in North Uganda: An Assessment of the International Criminal Court's Intervention' (February 2005) Crisis States Research Centre, London School of Economics and Political Science, at pp. 50.

[105] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books Ltd. 2013), at pp. 106-107.

especially in international criminal justice. For many Ugandan people, the concept of "justice" at the ICC was forced upon them by "Western States"; this concept strongly ignores local ideas of justice. For local people who had suffered from long-lasting conflicts, peace seemed to be the main objective, not legal justice.[106] In addition, the involvement of the ICC was also seen as a potential threat to some vulnerable groups, in particular, witnesses, women, and children.[107]

One study concluded: "[It] [the ICC] is biased; it will exacerbate the violence; it will endanger vulnerable groups – notably witnesses and children; it is spoiling the peace process by undermining the amnesty and the ceasefire; and it ignores and disempowers local justice procedures."[108] These four points can be further narrowed into two big aspects, peace versus justice and the needs of victims; the first point focuses on peace; the second one concerns both peace and the needs of victims (though the word "victims" was replaced by "vulnerable groups"); the third and fourth points pay attention to "peace versus justice" and the proper understanding of justice. As a response to the reports done in the Refugee Law Project in Uganda, that have been used as an introduction to the criticism in the first section, the four points were examined one by one, indicating that the criticism was overstated. In dealing with the situation in Uganda, the ICC was still learning from its mistakes, though it sounds quite unfair to the Ugandan people that their situation was not dealt with in the way that they had wished. ICC involvement did not stop the violence immediately. However, immediate peace is probably beyond any organisation's capability. Even the capability of the Security Council of the United Nations, which is the international body with the highest

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[106] Kasaija Philip Apuuli, 'Peace over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) vs. the International Criminal Court (ICC) in North Uganda' (2011) 11(1) *Studies in Ethnicity and Nationalism* 116.

[107] See Rory E. Anderson, Fortunate Sewankambo and Kathy Vandergrift, 'Pawns of Politics: Children, Conflict and Peace in Northern Uganda' (World Vision International 2004).

[108] Tim Allen, 'War and Justice in North Uganda: An Assessment of the International Criminal Court's Intervention' (February 2005) Crisis States Research Centre, London School of Economics and Political Science, at pp. 96.

level of authority to prevent armed conflict, cannot guarantee the peace as such. The expectations placed upon the ICC were far too heavy.

Under such circumstance, the recommendation of restorative justice to solving other situations similar to the Uganda's had been raised, since restorative justice shares many similarities with the non-punitive justice process. However, the concept of Africa's traditional justice, as well as many other forms of traditional justice in Asia, Latin America, the Pacific, cannot be seen as the same as restorative justice. One crucial reason is that the occurrence and development of restorative justice is the consequence of dissatisfaction with and re-imagination of the modern criminal justice system rather than the resurrection of old traditions. Restorative justice resonates with some older and informal ideas of a dispute solution[109], and is based on some principles of formal criminal justice. But in the case of the Ugandan situation (and most of the situations involving mass human rights violations), formal criminal justice has malfunctioned or been significantly undermined, which deprives the foundation of discussing restorative justice in solving disputes. Furthermore, though many studies have expressed different attitudes towards the impact of the ICC in peace-building and justice-achieving, only a few go deeper to inquire into the internal logic of the criticism and analyse the relationship between justice and peace, and between restorative justice and international criminal justice.

2. Re-thinking the critiques on the ICC's impact in the situation in Uganda

The influence of amnesty and the opinions of victims

The debates about the impact of the ICC on international criminal cases derive

[109] Dobrinka Chankova and Daniel W. Van Ness, 'Regional Reviews, Section G: Themes' in Gerry Johnstone and Daniel W. Van Ness (eds.) *Handbook of Restorative Justice* (Willian Publishing 2007), at pp. 529.

mainly from the role of the ICC on peace negotiations between the Ugandan government and the rebel group, the LRA. According to the criticism, there are two points that need to be considered. First of all, it assumed peace would be promised through amnesty, which was supported by restorative justice but rejected by the formal criminal justice of the ICC; secondly, peace was more important than justice because it was more desired by local Ugandan people as well as by the international community. The logic behind the assumptions concentrates on the short-term result, after the ICC's mechanism was triggered, during the time when armed conflict was still terrifying the people in Uganda. But careful consideration must be given to the problems, or variables, that were created by the ICC's involvement, rather than just blaming its short-term consequences. The restorative justice critique may be seen as a hypothesis, because it is hard to imagine what the situation would be if the ICC revoked its indictments. Perhaps the topic of the impact of the ICC itself is a moving target that needs to be examined through more cases.

The claim that amnesty will guarantee peace is questionable. As announced by the LRA leaders, and well recognised by the Ugandan government and many researchers, ICC prosecution would be the only barrier for the rebels to discontinue violence, thus, that amnesty should have been bestowed to end the armed conflict. But the amnesty effort in which the ICC "interfered" had a predecessor in the year 2000. Before the last attempt to end the civil war, the Ugandan government promised a blanket amnesty to all rebels through the Amnesty Act 2000. The legislation covered those who were in

> "(a) actual participation in combat;
>
> (b) collaborating with the perpetrators of the war or armed rebellion;
>
> (c) committing any other crime in the furtherance of the war or armed rebellion; or

(d) assisting or aiding the conduct or prosecution of the war or armed rebellion"[110]

As to the form of amnesty promised, in Article 3 (2), the act promised that perpetrators "shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion" after they go through the process. Many guerrillas came out of bush and ceased hostilities, receiving total forgiveness in accordance with the Amnesty Act 2000. However, such favourable amnesty did not end the war as expected. In the warrants of arrest issued against Joseph Kony, the Pre-Trial Chamber II revealed some crucial facts that in or around the middle of the year 2002, LRA forces were ordered to begin a campaign of attacks upon civilians in two regions; and in 2003, LRA fighters were commanded to move into a certain region to attack the Ugandan army and civilian settlements, and to "abduct civilians for the purpose of recruitment to the ranks of the LRA"[111]. It is reasonable to conclude that it was not amnesty that those main perpetrators, indicted by the ICC, thirsted for; or at least, not being punished was not the original motivation with which they resumed violence.

The Legal Advisor to the Chief mediator on the Uganda peace process negotiations observed that the Juba Talks might be only another peace negotiation of which the LRA leaders took advantage and then withdrew.112 The reasons for the withdrawal from peace negotiation of the LRA leaders might be complicated, in which the greedy for more political benefit could have play a more important. Bing granted of amnesty for the LRA leaders could only be the first step for the ultimate goal. The power of amnesty

[110] Article 3 (1) of the Amnesty Act 2000, Uganda.

[111] 'Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (27 September 2005) ICC-02/04-01/05-53, situation in Uganda, Pre-Trial Chamber II, para. 12.

[112] 'Review Conference of the Rome Statute of the International Criminal Court', Official Records, Kampala (31 May – 11 June 2010), at pp. 104.

in peace negotiation might not be as great as was presumed. Hence, the idea in favour of restorative justice idea in current researches that was based on the influence of amnesty to the perpetrators may not be reliable.

The statement that peace is more important than justice, because it is the desire of local people, is also worthy of examination. One study from Uganda suggested that local people strongly expressed the aspiration for amnesty, as they believed peace could only be achieved through amnesty to the LRA rebels. The opposition of the ICC to the amnesty in Uganda "had a serious negative impact on the potential for resolution of the conflict".[113]

But another positivistic quantitative study made by a foreign institute, which was updated and released on the Internet by the International Centre for Transitional Justice (ICTJ) in 2005, produced some more complex statistics on this issue.[114] It suggested that peace and justice were equally desired. According to the statistics, about 76 per cent of the people interviewed expressed the will that those who were responsible for abuses of human rights "should be held accountable for their actions". And when they were asked whether they would support amnesty if it were the only path to achieving peace, 29 per cent of the respondents gave a negative answer.[115] The second discovery is that even for the people who accepted the granting of amnesty for the perpetrators, the blanket amnesty could hardly be a choice. Only 4 per cent of respondents agreed that "amnesties should be granted unconditionally". The vast majority considered that the acknowledgement of the wrongness, criminal conducts and penalty as retribution in

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[113] Lucy Hovil and Zachary Lomo, 'Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-term Reconciliation' (2005) *The Refugee Law Project*, Makerere University 2/2005, at pp. 15.

[114] Phuong Pham, Patrick Vinck, *et al*, 'Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda' (2005) Human Rights Center, University of California, Berkeley < https://www.ictj.org/sites/default/files/ICTJ-HRC-Uganda-Voices-2005-English.pdf > accessed 19 October 2014.

[115] Ibid.

certain form "should be required of all those granted amnesty".[116] The third observations was that neither the traditional justice mechanism nor formal criminal justice mechanisms were entirely understood by the Ugandan people. There was also an imbalance in the understanding of restorative justice amongst people from different areas. In Acholi areas, traditional justice ceremonies, similar to restorative justice, were acknowledged by 59 per cent of the local people. However, in non-Acholi areas, this number dropped down to 19 per cent. Another noticeable problem was that only 17 per cent of the respondents knew about the ICC and its work. The two reports drew quite different conclusions about public opinion with respect to the ICC's involvement. It is not necessary to assess the validity of the two reports because they were prepared under different circumstances. The importance of the comparison between them is that it may not be possible to give a simple answer to what victims of international crimes want. Their opinion varies through time and is driven by the information provided. Nevertheless, the studies convey one message which is so illuminating and which should not be neglected in international criminal justice: The voice of victims must be heard, and there must be a more comprehensive way to achieve such a goal. The voice from victims is more crucial than theoretical discussions, if not a conjecture, on the impact of the ICC's work.

In the analysis above, the stress on the short-term effect of the ICC's involvement may have distracted attention from the correct direction. Fortunately, such short-term effect is not the only focus of all studies. There are also many proponents of the ICC's impact in the Ugandan situation, especially those who have reviewed this issue in recent years. For example, after visiting Uganda, delegates from different States Parties discovered that local people have a strong will to enforce the warrants of arrest against those indicted LRA leaders. A report on a mission confirmed that

[116] Ibid.

> "Delegates heard repeatedly from victims and communities the need for arrest warrants against the LRA leadership to be enforced…The failure to arrest suspected perpetrators of mass crimes results in a lasting, tangible fear that violence will recur, which hinders 'recovery' at the level of both individual healing and regional rebuilding. Communities were often aware of news reports of LRA attacks in DRC, CAR or Sudan, which exacerbated their insecurity and raised concern that LRA would return to Uganda."[117]

Other studies have examined the limits of local traditional justice process, pointing out several flaws of the opinions, which disprove the impact of the ICC through supporting traditional justice approach. Firstly, such process depends far too much on the power of spirit medium and monetary compensation, making it too close to a "trade".[118] There will be more problems if restorative justice is used to exchange the dignity of victims with limited financial compensation. Secondly, the local elders or chiefs could hardly handle the process fairly enough, considering that the soldiers in the army of the Ugandan government also committed serious crimes.[119] And the so-called "traditional process" may not be very representative of all the victims, so that a certain procedure must comply with international norms on victim's rights.[120] So, on many occasions restorative justice alone does not function well in giving satisfying answers to the international community when dealing with mass scale international

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[117] No Peace Without Justice, 'Visits by ICC States Parties Delegates to Uganda', Final Report, January-June 2010, at pp. 33.

[118] Erin K. Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *The International Journal of Transitional Justice* 91, at pp. 105.

[119] Refugees International, 'Inadequate Response to Protection Crisis in Northern Uganda', Mission Report, 14 December 2004.

[120] Tim Allen, 'War and justice in North Uganda: An Assessment of the International Criminal Court's Intervention' (February 2005) Crisis States Research Centre, London School of Economics and Political Science, at pp. 107.

crimes with huge numbers of victims.

For a large number of the Ugandan people, including citizens and academics, the ICC's role is primarily negative in solving the problems of how to end the conflict or at least reach a ceasefire. But for many researchers outside Uganda, the ICC has made a big contribution to legal transition in Uganda, though it was promoted largely by civil society rather than Ugandan government agencies.[121] For academics in legal study, the formal justice procedure has obvious advantages in dealing with international criminal cases, such as helping to instill a feeling of guilt in perpetrators, minimising the desire of victims to seek revenge, and strengthening peace building and reconciliation in society.[122] However, for many criminologists, such "advantages" are just "good wishes" because legalism has limitations and even at times may endanger the peace building and the delivery of justice.[123] It must be acknowledged that the ICC did not achieve peace or security, or dispense justice in short term in Uganda.[124] But the ICC's involvement "was carefully utilised at Juba in order to negotiate a solution that would seek to achieve a comprehensive approach to justice at the national level".[125]

What is more important is that there is now a promising future of a Uganda without armed conflict. After the issuance of the warrants of arrest against the top leaders of the

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[121] See Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013), at pp. 234.

[122] See N.J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 *Law and Contemporary Problems* 127; Payam Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 *Human Rights Quarterly* 737; Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2; K.C. Moghalu, 'Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions' in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004), at pp.197.

[123] Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) *Journal of Law and Society* 411; Vincenzo Ruggiero, 'An Abolitionist View of Restorative Justice' (2011) 39 *International Journal of Law, Crime and Justice* 100.

[124] M. Cherif Bassiouni, 'The ICC- Quo Vadis?' (2006) 4 *Journal of International Criminal Justice* 421.

[125] Michael Otim and Marieke Wierda, 'Uganda: Impact of the Rome Statute and the International Criminal Court' (June 2010), in the Rome Statute Review Conference, Kampala, Uganda.

LRA, President Museveni won the multi-party election. The Commonwealth highlighted that though there were several serious shortfalls, the election had enabled the will of the people to be expressed and that the result "reflected the wishes of those able to vote".[126] Since the election in 2006, even considering the failure of the "Juba Peace Talks", there has not been any significant attack reported that was launched by the LRA in the territory of Uganda. So, it is not correct to criticise the ICC for its flaws made in early stage because the people did not see instant peace. The assertion that pursuit of justice will risk the chance for peace may not be the outcome in international criminal justice. The ICC might have delayed peace during the on-going conflict, but also had encouraged the Ugandan people and the government to embrace justice, which facilitated peace building in another way. Therefore, the real question in judging the impact of the ICC in justice and peace should be as to how to achieve them with less difficulty through the legal mechanism of the ICC in combination with other forms of justice, and in particular restorative justice.

The focal questions in the relation between restorative justice and the ICC

The example of the ICC's impact on the situation in Uganda has exposed two aspects in the relation between restorative justice and the legal mechanism of the ICC. The struggle of the ICC to accept amnesty in international criminal cases clearly indicates that amnesty will not be able to be regarded as a proper measure to end the impunity of the perpetrators of the most serious crimes for humanity. The justice at the ICC does not tolerate amnesty granted to the most responsible persons for the charged crimes at the ICC. However, there is not a direct interpretation on whether amnesty violates the nature or the form of the justice at the ICC, nor is there any enlightening statement from the authorities of the Court addressing the question. Because the attitude

[126] The Commonwealth Observer Group, *Uganda Presidential and Parliamentary Elections* (18 February 2011), at pp. 4.

of the ICC shown in the situation in Uganda, all the parties in the cases proceeded at the ICC realised that national amnesty had become unavailable as a defence rationale in court. Consequently, amnesty has been studied less and less in researches around the issues in relation to the ICC. The ICC shall not ignore amnesty, because amnesty may not be completely incompatible with the spirit of the Court. The last chapter will analyse how restorative justice connects amnesty and the ICC within the meaning of justice.

Another aspect in the relation between restorative justice and the ICC concerns the way to combine them to overcome the flaws in the ICC's work. In theory, the ICC could either compromise to the national process run in each State, or manage to utilise restorative justice idea in its own legal framework. In addition, restorative justice and formal criminal justice can be operated in one trail, or in two trails. As a result, there can be six possibilities for combining restorative justice and formal criminal justice: Restorative justice and formal criminal justice could be run in domestic process in one authority, or in two separate institutions; they can be both operated at international level by one organisation, or by two organisations; on some special occasions, restorative justice and formal criminal justice can be executed in two trails respectively at domestic level and international level. The theoretical possibilities to combine restorative justice and the formal justice mechanism at the ICC is based on whether it is legitimate to integrate the core value of restorative justice into the ICC's legal framework. This question will be analysed in the last chapter.

In reality, however, the relation between restorative justice formal criminal justice is more complicated and in the meantime simpler than theory. There is the example of the transitional justice in South Africa through the TRC model, which utilised only restorative form of justice-not properly a restorative justice process- but no formal criminal justice to address the crime of apartheid. In the Eichmann Trial, the domestic court in Israel utilised formal criminal justice, but also put victims at the centre of the trial, which involved restorative justice idea inside the formal justice. Restorative

justice, usually operated in transitional justice process, can be closely cooperative with formal criminal justice, like the Sierra Leone's Truth and Reconciliation Commission with the Special Court for Sierra Leone. Or, restorative justice could be far from formal criminal justice, like the Gacaca Courts and the ICTR in Rwanda.

3. The situation in Darfur, Sudan

An assessment of the ICC's impact on justice, peace and victims

The selection of the situation in Darfur, Sudan is based on the fact that the ICC investigation may have not obviously influenced either the justice or peace in the whole situation. Even worse, as the ICC has shown no sign of restraining the prosecutorial investigation against the governmental officials in Sudan, the influence of the ICC has been marginalised by the Government in almost all aspects. It gives very limited space for assessing the impact of the ICC on justice, peace and victims' interests, however, it enables researchers to reconsider- or assume- the possible consequence if the relationship between the Court and Sudan could be improved.

The situation of international crimes occurring in Darfur, Sudan (hereinafter "Sudan") has been analysed together with the situation in Uganda in several studies, notably those on the principle of complementarity of the ICC in Africa by Nouwen[127], Peskin[128] and Jurdi[129]. The situations in Uganda and Sudan share many similarities, but also distinguish in some aspects. Uganda is one State Party to the Rome Statute, but

[127] See Sarah M. H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21(4) *The European Journal of International Law* 941; Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013).

[128] Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) 31(3) *Human Rights Quarterly* 655.

[129] See Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011).

Sudan is not. The situation of Uganda was referred to the ICC by the Ugandan government, whereas the situation in Sudan was referred to the ICC by the Security Council of the United Nations.[130] In accordance with the Rome Statute, a situation can be referred to the Court by the Security Council of the United Nations acting pursuant to Chapter VII of the Charter of the United Nations.[131] The different types of referrals in the two situations in fact have implied that the ICC may have faced more difficulties in the Sudan situation because self-referral often means the State would be cooperative with the ICC.

Another big difference between these two situations, which made the work of the ICC in Sudan more challenging, is that several targets of the prosecution in the situation in Sudan were or still are working for the Government of Sudan. On 14 July 2008, the Prosecutor applied for the issuance of an arrest warrant against President Omar Al Bashir. Since then, the attitude of the Sudanese government shifted from non-cooperative to totally hostile. The whole situation involving Sudanese governmental officials became a "combat" between the ICC and the Sudanese government. In this circumstance, the African Union intervened, demanding the deferral of the investigation by the ICC in the situation in Sudan, so that both judicial and reconciliation process would be proceeded.[132] In 2009, Peace and Security Council of the African Union established a High-Level Panel on Darfur (AUPD) to assist and monitor the national process for the serious human rights violation in Darfur. In the Report on October 2009, the AUPD indicated that the deferral of the investigation required by the African Union was strongly opposed by many people in Sudan and that the ICC prosecutions had been seen as the only proper mechanism to deal with the atrocities in Darfur by the

[130] UN Security Council Resolution 1593 (31 March 2005) UN Doc S/RES/1593 (2005).

[131] Article 13 of the Rome Statute.

[132] Peace and Security Council of African Union, 'Communique of 142nd Meeting' (21 July 2008), Addis Ababa, Ethiopia, PSC/MIN/Comm (CXLII) Rev.1.

displaced people of Darfur[133]. The AUPD also emphasised that "all the Sudanese stakeholders it consulted expressed with candour their commitment to peace and reconciliation".[134] The AUPD report was adopted on 20 October 2009, and thus a High-Level Implementation Panel (AUHIP) was appointed, aiming at implementing the recommendations in the AUPD report.[135] The claims with respect to peace, justice and the needs of victims became the central points in the situation in Sudan. The conclusion based on the AUPD's survey resembles the situation in Uganda, though these two situations are quite different in background. Both peace and justice are urgently required by victims for human rights protection.

The first concern about the involvement of the ICC in Darfur is that it could bedim the effort of Sudanese government to make a ceasefire or a permanent peace agreement with other belligerent groups. On 9 January 2005, about two months before the referral of the situation in Darfur, Sudan to the ICC by the Security Council of the United Nations, a Comprehensive Peace Agreement was signed between the Sudan People's Liberation Movement (SPLM) and the Government of Sudan to settle the prolonged conflicts in Southern Sudan. The peace agreement acknowledged the rights of people in South Sudan to control and govern their regional affairs, as well as the right to self-determination. It also regulated that the status of South Sudan would be determined through referendum, which provided the legal basis for the independence of South Sudan in 2011. It was a sacrifice on the territorial integrity made by the Sudanese government, which did not exchange the result hoped. The representative of Sudan consequently complained in 2005 in one Security Council meeting that the decision of the Security Council to refer the Darfur situation to the ICC was "[unwisely] rewarded

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[133] African Union, *Report of the African Union: High Level Panel on Darfur (AUPD)* (29 October 2009) PSC/AHG/2(CCVII), paras. 240-242.

[134] Ibid, paras.284 and 360.

[135] Peace and Security Council of African Union, 'Communique of the 207th Meeting' (29 October, 2009) PSC/AHG/Comm.1(CCVII).

for putting an end to the longest conflict in Africa with further sanctions and procedures", and "the question of accountability have nothing whatsoever to do with the achievement of stability in Darfur".[136] Since then the Government of Sudan became more cautious in peace negotiation, and managed to avoid any cooperation with the ICC in judicial affairs.

One example is the Darfur Peace Agreement signed in Nigeria in 2006, also known as the Abuja Agreement, which aimed at a peace settlement of conflicts between the Sudanese government and the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) in Darfur. The Abuja Agreement entitled the Government of Sudan to prosecute the perpetrators of atrocities committed in Darfur[137], but provisions of facilitating international prosecution were totally missed. In 2011, the All Darfur Stakeholders Conference was held in Doha, Qatar, and finalised with the *Doha Document for Peace in Darfur* (DDPD). The DDPD reaffirmed the need to respect the sovereignty of Sudan in domestic judicial process in the first paragraph in its Preamble, which was re-stressed in Article 2 of the DDPD as the first principle to obey for power sharing in Darfur.[138]

The emphasis on State's sovereignty might have influences to the involvement of the ICC in two points. Firstly, the relevant issues in Darfur, including regional justice, reconciliation and healing, should be regarded as internal affairs.[139] It indicates that the crisis in Darfur would not be addressed as the way in Southern Sudan, which eventually caused the independence of South Sudan. Secondly, and more importantly, it planned

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[136] The statement of Mr Erwa, the Representative of Sudan, in UN Security Council 5158th Meeting, UN Doc S/PV.5158, at pp. 12.

[137] Darfur Peace Agreement 2006 (5 May 2006), paras. 277 and 367.

[138] The first principle in Article 2 of DDPD is read as "Sudan is an independent, sovereign and federal republic in which sovereignty is vested in the people and shall be exercised by the State according to the provisions of the Constitution of Sudan."

[139] Article 10 of DDPD.

in the DDPD to establish Truth, Justice and Reconciliation Commission to manage the transition in Darfur, and Special Court for Darfur to deal with the violence, with no amnesty granted to ICC crimes.[140] It implied that the Sudanese government has determined not to compromise with the ICC's investigation. In other words, these initiatives might be designed to exclude the work of the ICC in the situation but not for sincere resolution of the crisis, even though the ICC Prosecutor had already determined to open the investigation on 1 June 2005. However, there has not any proper domestic prosecution against the alleged persons at the ICC. The domestic justice mechanism may have been utilised as shielding the indicted persons from being charged at the ICC.

Studies also express concerns that the warrants of arrest at the ICC had made positioned the Sudanese government at a disadvantageous place in peace negotiation in future, which in turn motivated the Sudanese government to become a rejectionist to international criminal justice.[141] The political effects of the proceedings of the ICC Prosecutor had been observed by researchers. For example, Sarah Nouwen and Wouter Werner advised the ICC to accept the reality that trying the President of Sudan had not only been attacked by the Sudanese government as a political interference from the West, but also been objected by Sudanese people.[142] The Court planned to label the officials of Sudanese government, especially the President, as the enemy of humanity. But in the end it turned out that the ICC has become the enemy of Sudan and Sudanese people. There was a worry that the Court would be largely marginalised and used as a "bargaining chip" in peace negotiations in future.[143] Now the ICC has already been

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[140] Article 58, 59, 60 of DDPD.

[141] Alex De Waal, 'Darfur, the Court and Khartoum: The Politics of State Non-Cooperation' in Nicholas Waddell and Phil Clark (eds.) *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008).

[142] Sarah M. H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21(4) *The European Journal of International Law* 941.

[143] Nick Grono and David Mozersky, 'Sudan and the ICC: A Question of Accountability' (31 January 2007) *Open Democracy* < https://www.opendemocracy.net/democracy-africa_democracy/sudan_icc_4301.jsp> accessed 27 July 2014.

marginalised in the situation in Sudan, and the role of the ICC's prosecution would be hardly influential, since the rebel groups must have noticed that no States is willingly to cooperate with the ICC in arresting or surrendering the alleged persons in the situation in Sudan.

In fact, the efforts of the ICC were not absolutely in vain. One noticeable result has been reflected in a series of changes in legislations in Sudan, in particular, the developments in human rights legislation. In 2005, an *Interim National Constitution* was adopted and came into force in Sudan. This constitution mandated that all the rights and freedoms enshrined in international human rights instruments, which had been ratified by Sudan, must be integrated into its national legislation in the form of a Bill of Rights. However, such a requirement was not applied to the reform of criminal law in Sudan, which could be seen as a move to shield the perpetrators of human rights violations from being punished. This situation lasted for many years until the intervention of the ICC into Darfur. In 2009, the National Human Rights Commission was created in Sudan to function as the supervisory institute of any human rights violations. In the same year, war crimes, crimes against humanity, and the crime of genocide were integrated into the Criminal Law of Sudan[144]. It is unclear whether it was the African Union's involvement or the ICC's intervention that prompted those changes in Sudan. Given the overwhelming power of the Sudanese government over the local rebel groups in Darfur, it is not convincing that the Sudanese government made the changes only because of the inter-state factors, without adjusting its policies and strategies pursuant to the prosecution of the ICC and relevant human rights principles.

More importantly, it is revealed that the work of the ICC, including the warrants of arrest and the opening of investigation in the situation in Darfur, Sudan, changed the

[144] See Sigall Horovitz, 'Sudan: Interaction between International and National Judicial Responses to the Mass Atrocities in Darfur' (April 2013) working paper No. 19, *DOMAC Project*.

balanced of military power between the Sudanese government and the strongest rebel force in Darfur,[145] compelling the Sudanese government to sign the Darfur Peace Agreement on 5 May 2006 to solve the conflicts in Darfur. The African Union alone might not be able to put considerable pressure to the top leaders of the Sudanese government, for the Sudanese militia and opposition forces had no fear about attacking the personnel for Peacekeeping Missions as many reports disclosed[146]. The impact of the intervention by the ICC was also acknowledged as the "deterrent effect" of the international prosecution and it should not be underestimated.[147]

Admittedly, such an effect is hard to assess,[148] because it is "likely to be modest and incremental, rather than dramatic and transformative"[149]. However, some deterrent effects have been witnessed. In 2009 and 2010, two men who were alleged to be from rebel groups and were charged to be responsible for the attacks on AU Peace Keeping Missions voluntarily appeared in front of the ICC. Although the indicted officials of the Sudanese government still refused to cooperate with the ICC, the surrender of the rebel group leaders obviously proved the importance of the ICC to peace and justice.

The truth about the impact of the ICC to the justice and peace in Sudan, especially in Darfur, is that the ICC investigation has not been a significant hinder, but also has

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[145] Suliman Baldo, 'Sudan: Impact of the Rome Statute and the International Criminal' (ICTJ May 2010).

[146] See 'Sudanese Army Elements Attack UN Convoy', *UN News Centre* (8 January 2008); 'Sudan Admits Darfur Attack on UN', *BBC News* (10 January 2008). A UN Report also disclosed the existence of several attacks on AU-UN mission in Darfur. See UN Secretary-General, 'Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur' (18 August 2008) UN Doc S/2008/558.

[147] Pablo Castillo, 'Rethinking Deterrence: The International Criminal Court in Sudan' (January 2007) *UNISCI Discussion Papers*, No.13; Nick Grono and Anna de Courcy Wheeler, 'The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015).

[148] See Tom J Farer, 'Restraining the Barbarians: Can International Criminal Law Help?' (2000) 22(1) *Human Rights Quarterly* 90; Michael L. Smidt, 'The International Criminal Court: An Effective Means of Deterrence?' (2001) 167 *Military Law Review* 156; Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95(1) *The American Journal of International* 7; William A. Schabas, 'Criminology, Accountability, and International Justice' in Mary Bosworth and Carolyn Hoyle (eds.), *What is Criminology?* (Oxford University Press, 2011).

[149] David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473.

not been a decisive factor to stable the societal environment either. Despite the signing of peace agreements between the Sudanese government and the rebel forces and the deterrent effect of the prosecution of the ICC, none of those peace agreements lasted very long or truly functioned well. The conflicts in the whole area continue while the United Nations is trying to maintain peace. Delegates from rebel factions and the Sudanese government met numerous times, and no good news had come from these meetings as to when the conflicts would finally end.[150] The continuation of conflicts in Darfur in fact confirms the limits of the capability of the ICC and the cruel reality that in order to achieve peace, formal justice procedure alone may not be enough.

With respect to the protection of victims, and the prevention of human rights violations, studies have not shown a very positive image. What surprisingly resembles the warning to the intervention of the ICC in Uganda by the LRA is that the Sudanese government used victims as a tool to isolate the ICC. As a response to the arrest warrants against its officials, especially the one against its president Al Bashir, the Sudanese government expelled many non-governmental organisations that were leading humanitarian operations and human rights protection in Darfur in early years.[151] Subsequently, the expulsion policy was extended to other parts of Sudan as well.[152] It was estimated that without the work of those agencies, "50 to 70 per cent of the total humanitarian assistance in Darfur, including food, water, and medical care" could be suspended according to the reports.[153]

Considering the conflicts in Darfur are mainly the competition over natural

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[150] 'Sudan: Peace Talks End without Deal' (December 2015) 52(11) *Africa Research Bulletin: Political, Social, and Cultural Series*, pp. 20797C-20798A.

[151] 'Expulsions of Aid Groups from Darfur Will Have Wide Impact, UN Agencies Warn', *UN News Centre* (6 March 2009); Sara Pantuliano, Susanne Jaspars and Deepayan Basu Ray, 'Where to Now? Agency Expulsions in Sudan: Consequences and Next Steps' (2009) *Humanitarian Policy Group*, *ALNAP Lessons Paper.*

[152] 'Khartoum Expels Foreign Agencies from East Sudan', *BBC News* (1 June 2012).

[153] Human Rights Watch, 'Sudan: Expelling Aid Agencies Harms Victims' (5 March 2009).

recourses, the poverty of Sudan has been one of the most crucial reason for the civil war. As the life of local people largely depends on external assistance, the consequence of the actions taken by the Sudanese authorities could be lethal to peace and security in Darfur. The refusal of the Sudanese government to cooperate with the ICC simply focuses on the ICC investigation and prosecution, but the top leaders would vent their anger to other international organisations, aggravating the living conditions of victims. Although similar actions have not been reported in recent years, the fear that the Sudanese government may over-react to the ICC's work one more time requires the Prosecutor to re-calculate the tactics in future.

Another weakness of the ICC's work in protecting victims' rights and needs is that such requirement usually exceeds the capability of justice, legalism and the ICC itself. According to the United Nations' Fact Sheet on the crisis in Darfur, more than 200,000 people have died and at least two million have been displaced from their homes in Darfur since the fighting broke out in 2003.[154] The mass atrocities determine the large number of victims and the scale of needs. Damage which was caused by both the Sudanese government and rebel groups could not be recovered through delivery of justice, because justice may satisfy the sense of retribution of the victims but it hardly enables the recovery of what they have lost because of the conflicts. The living conditions, as has been mentioned above, force the victims to seek something other than justice alone, by virtue of the fact that the victims must survive in the first place, before asking for revenge through punishing those perpetrators, among whom governmental officials should be included. As a result, peace must be achieved in Darfur as the most important protection of victims.

Research on the peace process and reparations to victims of the conflicts in Darfur

[154] 'The United Nations and Darfur Fact Sheet', United Nations < http://www.un.org/News/dh/infocus/sudan/fact_sheet.pdf > accessed 9 April 2015.

by the International Centre for Transitional Justice point out that the Sudanese government did not or does not have enough resources to complete the work of reparation.[155] So, firstly, the Sudanese government needs international assistance. Even if the Sudanese government were to decide to cooperate with the ICC and accordingly leave reparations to the ICC, the ICC could do very little on this issue.[156] And again, after the monetary reparation, if it is possible to be accomplished, remedies for mental damages will be the inevitable demand. As well, the hope for a permanent resolution of the conflicts will grow, in accordance to what was asked of the ICC as a bringer of peace and a peace-builder.

The reconciliation process and ICC's potential role

The Darfur crisis was generated by many different causes, but unfortunately the ICC can only focus on legal issues. Of course, lack of democracy, rule of law, good legislation, and serious corruption, are among the acute problems that have contributed to crises in Darfur and the whole of Sudan[157]. Attention to other urgent causes of conflicts in Darfur and other regions of Sudan perhaps are more realistic than reforming the rule of law and the intervention of international justice. Economic interests, poor governance, geopolitics, political ambition, hostility between ethnic groups, and even religious conflicts, are believed to be the root causes of the Darfur crisis, and together they depict the whole scenario in Darfur.[158] Addressing these root causes is beyond the capacity of legal mechanisms and international justice. The role of international law in

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[155] Suliman Baldo and Lisa Magarrel, *Reparation and the Darfur Peace Process: Ensuring Victims' Rights* (ICTJ November 2007), at pp. 9-14.

[156] Ibid, at pp. 18.

[157] G. Norman Anderson, *Sudan in Crisis: The Failure of Democracy* (University Press of Florida 1999).

[158] See David Campbell, 'Geopolitics and Visuality: Sighting the Darfur Conflict' (2007) 26 *Political Geography* 357; Alex de Waal (ed), *War in Darfur and the Search for Peace* (Global Equity Initiative, Harvard University 2007); Richard Barltrop, *Darfur and the International Community* (I.B.Tauris 2010); Osman Suliman, *The Darfur Conflict: Geography or Institutions?* (Routledge 2011); Johan Brosché and Daniel Rothbart, *Violent Conflict and Peacebuilding: The Continuing Crisis in Darfur* (Routledge 2013).

on going conflicts may not be to deter, but to "compel"- by using force to overturn the rule of the perpetrators or to defeat them (brute force), or to utilise force as a threat to coerce them to surrender to international justice or to change their behaviour (coercion).[159]

Unfortunately, defeating the perpetrators of the situation in Darfur, Sudan is not realistic, because it seems that all warring parties would have to be defeated, since they all have committed international crimes. What is even worse is that many local people have "dual-identities", they are both the victims and perpetrators of gross human rights violations[160], making it difficult to decide whom to defeat. International criminal justice cannot fully coerce the perpetrators to surrender to the court, as seen by the international community. The only two suspects who surrendered to the ICC accepted the charges of attacking the UN Peacekeeping Mission rather than all the atrocities they had committed during the conflicts. They bent their knee to political power, not to the value of human rights and humanitarianism.

In history, national reconciliation has been attempted several times to unite different regions in Sudan. None of those efforts succeeded in bringing real reconciliation to the country. As to the crisis in Darfur, the programs of truth, reconciliation, and restoration have not been organised at national level. Many practices based on local traditions have been taken in the form of reconciliation commission and restorative justice process, trying to hold together the small sporadic achievements in the region of Darfur. But the complex situation in religion, ethnicity, language, and the history between religious and ethnical groups may have rendered difficulties to include those tribe-based restorative justice process into one wide program. After the

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[159] Thomas C. Schelling, *Arms and Influence: With a New Preface and Afterword* (Yale University Press 2008), at pp. 1-5.

[160] Suliman Baldo and Lisa Magarrel, *Reparation and the Darfur Peace Process: Ensuring Victims' Rights* (ICTJ November 2007), at pp. 4.

independence of South Sudan in 2011, international community has endeavoured to assist the new State to operate an effective national transition, including training staff for the proposed truth and reconciliation commission. But the reconciliation in Darfur has not been carried out by the Government of Sudan effectively.

Rules on justice and reconciliation were regulated in Chapter V of the DDPD, recognising that "[j]ustice and reconciliation are integral and interlinked elements in for achieving lasting peace in Darfur and are essential for upholding the rule of law".[161] The Truth, Justice and Reconciliation Commission (TJRC) was established according to article 58 of DDPD, consisting of Justice Committee and Truth and Reconciliation Committee. The Justice Committee shall be responsible for the affairs relating to victims, such as receiving the claims and assessing the compensation. The Truth and Reconciliation Committee, on the other hand, shall be the main body to execute restorative justice approaches.[162] However, the reconciliation mechanism has hardly delivered effective restorative solution to the religious and ethnical tension in Darfur since its establishment. In an early observation by the UN Independent Expert, it was stated that the reconciliation mechanism could not function because of the lack of necessary resource.[163] This difficulty has not been overcome yet. The UN Secretary-General examined the implementation of DDPD and noticed that while the concerns to insecurity and poverty still harassed human rights protection, "the Truth, Justice and Reconciliation Commission has reportedly completed the mapping and analysis of conflicts, but there have been no further activities" because of the very similar reasons since 2012.[164] The national reconciliation by Sudanese government has failed its

[161] Article 55 of DDPD, para. 277.

[162] See Section (3) and (4) of Article 58 of DDPD.

[163] Mashood A. Baderin, 'Report of the Independent Expert on the Situation of Human Rights in Sudan' UN Doc A/HRC/24/31 (18 September 2013), para. 43.

[164] UN Secretary-General, 'Implementation of the Doha Document for Peace in Darfur and Security Council resolution 2363 (2017)' in Annex to 'Letter dated 30 August 2017 from the Secretary-General addressed to the

purpose insofar.

The community level of reconciliation and restorative justice has been slowly moving forward. In 2006, African Union deployed the peacekeeping mission in Darfur, followed by the hybrid operation led by both the UN and AU. The Hybrid Operation, named United Nations-African Union Mission in Darfur (UNAMID), has observed the development of restorative justice in different tribes and communities, and held many judicial sessions and workshops on justice and corrections for local trainees. However, the community conflicts keep raising challenges to the effort. In 2014, the former UN Secretary-General noticed that the then on-going tribal conflicts in all areas in Darfur exposed the co-existence of two opposite aspects: the efforts to reconciliation and the perseverance to military actions of the tribal leaders.[165] Almost all belligerent parties wanted peace and reconciliation, but no party was willingly to hold back military force. The UNAMID continues meeting with group leaders in different regions in Darfur, aiming to mitigate the tension between groups and serious violation of human rights, but has not gained plausible outcomes. In 2018, the UN Security Council adopted Resolution 2429 (2018) to renew the mandate of UNAMID because of the continued concern in justice and peace in Darfur and the whole State of Sudan. It noted the contribution to local security of the unilateral announcement of ceasefire by the military force of the Government with three major rebel groups in Darfur, and the decreased inter-communal armed conflicts. But in the meantime, it warned that the conflicts between communities still remained as one main source of violence in Darfur, which constitutes a threat to international peace and security.[166] The contact of the official of Sudanese government and the local leaders had been started on 24 July 2018 with the

President of the Security Council' (30 August 2017) UN Doc S/2017/747, para. 5.

[165] UN Secretary-General, 'Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur' UN Doc S/2014/852 (26 November 2014).

[166] Resolution 2429 (2018) (13 July 2018) UN Doc S/RES/2429 (2018), at pp. 3-5.

help of UNAMID.[167] It could become the initiation of the community reconciliation being integrated into the national reconciliation program.

The ameliorated security in recent years in Darfur could be attributed to many factors. The AU Peace and Security Council and UN Security Council underlined two significant factors that attributed to the situation, the weakened military capability of rebel groups and the weapon collection campaign run by the Sudanese government.[168] In the latest report on the Hybrid Operation, UN Secretary-General confirmed the importance of the Government forces in stabilising the situation, and appraised the ceasefire between the Government forces and three military groups, suggesting that the strong and stable government is the indispensable factor for the security in Darfur.[169] Furthermore, the Secretary-General noted that the tension over land and other natural resources among non-militia citizens had increased, which has become the new concern in keeping security of the region. The Government forces interfered the intercommunal conflicts, and deployed soldiers to suppress the clashes.[170] However, it was also stated in the Secretary-General report that the governmental militia had involved in several human rights violations, and the responsible persons have gone unpunished.[171] Such situation created a dilemma to the role of Sudanese government when the security in Darfur has predominantly relied on the actions of the Government.

The ICC's work has not helped the reconciliation in Darfur. The role of the ICC to the restorative justice in Sudan is not witnessed at all. More importantly, it is

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[167] UN Secretary-General, 'Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur' UN Doc S/2018/912 (12 October 2018), at pp. 11.

[168] UNAMID, 'Special report of the Chairperson of the African Union Commission and the Secretary-General of the United Nations on the strategic review of the African Union-United Nations Hybrid Operation in Darfur' (1 June 2018) UN Doc S/2018/530, at pp. 2-4.

[169] UN Secretary-General, 'Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur' UN Doc S/2018/912 (12 October 2018).

[170] Ibid, at pp. 3.

[171] Ibid, at pp. 3-4.

predictable that the ICC will not be a positive role to the Sudan's national reconciliation since Sudan has deemed the Court as one archenemy. There exists a voice arguing that the most significant reason why the ICC failed to proceed with its work in the situation of Sudan, is that the ICC does not have coercive power but relies on outside political support in order to apprehend the suspects.[172] The ICC has kept asking States Parties to the Rome Statute and State not parties to surrender or arrest the President of Sudan, arguing that it is an international obligation for States Parties to be fully cooperative with the Court.[173] No State Party has responded such request with real action. On the legal question in regard to the immunity as the Head of a State, the obligation of States Parties to fully cooperate with the ICC, and the effect of the referral of the situation by the UN Security Council, the debate is well balanced. The realistic problem, if the ICC succeeded convicting the President of Sudan, would be that the security situation in Darfur could be worsened rapidly and the reconciliation at community level would go vanished. All the fragile achievements in maintaining peace and establishing justice in Darfur and the whole State of Sudan depend on a stable government to communicate with local groups leaders and put pressure on rebel military groups. The ICC has to pause proceeding the charges against the officials of Sudanese government. Perhaps the best possible role for the ICC to the crisis in Darfur is not to impair the Government by insisting immediate arrest of the top leaders.

If the ICC had been aware of the function of restorative justice in the situation in Darfur, Sudan, the relationship between the Court and the Sudanese government would have not become so intense. The Government of Sudan needs its officials to stay in

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[172] Cécile Aptel Williamson, 'Justice Empowered or Justice Hampered: The International Criminal Court in Darfur' (2006) 15(1) *African Security Review* 20.

[173] See *the Prosecutor v Omar Al Bashir* (Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139-Corr, Pre-Trial Chamber I (15 December 2011).

their roles so that the intrastate conflicts could be controlled. The ICC pursues the aim of combating impunity and bringing the persons responsible for the serious violence to justice. In the current understanding of justice by the ICC Prosecutor and Judges, the alleged persons must be and can only be accountable for international law obligations. Restorative justice idea requires the criminal offenders to be accountable to victims and the affected communities. By holding the view of restoration on justice, the ICC would recognise that the most important obligation for the Sudanese government is to end the inter-communal conflicts and proceed the national reconciliation mechanism.

Another hypothesis on the possible role of the ICC in the situation in Sudan is that it could be the organisation to assist the Government to unite the sporadic community-based reconciliation events. The result of small reconciliation events seated in specific communities will be limited to the scope of the community. The conflicts between communities require a bigger plan that is operated by national authority. Different reconciliations in Darfur are now being run by several organisations, including the UNAMID and the UN Development Programme (UNDP). They need to be collectively operated and monitored by one entity where both justice and reconciliation could be synergised. Restorative justice idea, which does not isolate the Government leaders but encourage them to participate national reconciliation, would make the ICC the organisation that helps the Sudanese government and achieve justice simultaneously.

4. The situation in the Democratic Republic of Congo (DRC)

An analysis on the need of victims in *Lubanga* case

One interlink between restorative justice idea and the ICC's work in the situation in DRC dominantly lies in the engagement of victims in justice process. The special attention on victims of international crimes has been highlighted frequently in the Rome Diplomatic Conference in 1998. The interests of victims were not recognised

universally in the Conference in the beginning. In particular, many Delegates felt afraid that the emphasis on reparation to victims would distract the Court from charging the accused persons. But gradually, more Delegates accepted that victim reparation could contribute to the reconciliation process, so that awarding reparation would strengthen the pursuit of justice.[174]

For example, in the first plenary meeting, the then UN Secretary-General, Mr. Kofi Annan, shortly reviewed the history of the efforts fighting impunity of international crimes, and expressed the special concern on victims by addressing that a permanent international criminal court must recognise that "the overriding interest must be that of the victims and of the international community as a whole".[175] In the next discussion, the Delegate of UK stated that the Court must "have power to award reparations to victims", and "provide adequate protection and assistance to victims in giving evidence".[176] The Delegate of Slovenia underlined that the perpetrators of international crimes must be brought to justice and "rehabilitation of individual victims and war-torn societies should be made possible".[177] Finally, the reparation to victims was confirmed as one basic principle in the Rome Statute.[178] Victims are also authorised the right to participate the justice procedure at any stage[179], which is the procedural right for victims distinguished with reparation. More details on the need of victims will be discussed in chapter 3 and 4. This section only provides an examination of the ICC onto the situation

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[174] See Christopher Muttukumaru, 'Reparation to Victim' in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999), at pp. 263-264.

[175] 'Summary Record of the 1st Plenary Meeting' (15 June 1998) in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, *Official Records,* vol. II UN Doc A/CONF.183/13(Vol.II), at pp. 62.

[176] 'Summary Record of the 2nd Plenary Meeting' (15 June 1998) in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, *Official Records,* vol. II UN Doc A/CONF.183/13(Vol.II), at pp. 67.

[177] Ibid, at pp. 70.

[178] Article 75 of the Rome Statute.

[179] Article 68 of the Rome Statute.

in DRC.

The situation in the Democratic Republic of Congo was referred to the Prosecutor of the ICC by the government of the DRC in 2004. In the communication letters, the government of DRC asked the ICC to open investigations on the crimes committed since 1 July 2002. This time frame just covers the period of the second Congolese Civil War, which is also notoriously known as the "Africa's world war".[180] Like the situation of Uganda, all the alleged perpetrators in the situation of DRC are leaders of non-governmental military groups. What is distinguished from the Ugandan situation is that most of those accused do not belong to the same group. This is not the first situation at the ICC, but the *Prosecutor v. Thomas Lubanga Dyilo* case is the first case that was judged at the ICC. The special "identity" of this case has attracted many studies to discuss its legal issues and effects. The symbolic meaning of this case to international criminal justice will not be dealt with in this study; as well, certain legal issues of it will not be the focus of this study either[181]. As it is stated by professor Schabas, this case will probably be remembered "for [its] contribution to the articulation and testing of the law, rather than [the] motivation and societal impact".[182] The issues related to litigation techniques do not play a big role in the search for peace, but do affect people's sense of justice. The milestone aspect of the *Lubanga* case is that this was the first time for the ICC to demand reparation to victims. But the first try on victim reparation

[180] Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press 2009).

[181] See Thomas Weigend, 'Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges' (2008) 6 *Journal of International Criminal Justice* 471; Alex Whiting, 'Lead Evidence and Discovery before the International Criminal Court: The *Lubanga* case' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 207; Sylvan Vité, 'Between Consolidation and Innovation: The International Criminal Court's Trial Chamber Judgment in the Lubanga Case' and Mark A. Drumbl, 'The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering' in Terry D. Gill, *et al*. (eds.), *Yearbook of International Humanitarian Law 2012 Volume 15* (T.M.C Asser Press 2014); Kai Ambos, 'The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues' (2012) 12 *International Criminal Law Review* 115.

[182] William A. Schabas and Carsten Stahn, 'Introductory Note: Legal Aspects of the Lubanga Case' (2008) 19 *Criminal Law Forum* 431.

exposed many problems.

In 2008, the Trial Chamber I of the Court ruled the criteria on which the identity of victim should be acknowledged for the participation of legal proceedings in *Lubanga* case. The Decision on victim participation considered three questions for all the applications to participate: What recognisable document proof for the identity should be required; whether to include both the direct and indirect harm suffered by applicant; and, whether the harm in the application must be caused by the alleged crime .[183] In the Chamber's opinion, the victims in *Lubanga* case should be legally approved on the standard that the victim must be a natural person, with recognisable document proof, whose interests were harmed, directly or indirectly, by the crime that fall in the jurisdiction of the Court.[184] The Decision was then appealed by both the Prosecution and the Defence. On the issue of identifying victims, the Appeals Chamber confirmed that the harm suffered by the applicant should not be confined to direct harm, but reversed the Trial Chamber I's decision that the harm might not be restricted only to the charged crime.[185] The conclusion in this Judgement received not further challenge in the next phases of the case.

In the Trial phase, the Trial Chamber I reconfirmed the formulation decided by the Appeals Chamber above, and defined the identity of a victim as

> "[S]omeone who experienced personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss"… "as a

[183] *The Prosecutor v Thomas Lubanga Dyilo* (Decision on victims' participation) ICC-01/04-01/06-1119, Trial Chamber I (18 January 2008), para. 86-94.

[184] Ibid.

[185] *The Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) ICC-01/04-01/06-1432, Appeals Chamber (11 July 2008).

result of the crime charged".[186]

The definition of victims may be seemingly in favour of all the victims as long as they are able to demonstrate the link between their alleged harm and the crime charged in court, but in effect, it is rather narrow in *Lubanga* case. Given that Mr. Lubanga's charges were mainly on the enlistment and conscription of child soldiers, the major victim participants in justice procedure were the former child soldiers from Mr. Lubanga's military group. The standpoint in the Judgement manifested the determination of the protection of children during wartime, and is believed to have deterrent effect on similar crimes in future.

However, the Trial Chamber I's judgement *Lubanga* case dismissed a wide understanding of the victim identification. The narrow definition eventually became the consistent standard in the situation in DRC. The Appeals Chamber in *Lubanga* case agreed the definition and reconfirmed that the victims of the *Lubanga* case eligible for reparations must be those who "suffered harm as a result of the commission of the crimes of which Mr Lubanga was found guilty".[187] This opinion seems very strange because on the one hand it shows full consideration to those child soldiers who experienced extreme victimisation, but on the other hand, it does not acknowledge the identity to the victims who were attacked by the child soldiers. As the ICC ruled out the possibility that the people who were attacked by child soldiers should have been counted as victims, the victims as such would not have the right to participate in the justice procedure at the Court.[188] This decision is very unfair, because in battlefield or

[186] *The Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, Trial Chamber I (14 March 2012), para. 14 ii)-iv).

[187] *The Prosecutor v Lubanga* (Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2) ICC-01/04-01/06 A A 2 A 3, Appeals Chamber (3 March 2015), para. 211.

[188] *The Prosecutor v Lubanga* (Redacted version of "Decision on 'indirect victims'") ICC-01/04-01/06-1813, Trial Chamber I (8 April 2009), para. 52.

in normal places during wartime, child soldiers sometimes commit crimes that are not less terrifying than that committed by adults.[189] The protection of children is important, of course. But it shall never mean that the wrong-doings by children would not be measured in an international court. It would be very disappointing for the victims of the crime committed by child soldiers if their identity as victim would not even be legally approved. Professor Ambos has expressed the concerns that the denial of being recognised as victim would cause unnecessary psychological harm and secondary traumatisation[190]. This pitfall has also been challenged by many other studies.[191] The identity of victim in international crimes shall be an objective fact which indicates the very nature of atrocities. But the *Lubanga* case told people that identification of victims is going to be decided- or rather selected- by the judicial branch of the ICC.

Another problem in the *Lubanga* case relates to how to understand victims' participation in the justice procedure. According to the opinion of the Court, the participation of victims and the crime are connected by the concept of interests- the interests harmed by the charged crime. The Trial Chamber I announced that it would ensure "the wide-ranging particular needs and interests" which include

> "[A]n interest in receiving reparations, an interest in being allowed to express their views and concerns, an interest in verifying particular facts and establishing the truth, an interest in protecting their dignity during the trial and ensuring their safety, and an interest in being

[189] See Jo Boyden, 'The Moral Development of Child Soldiers: What Do Adults Have to Fear?' (2003) 9(4) *Peace and Conflict* 343.

[190] Kai Ambos, 'The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues' (2012) 12 *International Criminal Law Review* 115, at pp. 118.

[191] See Gioia Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis' (2007) 7 *International Criminal Law Review* 531; Anja Wiersing, 'Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court' (2012) 4(3) *Amsterdam Law Forum* 21; Luke Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' (2013) 17(3) *The International Journal of Human Rights* 368; Carsten Stahn, 'Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or "Juridified Victimhood" by Other Means?' (2015) 13 *Journal of International Criminal Justice* 801.

recognised as victims in the case, among others."[192]

The interlink in between interests and the right to participate of victims makes the participation relevant to two core aspects in the justice procedure at the Court. Normally, there should be a difference between being entitled to participate in the legal procedure at the ICC and being able to have access to the reparations process. The right to participate is a procedural right, but accessing the reparations process counts to a substantive right. The rejection of a procedural right of a victim, in ordinary circumstance, does not necessarily cause the denial of the corresponding substantive right. Unfortunately, the boundary between the two different rights has become blur in *Lubanga* case. More precisely, the right to reparation is considered as one part of the right to participate. Such formulation on victim's participation is a double-edged blade. If the application of a person to participate the justice procedure is accepted by the Court, then it guarantees that the applicant will be recognised as a victim and there will be no further worry in receiving reparation, unless the conviction of the accused fails. However, in the meantime, victim's non-success in demonstrating the link of the harm onto personal interests and the charged crime always results in the loss of any chance to get reparation. The shortage of this formulation becomes particularly notable if the Prosecutor decides to bring only part of the criminal actions in the case to the Court. The *Lubanga* case has been the first and most famous case for such disadvantage. The self-esteemed reparative justice at the ICC, or the restorative side of the justice, which is witnessed by the participation of some victims, may have been based on the neglect of the interests of more other victims.

The focus on the crimes in relation to child soldiers in *Lubanga* case was a safe-play for the ICC. As the first case at the Court, the *Lubanga* case must be a success.

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[192] *The Prosecutor v Thomas Lubanga Dyilo* (Decision on victims' participation) ICC-01/04-01/06-1119, Trial Chamber I (18 January 2008), para. 97.

After this case, both the Prosecutor and the Judges should be more brave in scrutinising more serious crimes in other cases. It has been blamed that the mass violation of human rights, especially the large scale sexual violence and abuses, was reported but remained untouched by the Prosecution in the first case.[193] In other two cases, Mr. Katanga was prosecuted for being responsible for, *inter alia*, rape and sexual slavery as crimes against humanity, but was judged as not being responsible for those crimes[194]; the confirmed charges against Mr. Ntaganda include rape and sexual slavery as both war crimes and crimes against humanity under organisational policy.[195] The ICC has shown its determination of protecting child rights in *Lubanga* case. It is also necessary gain the sense of justice in gender-based crimes. Lack of justice for such crimes may not desist potential offenders from committing similar crimes. Victims need the Court to address more serious crime, as well as a broader definition of victim. Since the ICC has adopted a narrow definition of victim, what crimes will be convicted in the final judgement to the perpetrators is the decisive factor to who can receive the reparation. The help of victims to the Court may be greater in quantity and quality than the contribution of the Court to victims, which will undermine the trust of people on international criminal justice.

The role of the ICC in the situation of DRC

Despite the shortages, the prosecution against Lubanga at the ICC has been a great achievement in ensuring the confidence of the international community and the trust of victims in justice, considering the failure of domestic justice in the DRC. This

[193] Laura Davis, 'Justice-Sensitive Security System Reform in the Democratic Republic of Congo' (2009) *Brussels: Initiative for Securing Human Rights.*

[194] *The Prosecutor v Germain Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG, Trial Chamber II (7 March 2014), para. 1693.

[195] *The Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06, Pre-Trial Chamber II (9 June 2014), para. 36.

achievement contributes to the relief of pain of those victims, although it is impossible that all pain can be relieved through formal justice.

Beside Mr. Lubanga, there are five other persons being accused in the situation of DRC. One wanted person, Mr. Mudacumura, is still at large. The charges against Mr. Mbarushimana was not confirmed at Pre-Trial Chamber I, indicating that Mr. Mbarushimana was not the main contributor for the charged crimes.[196] The charges against Mr. Ngudjolo were firstly confirmed jointly with Mr. Katanga on 30 September 2008,[197] but was dropped at Trial Chamber II for insufficient evidence to prove Mr. Ngudjolo's personal responsibility.[198] In the cases where the charged crime have been confirmed in the situation in DRC, *Lubanga* case and *Katanga* case are under reparation phase. The *Ntaganda* case awaits the judgement at Trial Chamber IV by the time this study is being written.

The proceedings of the ICC's work in the situation in DRC considerably rely on the cooperation of the authorities of DRC. Mr. Lubanga was caught by Congolese authorities and then surrendered to the ICC on 17 March 2006, approximately one month later than his warrant of arrest being issued at Pre-Trial Chamber I.[199] Mr. Mbarushimana, according to the information provided by the ICC, obtained the status of refugee in France in 2003.[200] The French authorities surrendered Mr. Mbarushimana to the Court in early 2011. It was reported that before the issuance of his warrant of

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[196] *The Prosecutor v Callixte Mbarushimana* (Decision on the confirmation of charges) ICC-01/04-01/10-465-Red, public redacted version, Pre-Trial Chamber I (16 December 2011).

[197] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07-717, public redacted version, Pre-Trial Chamber I (30 September 2008).

[198] *The Prosecutor v Mathieu Ngudjolo* (Judgment pursuant to article 74 of the Statute) ICC-01/04-02/12-3-tENG, Trial Chamber II (18 December 2012).

[199] *The Prosecutor v Thomas Lubanga Dyilo* (Warrant of Arrest) ICC-01/04-01/06-2-tEN, Pre-Trial Chamber I (10 February 2006).

[200] *The Prosecutor v Callixte Mbarushimana* (Decision on the confirmation of charges) ICC-01/04-01/10-465-Red, public redacted version, Pre-Trial Chamber I (16 December 2011), para. 1.

arrest, Mr. Ngudjolo had signed a peace agreement with the DRC government, and had been granted amnesty accordingly.[201] He was serving in the military force which is the national defending force for DRC when he was arrested and then transferred to the Court in February 2008.[202] The story of the arrest and surrender of Mr. Katanga was very similar to Mr. Ngudjolo. Mr. Ngudjolo was appointed by the President of DRC as the Brigadier General of the national defending force before he was arrested by the DRC authorities and transferred to the Court.

Mr. Ntaganda surrendered himself to the ICC in 2013, seven years after Lubanga was transferred to The Hague.[203] Ntaganda came from the same military group as Lubanga and held the position of Deputy Chief controlling the military actions. While Lubanga was in detention in The Hague, in 2012, Ntaganda re-organised group led by Lubanga and created another one named M23. Ntaganda turned himself to the embassy of the United States in Rwanda in the next year, following the internal conflicts amongst factions of his own military group.[204] It was possible that the example of Lubanga left Ntaganda a message that cooperating with the ICC could be a better choice for him to keep himself alive. His appearing at the ICC could have been a signal for the M23 to work towards a peace settlement with the DRC government. In 2013, the military group M23 signed a deal with the DRC government in Kenya, promising the dissolution of the group and the reintegration of the combatants.[205]

The ICC's work for DRC, comparing with the support given by DRC to the Court,

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[201] *The Prosecutor v Mathieu Ngudjolo* (Judgment pursuant to article 74 of the Statute) ICC-01/04-02/12-3-tENG, Trial Chamber II (18 December 2012), para. 10.

[202] Ibid.

[203] *The Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06, Pre-Trial Chamber II (9 June 2014), para. 2.

[204] Human Rights Watch, 'Bosco Ntaganda' < https://www.hrw.org/topic/international-justice/bosco-ntaganda > accessed 19 August 2015.

[205] 'DR Congo Government "Signs Deal with M23 in Kenya"', *BBC News* (12 December 2013).

is a mixture of good consequences and bad news. It is said that the arrest of the perpetrators itself was a great success for the international community, since people in the DRC have been "crying" for justice for many years.[206] Being tried at the ICC of some former rebel leaders may have been one of the very few occasions where people in DRC gain some satisfaction. Ideally, justice should be done in domestic courts because the ICC could only charge the criminals most responsible rather than all of them. But after years of civil war and external military interfere from neighbour States, DRC could not establish institutions for proper justice. However, the happiness brought by the ICC to the State is limited. For lasting security and peace, justice for the most responsible persons, for low-rank soldiers, and for civilian combatants shall be connected as a whole. Lack of justice on any stage may deepen people's dissatisfaction, intensify the oppositional attitude between groups. The United Nations had emphasised the importance of domestic prosecution by saying that the Congolese authorities should "bring to justice all perpetrators of these [human rights] violations".[207] Unfortunately, the ICC's decisions and judgements have not contribute to peace or national reconciliation in DRC. More will be discussed in the next section.

The ICC has hardly contributed to the change of life for victims and other people in DRC. The insufficiency of care on victims' need in trial phase has been discussed above. Extra attention shall be paid to the influence of the ICC's work outside the trial. As professor Cassese noted, one reason that none of the trials at the ICC was held in DRC local areas is that any intention to locate the trial in DRC could have put the witness and victims at risk of death or bodily injury.[208] The participation of witnesses

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[206] Géraldine Mattioli and Anneke Van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo' in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008), at pp. 56.

[207] OHCHR, 'Report of the United Nations Joint Human Rights Office on International Humanitarian Law Violations Committed by Democratic Forces (ADF) Combatants in the Territory of Beni, north Kivu Province, between 1 October and 31 December 2014' (May 2015), at pp. 18.

[208] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), at pp. 344.

as well as victims at the ICC in The Hague instead of the DRC is a good protection mechanism. However, only some of the witnesses and victims of the international crimes in the DRC attended the trial, and it was not possible for them to stay in The Hague forever, away from the dangers in DRC. They return to the DRC after they finish their "jobs" at the ICC, and their participation at the trials against those former leaders of military groups will be revealed sooner or later. Even if the ICC takes careful consideration to the confidentiality and safety of those participants, such news may have been dispersed already. Then how can the ICC continue its protection of victims and witnesses outside the Hague?

Apart from the *Lubanga* case, the limits of the ICC to fully involve the victims rest on two main points. First, the financial ability of the ICC has limits, so that the ICC has to control the participation of the number of victims and witnesses. It is not likely for the ICC to provide enough space and time for those victims, given that perhaps all the Congolese could qualify as victims. The Prosecutor's strategy in the selection of cases and the charged criminal acts has been widely criticised.[209] It could be hard for the ICC to clearly identify those who are victims because "all the parties have legitimate grievances, but all are also responsible for massive human rights violations".[210] The position of the Court becomes crucial because all parties prefer to become the one who will be protected by the Court and have their enemies condemned. The ICC must be very cautious in selecting cases to avoid such risks. Even after careful consideration, there is the dilemma that in the *Lubanga* case "[c]hild soldiers are typically victims and perpetrators at the same time".[211] Under these conditions, in establishing the principles

[209] See the discussion in Michèle Laborde-Barbanègre and Roxane Cassehgari, 'Reflections on ICC Jurisprudence Regarding the Democratic Republic of the Congo: Drawing Lessons from the Court's First Cases' (ICTJ Briefing 2014).

[210] Sverine Autesserre, 'The Trouble with Congo: How Local Disputes Fuel Regional Conflict' (2008) 87 *Foreign Affairs* 94.

[211] Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of International Criminal Court' (2008) 90(870) *International Review of the Red Cross* 409, at pp. 419.

and procedures for reparation in the *Lubanga* case, the ICC Prosecutor recommended using restorative justice approaches to cover more victims in its reparations program, which has been rejected by the Court.[212]

The ICC's intervention to the situation in DRC has not been observed of being influential to peace and national reconciliation at all. In April 2002, the DRC government and rebel groups unanimously expressed the will to organise a new government through a transitional constitution, which would be functioning and respected by all parties for two years. On 7 August, the DRC government received a loan worth $454 million from the World Bank to assist in national development and reconstruction. In July a peace agreement was signed between the DRC and Rwanda under which Rwanda would withdraw its troops from the eastern boundary and the DRC would be obliged to disarm and arrest Rwandan Hutu combatants who were charged for taking part in the Rwanda genocide of 1994.

In addition, in September, the Ugandan government agreed that Ugandan troops would retreat from the territory of DRC. Finally, at the end of 2002, the government of the DRC achieved a peace deal with main rebel groups in DRC and promised them political benefits in the transitional government.[213] However, although more so-called peace deals were signed to solve the problems in the DRC, the conflicts had not truly ended. In 2003, the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC) repeatedly reported military activities in different regions in the DRC.[214] Even after the ICC became involved in the DRC situation, the overall conflict

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[212] *The Prosecutor v Lubanga* (Prosecution's Submissions on the Procedures and Principles for Sentencing) ICC-01/04-01/06-2867, Trial Chamber I (18 April 2012), paras 4-6, cited in *Prosecutor v Lubanga* (Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06, Trial Chamber I (7 August 2012), para. 76.

[213] See Michael Wallace Nest, Francois Grignon and Emizet F. Kisangani, *The Democratic Republic of Congo: Economic Dimensions of War and Peace* (Lynne Rienner 2006). Also see 'Democratic Republic of Congo Profile- Timeline', *BBC* < http://www.bbc.co.uk/news/world-africa-13286306 > accessed 22 September 2016.

[214] See UN Secretary-General, 'Thirteenth Report of the Secretary-General on MONUC' (21 February 2003) UN Doc S/2003/211; 'Second Special report of the Secretary-General on MONUC' (27 May 2003) UN Doc

between the Government and rebel groups, and between different military factions, remained much the same. In 2012, the year Mr. Lubanga was convicted at the ICC, the Secretary-General of the United Nations (the UN Secretary-General) reported the deteriorated humanitarian situation in the DRC:

> "According to the Office for the Coordination of Humanitarian Affairs, humanitarian needs increased during the reporting period, in particular as displacements grew because of renewed fighting and insecurity in the eastern Democratic Republic of the Congo."[215]

It sounded like the DRC was living in another sphere, away from the international community, and that the involvement of international justice and even the missions of the United Nations could not result in significant changes. Nonetheless, this outcome helps, or cautions the international community to realised that the conflict in DRC and the whole region of the African Great Lake, which includes Burundi, Democratic Republic of Congo, Kenya, Rwanda, Tanzania, and Uganda,[216] is too complicated for international law to resolve alone. Even the ICC may be relatively powerless in the face of such complexities.

The continued conflicts are led by several political parties for gaining more benefits through negotiations with the DRC Government. In early 2014, the top United Nations official in the Democratic Republic of the Congo expressed the concern about the security conditions in the country and stated that "[p]reserving peace and security for all as well as respect for human rights is everyone's responsibility".[217] Professor

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S/2003/566; 'Fourteenth Report of the Secretary-General on MONUC' (17 November 2003) UN Doc S/2003/1098.

[215] UN Secretary-General, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (14 November 2012) UN Doc S/2012/838, para. 26.

[216] See Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press 2009).

[217] 'UN Peacekeepers in Eastern DR Congo Meet the Injured after Political Rally Turns Violent', *UN News*

Raymond Murphy carefully analysed the failures in civilian protection in the UN Peacekeeping Mission in DRC (MONUSCO), and warned that UN military power had limited influence on the too many rebel groups.[218] He underscored the problematic but realistic fact that the on-going crisis in DRC has been caused by the difficulties in making "a successful disarmament and reintegration programme".[219]

Nevertheless, the MONUSCO has been continuing its work on peace and security in DRC, trying to provide assistance to reaching a peace agreement between the Government and other political factions, and to establishing reconciliation programs at communal level.[220] Such effort, together with the plan by the DRC government to organise a national transition to establish a new government that will include more political parties, has moved on with great struggles pacifying the intrastate conflicts, and finally brought the 31 December 2016 agreement. However, the implementation of the agreement has not gone well. According to the assessment of the UN Secretary-General, the agreement "has been steadily eroded by a lack of trust between the signatory parties and the increasing disaffection of the Congolese population with the political class as a whole."[221]

Fairly saying, without the general environment of peace, there can be hardly a unified and fair system provided for criminal justice. Criminal prosecution managed by one group against the persons belonging to other groups, especially when they were enemies before, must be based on commonly agreed conditions. Otherwise, it will be

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Centre (21 February 2014).

[218] Raymond Murphy, 'UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians' (2016) 21(2) *Journal of Conflict and Security Law* 209.

[219] Ibid, at pp. 223.

[220] UN Security Council Resolution 2098 (2013) (28 March 2013) UN Doc S/RES/2098 (2013).

[221] UN Secretary-General, 'Special report of the Secretary-General on the strategic review of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (29 September 2017) UN Doc S/2017/826, para. 9.

seen as a "vengeance" taken by the victors onto the defeated. Unfortunately, armed conflicts have not been stopped in DRC. Similar to the situation in Uganda, the Government of DRC expressed a will to work with one of the alleged perpetrators at the ICC, Bosco Ntaganda, as a gamble to make sure peace could be achieved earlier.[222] Inevitably, the complex relationship between the government of the DRC and the perpetrators triggered "peace versus justice" debates.[223] And not surprisingly, all the arguments on the question of "peace versus justice" in the situation of DRC are almost the same as the ones in the Uganda situation. The ICC has been lucky in the situation in DRC, due to the fact that the wanted person by the ICC were almost all under the control of the Government. The Court also benefits from the narrowed view on the crisis in DRC, which facilitates the Court with some support the ruling party of the DRC government. The failed attempt of the Truth and Reconciliation Commission in DRC[224] exposed the fact that the DRC government does not have enough experience and resource to proceed national reconciliation, and must rely on the ICC to achieve justice.

5. Lessons from the Gacaca Courts in Rwanda

International crimes are the serious violations of international customary rules, which are intended to protect and "considered important by the whole international community and consequently binding all the states and individuals".[225] Those values

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[222] David Smith, 'Congo Conflict: The "Terminator" Lives in Luxury while Peacekeepers Look on', *The Guardian* (Goma, DRC, 5 February 2010) < http://www.theguardian.com/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc > accessed 27 October 2015.

[223] Håkan Friman, 'The Democratic Republic of Congo: Justice in the Aftermath of Peace?' (2001) 10(3) *African Security Studies* 62; Debbie Sharnak, 'Justice and Moral Responsibility in Congo' (2007) 4(1) *Eyes on the ICC* 65; René Lemarchand, 'Consociationalism and Power Sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo' (2007) 106(422) *African Affairs* 1.

[224] Elena Naughton, 'Democratic Republic of the Congo: Case Study' in ICTJ, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Process?* (June 2014).

[225] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), at pp. 11.

should be universally acknowledged and must be laid down in international legal instruments.[226] Peace, justice, and human rights have become the most outstanding themes amongst those values, which are highlighted in the UN Charter. Although the ICC is independent of the UN, those values are still prominent for the ICC if the ICC is ready to accept its role and responsibility to the international community. In previous examples, the role of the ICC to peace, justice and the need of victims either became a hinder to the effort of the concerned State to make peace negotiation and end the conflict, or had been limited by its real capability in formal justice procedure to meet victims' requirement. Or, the ICC may be simply of no significant effect on any one of the three aspect because of the insistence on retributive action against the top leaders. The outcome of not applying restorative justice idea has been seen.

However, the current discussion needs an analysis on results of a restorative justice process without being guided by the important values and principles in international criminal justice. The Gacaca Courts in Rwanda provide such a good opportunity. To this end, this section will not include the impact of the International Criminal Court for Rwanda (ICTR) on peace, justice and victims' need.

The background of establishing the Gacaca Courts

When facing the unimaginable atrocities that constitute international crimes, which have threatened or already endangered peace and justice, the mechanism at international tribunals may be impeded in achieving proper peace or delivering satisfying justice to the harmed society and victims. However, it does not imply that the formal criminal justice should be replaced by pure restorative justice methods. One frustrating problem is that the "traditional approaches" in many states for handling post-violence issues, which include processes based on the idea of reconciliation, do not

[226] Ibid, footnote 10.

always serve the purpose of guaranteeing the successful achievement of peace and justice. It can be observed more clear if restorative approaches are totally separated from the fundamental principles in formal justice.

The massacre in caused by political disputes between different ethnicities in April 1994 in Rwanda, which has been acknowledged as one real genocide after the Holocaust since the Second World War.[227] About four months after the genocidal violence in Rwanda, the UN Security Council decided to establish the ICTR to prosecute the persons responsible for the most serious crimes in the genocide.[228] Some top leaders for the genocide were to be tried at the ICTR, meanwhile, national prosecutions against other criminal offenders should be managed at domestic level. However, the national justice went on in a very slow pace. The new Government of Rwanda insisted on pursuing full accountability to all offenders. But the number of the persons to be prosecuted was rather large, which was far beyond the capability of the Rwandan judicial system.

From 1998 to 1999, a series of meetings held by the Rwandan government to discuss the issues relation to national prosecution. The meetings found out many problems in achieving justice under the then judicial system in Rwanda to take accountability of all the offenders, including the huge number of the person in detention and the limited number of professional staff as a comparison.[229] The meetings also noticed that the formal criminal justice could not satisfy people's need in living and working in post-genocide Rwanda.[230] The insufficient capability urged for an

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[227] The situation in Darfur, Sudan has also involved in the crime of genocide. See *the Prosecutor v Omar Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3, Pre-Trial Chamber I (4 March 2009).

[228] UN Security Council Resolution 955 (1994) (8 November 1994) UN Doc S/RES/955 (1994).

[229] Office of the President of the Republic of Rwanda, 'Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999' (August 1999), para. 74.

[230] Ibid, para. 73.

alternative form of justice. The conclusion and recommendation of the meetings mentioned above was to resurrect the traditional *Gacaca* process and integrate it into modern justice.[231] After preparation for more than one year, the *Gacaca* mechanism was set up in 2001 by the decision at the Transitional National Assembly.[232]

The Gacaca Courts in Rwanda, which were established to offer a broader platform for taking accounts of the persons who might be criminally involved in the genocide, are paralleled to the formal justice proceedings at ICTR. It served the aims of restoring peace and harmony, re-building the State of Rwanda, and punishing the criminals of the genocide.[233] It originated from local language and indicate the form of dispute resolution in which people sit on the grass and negotiate the offence with all concerned persons,[234] and abandoned the modern criminal procedure. The system was primarily designed for the urge for simplifying the justice process with the necessity of respecting local tradition and culture, providing some procedures that were more familiar to local people, and helping victims and criminals find belongingness and inclusiveness, which included many valuable restorative justice elements.[235] In addition, the Gacaca Courts, often believed as "community justice", intended to bring justice to more citizens at domestic level by focusing on lower-hierarchy perpetrators in the genocide. So that it could be deemed as one great creative attempt to proceed a transitional justice with local traditions. Though it was praised for its efficiency and acceptability,[236] and

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[231] Ibid, para. 76 and 81.

[232] Transitional National Assembly of Rwanda, Organic Law no. 40/2000 of 26/01/2001. The Organic Law was then amended in 2004.

[233] Office of the President of the Republic of Rwanda, 'Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999' (August 1999), para. 76.

[234] Jeremy Sarkin, 'The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the *Gacaca* Courts in Dealing with the Genocide' (2001) 54(2) *Journal of African law* 143, at pp. 159.

[235] See Mark Drumbl, 'Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda (2000) 75(5) *New York University Law Review* 1221; Helena Cobban, 'The Legacies of Collective Violence: The Rwandan Genocide and the Limits of the Law' (2002) 27(2) *Boston Review* 4.

[236] Tharcisse Karugarama, 'After such Horror, What Forgiveness? How *Gacaca* Forced Virtue upon Us', *The EastAfrican* (16 June 2012) < http://www.theeastafrican.co.ke/oped/comment/After-such-horror--what-

considered that traditional process might be safer than formal trials for genocide survivors to participate,[237] the problems still remain to be analysed.

The legacy of Gacaca Courts has been studied by serval researchers and NGOs. The assessments, consisting of many positive opinion and more negative comments[238], mainly concentrate on the issues in the procedure from the perspective of legalism. Since the *Gacaca* was believed as one experience of restorative justice as mentioned above, it is also necessary to examine the practices by the spirit of restoration, especially on the negative aspects.

Some positive aspects of the Gacaca Courts

The initiation of Gacaca Courts in Rwanda is a great innovation. Considering the primary aim of designing the Gacaca Courts was to accelerate the domestic justice process that was impeded for years after the genocide in Rwanda, it did make the justice process faster and cheaper. Human Rights Watch estimated that when the Gacaca mechanism was established, more than 125,000 persons were still waiting for trial to be taken, even there had already about 5000 trials taking place.[239] In the first phase of the *Gacaca* from 2002 to 2004, known as the "pilot phase", 54,573 cases had been filed and were waiting for the next step, which involved the same number of persons in total.[240] The focus of this phase was on data collection through public hearings and

forgiveness-Gacaca/434750-1429080-120wuxl/index.html> assessed 4 March 2015.

[237] UN Human Rights Council, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (21 August 2017) UN Doc A/HRC/36/50, advance edited version, para. 75.

[238] See for example, Bert Ingelaere, 'The Gacaca Courts in Rwanda' in Luc Huyse and Mark Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experience* (International Institute for Democracy and Electoral Assistance 2008), at pp. 37; Human Rights Watch, 'Justice Compromised: The Legacy of Rwanda's Community-Based *Gacaca* Courts' (May 2011); National Service of Gacaca Courts, 'Gacaca Courts in Rwanda' (June 2012).

[239] Human Rights Watch, 'World Report 2001', at pp. 65-66.

[240] See National Service of Gacaca Courts, 'Gacaca Courts in Rwanda' (June 2012), at pp. 58-59.

confessions. After the revisions of the procedure and structure of Gacaca Courts in 2004, the number of courts in different level of political units reached 12,103 throughout the whole country when Gacaca Courts ended the mandate in 2012.[241] Considering the economic situation of Rwanda, and the ethnical tension still existed during the Gacaca Courts, such achievement in delivering justice must be highlighted. The efficiency of Gacaca Courts met people's expectation to see justice done when the pain caused by the violence haunted the country and the victims. It provided one possibility to solve the problem that justice is always delayed when facing international crimes beyond the slow-paced criminal prosecution.

The efficiency of Gacaca Courts can be attributed to the special form of justice procedure, which is also another positive aspects of the system. The basic level of the courts was located at the smallest political unit- cell, each one of which can be seen as a community. In the bigger units above cell, sectors, there were trial courts and appeal courts. In this way, Gacaca system include all the administrative units so that the operation of justice was deployed in every community, and all the information was gathered and sent to the State authorities.[242] The structure of the Gacaca Courts could help the judgements made at grass-root level to be linked together and to be imbedded into State's will. More importantly, in cell courts, the participants were neighbours who experienced the massacre collectively. Their opinions about the crimes and the view on the proper response to the perpetrators were important to clarify the truth and share the feelings. The effect of the structure of Gacaca Courts, according to the design, should convey people's voice, including victims, witnesses, as well as the offenders, to the Government of Rwanda. It should be a justice that was about everyone and replied on everyone. Through the reconciliations at community level, the State could achieve the

[241] Ibid, at pp. 64.

[242] See Parliament of Rwanda, Organic Law no. 16/2004 of 19/6/2004.

national reconciliation after the horrible massacre.

The procedure of Gacaca Courts was not based on formal justice. Rather, dialogues between persons, which replaced the quarrel between litigants, were the main form of communication. The face-to-face talks between victims, witnesses, and the accused persons, encouraged the participants to directly share information and feelings, and helped them to let the emotion out in front of the neighbours. As a result, the justice process in Gacaca Courts were not only about the disputing with logic and evidence, but the re-connecting of each other as the member of a community. The dialogues between participants in Gacaca Courts, firstly of all, admitted the different identities between victim and offender, making clear the wrong-doings that would be discussed in the process. But the Gacaca Courts also merged victims, witnesses and offenders into one more important identity- Rwandan, so that the sense of integrity and belonging would not be forgotten during the process. In fact, the former perpetrators did live in their community together with victims. The persons who committed violence in the massacre wished to be accepted by their community, evident by expressing great remorse and apologising to the people they hurt.[243] Other than what the former perpetrators wanted for themselves, one realistic reason to utilise the power of daily conversation into Gacaca Courts was that the broken State needed enough people to get involved in the re-build of the country, economically and psychologically. The tragedy in the past should be remembered and life must continue. There would be no better choice but to decrease the division between different ethnics. Gacaca Courts had play a proper role in it.[244]

In general, Gacaca Courts was created on the root of the ancient culture among

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[243] See the documentary directed by Anne Aghion, *Gacaca, Living Together Again in Rwanda?* (2002).

[244] See National Service of Gacaca Courts, 'Gacaca Courts in Rwanda' (June 2012), at pp. 268-273. See also Megan M. Westberg, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR' (2011) 59 *Kansas Law Review* 331.

Rwandan people in solving disputes, and adjoined with some core elements in modern criminal justice. The *Gacaca* in history, as many experts have already introduced, was on the basis of gender distinguishing that granted men much more power than women, and primarily aimed to restore the harmony in the community, with retribution being subsidiary to such aim.[245] The new Gacaca Courts authorised all people, including both men and women, to participate the talks. In addition, the Gacaca Courts in post-genocide Rwanda underscored the need to inflict punishment onto the convicted persons. In trial phase, the law establishing Gacaca Courts categorised three tiers of the prosecuted persons by their roles in the crime and the gravity of the criminal acts, and set different penalties accordingly with the consideration to the attitude of the accused in front of the court.[246] The sanction to the convicted persons could be mitigated depending on how remorseful they behaved in the court, but no amnesty would be granted. To the end of restoration, though retribution was one driving ideology in Gacaca Courts, many criminals received the sanction of community service that kept them attached to the place they live and the people they know, and made them pay back the damage they caused to others.[247] The criminals were taken accountability for victims and the community, but not only because the law required so. In other words, the *Gacaca* resurrected was a combination of the ameliorated traditional justice procedure and the retributive idea in formal criminal justice.

Such combination allowed the State to seek national reconciliation through a procedure that is more familiar to local people without violating the international obligation to combat impunity of the perpetrators committing international crimes. On

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[245] See Bert Ingelaere, 'The Gacaca Courts in Rwanda' in Luc Huyse and Mark Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experience* (International Institute for Democracy and Electoral Assistance 2008), at pp. 33-34.

[246] Article 51-81, Organic Law no. 16/2004 of 19/6/2004.

[247] Megan M. Westberg, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR' (2011) 59 *Kansas Law Review* 331.

this point, as well as the points discussed above, the Gacaca system should be considered as a good example of transitional justice practice, which brought restorative justice elements and formal justice together. But, on the other hand, the combination of restorative form and retributive core in Gacaca Courts brought many problems in achieving national reconciliation.

Some criticisms toward Gacaca Courts

Among all the studies on the Gacaca Courts, some researches particularly focus on the negative aspects. The report by Human Rights Watch, for example, severely criticised the lack of due process to the participants of Gacaca Courts, especially the lack of effect defendant method for the alleged persons.[248] It is true that harsh punishment inflicted on the convicted criminals must be decided through restrict procedure, so that the sanction will not turn in the abuse of people. In the standard of formal criminal justice, the view of Human Rights Watch caught the dilemma in pursuing retribution in the name of restorative justice. However, one fact that pushed the then Rwanda government was the lack of professional staff to operate formal justice at domestic level. The weakness continued to cause problems in Gacaca Courts, as Human Rights Watch also noticed.[249]

Other than some extreme examples, most of studies on Gacaca Courts, nevertheless, provide quite critical and balanced assessments. The brave step taken by the Government of Rwanda to include all Rwandans in justice process through genuine conversations has been appraised, but the unprofessional operations of justice and the intense influence by the Government have concerned almost all the scholars in this

[248] Human Rights Watcher, 'Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts' (May 2011).

[249] Ibid, at pp. 65-68.

areas.[250]

The issue in relation to professionalism in Gacaca Courts firstly has been observed in how Gacaca Courts were held. As to the data collection phase, professor Schabas described the *Gacaca* system as it was "really nothing more than a very decentralized system of justice administered by non-professionals at the local level".[251] In a vivid portrait by Corey and Jorieman, the court in *Gacaca* system was proceeded in a way that

> "Village elders and community members would voluntarily gather together on a patch of grass to discuss civil disputes. Elders would present a resolution to the issue in an effort to salvage social peace and cohesion in the village. The current process differs from the traditional process in three key aspects: in the traditional process participation was voluntary; it was primarily used to deal with conflicts within a given community; and the judges or elders were given leeway to decide any punishment they wished within certain boundaries. The highly regulated, national and involuntary Gacaca process currently under way is substantially different from its traditional predecessor."[252]

The inadequate judges were the first concern to this issue. The judges- the elders in the community- did not receive proper training to deal the matters that would

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[250] See for example, Arthur Molenaar, 'Gacaca; Grassroots Justice After Genocide- The Key to Reconciliation in Rwanda?' (2005) African Studies Centre, Research Report 77/2005; Jacques Fierens, 'Gacaca Courts: Between Fantasy and Reality' (2005) 3 *Journal of International Criminal Justice* 869; Linda E. Carter, 'Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda' (2007) 14(1) *New England Journal International and Comparative Law* 41; Timothy Longman, 'An Assessment of Rwanda's Gacaca Courts' (2009) 21(3) *Peace Review* 304; Amaka Megwalu and Neophytos Loizides, 'Dilemmas of Justice and Reconciliation: Rwandans and the Gacaca Courts' (2010) 18 *African Journal International and Comparative Law* 1; Anne-Marie De Brouwer and Etienne Ruvebana, 'The Legacy of the Gacaca Courts in Rwanda: Survivors' Views' (2013) 13 *International Criminal Law Review* 937.

[251] William A. Schabas, 'Genocide Trials and Gacaca Courts' (2005) 3 *Journal of International Criminal Justice* 879, at pp. 895.

[252] Allison Corey and Sandra F. Joireman, 'Retributive Justice: The *Gacaca* Courts in Rwanda' (2004) 103(410) *African Affairs* 73, at pp. 82.

possibly send the accused persons to prison. Or, at most, they only underwent informal training before managing serious discussions in relation to genocide.[253] As a result, their decisions were vulnerable to some serious debate, because the final judgement might be made on personal feelings rather than rational analysis. The elders might have sufficient experience to handle disputes between a limited number of community members, but the experience would not work well in the genocide. The cases in Gacaca system were national-wide crimes, committed by groups against other groups. The crimes had gone beyond the capability of the elders, no matter judged from the huge number of victims and offenders, or the gravity of the crime.

The unprofessional operators of Gacaca Courts brought some dissatisfaction to the participants. Under the tradition of *Gacaca*, the procedure of justice usually went on flexibly. But lack of rights to due process in justice undoubtedly create turbulence between victims and offenders, because neither of them can express their opinions fairly. Both groups feel that they are victims of the procedure.[254] The advantage of flexibility in restorative justice, as the comparison to formal criminal justice, shall be managed for the need of victims and for the best result of the process. It requires long and systematic training so that the operators would hold the values in human rights, such as equality and mutual respect. The good morality of the staff in Gacaca Courts has been emphasised as one of the core criteria in Rwanda's law.[255] Being moral is important for judges, but shall not be the decisive factor for a successful restorative justice program.

The impartiality of judges was also challenged. As to the credibility of judges in Gacaca Courts, Human Rights Watch observed some personal biases among the elders, and, more controversially, the corruption issues. It is indicated that local

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[253] Ibid, at pp. 83.

[254] Kasaija P. Apuuli, 'Procedural Due Process and the Prosecution of Genocide Suspects in Rwanda' (2009) 11(1) *Journal of Genocide Research* 11.

[255] For example, see Article 14 and 21 in Organic Law no. 16/2004 of 19/6/2004.

Rwandan people who had participated in the *Gacaca* processes listed many cases of corruptions among "judges", including

> "[J]udges accepting bribes from wealthy accused persons in exchange for acquittals or asking the accused to pay money in exchange for an acquittal; genocide survivors accusing wealthy people in the community of crimes in order to receive monetary compensation to drop the case; witnesses taking bribes from the accused; and civil parties bringing cases in exchange for making false allegations, changing their testimony, or defending an accused person."[256]

It is hard to assess how much the corruption has affected the justice in Gacaca Courts, because the decisions from this system are not similar to those in formal justice. But the direct consequence of such process, as has been revealed, is that the investigation, negotiation, and "judgements" - factors that inevitably influence how people view justice as one aspect of post-genocide solution - relied on lies and half-truths.,[257] It is almost impossible to believe that real justice will be obtained from lies rather than from truth, as it is inconceivable to uphold that peace will be achieved on inadequate justice. Criminals may not be necessarily punished by deprivation of life, freedom, or property rights, but the wrongfulness of their criminal actions must be recognised by the courts. Unfinished justice leaves key conflicts unsolved to the people concerned, causing difficulties to maintain stable peace in future.

Another dangerous issue in Gacaca Courts is that forgiveness and reconciliation were at times forced upon participants. Timothy Longman abstracts several negative points in Gacaca Courts on the strong influence from the then Government according

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[256] Human Rights Watch, 'Justice Compromised: The Legacy of Rwanda's Community-Based *Gacaca* Courts' (May 2011), at pp. 105-106.

[257] Max Retting, '*Gacaca*: Truth, Justice, and Reconciliation in Postconflict Rwanda?' (2008) 51(3) *African Studies Review* 25.

to his own observation in the field. He listed many occasions indicating the Gacaca was manipulated, *inter alia*, which could have undermined the possible benefits of such great creation.[258] The *Gacaca* system seemed to have been driven by the desire of the Rwandan government to strengthen the image that the massacre in Rwanda in 1994 was committed by one ethnical group against another ethnicity.

In the official statement, Gacaca Courts were designed and prepared specifically for the genocide, which has been publicly announced by the Rwandan government as the crime "targeting Tutsi".[259] Of course, the genocide against Tutsi was one of the biggest tragedy for humanity, and all should endeavour to prevent any similar crime in future. However, what must be borne in mind is that, albeit the genocide against Tutsi people was biggest piece in the whole picture of the violence, Tutsi people were not the only victim in the ethnical conflicts. The genocide should not be isolated from the history of Rwandan civil war, nor from the mutual attacks between all ethnical groups. The narrowed view inflicted on Gacaca Courts would result in a satisfaction for the Government or the ethnical extremists, but not an adequate national reconciliation. Instead of bringing re-union of all ethnicities in Rwanda, the narrowed focus on the pain suffered by Tutsi people in *Gacaca* process had labelled people by ethnicity, and thus created a new invisible tension through governmental activities.

The narrowed focus confined the truth to be spoken. It is possible that the government of a State, especially the States under transition, exerts its controlling over the process and monitor people's speech so that the reconciliation will not be ruined by malicious words. National policy may play a crucial part in national reconciliation, because people's negative emotions need to be pacified and the possible riot, which has

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[258] Timothy Longman, 'An Assessment of Rwanda's Gacaca Courts' (2009) 21(3) *Peace Review* 304, at pp. 309-311.

[259] National Service of Gacaca Courts, 'Gacaca Courts in Rwanda' (June 2012), at pp. 212.

been seen in many States during transition, needs to be supressed. However, a good national policy on reconciliation must concentrate on the best way to achieve restoration, not the way to enforce the government's preference. The policy implanted in Gacaca Courts onto individual persons impeded the truth-telling.[260] Many participants in Gacaca Courts, including victims, witnesses, offenders, and even judges, could not discuss the facts other than what the Government asked, or they would face the punishment for the undesired words. It is believed that "[t]he constant threat of sanction [upon participants] means that some ordinary Rwandans adopt a tactical approach to performance before the [G]acaca [C]ourts."[261] If people were allowed to speak, they must be allowed to express the true feelings; if they had the rights to truth, they must be granted the right to access all the concerned truth. Knowing about the whole situation of the crime by sharing knowledge and information between participants in justice process is one advantage of restorative justice, but the bias in selecting the focused crime would deeply weaken such advantage.

According to some studies, the fear of the government's such power is the primary reason why most citizen participants complied with Gacaca's demands.[262] It meant the Rwandan government used restorative justice in a wrong way. The inadequate truth-telling and involuntary participation could exhaust the confidence of victims toward the national authorities where they hoped to seek care and respect. The core value in restorative justice, respect to the need of victims, was not carefully esteemed in *Gacaca* process, without which national reconciliation can hardly reach the pursued end of the community justice. Truth-telling and hearing the truth can be painful in restorative

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[260] S. Buckley-Zistel, '"The Truth Heals?": *Gacaca* Jurisdiction and the Consolidation of Peace in Rwanda' (2005) 80 *Die Friedens-Warte* 113.

[261] Susan Thomson, 'The Dark Side of Transitional Justice: The Power Dynamics behind Rwanda's "Gacaca" Courts' (2011) 81(3) *Journal of the International African Institute* 373, at pp. 379.

[262] Susan Thomson and Rosemary Nagy, 'Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda's *Gacaca* Courts' (2011) 5 *The International Journal of Transitional Justice* 11.

justice because it recalls the memories of victims when they suffered violence and horror, but eventually shall be of healing nature: victims' pain is shared and acknowledged by the collective in a slow process where perpetrators offer an apology and respect to victims. The forcible participation, especially the forced "acceptance" to reconciliation, has no healing effect but adds more humiliation in that it denies the need of victims when facing the past atrocities.

A re-imagination of Gacaca Courts

The UN High Commissioner for Human Rights highlighted the Gacaca Courts and the practices, and considered them as an example of "combating impunity, promoting democracy, the rule of law and good governance at national level".[263] The evaluation resonated an earlier statement by the Rwandan delegation in a working group discussion at the Human Rights Council in 2010 where the *Gacaca* process was evaluated as well-serving Rwanda in post genocide nation-build: The number of cases dealt through *Gacaca* was huge; revenge killing had not been seen, which clearly proved its impact to peace; former perpetrators and victims lived together in community as the result of reconciliation.[264]

The evaluation by academics, being compared with the official statement of the Rwandan government, showed a quite complex image. The most frequently criticised aspect of *Gacaca*, aside from the lack of professionalism and the partial influence from the Government, was the credibility of "truth". Many victims were summoned to *Gacaca* trials and compelled to accept the "truth" that had been prepared, so that

[263] UN High Commissioner for Human Rights, 'Summary of the High-level Panel Discussion Dedicated to the Sixty-fifth Anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide' (30 June 2014) UN Doc A/HRC/27/24, para. 39.

[264] 'Draft Report of the Working Group on the Universal Periodic Review: Rwanda' (27 January 2010) UN Doc A/HRC/WG.6/10/L.2, para. 19.

reconciliation could be swiftly achieved.[265] The intent to achieve reconciliation and restoration should not be criticised, but the treatment of victims will not reach the best results if basic requirements to respect their rights and needs are not satisfied.

The analysis on the criticised design of truth-telling process in *Gacaca*, however, reveals some surprising information. Participants in *Gacaca* trials, especially women who experienced sexual violence during the atrocities, had increasingly spoken of traumatisation and insecurity.[266] The process was supposed to heal the victims of international crimes, but in fact it evoked more painful feelings. However, those negative feelings were not simply caused by the bad pattern of justice in Gacaca Courts. Studies suggest that any process involving truth-telling, face-to-face talking, or other collective discussion of past crimes, will not avoid negative emotions of victims or of other witnesses.[267] A relevant study even found that negative emotions during the participation of *Gacaca* trials, such as fear, sadness, and anxiety, could be redirected toward increasing social re-integration between victims and perpetrators.[268] This finding is supported by studies based on surveys done in Rwanda in understanding the public's attitude to restorative justice approaches, according to which the majority of the Rwandan people see *Gacaca* positively with the belief that it will help to eradicate the culture of impunity and lay a foundation to sustainable peace and social harmony.[269]

A more recent survey indicates that the majority of participants responded with

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[265] Jacques Fierens, '*Gacaca* Courts: Between Fantasy and Reality' (2005) 3(4) *Journal of International Criminal Justice* 898.

[266] Karen Brounéus, 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan *Gacaca* Courts' (2008) 39(1) *Security Dialogue* 55.

[267] Karen Brounéus, 'The Trauma of Truth Telling: Effects of Witnessing in the Rwandan *Gacaca* Courts on Psychological Health' (2010) 54(3) *Journal of Conflict* 408.

[268] Bernard Rimé, *et al*, 'The Impact of *Gacaca* Tribunals in Rwanda: Psychosocial Effects of Participation in a Truth and Reconciliation Process after a Genocide' (2011) 41(6) *European Journal of Social Psychology* 695.

[269] Phil Clark, *The Gacaca Courts, Post-genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge University Press 2010), at pp. 227.

expressing support for *Gacaca* on more general questions, such as whether or not it will deliver justice and sustain peace. But in specific questions, including feelings of security, credibility of truth and confessions, and the treatment of victims and criminals, dissatisfaction in response has clearly been the tendency.[270]

As a result, the evaluation of pure restorative justice utilised to deal with international crimes - the *Gacaca* process in this section - is more complicated than many have anticipated. The warning lessons from *Gacaca* utilised in Rwanda show that the operation of restorative justice to face the most serious crimes, even by the most experienced elder in the community, may not be as easy as many people think. Unprofessional restorative justice may lead to a situation where individuals, especially victims, receive intolerable disrespect, judging from the view of law and human dignity. More importantly, because the success of restorative justice relies on voluntary participation, the operators must manage the activities in restorative justice in a way facilitating the communication and emotion-sharing. When participation rate decreases in restorative justice, the operator shall analyse the reasons and adjust the process correspondingly.

Again, the local elders or respected people who operated the courts in *Gacaca* may be qualified to demonstrate the way the alleged crimes were committed and the real feelings of local people to the crimes, or to play a role as to communicate for judges with victims. They have very good understanding about the local culture and traditional values among people, which can explain the ethnical conflict between groups that invoked the tragic genocidal violence. However, the good features of the judges in *Gacaca* did not necessarily make them good operators of restorative justice. They need to be combined with professional skills that are required for being a real judge in formal

[270] Joanna Pozen, Richard Neugebauer and Joseph Ntaganira, 'Assessing the Rwanda Experiment: Popular Perceptions of *Gacaca* in its Final Phase' (2014) 8(1) *International Journal of Transitional Justice* 31.

criminal justice.

The partial influence from the Government of Rwanda may have suggested that even a process based on restorative justice approaches like *Gacaca* need to be piloted by a third party that has no interests in the dispute. It does not lead to the conclusion that the Rwandan government then was biased by its own political ambition. Rather, it simply means that indifferent party to prosecute the massacre in Rwanda, because the then ruling party could be deemed as representing the victimised ethnicity.

The creative aspect in *Gacaca*, which abode by the procedure of restorative justice and sought the value of retribution as one central part in formal criminal justice, could have displayed a not very successful example of how the two modes of justice should be combined. Then perhaps the other way of making restorative justice and formal criminal justice co-exist in one system is to utilised restorative justice idea (not the mechanism) in formal procedure of justice. Following this lead, perhaps the suggestion to improve the performance of Gacaca Courts is that it could have been a part of the ICTR, enacting the Judges of ICTR to be the operators or mediators in the community-based justice. Unfortunately, such suggestion can only be a hypothesis, since there existed very little interaction between the ICTR and Gacaca Courts. The legal basis for ICTR did not leave space for utilising restorative justice, which also made the suggestion an impossible re-imagination.

6. The experience of the TRC in Sierra Leone

The academic analysis on the impact of Sierra Leone TRC has been abundant.[271] Similar to many other TRCs for post-violence States, the TRC in Sierra Leone

[271] The details of the Sierra Leone TRC can be found, *inter alia*, in the works by professor William Schabas. See, particularly, footnote 9 in William A. Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 15 *Criminal Law Forum* 3.

employed restorative justice approaches to involve both victims and perpetrators in face-to-face talks, and strengthened the sense of justice in a relatively peaceful way. Like all the other TRC modes, the Commission managed to make perpetrators confess their guilt in front of others, and encouraged the victims to express forgiveness, which eventually catalysed reconciliation in the society. In respect with the basic function, the Sierra Leone TRC did not show many differences with other TRCs. The outcomes of the Sierra Leone TRC had fulfilled its objectives, making the truth come out to surface and bringing more stability to the society. Other than that, the Sierra Leone did not make a huge breakthrough. In the words of professor Schabas, one of the Commissioners of Sierra Leone TRC, "it was probably no better or worse than many other truth commissions".[272] In this view, the Gacaca Courts could have been more innovative for applying the combination of the procedure of restorative justice and the core of formal criminal justice.

Nonetheless, the TRC in Sierra Leone provides a decent comparison with the Gacaca Courts in Rwanda, in the aspects of professionalism and the impartiality of the institutions. Some aspects, such as the capability of TRC mode to uncover the truth of the past violence in Sierra Leone, and genuineness of the testimony out of the talks between victims and perpetrators, have also concerned scholars.[273] But fairly speaking, the challenges that the Sierra Leone TRC faced in its mandate could be seen in almost all transitional justice mechanisms, similar to TRC mode or not. The restorative justice approaches in transitional justice, in Sierra Leone and other States, is the way to correct the wrong, not to make things flawless. It is very normal that the Sierra Leone TRC

[272] William A, Schabas, 'Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience' (2004) in Proceedings of Annual Meetings (American Society of International Law), vol. 98, at pp. 191.

[273] See for example, Tim Kelsall, 'Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone' (2005) 27(2) *Human Rights Quarterly* 361; Rosalind Shaw, 'Memory Friction: Localizing the Truth and Reconciliation Commission in Sierra Leone' (2007) 1 *International Journal of Transitional Justice* 183.

made similar mistakes, or appeared powerless to overcome the flaws for some reasons beyond the TRC mode itself. For example, the lack of adequate funding has been regarded as one significant reason for the TRC to run for only about eighteen months and its limited impact to the whole society of Sierra Leone.[274] The painful lessons of the TRC in Sierra Leone would not be enlightening the transitional justice in future. The focus must be on the areas where the Sierra Leone TRC made differences.

The professionalism and impartiality of the Sierra Leone TRC

The *Gacaca* system was established by the then Government of Rwanda after the intrastate violence had been settled down, for bringing changes to the slow-paced criminal prosecution. The then Government of Rwanda had already been able to stabilise the security situation when the decision of resurrecting *Gacaca* to prosecute all the perpetrators responsible for the crimes relating to the Genocide. But it was not the case for Sierra Leone.

The short peace in Sierra Leone was a concession for power-sharing between the Government and the rebel group. Around eight years after the outbreak of civil war in 1991, the Government of Sierra Leone and the main armed group, Revolutionary United Front of Sierra Leone (RUF), reached a peace agreement in Lomé, Togo in 1999. Perhaps both sides realised the importance to organise a new government that would be run by two political parties, otherwise the conflict would never end. To this end, the Lomé Peace Agreement spent many pages introducing the process of the political transition, such as the obligation for RUF to transfer into political party and the duty of the Government to assist RUF member in training[275] and more importantly, granted amnesty to all combatants and forbade any further judicial actions against any member

[274] See Beth K. Dougherty, 'Searching for Answers: Sierra Leone's Truth and Reconciliation Commission' (2004) 8(1) *African Studies Quarterly* 39.

[275] Article III to VIII of the Lomé Peace Agreement.

of the parries.[276] It also provided the legal basis for establishing a truth and reconciliation commission (TRC or the Commission), stating that the aims of such a commission shall

> "[C]reate an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered."[277]

The clause in the peace agreement was then absorbed in section 6(1) of the Truth and Reconciliation Commission Act 2000 in Sierra Leone (Sierra Leone TRC Act, or SLTRC Act), which was the official legal foundation for all the TRC processes. As a national mechanism against serious human rights violations, corresponding to the wording "address impunity" rather than "end impunity", the TRC targeted restoration and reconciliation to resolve the harm caused by the armed conflicts between the Government and RUF. Section 7(2) of the Sierra Leone TRC Act authorised the Commission to "seek assistance from traditional and religious leaders to facilitate its public sessions", bringing indigenous experience to an official platform.

One difference between the TRC in Sierra Leone and the *Gacaca* in Rwanda, as it stated above, rests in the driving factors to establish the institutions. While the Gacaca Courts were aiming at prosecuting perpetrators relating to the genocidal violence in an alternative way without worrying about further armed conflict, the Sierra Leone TRC attempted to make the temporary cessation of armed conflict into a real lasting peace

[276] Article IX of the Lomé Peace Agreement.

[277] Article XXVI of the Lomé Peace Agreement.

and address the accountability issues under such condition. The difference was caused by the fact that there was not a predominant side that could control the whole situation and then decide the direction of the transition. In other words, neither the Sierra Leone government nor the main Opposition group could make any decisive influence onto the TRC in their own will power. They needed some a third power to keep the impartiality of the transition process.

As a result, both the signatories of the peace agreement consented to invite some international actors, such as the UN Security Council and the Peacekeeping Mission in Sierra Leone, to provide necessary assistance to monitoring and facilitating the transition.[278] The participation of the Special Representative of the UN Secretary-General and the UN High Commissioner for Human Rights in selecting the Commissioners, regulated in Section 3 and the Schedule of Subsection (1) of Section 3 of the Sierra Leone TRC Act, increased more impartiality to the work of the Commission.

Another difference is that although the TRC Act bestowed the Commissioners the power to seek traditional and religious elements to facilitate the process, it did not limit the Commission to such sole value. The Sierra Leone TRC utilised restorative justice idea, not based on pure traditional customs, nor operated as "community justice". The TRC Act fully entrust its Commissioners, allowing them to determine the operating procedure and the mode of work according to their discretion.[279] Based on such authorisation, it was also confirmed that international human rights law and humanitarian law must be respected as the principal guide for its value, process and decision-makings.[280] The decisions of the Commission must be made by all

[278] Article III and Article XXXIII to XXXV of the Lomé Peace Agreement.

[279] Section 7(1) of the TRC Act 2000 in Sierra Leone.

[280] Section 6(1) of the TRC Act 2000 in Sierra Leone. Also see the Chapter One of the Report of the Sierra Leone Truth and Reconciliation Commission (2004), Vol. I, at pp. 23-25.

Commissioners as a whole, taken by consensus or vote when it did not reach a consensus.[281] In procedure, the Commission took specific attention to confidentiality, appropriateness, and the relevance of the gathered information, and the methods of taking testimony, for filling the mandate set in Section 6(1) of the TRC Act.[282] The authorisation to the Commissioner did not result in abuse of power. Rather, the Commissioners prudently managed the work in almost all aspects, and created a public and transparent platform to include all concerned citizens, so that the authorisation did not undermine the legitimacy of the TRC.

In addition, when participants who were called by the Commission provided false or misleading information to the Commission, certain criminal responsibility could be possible to be taken through the Commission's referral of the case to national courts.[283] Although the Commission did not refer any case to relevant national courts based on false testimony, it did suggest the legal feature of the hearings. Those clauses about the establishment and functions of the TRC, which are highly close to setting up a real court, sent an unmistakable message that the TRC in Sierra Leone would be executing its work in a fair, reconciliatory, culture-friendly, and also semi-judicial way.

Albeit both the Gacaca Courts and the Sierra Leone TRC were organised with restorative justice feature, the roles of the main operators were different. In Gacaca Courts, all the Judges must be local Rwandans who were not required to be experts in handling the process, but must be the people who were considered of having the following features, for strengthening the sense of integrity among people:

"a) to have a good behaviour and morals;

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[281] Section 7(5) of the TRC Act 2000 in Sierra Leone.

[282] See Chapter Five of the Report of the Sierra Leone Truth and Reconciliation Commission (2004), Vol. I.

[283] Section 7 and 8 of the TRC Act 2000 in Sierra Leone.

b) to be truthful;

c) to be trustworthy;

d) to be characterised by a spirit of sharing speech;

e) not to have been sentenced to a penalty of at least 6 months' imprisonment;

f) not to have participated in perpetrating offences constituting the crime of Genocide or crimes against humanity;

g) to be free from the spirit of sectarianism and discrimination."[284]

The election of the Judges in *Gacaca* should be understood together with the objects of the then Rwandan government to acknowledge the genocide as the only condemned crime and to re-establish the "oneness" of Rwandan society. The emphasis on the moral credibility of the Judges might have suggested that the expertise was not the central element to run Gacaca Courts. Furthermore, article 15 of the Organic Law no. 16/2004 of 19/6/2004 in Rwanda forbade career magistrates to be elected as Judges in *Gacaca*, which almost completely cut the connection of the Courts with modern legal thoughts. There were, of course, some positive sides in those criteria, including invoking more moral sensitivity and cultural pride during the justice process. But the negative sides were also clear. The Judges were lack of experience managing *Gacaca* to deal with the most heinous crimes like genocide, because the traditional *Gacaca* did not function to solve such serious disputes.[285] Furthermore, when facing the influence of the authorities to the Gacaca Courts, it could be even harder to remain impartial for those "moral, truthful and trustworthy" Judges than the real experts in law.

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[284] National Service of Gacaca Courts, 'Gacaca Courts in Rwanda' (June 2012), at pp. 35.

[285] See the discussion in Bert Ingelaere, 'The Gacaca Courts in Rwanda' in Luc Huyse and Mark Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experience* (International Institute for Democracy and Electoral Assistance 2008), at pp. 33-38.

In contrast to Gacaca, the Sierra Leone TRC received much help from international community. Unlike in setting Gacaca Courts where the then Rwandan government did not accept external assistance, the establishment of the Truth and Reconciliation Commission in Sierra Leone derived from international supports. The United Nations intervened the situation in Sierra Leone and aided the State in many aspects, in particular, the selection of the four citizen members and the three international members of the Commission. The Sierra Leone TRC Act stipulated that the Commissioners should be selected on two main aspects: the integrity and credibility, and the highly professional experience in law, social sciences, religion, and psychology.[286] In the end, with the help of the Special Representative of the UN Secretary-General, the UN Peacekeeping Mission in Sierra Leone, and the High Commissioner for Human Rights, the Commission included religious leaders, culture representatives, law professor, sociologists, and expert in running real Truth and Reconciliation Commission, which almost covered all the practical risks that might be encountered in the TRC process. More than that, the Office of the High Commissioner for Human Rights (OHCHR) contributed much to the early work for the establishment of the Sierra Leone TRC, and undertook the researches on the historical background, the religious demography, the education situation, and even the traditional way to solve disputes in Sierra Leone. All the efforts in preparatory activities prepared the Commission with professional knowledge and skill, rather than simply moral disciplines.

The element of mutual respect should not be negligible in Sierra Leone TRC. Within the Commission, all the experts as the Commissioners acknowledged the importance of each other's specialty to the whole process, not partly relying on traditional approaches or legal concepts. For example, in the final report, the Commission specifically emphasised the key role of truth and truth-telling for transition

[286] Section 3(2) (a) and (b) of the TRC Act 2000 in Sierra Leone.

and justice at social and private level. The Commission noted that in truth-seeking, the TRC mode would be better than formal criminal prosecution, especially when amnesty had already been granted, to take account of the perpetrators.[287] Beyond the existing fact, the Commission analysed the "right to truth" in international case law, and recognised that such right should be fulfilled as both collective and individual right. The former aspect requires State authorities to carry on effective investigation of the atrocity in the past, the latter enables victims to access the truth and receive tangible reparation for their loss.[288]

Being guided by international norms, the Commission learned from the experience of South Africa, and categorised the truth into "factual and forensic truth; personal and narrative truth; social truth; healing and restorative truth".[289] Each category of truth would function on particular issues that might concern participants of the TRC process, making sure victims and perpetrators could discuss different forms of evidences from more angles. The organic combination of legal concepts and restoration, in fact, provided a dual-insurance for confirming the wrongness of the violence, understanding better the nature and results thereof, and find the proper resolutions accordingly. Because of the professional attitude of all Commissioners toward an effective, efficient, and restorative justice for Sierra Leoneans, different ideas could co-exist and merge into each other, bringing out the positive and pre-empting the negative to a great degree.

Re-imaging the relationship between the Sierra Leone TRC and the Special Court for Sierra Leone

Before the Sierra Leone TRC was fully established, in May 2000, the Signatory

[287] Report of the Sierra Leone Truth and Reconciliation Commission (2004), Vol. I, at pp. 77-79.

[288] Ibid, at pp. 79-82.

[289] Ibid, at pp. 82-83.

rebel group of the Lomé Peace Agreement took hostage of several hundreds of UN peacekeepers. It caused more violent political crisis to the domestic situation, and made the UN Security Council authorise a rapid military reinforcement to the Peacekeeping Mission in Sierra Leone as a serious response to the hostility,[290] which indirectly strengthened the political power of the then Sierra Leonean government. The hostile actions taken by one strong rebel group, the Revolutionary United Front (RUF), undermined the progress made in disarmament and demobilisation of different military groups in Sierra Leone, and in turn diminished the political influence of RUF to the national transition. The then President of Sierra Leone seized the chance and wrote to the UN Security Council for establishing an international criminal tribunal, in order to try the perpetrators responsible for the gross violence in formal criminal court.

In the letter, the then Sierra Leone President highlighted the urgency to try the RUF leaders and the collaborators in criminal court, which might challenge the total amnesty granted months before.[291] The UN Security Council, while underlined the contribution of the national truth and reconciliation process to the rule of law, responded that "a credible system of justice and accountability for the very serious crimes" were necessary for the national reconciliation, and requested the Secretary-General to reach an agreement with the Government of Sierra Leone for an independent special court.[292] In a following report by the then Security-General to the Security Council, it was confirmed that the amnesty clauses in the Lomé Peace Agreement and the TRC Act should not confine the prosecutorial power of the Special Court,[293] which was re-

[290] UN Security Council, Resolution 1299 (2000) (19 May 2000), UN Doc S/RES/1299 (2000).

[291] 'Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council' (10 August 2000) UN Doc S/2000/786, Annex.

[292] UN Security Council, Resolution 1315 (2000) (14 August 2000), UN Doc S/RES/1315 (2000).

[293] UN Secretary-General, 'Report of the Secretary-General on the establishment of a Special Court for Sierra Leone' (4 October 2000) UN Doc S/2000/915, para. 22-24.

affirmed in Article 10 of the Statute of the Special Court for Sierra Leone (SCSL).[294] The mandate of the Special Court for Sierra Leone, in effect, created a judicial competence between it and the Truth and Reconciliation Commission.

But the relationship of the SCSL with the TRC was never clarified. One noteworthy fact was that when the first trial began in June 2004 at the Special Court, the Sierra Leone TRC had almost finalised its work.[295] For most of the time, the two mechanisms functioned parallel to each other. The TRC was established earlier, focusing more on restoration and reconciliation, and the SCSL on cases in regard to international crimes. In despite that amnesty had been claimed as invalid for the Special Court, the UN Security Council still deemed the TRC as the complementary role in the formal justice process.[296] On 20 and 21 December 2001, one meeting was organised by the UN Office for High Commissioner for Human Rights and the Office for Legal Affairs to discuss the relationship between the two bodies, and concluded three principles as follow:

> "(i) The TRC and the Special Court were established at different times, under different legal bases and with different mandates. Yet they perform complementary roles in ensuring accountability, deterrence, a story-telling mechanism for both victims and perpetrators, national reconciliation, reparation and restorative justice for the people of Sierra Leone.
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> (ii) While the Special Court has primacy over the national courts of

[294] Article 10 of the Statute of the Special Court for Sierra Leone is read as "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."

[295] See William A. Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006), at pp. 40.

[296] 'Letter Dated 22 December 2000 from the President of the Security Council Addressed to the Secretary-General', UN Doc. S/2000/1234, at pp. 1.

> Sierra Leone, the TRC does not fall within this mould. In any event, the relationship between the two bodies should not be discussed on the basis of primacy or lack of it. The ultimate operational goal of the TRC and the Court should be guided by the request of the Security Council and the Secretary-General to "operate in a complementary and mutually supportive manner fully respectful of their distinct but related functions" (S/2001/40, paragraph 9; see also S/2000/1234).
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> (iii) The modalities of cooperation should be institutionalized in an agreement between the TRC and the Special Court and, where appropriate, also in their respective rules of procedure. They should respect fully the independence of the two institutions and their respective mandates."[297]

The above principles admitted that the two organisations should be respectful to their different roles, and suggested they should provide mutual supports to each other's work. It still did not indicate how they might be mutually supportive. In practice, the two organisations kept a polite, diplomatic and distant relation. But there were always some problems in such relation since they both aimed at bringing justice and peace in their respective way. In the final report, the Sierra Leone TRC specifically demonstrated the issues that had caused some conflicts to the two bodies, which mainly focused on the legitimacy of amnesty and information facilitating.[298]

Those conflicts constituted the only occasional interactions between the TRC and SCSL. In relation to the granted amnesty, the SCSL rejected the challenge of the jurisdiction of the Court on the reason that amnesty was bestowed in the Lomé Peace

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[297] UN Economic and Social Council, 'Report of the High Commissioner for Human Rights pursuant to Commission on Human Rights Resolution 2001/20: Situation of Human Rights in Sierra Leone' (18 February 2002) UN Doc E/CN.4/2002/37, para. 70.

[298] Report of the Sierra Leone Truth and Reconciliation Commission (2004), Vol. III (B), at pp. 367-388.

Agreement, indicating that the peace agreement was not a treaty and could not remove the criminal prosecution against the perpetrators of international crimes, which fell into the jurisdiction of the SCSL.[299] Even the acknowledgement of the granted amnesty was fundamental for the work of the TRC, the Commission remained "self-restraint" to a degree, not to undermine the efforts made by the Prosecutor of the SCSL. Yet on some points which related to the core of truth and truth-telling, such as whether to share the self-incrimination testimony with the Special Court, the Commission stayed in a very prudent position and refused to submit any collected evidence. Because once such cooperation between the Commission and the Special Court occurred, the participants of TRC process would lose their trust to the Commission, which would make truth-seeking an impossible mission.[300] This steadfast attitude of the Commission might have be one of the reason why the Special Court disapproved the request of two accused persons to confess in the public hearing at the TRC.[301] However, on this issue, the Decisions at the Special Court conveyed some complicated messages.

In *Prosecutor v Samuel Hinga Norman* (*Norman* case), the Trial Chamber acknowledged the jurisdiction to try the Accused was exclusive to the Special Court, which implied that public hearing might be considered as being of similar effect with the justice procedure at the Special Court. On the other hand, however, the presiding Judge determined that for the interest of justice and the right of the Accused to due process, and on the reason that the Judges at the SCSL were more professional to avoid

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[299] See *the Prosecutor v Morris Kallon and Brima Bazzy Kmara* (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-04-15-PT-060 and SCSL-04-16-PT-033, the Appeals Chamber (13 March 2004); *the Prosecutor v Allieu Kondewa* (Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord) SCSL-04-14-T-0128, the Appeals Chamber (25 May 2004).

[300] William A. Schabas, 'The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone' (2003) 25(4) *Human Rights Quarterly* 1035, at pp. 1052.

[301] See *the Prosecutor v Samuel Hinga Norman* (Decision on the request by the Truth and Reconciliation Commission of Sierra Leone to conduct a public hearing with Samuel Hinga Norman) SCSL-03-08-PT-101, the Trial Chamber (29 October 2003); *the Prosecutor v Augustine Gbao* (Decision on the request by the Truth and Reconciliation Commission of Sierra Leone to conduct a public hearing with Augustine Gbao) SCSL-03-09-PT-063, the Trial Chamber (3 November 2003).

extraneous influence, the Request of the TRC for permitting Mr Norman to present in the public hearing in TRC process should be refused.[302] This reasoning, euphemistically, did not recognise the legitimacy and the professionalism of the work of the TRC. In the Decision made by the President of SCSL answering the appeal of this case, similar gist was announced again, indicating that the evidence to be collected in the public hearing of the TRC process could not be legally utilised before the Special Court because of lack of professionalism.[303] Under such idea, it is hard to believe that the Special Court for Sierra Leone would equally cooperate with the Sierra Leone Commission. Perhaps the best collaboration that the Special Court could offer to the Commission was not to forcibly ask the TRC to be banded by the Special Court's legal opinion.

But the TRC process had great impact to victim, perpetrators, and the whole society in Sierra Leone. Professor Schabas, as one of the seven Commissioners at the Sierra Leone TRC, observed that

> 'As the TRC hearings progressed during mid-2003, many perpetrators came forward to tell their stories to the Commission and, in some cases, to ask pardon or forgiveness of the victims. Belying most predictions, they did not appear at all concerned about the threat of prosecution by the Special Court. Perhaps they had already understood that the Special Court was only concerned with "big fish", and realised that their own level of responsibility was more modest or secondary. But even some of the "big fish" who had been indicted by the Special Court indicated to

[302] *The Prosecutor v Samuel Hinga Norman* (Decision on the request by the Truth and Reconciliation Commission of Sierra Leone to conduct a public hearing with Samuel Hinga Norman) SCSL-03-08-PT-101, the Trial Chamber (29 October 2003), at pp. 6.

[303] *The Prosecutor v Samuel Hinga Norman* (Decision on appeal by the TRC for Sierra Leone ("TRC" of "the commission") and accused against the decision of Justice Bankole Thompson delivered on 30 October 2003 to deny the TRC's request to hold a public hearing with accused) SCSL-03-08-PT-112, the President (28 November 2003).

> the TRC that they would be interested in testifying. This was the complete opposite of what anybody had expected."[304]

It is true that most of the Truth Commissions have not been managed by all legal professionals. But it shall never be asserted only legal professionals can achieve proper justice. The problem is if formal criminal justice and restorative justice are always operated within parallel organisations, or restorative justice idea is always inferior to formal criminal justice, it may not be easy to realise that restorative justice, when administered by experts, could explore the truth, achieve reconciliation, satisfy victims, contribute to justice, and bring some positive outcomes beyond the capability of international tribunals.[305]

The Sierra Leone TRC, where restorative justice functioned well, has showed that justice could be achieved in an alternative way. It has many advantages over formal criminal justice, such as collecting a wider range of information related to the violence, holistically judging the accountability of all parties, utilising more flexible process to get more individuals engaged, and managing justice in a less conflictive but more ritual and resolving way.[306] In contrast, the formal justice at international tribunals is limited to jurisdictional issues, like *ratione temporis*, *ratione materiae*, and *ratione personae*, which was seen in the complaints of the Liberian people of the fact that their then President was brought to another country to face justice, and that the perpetrators were charged with the crimes committed in Sierra Leone without including the crimes in Liberia.[307] There will not be significant improvement to those challenges unless the

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[304] William A. Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 15 *Criminal Law Forum* 3, at pp. 10.

[305] 'Peace, Justice and Reconciliation in Sierra Leone: A Survey of Knowledge and Attitudes Towards Transitional Institutions in Post-Conflict Sierra Leone' (August 2008) BBC World Service Trust, ICTJ, Search for Common Ground.

[306] See Report of the Sierra Leone Truth and Reconciliation Commission (2004), vol. II and vol. III(B).

[307] 'Impact and Legacy Survey for the Special Court for Sierra Leone', the Special Court for Sierra Leone and No Peace Without Justice (August 2012).

Prosecutors and Judges could ponder the meaning of justice at a higher level and believe justice should be achieved beyond the legal provisions. Unfortunately, the Special Court for Sierra Leone, like most of the other international tribunals, failed to see the value in restorative justice.

If it was true that no fundamental interaction between the Special Court for Sierra Leone and the Sierra Leone TRC, in effect, facilitated each other's work, then the conflicts abovementioned left some opportunities to re-imagine what could have been achieved if they did cooperate positively in sharing useful information and mutually respecting the validity of the counterpart's work. It requires, specifically, that the formal criminal justice equally treats the decisions made through restorative justice, and acknowledges the legal effects of the evidence collected in the communication between the participants of restorative justice. Similar advices have been put forward to solve the conflicts in the resource fight between the two organisations in Sierra Leone. For example, in dealing with the self-incrimination testimony, it is suggested that the Special Court could adopt a rule that any confession made in the public hearing in TRC process, in particular the self-incriminations, could not be used as the convicting evidence against the persons who confessed, unless the persons provided fraud testimony.[308] The suggestion is bold, because it implied that the TRC process should be regarded as having the same effect as the legal procedure at the Special Court.

There can be an even braver suggestion. The Sierra Leone TRC and the Special Court could have been combined in one organisation as two branches. Such situation could have granted the them equal status in jurisdiction and judicature, making information-sharing natural and reasonable without extra agreement. In addition, because investigation and hearings at the Truth Commission could have been seen as

[308] William A. Schabas, 'The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone' (2003) 25(4) *Human Rights Quarterly* 1035, at pp. 1053.

being of same effect as criminal investigation and prosecution, under the principle of *ne bis in idem*, participants of restorative justice would not feel worried of being charged in another trial chamber for what they had confessed. The Judges, being assisted by other experts, could have considered the cases at hand with a bigger perspective and calculated the impact of the decisions and judgements to the whole society. Moreover, the Judges, or the Operators of justice, could have adjusted the judicial approaches according to the reality, so that the it would be more cultural friendly to local people. The work for the Prosecutor would be easier, too, since the local people and the Government would have known that international criminal justice was not only about taking someone into prison without considering whatsoever the consequence would be for the State.

The outcome of the "cooperation" between the Sierra Leone TRC and the SCSL could have been more fascinating. But it is just a re-imagination. And it was the formal criminal justice that refused to adopt restorative justice idea in TRC mechanism, not the opposite.

From Sierra Leone to ICC

A similar imagination can be made to the ICC, for example, to the situation in Burundi. The Office of the Prosecutor learned the historical context on the violence in Burundi, and remarked the "repeated cycles of violence" between ethnical communities since its independence in 1962, and emphasised necessity to investigate the violence during the period of presidential election in 2015.[309] In particular, it was indicated that the Prosecutor would not investigate the violence allegedly committed by the

[309] The Office of the Prosecutor, 'Report on Preliminary Examination Activities 2017' (4 December 2017), para. 290-296.

Opposition side, because it did not reach the severity of international crimes.[310]

In responding to the preliminary examination of the situation at the ICC, Burundi accused the partiality of the Prosecutor, the political influence of the third parties to the Court, and disrespect to the choice of Burundian people. It also claimed that the ICC Prosecutor had disrespected the effort made by Burundi to end the impunity of the alleged crimes, and ignored the "independence and effectiveness" of the domestic judicial system. In particular, Burundi stressed the key role of the Transitional Justice Institutions in "redressing the socio-economic, cultural and political situation of Burundi".[311] The statement was made after Burundi lodged a notification to the UN Secretary-General of the withdrawal from the ICC. The reasons that Burundi withdrew from the ICC was attributed to the political bias, exerted by Belgium, France, the European Union, and even the Office of the High Commissioner for Human Rights, against the President of Burundi, setting the Oppositions at the preferred position.

The Prosecutor continued the work on the situation in Burundi even Burundi announced to withdraw from the Rome Statute, quitting the acceptance of the ICC's jurisdiction. Before the withdrawal from the ICC of Burundi official took effect, on in September 2017, the Office of the Prosecutor submitted the Request for authorisation to open the investigation on the situation of Burundi. In the Request, the Prosecutor stated that the national commissions established by Burundian authorisation were only for taking the criminal responsibility of the political opposition, but not for examining the violence committed by all involved parties,[312] which constituted the shielding of the responsible persons. Based on the available documentation, Pre-Trial Chamber III

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[310] Ibid, para. 299.

[311] See 'Statement of H. E. Vestine Naimana Ambassador of Burundi during the 15th Section of the Assembly of States Parties to the Rome Statute' (16-17 November 2016).

[312] The Office of the Prosecutor, 'Request for Authorisation of an Investigation Pursuant to Article 15', public redacted version, the situation in Burundi, ICC-01/07-5-Red, Pre-Trial Chamber III (15 November 2017), para. 148-150.

concluded that the national Commissions and proceedings in Burundi in relation to the alleged crimes had not taken "concrete, tangible and progressive" steps to investigate the violence committed by the member of Burundian authorities, security force, and youth wing of the ruling party, which made the situation admissible at the ICC.[313] In the perspective of the ICC, the investigation should be permitted to complete the work that the Burundian authorities did not. It is not politically biased as Burundi claimed. Instead, it aimed at clarifying the whole situation of the violence. The transitional justice process was not examined in the Prosecutor's Request or the Decision of Pre-Trial Chamber III to the Request. Perhaps the Burundi government considered to utilise restorative justice process to address the violence where the national authorities involved, thus to stabilise the society and deliver justice in the meantime. However, the plan and purpose of the authorities of Burundi to use restorative justice has never been confirmed. Even it was the plan for the authorisation of Burundi to trigger restorative justice idea, the ICC would still intervene in the situation, because the approaches of restorative justice were not regarded as adequate justice at the Court.

The optimistic part of utilising restorative justice idea to improve the work of the ICC, which is different with other occasions, is that it can become true, because there is not legal difficulty in its existing legislation. Furthermore, as it has proven in chapter 2, the ICC is willingly to involve more restorative justice approaches in its judicature. Admittedly, it is not realistic to completely replace the current justice procedure at the ICC. The more practicable way, is to introduce the idea of restorative justice deeper into the concept of justice for the Prosecutor and the Judges. Once they examine the meaning of justice from multi-dimensional angles, they would actively undertake more creative approaches into the procedure.

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[313] Situation in the Republic of Burundi (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi) ICC-01/07-9-Red, pubic redacted version, Pre-Trial Chamber III (9 November 2017), para. 181-182.

7. Summary

This chapter analyses different situations in international tribunals, including the situations at the ICC, ICTR, and SCSL. The situation in Uganda has been carefully examined to clarity the real issue between peace and justice, concluding that granting amnesty to the high-ranking perpetrators is not necessarily the guarantee for peace, and that prosecuting the perpetrators at international criminal tribunals is not the only aspect for justice.

The examination of the situation in Darfur, Susan and in DRC discloses that under the current legal mechanism and ideology on justice, the ICC has not played a major role in bringing peace or delivering justice. The ICC needs to change and make the justice closer to local people.

The analysis on Gacaca Courts indicates that, unlike some studies have claimed, restorative justice alone could not bring sustainable peace, especially when there lacks professional assistance. Formal criminal justice mechanism is necessary, but needs to be combined with restorative justice idea.

The experience of Truth and Reconciliation Commission in Sierra Leone proves that restorative justice and formal criminal justice can work synergistically. Unfortunately, it has only occurred when restorative justice stays independent from international tribunal. This chapter suggests that the influence of both formal criminal justice and restorative justice can be amplified if they accept each other.

Chapter 3: The Meaning of Justice

The problems in real situations to balance peace and justice in the ICC's work are caused by some deeper reasons. It is revealed in the last chapter that it is a serious pitfall that international criminal justice has not included a restorative view of justice. What remains to be examined is to understand meaning of justice for the ICC, and what are the issues to achieve justice as such.

The justice mechanism at the ICC to deal with international crimes comes from modern criminal justice. The meaning of justice to the ICC does not differentiate much from the philosophies, on which the ICC's prosecution against international crime is based. Therefore, such philosophical background shall be clarified before examining the problems of achieving the goals at the ICC.

Currently, the legal justice mechanism at the ICC follows two main schools of viewing justice, the legal moralism and the harm principle. The ICC is struggling on both aspects. In addition, the philosophy on punishment has been restricted to retributivism and deterrence at the ICC, which are also hard to be fully achieved.

1. A general examination on the concept of Justice

The implications of legal criminal justice

In modern criminal justice system, the legal response to criminal conducts calls for the treatments to the offenders reflecting the will of the nation, the requirements of the society, the need of victims and the rights of the accused. The consideration to individual's need in criminal cases has been inferior to the former two elements, because it is asserted that individuals must submit their interests to the will of the nation, and defer their desire to the requirements of the society. Consequently, the criminal justice hardly allows any space for private judgement, and postulates any individual

reaction to crime as "seeking revenge". The crime occurred critically influences the individuals' life, yet they are not authorised to fully express their opinions before the court. That is the "de-individualisation" of justice in legal procedure. This phenomenon is especially noteworthy in victims' role in criminal justice. To answer what is "de-individualised" justice for criminal offenses, another related question must be discussed as a precondition. The question is how justice shall respond to criminal offenses. In most countries, if not all of them, the option for solving such questions is punishment[314].

As a solution and a reaction to crimes, punishment is based on a human's instinctive reaction to wrongdoings, which relates to social moral disciplines and human's personal feelings. It sometimes drives human to find a way to relieve the negative emotions and to balance the loss caused by criminal acts. Human instinct is not based on rational decisions, so that punishment that is created by human may share many similarities with the desire of "taking vengeance". But punishment is not the simple transformation of such an instinct. Punishment must be applied in accordance to an established criminal law, and must not be exercised in the situation where conviction is not reached through due legal process. This requirement is based on the most accepted and fundamental principle in criminal law: *nullum crimen, nulla poena sine lege*. There are many theories in explicating the intrinsic link between crime and punishment. This study mainly focuses on two of the most popular theories among them, which are the principle of legal moralism and the harm principle.

Legal moralism

The principle of legal moralism stems from the natural law tradition.[315] This

[314] The distinction between "punishment" and "penalty" will not be developed in this study since it does not make significant impact to the topic. See Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970), at pp. 95-98.

[315] See Brian H. Bix, 'Natural Law: The Modern Tradition' in Jules Coleman, Scott Shapiro and Kenneth E. Himma (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002), at pp. 61-103.

theory considers criminal conduct as morally wrong. It is not hard to understand why immoral activities shall be regarded as crimes, because such activities normally violate some of the most common moral disciplines and cause damage to the most important values of a group. For example, murder takes life from others, and life is the foundation for all human activities and can only be owned once by a person. Losing life is losing everything that a human can possess. So, when someone commits murder, he/she is extremely immoral for that the most valuable thing was destroyed by his/her misconduct. The basic idea of the legal moralism principle is that there exists morally a wrong conduct, in the first place, and punishment, as the response, is simply necessary to re-assure that the violation of law must not be tolerated. So, punishment is not rooted in the desire for revenge, but shall be regarded as the manifestation of public denial and condemnation of the crime. "The criminal law does not create wrongs: it does not make wrong what was not already wrong by criminalising it."[316]

In thinking about the roots of law in the natural law tradition, Hart provided some edificatory thoughts to those questions. In examining the influence of morality to law and legislation, Hart insisted that there should not a necessary link between morality and law.[317] He rationalised his assertion in some unique situations. For example, when trying to prove that law and morality are not connected, he said:

> "Connection […] between natural conditions and systems of rules are not mediated by reasons; for they do not relate the existence of certain rules to the conscious aims or purpose of those whose rules they are. Being fed in infancy in a certain way may well be shown to be a necessary condition or even a cause of a population developing or maintaining a moral or legal code, but it is not a reason for their doing

[316] R. A. Duff, 'Towards a Theory of Criminal Law?' (2010) 84(1) *Aristotelian Society Supplementary* 1.

[317] See Herbert L. A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012).

so."[318]

It makes sense that taking good care of infants may originate from human's parental instinct or social morality, but not necessarily requested by law. Yet it does not mean that law will also stay indifferent when the responsible persons don't take care of infants. Neglecting certain legal obligation will cause serious consequences, and punishment may be applied if the gravity of the wrong-doing is high. As many have argued, his effort to prove the falsity in the connection between morality and law is actually false, because his arguments could not rule out all the possibilities in the relationship of morality and law.[319]

In another work, Hart used the example of sexual immorality to criticise the standing point that "all morality… forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole".[320] In his opinion, it is wrong to regard causing damage to social morality as threatening to the existence of the society, and it is a mistake to enforce social moral discipline in law. However, his argument that was established on sexual morality could not be applied to serious crimes like murder, which is undoubtedly a violation of social morality.[321] The mistake Hart made is that he did not pay attention to the changes in social morality. Voluntary sexual activities between adults are becoming more morally tolerable in human society, but it does not mean serious crimes can be tolerated too. On this point, what Hart opposed in his research was not the link between law and morality, but the conservativeness in law making to enforce the social morality without considering the necessity to criminalise such immorality. A more accurate statement on

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[318] Ibid, at pp. 194.

[319] Brian Leiter, 'Beyond the Hart/Dworkin debate: The Methodology Problem in Jurisprudence' (2003) 48 *American Journal of Jurisprudence* 17.

[320] Herbert L. A. Hart, *Law, Liberty, and Morality* (Stanford University Press 1963), at pp. 50-51.

[321] Herbert L. A. Hart, *Law, Liberty, and Morality* (Stanford University Press 1963).

the relationship between law (especially criminal law) and morality can be made in this way: law and law-making have their roots in moral disciplines of a society; when people's perspective on certain aspects in morality has changed, law shall adjust its ideas and rules accordingly.

Legal moralism focuses on the motivation of people's actions and then makes judgements on the level of evilness. There is a risk in this theory similar to the "de-individualisation process" in instituting moral standards for the law of humans in which the will of individuals might be delegated by a certain small group of persons or suppressed by group decisions. Hence, individual may feel detached from the morality and less responsible for the wrong-doing. Generally, when achieving and delivering justice to individuals, risks may occur in three phases. In the phase of recognising moral standards, some top leaders of a group can overstate the common facets in morality and thus, individual's need may not be acknowledged or reflected in law. Admittedly, there exist common values among people in a certain society, but detailed understanding to specific values could vary. One persuasive example is the extent of the right to express. Some topics, especially when they concern religious contents, may draw fierce reactions of certain people, but could be totally non-offensive to others. It is necessary for law to respect various opinions that are not extremist, thus to cogitate different values in morality on which law need to be made. There shall be a carefully considered balance between social morality and the private morality in law.

The second phase is the codification of the moral standards. People might commonly believe that some certain conducts in law is not morally acceptable and should be brought to justice. However, in the codification of criminal law based on certain social morality, the elements of crimes may not be agreed or understood by everyone in society. Additionally, people may also have different opinions as to the legal thresholds of criminalising relevant acts. Of course, this work shall be given to legal experts since it requires great skill to design good rules in law. But the rules need

to reflect normal individuals' anticipation, or at least to avoid severe objections. In the third phase, the legal response to crimes, the risk of ignoring individual's need may create the sense of injustice. That is because even if people agree on the question of what conducts are crimes and by which criteria law shall recognise those crimes, it may still be hard to reach a common agreement on how to treat criminals. Some treatments themselves, such as capital punishment and any form of torture, involve moral issues. People universally concur that murder is a crime and the legal elements constituting the crime of murder are similar. However, the form and harshness of punishment toward it differ regionally and temporally. Assertive exercise of the law and the punishment based on one culture to people who follow other cultures, under the theory of legal moralism, is to enforce moral principles in law blindly.

The harm principle

The harm principle is based on an assumption that individuals have the liberty to take actions in society and avoid harm for themselves, so that the authorities must offer protection to individuals to guarantee their liberty. In his book *On Liberty*, John Stuart Mill notes:

> "That principle is, that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or

> entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise."[322]

In this view, crime must be punished because it causes harm to other people, which is a violation of the governmental authority and the requirement for all members in the society to behave. In accordance with this principle, people's actions shall be rational to prevent harm for both themselves and for others. On the one hand, people should be fully aware of the protected liberty promised by law and seek ways to shield their interests from harm. On the other hand, though, it is people's legal obligation to prevent causing harm to other people; therefore, harming others will eventually bring harm to the offenders themselves. So for the benefit of every social member, being rational is a basic guide for behaviour, as long as the limit of liberty is causing no harm to other individuals. The logic for punishment is that since it is every person's liberty to be free from harm caused by others, then the violation to such liberty shall be ended and corrected through loss demanded by law. This principle does not only argue for the reasons why people utilise punishment as a response to crime, but also shows a way to crime prevention by invoking individuals' fear to loss and pain. Such effect-oriented principle has been the subject of some ethical controversies.

Firstly, if justice is based on the result of harm, can it be justifiable to treat variously crimes of different nature that may cause harm of the same type and same severity? It seems that the result of the crime -the harm according to harm principle- could not suffice alone to decide on how to respond to certain crimes. The harm principle links the gravity of the crimes with the actual damage caused by the offender, but does not weigh enough the mental factors, which will result in imbalance in determining the severity of the punishments given to convicted individuals.

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[322] John Stuart Mill, *On Liberty* (Appleton–Century Crofts 1859), at pp. 21-22.

Secondly, it is inaccurate to suppose that certain harm may cause the same problems for different persons. Furthermore, one criminal conduct may cause multiple effects, which can also be different from person to person. For example, shoplifting mainly violates people's property rights. But in some circumstances, it also has an emotional impact on people, such as causing fear or the feeling of insecurity. If that can be seen as harm, punishment based on such differences will increase instability in the penalty system. Hence, there must be an objective standard for determining the gravity of the harm caused by crime. On this point, the way victims feel about the harm done to them is not important to law and decision-making in criminal justice.

Thirdly, when facing victimless crimes, the harm principle may find difficulties to endorse its points. The example used most frequently in studying victimless crimes is possession of drugs for personal use. Such action seldom causes harm to other people except to the drug-users themselves. In theory, according to the harm principle, self-harming shall not be criminalised because it does not insult others' liberty. Perhaps one can argue that the use of drugs is not rational and that social order may be breached because of such actions. But irrationality cannot be used as the necessary connection between crime and punishment, nor it may be interpreted as violating social order because no other people receive harm from it.

In spite of many questions remaining in the two theories introduced above, the principle of legal moralism and the harm principle constitute the two pillars in the modern criminal law system. The principle of legal moralism, which seeks reasons to punish crimes on moral disciplines, concentrates on the offenders' mental elements and treats crimes as morally wrong conducts. It contributes to criminal law as the *mens rea* part. The harm principle, in the view of the present study, reflects the part of *actus reus* in criminal law, which measures the objective gravity of criminal conducts and consequences. It recognises that one feature of crimes allows criminal law to judge offenders with objective results of crimes instead of dedicating it into moral principles.

It must be admitted that the content of *mens rea* and *actus reus* have more legal aspects than these two theories. However, their basic ideas and questions arising from them are still enlightening in considering those problems that will be discussed in the next sections. These two theories have profound influence on the rules of the Rome Statute, which may potentially cause a need for many related issues to be discussed in the sections that will follow.

Theories on justice and punishment

If it may be acceptable to recognise the sense of justice as a natural response to crimes committed by others, then there would be no necessity to justify the reasons why people incline to "pay back" those criminal offenders. Under this presumption executing punishment to crimes is simply a self-vindicated reaction for humans, which is not that different from other animals' behaviour. However, as it must be underlined, criminal justice and punishment in human society is not totally comparable with pure retaliation, because it reflects the basic moralities of all social members, and supplies a sound and stable baseline beyond which actions will be inappropriate or even criminalised. Based on the theory of legal moralism and the harm principle, all the explanations for imposing penalty to criminal offenders may be concluded in three general aims: giving the criminals what they deserve in accordance with the severity of the crimes; making the criminals an example to the public to prevent further commissions; and when it is necessary, providing assistance for criminals to correct their wrongful behaviours.

Studies based on these three aims have different expectations from criminal justice and punishment. Retributivism, which perhaps is the oldest ideology in punishment, claims that justice is only about desert. The deterrent theory, which often consults the philosophy of Utilitarianism, states that justice should be of preventive function. Criminal rehabilitation involves serial approaches that correct the wrongdoing and

supply education to criminals, so that they will recognise why they were convicted, and learn necessary skills to avoid re-offending. These three theories function as the main pillars in interpreting the meaning of justice in the criminal justice system, and serve as the dominant source in supporting, modifying, or improving punishments pursuant to different aims.

The theory of retributivism

Retribution may have played the main role in the history of criminal justice, and has been the only principle for delivering justice for many hundred years. In some ancient codes that had been discovered and wholly or partly deciphered, such as the Code of Ur-Nammu and the Babylonian Code of Hammurabi, the concept of retribution had already been systematically introduced. Retribution in criminal law is based on *lex talionis*, which gives vast importance to *mens rea* (guilty state of mind) and *actus reus* (guilty act) in judging the criminality of certain conducts. As *mens rea* and *actus reus* are the two undisputable aspects for elements of crime universally at both domestic and international criminal laws, among many other reasons, retributivism is now the predominant ideology in viewing criminal justice.

The concept of "desert" is placed at the centre of the retributivism theory. "Desert" firstly relies on the moral responsibility, which bonds all social members so that there are shared values and criteria for people to behave with the precondition that every social member is equal to another.[323] For retributivists, crime should be seen as a conduct breaching such moral responsibility and thus causing loss to other people and to the whole society. Therefore, criminal offenders must be punished as they failed to abide by the obligation to respect other fellow humans equally, which makes the other

[323] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor tr, Cambridge University Press 1998).

people "lower" in value, so that intrinsically rests on the fact that we are all humans.[324] As a consequence of failing the moral responsibility that constitutes crime, punishment is imposed to criminal conducts both driven by wicked intention and caused by serious omission.

Retribution is not revenge. The former part of this study has stated that seeking revenge stems from a natural reaction of people to criminal conducts that cause loss, and ideally directs the same type and level of loss back to the criminal offender. Retribution may share a similar origin with revenge, but reflects the will of a society or a nation, rather than private desires. In criminal justice, punishment is imposed to offenders because they are guilty by legal standards, and such guilt meets the rules set in the society, but not because the victim urges so. Through the "de-individualisation" process, nations become obliged to protect people from the infliction of crimes. Giving deserts to criminals then transforms the nation's authority to collectively exercise the power to punish. Hence, retribution serving as justice requires that "officials have a duty to punish deserving offenders and that citizens have a duty to set up and support institutions that achieve such punishment".[325]

Retributivism does not establish the severity of punishment without limits. Instead, it insists that proportionality should be functioning within desert so that the punishment set in criminal law will not turn into revenge in another name by another hand. It means that punishment shall not go beyond what the law demands. However, there is hardly any entirely convincing argument in clarifying how to decide the desert. One opinion cleverly avoids such question by emphasising that the desert is simply commensurate in law[326]; this indicates that the severity of punishment should comfort with the gravity

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[324] Jean Hampton, 'Correction Harms versus Righting Wrongs: The Goal of Retribution' (1992) 39 *UCLA Law Review* 1659.

[325] Michael S. Moore, 'The Moral Worth of Retribution' in F. Shoeman (ed.) *Character, Responsibility, and the Emotions* (Cambridge University Press 1987), at pp. 182.

[326] Andrew Von Hirsch, 'Giving Criminals Their Just Deserts' in Eugene McLaughlin and John Muncie (eds.)

of the crime and with a certain level of "mercy"; the law does not impose on criminals exactly the same damage that they have made. As well, law, as this study may infer, offers unquestionable rationality since it represents the collective will of the whole society. Consequently, the belief that giving criminals what they deserve is the incontestable justice, and the way of how to make criminals suffer, as punishment appears irrelevant. Retributivism, if being explained in this way, is to make justice and punishment become what lawmakers want them to be.

Deterrence theory

Deterrence theory in justice has faith in one presumption: it is a part of human nature to avoid pain and seek pleasure.[327] According to such presumption, punishment in criminal law, which stands for pain for anyone who is criminally convicted, will deter the criminal from committing a potential crime in the future. Similar to retributivism, deterrence theory too develops its arguments from human nature; it also takes into consideration what justice could do to criminal offenders, but from another point: how punishment should function so as to prevent crime rather than to merely respond to it. In other words, the deterrence theory believes that when people are tempted to get involved in criminal actions, or not, the fear of punishment will deter them from choosing the former. Furthermore, it is the authority's obligation to guarantee that people will not be inclined to commit crime, as Bentham describes:

> "The business of government is to promote the happiness of the society, by punishing and rewarding. That part of its business which consists in punishing, is more particularly the subject of penal law. In proportion as an act tends to disturb that happiness, in proportion as the tendency of it

Criminological Perspectives: Essential Readings (3rd edn, Sage 2003).

[327] Richard N. Lebow and Janice G. Stein, 'Rational Deterrence Theory: I Think, Therefore I Deter' (1989) 41(2) *World Politics* 208.

> is pernicious, will be the demand it creates for punishment. What happiness consists of we have already seen: enjoyment of pleasures, security from pains."[328]

For the proponents of deterrence theory, making criminals suffer from the wrongdoing is not the purpose of justice. Rather, it shall only be regarded as an approach through which criminal law achieves deterrence.[329] That is to say the criminal justice system does not aim at giving criminals punishment. It executes the duty to punishment simply for a better future by leading people to be better individuals. Justice does not cause equal loss to criminals because loss is an end, but justice shall be a new beginning. Otherwise, criminal justice is no better than torment if there is nothing more than pain in punishment, and criminal law is but the instrument of cruelty. The true and most effective law and justice is, as Cesare Beccaria famously indicated, "that everyone would observe and propose while the voice of private interest […] is silent or in agreement with the voice of the public interest".[330] As a result, punishment must be enforced on behalf of the public interest to fulfil the purpose of justice. The public interest is not about causing pain but reducing or ending the committing of crime.

Deterrence theory highlights the necessity of looking forward to the effect of punishment. It upholds that punishment will, and should, prevent future crimes to an extent. Or at least, punishment hinders potential criminals to actualise their criminal intention. The way to achieve such goal is to escalate the impact of punishment so that committing a crime becomes more unattractive. However, though it is understandable that pain will keep people from doing certain things, it is very hard to determine how

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[328] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published in 1789, Batoche Books 2000) 61.

[329] See James Q. Wilson, *Thinking About Crime* (2nd edn, Basic Books 2013), at pp. 117-118.

[330] Cesare Beccaria, *On Crimes and Punishments and Other Writings* (A. Thomas and J. Parzen tr, University of Toronto Press 2009), at pp. 53.

severe punishments should be, established in law for such purpose. Theoretically, the higher severity the punishment is set at, the less attractive commission of crime becomes. Is it permissible to design punishments without any limitation that the suffering for criminals surmounts the damage they caused, for making best use of punishment for crime prevention? Pure preventive motivation must be warned because it may violate the fundamental value of human rights and dignity, which is widely respected in international law as the duty of nations. Indeed, unlimited pain in punishment leads to the paradox of the principle of "happiness", that when the threat of punishment becomes over-terrifying for everyone, people would be extremely sensitive to all actions they take and will not be able to feel happy at all. The balance between deterrent effect and the severity of punishment is the most problematic issue in deterrence theory.

Another problem in deterrence theory is that the reduction rate of crime is hardly evident or persuasive. Many studies have revealed that using punishment to achieve deterrence may only be able to make limited amelioration to crime statistics; and whenever it is believed to attribute to the small amount of crime rate reduction in deterrent punishment, there are often non-deterrence reasons for such changes.[331] This result of empirical research suggests that on the one hand, the potency of the threat in punishment to decision-making has been overestimated, and on the other, there are more powerful factors pushing people to commit crimes. This suggestion also implies that deterrence theory on justice does not truly touch the grounds of crime; punishment, no matter how much it is decorated with deterrent elements, lacks the power to be the

[331] For example, see Barry Scheck, Jim Dwyer, Peter J. Neufeld, and Michael Boatman, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* (Doubleday 2000); Steven D. Levitt and Stephen J. Dubner, *Freaknomics: A Rogue Economist Explores the Hidden Side of Everything* (William Morrow 2005); Jeffrey Fagan and Tracey L. Meares, 'Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities' (2008) 6 *Ohio State Journal of Criminal Law* 173; Sarah Britto, '"Diffuse Anxiety": The Role of Economic Insecurity in Predicting Fear of Crime' (2013) 36(1) *Journal of Crime and Justice* 18.

determinant to refrain people from committing crimes; and as for the non-cruel treatment of people, this cannot be the reason for making them consider crime as an option in life.

Crime rehabilitation

The deterrence theory of justice and punishment is aware of the shortage in the traditional view on crime and criminals, and notices that justice should achieve more than simply making offenders suffer. If the deterrence theory questions the concept of desert, then the rehabilitation theory challenges the very basic function of punishment in affecting criminals' behaviour.

As the deterrence theory does, criminal rehabilitation also strives to reduce the crime rate. Instead of insisting on the impact of punishment as a threat to both criminals and other individuals, rehabilitation argues that punishment mainly influences the behaviour of those convicted. The convicted have experienced the deprivation of freedom, property or other essential rights, and it is relatively difficult for them to bother the law-abiding people. So the deterrent effect of punishment on criminals is more obvious and tangible if criminals give up committing crime in their life. As evidence has shown that a painful experience from punishment could not make criminals better persons, advocates of crime rehabilitation attempt to explore more on what criminals need, rather than what should criminal justice do to criminals to change their behaviour. Several noteworthy studies successfully link the personal factors of criminals that lead them to committing a crime. One representative work by Raynor and Robinson criticises the idea of making crime less attractive, and applauds the alternative opinion of taking away from criminals the desire to commit a crime; they state that "rehabilitation is best understood not primarily as the prevention of re-offending, but

as the promotion of desistance from offending".[332]

Thence, the rehabilitation theory advances the concern for the need of criminal offenders, and argues for more care in criminal justice for them. Rehabilitation theory gives answers to both "desert" and "deterrence"; for many external reasons, some persons "have" to commit crime for surviving, so that they deserve more resources for life than just blame and punishment; because of the difficulties that cannot be overcome by the criminals themselves, criminal justice should pay more attention to their personal needs to achieve better deterrence.[333] Furthermore, supporters of crime rehabilitation emphasise the disadvantage of incarceration in formal criminal justice; incarceration exacerbates the situations of employability, financial status, social acceptance of criminals[334], and increases the struggles of the criminals' families as well as the community where criminals live.[335] In this view, criminal justice should not only rely less on punishment, particularly imprisonment, but also it should consider abandoning the usage of freedom deprivation.

The most remarkable issue of the rehabilitation theory is that it does not pay equal attention to the victims of crimes. It may be true that the society "owes" criminals some level of humane treatment because they were not taken care enough before committing the crimes. It may also be true that harsh punishments, by depriving them of the necessary resources that had been inadequate for them to survive, will make the situation of criminals' lives worse and consequently force them to reoffend more frequently. Admittedly, people shall acquiesce that an individual's urge to seek

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[332] Peter Raynor and Gwen Robinson, *Rehabilitation, Crime and Justice* (Springer 2005), at pp. 175.

[333] D. A. Andrews and J. Bonta, 'Rehabilitating Criminal Justice Policy and Practice' (2010) 16(1) *Psychology, Public Policy, and Law* 39.

[334] Bruce Western, 'The Impact of Incarceration on Wage Mobility and Inequality' (2002) 67(4) *American Sociological Review* 526.

[335] Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighbourhoods Worse* (Oxford University Press 2009).

"revenge" in criminal cases must be expressed through the formal criminal justice procedure. But all the reasons, which affirm the idea that victims should not be in the "triangle" structure in modern criminal justice, cannot deny the fact that victims are the persons who agonise over the crime directly. If criminals' need should be a concern to criminal justice, so shall the victims' need. Unfortunately, neither the rehabilitation theory, nor retributivism or deterrence seriously contemplates the question of bringing qualified consolation to victims.

2. **The troubles to achieve the objectives in justice at the ICC**

The crimes falling into the jurisdiction of the International Criminal Court are much more severe than those ordinary crimes in domestic criminal law. Being mindful of the fact that establishing legal provisions to prevent and to prosecute international crimes is encouraged and sometimes obliged to States[336], international crimes are considered as threatening the safety of humanity as a whole, which at times require efforts of States rather than one single State to face. The cases where the ICC is involved are more complicated in almost all aspects: the background of the crime, the number of people affected, the time scale of the crimes, the spatial influence of the crimes, the truth behind the crime, and so on. The special features of international crimes at the ICC may also be caused by some reasons behind the crimes, such as root causes of the crime, the diversity of culture, and potential risk inside the ICC's decisions and judgements of cases about global security. The nature of the ICC as both an international organisation and a court where people seek justice has special effects in dealing with international crimes as well. It is an organisation that does not belong to either any institution of a sovereign country, such as the High Court in England and

[336] For example, Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide demands the High Contracting States to undertake to enact necessary legislation to provide effectiveness to its provisions and penalties for those who are guilty of genocide.

Wales for the UK and the Federal Courts for the US. As well, it does not belong to any organ of super-national union, like the European Court of Justice for the European Union. Therefore, the ICC is independent from any country or international union and deals with cases that are very different from domestic cases. But the ICC must comply with some universally respected rules, laws, and even certain legal cultures where western thoughts predominate. Those specialities play a significant role, which could be positive or negative; the existing highly approved principles and theories in criminal law and criminal justice are to be applied to international criminal justice, in particular, to the work of the ICC. Hence, there must be enough attention paid to those special features in order to understand the differences between domestic criminal justice and international criminal justice. The possible misunderstanding and underestimation of those specialities of international criminal cases will cause, or perhaps have already caused many problems to the ICC's work.

The penal system at the ICC and the objectives

The International Criminal Court is organised in conformance to requirements of a modern formal criminal justice, following some foundational rules from most of the domestic courts. As a result, the penal system at the ICC mainly reflects on the most adopted formula of punishments in the world. Article 77 of the Rome Statute establishes two major forms of punishment, and it reads as follows:

> 1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
>
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
>
> (b) A term of life imprisonment when justified by the extreme gravity of

the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

The legal provisions in the Rome Statute indicate that the penal system is predominately guided by the idea of retributivism, because the legal response to international crimes is the deprivation of freedom or property. It also includes consideration of proportionality such as the maximum level of imprisonment in ordinary circumstances and non-inclusion of the death penalty. The principle of proportionality is also echoed in article 78 in calculating the joint sentence of the convicted; it states that the joint sentence of a convicted person "shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment".[337]

The penalties in the Rome Statute are mainly based on retributivism which reflects the idea that punishment shall inflict suffering to the convicted criminals. This fundamental idea, that punishment at the ICC against the perpetrators of international crimes, was not disputed in the Diplomatic Conference in 1998, nor was it questioned in drafting the Rome Statute. One noteworthy dispute in the part of the penal system involved whether to include death penalty in the Rome Statute,[338] which was about the

[337] Article 78 of the Rome Statute

[338] See the discussion in Nadia Bernaz, 'Sentencing and Penalties' in William A. Schabas and Nadia Bernaz (eds.) *Routledge Handbook of International Criminal Law* (Routledge 2011), at pp. 293-294.

most severe legal response on the basis on retributivism rather than abandon such idea. The debates on the maximum level of punishment during the Rome Diplomatic Conference finally ended with the conclusion that death penalty should not be included, and life imprisonment should be confined to the cases with the most grave aggravating elements.[339] Overall, during the plenary meetings, the attitude of delegates from all States in negotiating the establishment of the ICC on the response to perpetrators of international crimes was that they must not go unpunished,[340] as is reconfirmed in the Preamble of the Rome Statute. However, in the statements made by the delegates of Canada and of Azerbaijan in the 2nd and 5th plenary meeting respectively, there were the following mentions: "[the establishment of the ICC] would help to end cycles of impunity and retribution"[341] and that "the objective of the Court was justice rather than retribution"[342]. Given the circumstances that none of the States objected to the idea of retributivism during the whole conference, their statement above shall be understood as follows: that the ICC should achieve much more than just punishing perpetrators of international crimes. The evidence was that neither the delegates nor the States they represented evinced negative opinion to the statement of the President in the 1st Plenary Meeting:

> "The establishment of an international criminal court would send the unmistakable message to all those responsible for abominable crimes that they could no longer act with impunity and that they would be

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[339] See Rolf E. Fife, 'Penalties' in Roy S. Lee (ed.) *International Criminal Court: The Making of the Rome Statute* (Kluwer International Law 1999).

[340] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, vol. II, UN Doc A/CONF.183/13 (Vol.II).

[341] 'Summary of the 2nd Plenary Meeting' (15 June 1998) UN Doc A/CONF.183/SR.2, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, vol.II, UN Doc A/CONF.183/13 (Vol.II), para. 63.

[342] 'Summary of the 5th Plenary Meeting' (17 July 1998) UN Doc A/CONF.183/SR.5, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, vol.II, UN Doc A/CONF.183/13 (Vol.II), para. 33.

> brought to justice. It would make it clear that no one was above the law and that anyone seen as bearing individual criminal responsibility for such atrocities would be punished."[343]

While the idea of retributivism was not contested during the establishment of the ICC and the making of the Rome Statute, the impact of deterrence was also highlighted on almost all occasions. In fact, the deterrent effect of penalty was highly rated by many delegates in the negotiation process. For example, the delegate of the Republic of Korea said that "[b]ringing to justice the perpetrators of crimes of international concern would serve as an effective deterrent."[344] Such opinion resonated among delegates of many States and international organisations, including but not limited to, Afghanistan, Austria, Bangladesh, Burkina Faso, Canada, Chile, Denmark, Madagascar, Romania, Samoa, Senegal, Turkey, United Arabic Emirates, and the UN High Commissioner for Human Rights, and the Observers for institutes like the Council of Europe, the European Court of Human Rights, Human Rights Watch, Peace Centre, the Women's International League for Peace and Freedom.

Furthermore, in the dispute on whether to include the death penalty as an applicable punishment for those perpetrators of international crimes, it brought the deterrent effect of the punishment at the ICC to another dimension. One supporter of employing the death penalty in the Rome Statute argued that non-inclusion of the death penalty would leave an "ambiguous message, which its absence sent in relation to the gravity of the crimes within the Court's jurisdiction, especially in parts of the world where the deprivation of liberty was not an adequate deterrent".[345] The possible

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[343] 'Summary of the 1st Plenary Meeting' (15 June 1998) UN Doc A/CONF.183/SR.1, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, vol.II, UN Doc A/CONF.183/13 (Vol.II), para. 21.

[344] 'Summary of the 2nd Plenary Meeting' (15 June 1998) UN Doc A/CONF.183/SR.2, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, vol.II, UN Doc A/CONF.183/13 (Vol.II), para. 81.

[345] 'Summary of the 9th Plenary Meeting' (15 June 1998) UN Doc A/CONF.183/SR.9, in *United Nations*

powerlessness in deterrence of the ICC without the death penalty turned out to be a serious concern for some Delegates during the negotiations. Some countries even refused to vote for the adoption of the Rome Statute because of that, saying that the political influence of not including death penalty in the Rome Statute would undermine their domestic legislation.[346] There were also many States where death penalty was still applicable in domestic legislation supported to exclude death penalty, suggesting that the deterrent effect of international criminal justice does not rely on death penalty.[347] Nevertheless, the States that advocated to include capital punishment in the Rome Statue did miss the point that the severity of punishment is not the key to deter international crimes in future, and the lack of death penalty was not the cause for the perpetrators to commit the most serious crimes for humanity. To achieve the objective of deterrence in international criminal justice, the ICC must recognise the real complexities in balancing different values in justice at the ICC and the overall favourability to human rights protection and humanitarianism, but shall not anticipate that harsh treatment to convicted criminals would be important to the deterrent effect.

The general reliance on retribution and deterrence of punishment at the ICC is also seen in its case law. In the *Katanga case*, the Trial Chamber II signified the two prominent roles of the sentence:

> "[O]n the one hand, punishment, or the expression of society's condemnation of the criminal act and of the person who committed it […]; and, on the other hand, deterrence, the aim of which is to deflect

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Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, vol.II, UN Doc A/CONF.183/13 (Vol.II), para. 45.

[346] See Rolf E. Fife, 'Penalties' in Roy S. Lee (ed.) *International Criminal Court: The Making of the Rome Statute* (Kluwer International Law 1999), at pp. 335.

[347] Ibid, at pp. 331.

those planning to commit similar crimes from their purpose."[348]

Such formulation has been accentuated in some subsequent cases as well, constituting a constant attitude to the belief in retribution and deterrence.[349] Hence, the values of retribution and deterrence for the ICC are peculiarly unshakeable in achieving justice.

Rehabilitation for perpetrators is not explicated in the Rome Statute. In drafting the Statute of the International Criminal Court, the Preparatory Committee received proposals on the issue of whether to hold a pre-sentencing hearing to decide the possibility of imposing rehabilitation,[350] and of designating a State by the International Criminal Court as the proper place for social rehabilitation.[351] However, in regarding the context, the meaning of rehabilitation should be interpreted as the reconciliation with victims and the affected community, rather than the treatment and care for perpetrators. Although in the commentaries of the International Law Commission onto the *Draft Statute for an International Criminal Court*, it was confirmed that the Court should consider the necessity to promote rehabilitation under the spirit of the International Covenant on Civil and Political Rights. However, criminal rehabilitations may be applied to juvenile offenders only,[352] which mainly rely on each State's domestic process but not the work of the ICC.

As a comparison, the use of rehabilitation is recommended to the reparations of

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[348] *The Prosecutor v Katanga* (Decision on Sentence pursuant to article 76 of the Statute), ICC-01/04-01/07, Trial Chamber II (23 May 2014), para. 38.

[349] See for example, *the Prosecutor v Jean-Pierre Bemba* (Decision on Sentence pursuant to Article 76 of the Statute), ICC-01/05-01/08, Trial Chamber III (21 June 2016), para. 10; *the Prosecutor v Al Mahdi* (Judgment and Sentence), ICC-01/12-01/15, Trial Chamber VIII (27 September 2016), para. 66; *the Prosecutor v Jean-Pierre Bemba, et al.* (Decision on Sentence pursuant to Article 76 of the Statute), ICC-01/05-01/13, Trial Chamber VII (22 March 2017), para. 19.

[350] UN General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Official Records (Compilation of Proposals)*, vol. II (13 September 1996) UN Doc A/51/22 [VOL II], pp. 226.

[351] Ibid, pp. 322.

[352] ICL, 'Draft Statute for an International Criminal Court with Commentaries' in *Yearbook of the International Law Commission, 1994*, vol. II, Part 2, pp. 57.

victims. Article 75(1) of the Rome Statute stipulates that the Court can order the convicted persons to offer certain forms of reparations to victims, such as restitution, compensation, and rehabilitation.[353] This article authorises the ICC to initiate legal procedures for victim reparation when it is possible and necessary, but does not enable criminal rehabilitation for the convicted persons. This arrangement in the Rome Statute implicationally claims that the personal characteristics of perpetrators in alleged crimes will not be a concern for introducing alternative treatment thereto. Instead, those personal circumstances are scrutinised as factors in aggravating or mitigating sentences, not as evidence to apply rehabilitation for the convicted persons.[354] The attitude as such had been decided in the negotiations of establishing the ICC. It was evident that rehabilitative methods were not going to be included in the Rome Statute although many NGOs had proposed the rehabilitative approaches to be used for the convicted, especially for the under-aged.[355] The salient care of victims that goes beyond the limitation of the three main theories on justice and punishment, namely, retributivism theory, deterrence theory, and crime rehabilitation, prepared the ICC for a good initiation to consider restorative justice. However, the reparation mechanism to victims at the ICC, which was at times highlighted as restorative justice, may have been the cause of some unexpected problems, which will be analysed in the following sections.

The objectives to punish in international criminal justice, retribution, deterrence, and rehabilitation, has been reviewed in academy[356] However, the way to achieve these objectives is difficult to be concluded. The combination of the retribution against

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[353] Article 75(1) of the Rome Statute is read as "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."

[354] Rule 145 of the Rules of Procedure and Evidence.

[355] See the statements of the UN High Commissioner for Human Rights and Observer for the Children's Caucus International in the 2nd Plenary Meeting (15 June 1998) A/CONF.183/SR.2, para. 100 and 118.

[356] See William A. Schabas, 'Sentencing by International Tribunals: A Human Right Approach' (1996) 7 *Duke Journal of Comparative and International Law* 461, at pp. 498.

perpetrators of international crimes and the deterrence to future crimes with the rehabilitation to victims and the affected community, which formulates a triangle structure in the penal system in the Rome Statute, has indicated the anticipation of international community to the ICC. The anticipation, though may be a little ambitious, is that through the punishment inflicted upon the perpetrators, the potential perpetrators can reconsider their acts in future, and victims as well as the community can feel released. It must be pointed out that the punishment alone, which closely links the pain that the convicted persons may receive, cannot achieve those three objectives. The ICC's primary purposes of beaconing retribution, maximising deterrence and healing the damage are challenged by some features of international crimes, shading the impact of the Court, marginalising its role, and somehow being detrimental to its work. Those issues are more crucial for the ICC since the flaw or failure to achieve such objectives contaminates the very core functions of the Court.

The complicated background of international crimes

In domestic criminal cases, the background of a crime often includes personal information of the criminal, social influences, and sometimes, situational perspectives.[357] A criminal's personality, the relationship with the victim, the economic situation, and so many other factors are examined during the police investigation and prosecution process in order to clarify the dangerousness of the offender. Relevant social influences on the offender's conducts are also important in criminal procedure because they are related to the offender's criminal responsibility. For criminologists, crimes are usually more than the prohibited activities by law. Rather, they can be seen as a violation of social morality, as a consequence of conflicts between social classes, as an outcome of a poor economic status, or simply as harm to the interests of the whole

[357] See Derek B. Cornish, 'The Procedural Analysis of Offending and its Relevance for Situational Prevention' (1994) 3 *Crime Prevention Studies* 151.

society.[358]

International criminal cases, however, normally have complicated historical reasons. For most of the civil wars in Africa, violence and conflicts are a result of post-colonial governance. One instance, *inter alia*, is the serial violence in Kenya. Kenya used to be a colony of the British Empire. Like what happened in many colonies, the colonisers often initiated their influence by occupying land from indigenous people. The occupation of land would normally bring about mass violence and crucial damage to the life and economy of the local indigenous populations, involving taking lands from local people and redistributing it to new-coming settlers. After the British Empire decided to end its colonisation of Kenya, which meant most of the former settlers should return the lands to the indigenous people, the land-allocation issues were not peacefully resolved but were left to their successors. The deprivation of land caused imbalance and financial crisis for the original owners, and weakened their living conditions in contrast to other peers in society.[359] The injustice and grief of the land policy that was caused by colonialism was believed to be an "important underlying factor" in the post-election violence in Kenya between 2007 and 2008, according to the Kenyan national investigation of these human rights violations.[360] As well, an unsatisfying solution of crimes and violence, caused by political corruption and biases, in particular the fact that some violence leaders went unpunished and even grasped the throne of power, has made all political parties and normal people believe that violence might be the most, if not the only, reliable means of survival. The UN Office of the High Commissioner for Human Rights (OHCHR) upheld this opinion in its report, and further noticed that the dispute over the rights of land foreshadowed recurrent violence and pre-existing

[358] See John Muncie, 'The Construction and Deconstruction of Crime' in John Muncie and Eugene McLaughlin (eds.), *The Problem of Crime* (2nd edn, SAGA 2002).

[359] See D. Pal S. Ahluwalia, *Post-Colonialism and the Politics of Kenya* (Nova Publishers 1996).

[360] Kenya National Commission on Human Rights, *On the Brick of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, para. 36.

violations of social and economic rights to the local people.[361]

The complicated background of international crimes leaves the following question to the ICC: "who don't deserve punishment", rather than "who deserve". The Truth, Justice, and Reconciliation Commission Report (TJRC Report) of Kenya, for example, listed the violence and cruelty in four stages: The British colonial era (1895–1963), the presidency of Jomo Kenyatta (1963–1978), the presidency of Daniel Arap Moi (1978–2002), and the presidency of Mwai Kibaki (2002–2008). In each of these stages, there were different parties that should be taking specific responsibility.[362] In regard to such conclusion, the violence between 2007 and 2008 in Kenya might be just the continuation of the chaos in history. Therefore, prosecuting the ruling persons who were responsible to the recent violence does not provide retribution since it answers nothing to the crimes in the past. It must admit that taking responsibilities of all the perpetrators in history is unrealistic, especially considering the temporal jurisdiction of the ICC. But it does not mean that clarifying the historical reasons for the recent violence is useless. In fact, historical examination of the international crimes makes the decisions of the ICC more acceptable and persuasive to both the perpetrators and the local people.

The issues in Kenya are fairly representative of the whole situation of Africa, to which the ICC has mainly paid attention. Beyond the issues of Kenya, historical reasons in African situations have created numerous problems, which have become the root causes of conflicts in Africa. The root causes behind those issues differ from one country to another, and render different consequences. The conflicts in African countries may be caused by political struggles during post-independence time, or by the pain in the period of democratic transitions, or by claims over valuable economic

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[361] UN Office of the High Commissioner for Human Rights, *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008* (28 February 2008), at pp. 5-7.

[362] Kituo Cha Sheria, 'Summary of The Truth, Justice, and Reconciliation Commission (TJRC) Report' (2014) Legal Advice Centre.

resources such as oil, diamonds, and drugs, or simply by the existence of sporadic local powers that do not willingly accept governmental authorities.[363] The complicated background of international crimes makes it very difficult to apply one commonly accepted idea on justice or the means to deliver justice among so many countries.

The deterrence at the ICC will not be functioning well under a complicated background of atrocities. The threat of being punished will not deter the potential crimes as expected. Partly, it is because of the difficulty to identify who deserves punishment and to clarify the grounds for the proper punishment; mainly, it is because penalties could not make any positive changes to those root causes of the past and the present. On the one hand, the urges for advances in political power and economic bonus drives those "candidates to power" far from any consideration of "well-being" of the others; at times, the greed for their own interests overwhelms the unattractiveness of punishment. In Kenya's example, despite the fact that the ICC has ambitiously initiated the cases and charged the high-ranking persons, it has failed to convict anyone. The respectful fear to the ICC and its punishment may not constitute a real problem for the potential perpetrators who have enough power. These crucial facts have displayed to the world how the ICC's authoritativeness has been discounted. On the other hand, similar to the fact that the ICC could not and should not wrap all possible criminals into retributive responses, prosecuting and threating to punish some of these selected figures at the ICC is hardly a deterrence. Like what has already been analysed above, the primary importance for Kenya and all other States, which have been suffering long and vast conflicts, is to establish a government of credibility and capability to fairly "deliver

[363] See Alfred G. Nhema, and Tiyambe Zeleza (eds.) *The Roots of African Conflicts: The Causes and Costs* (Ohio University Press 2008). Also see Abdalla Bujra, 'African Conflicts: Their Causes and their Political and Social Environment' (2002) *Development Policy Management Forum*, Paper 4; Chyanda M. Querido, 'State-Sponsored Mass Killing in African Wars—Greed or Grievance?' (2009) 15(3) *International Advances in Economic Research* 351; Halvard Buhaug and Jan Ketil Rød, 'Local determinants of African civil wars, 1970–2001' (2006) 25(3) *Political Geography* 315.

the type of public expenditure"[364]. This requires stable circumstances for officials to execute their obligations with a certain level of effective external monitoring other than isolating themselves from governmental duties for pursuing the ICC's procedures. This may sound unfair comparing with the crimes in which they might have involved, but it is a productive solution.

It is important to create stable environment in politics to suppress violence, thus to deter the possible international crimes more effectively. In many cases, the method of violence is simply manipulated for the desire of political power; the desire for political power eventually serves for economic benefits of the ruling persons, according to some empirical studies on civil wars.[365] If that is correct, then imprisoning those perpetrators who are in control of power of a State could not be even deterrent at all to international crimes. Because by holding them apart from power, the ICC may create more opportunities for more ruthless perpetrators to take political positions through violence. The experience in transitional justice has told the lesson that criminal prosecution against the perpetrators of serious human rights violation usually fails if there is not a peaceful environment. If the punishment against the perpetrators cannot reflect the whole picture of violence history, retribution may become biased and less helpful to decrease the tension between different groups. And if the punishment at the ICC cannot decrease such tension, the deterrent effect that the Court aims at may not be more than just words. The complicated background of international crimes demands that the ICC shall very carefully contemplate the consequences of its decisions. The deprivation of the freedom of the perpetrators may be a custom in criminal law, but may not result in positive outcomes.

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[364] Jean-Paul Azam, 'The Redistributive State and Conflicts in Africa' (2001) 38(4) *Journal of Peace Research* 429, at pp. 442.

[365] Christopher Blattman and Edward Migeul, 'Civil War' (2010) 48(1) *Judicial Remedies in International Law* 3.

The difficulty in delivering condemnation

There are several similarities in dealing with both international criminal cases and domestic criminal cases; for instance, the principle of non-retroactivity and *ne bis in idem* must be followed at both levels. In trying criminal offenders in domestic courts, a stable social environment plays a very significant role. For example, at domestic level, criminal cases are about criminal offences and loss between individuals, rather than between groups of people or between ethnicities. Furthermore, there rarely exist complex historical issues in domestic criminal crimes, which requires national reconciliation to re-address. Criminals could have a very twisted life in childhood, which is believed to be an inductive factor to committing crimes among youth and adults.[366]

However, a very serious criminal case may leave shocking impressions for people in a society for a short period of time, but it would seldom threaten the foundation of a government or, cause the whole society disordered. Relatively simple grounds of crimes make the process of delivering justice easier at the national level, especially when the society of the nation is stable and organised and in good order. Usually criminals are at the opposite side to the whole society's values and traditions. Ordinary crimes cause harms that remain between individuals. But the conflicting parties in international criminal cases are often tribes, groups, regions, or even States. In reality, people belonging to different groups may use the excuse of defending their own interests to testify the self-righteousness in their criminal acts, and refuse to acknowledge the fact that such righteousness had caused great pain to others. It is not easy to make the

[366] See Rosalind E. H. Catchpole, and Heather M. Gretton, 'The Predictive Validity of Risk Assessment with Violent Young Offenders: A 1-Year Examination of Criminal Outcome' (2003) 30(6) *Criminal Justice and Behavior* 688; William E. Copeland, *et al*., 'Childhood Psychiatric Disorders and Young Adult Crime: A Prospective, Population-Based Study' (2007) 164(11) *American Journal of Psychiatry* 1668; Jessica W. Reyes, 'Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime' (2007) 7(1) *The BE Journal of Economic Analysis and Policy* 51.

perpetrators accept the wrongness of their acts and feel sympathetic to the victims through pure punishment. It requires the ICC to reconsider its methods in order to establish the condemn-ability within the crimes and deliver the right message to people.

A feature of international crimes of vast human rights violations and humanitarian crises is that they often involve different factions, which are mutually hostile for reasons of eagerness for political privileges and hunger for economic advantages. This was witnessed again in the situation of Kenya. The post-election violence in Kenya between 2007 and 2008 was attributed to the alleged electoral manipulation, which simply up-roused another political contest as occurred in many other political elections before. Studies have noted that political contests and social tensions appear inevitable since whoever successfully seizes power will enjoy immense political and economic benefits, and even impunity from directly or indirectly committing crimes.[367] The presidential candidates were backed by their followers, so that they joined the election not only for their personal benefits but also for the group's interests. Some participants in this post-election violence clearly belonged to one of the most powerful parties in the election. Those who inclined or refused to accept the electoral result labelled people pursuant to which group they supported. Hence, the concept of "us" and "others" was created in order to give excuse to the conflict, which is often seen in fights between mafias.

Surveys also discovered that the violence went beyond the disputes between different political parties, and extended to several ethnical military groups where soldiers were required combat training and loyalty pledging. The consequence of such distinction generated a special pattern of responsibility among those participants in violence, which was detached from social moral principles but highly attached to group mentality. Each group is responsible to all of its members, and every member was

[367] Human Rights Watch, 'Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance' (March 2008), at pp. 11.

required to take group interests as the primary principles. Thus, the participants of violence, either belonging to a political group or to an ethnic group, felt a very limited level of guilt when committing serious crimes to other group members. They were, according to the opinion of some studies, the achievers of the group's will.[368] As a result, they did not easily respect the legitimacy of the justice delivered from courts and which were organised by "others"; nor did they accept condemnations from the international community. The most effective and efficient way to fully transmit the sense of justice and the feelings of guilt is to make them realise the wrongness in the ideology of the group and their responsibility toward all the others.

As an outsider, the International Criminal Court is not going to be recognised as an entity to deliver "internal justice" to those perpetrators, and therefore the punishment at the ICC will not be respected as a fine solution. That is probably a critical issue for the ICC's decisions and judgements that cannot be accepted easily. At domestic level, the court, as an independent institution it may consider the legal facets, evidence, and accordingly to make fairly trusted judgements; it owns the basic faith among the stakeholders and most of the people who are in the territory where such courts are located, as described in Lon Fuller's study.[369] But such a condition may appear absent from the ICC because it is not established on the local culture or tradition; it is not deemed as a local legal authority, which practices with local values, and cannot deliver condemnation to those serious international crimes by representing the groups for which those perpetrators fought. The distance between the ICC and both the perpetrators and victims makes pure punishment from the ICC merely a tool that shows to the world that such international institution is still functioning, but is not held as a

[368] Oscar Foundation, 'Ethnicity and a Failed Democracy: A critical surgery of the pre and post elections violence in Kenya', in the Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15, Annex 12 ICC-01/09-3-Anx12.

[369] Lon L. Fuller, *The Morality of Law* (Yale University Press 1964).

symbol for confirming the wrongness of those crimes and the ideas behind them. Thus, the punishment, as a form of justice at the ICC, upon the persons who are either under investigation, prosecution, or conviction has limited impact in delivering the sense of justice.

The punishment coming from the ICC has great difficulty in playing an effective role in repairing the damaged social relationships or in achieving reconciliation. The justice at the ICC is not able to holistically ponder the historical background of crimes. Rather, it focuses on the restricted temporal scale based on the alleged crimes, demanded by both the jurisdiction *ratione temporis*[370] and the principle of non-retroactivity[371]. In theory and reality, the court will not delve into more details in history than the information relevant to the criminal charges. For example, in the *Ruto and Sang case* the Pre-Trial Chamber II of the ICC examined some relevant evidence, but prior to the alleged crimes, whether the attacks on civilian population that amounted to crime against humanity were organised through a previous plan.[372]

However, the scope of evidence, including the "facts and circumstances underlying the alleged crime as well as their legal characterisation ", examined by the Pre-Chamber II, had the purpose to "clarify its understanding with respect to the nature of such decision as setting the factual subject matter of the trial".[373] From a legal point of view, such practice is fully correct under the principle of the rule of law. But the sensitivity to legalism, as to what had been done during the post-election time and whether those conducts constituted international crimes that fall into the jurisdiction of the ICC, may also make the ICC an institution which pays little attention to the root

[370] Article 11 of the Rome Statute.

[371] Article 24 of the Rome Statute.

[372] *The Prosecutor v Ruto and Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute), ICC-01/09-01/11, Pre-Chamber II (23 January 2012), at pp.109-112.

[373] Ibid, para. 44.

causes of international crimes and whose legal practices may potentially undermine the chance to solve the inter-ethnical tensions throughout history.

In Kenya, for example, the corruption in the political system, impunity among criminal offenders, the economic imbalance between the rich and the poor, the long-lasting prejudice and hatred between tribes, were all present in the form of unrest conflict based on political and ethnical identity difference.[374] But the ICC is only capable of dealing with the superficial causes, though the Prosecutor had carefully investigated and prosecuted all political sides to avoid bias. The incapability of the ICC under the current legal framework and ideas left the situation continuously vulnerable to those very reasons, which may cause further violence; the damaged social relationships were not restored, and inter-trust between citizens and the government and mutual respect between ethnical groups remained un-rebuilt. The risk of violence was not only a hypothesis but it became a reality as the violence prior to the 2013 election in Kenya, which was caused by almost the same root causes as those in the post-election violence between 2007 and 2008, according to the observation of Human Rights Watch[375]. The fear of violence aroused by the political elections in Kenya continues to be a concern to the international community as a threat to local security and human rights protection in 2017, which, as this study argues, results from the unresolved abovementioned root causes.

On both the purpose of the delivering of justice and of restoring damaged social relationships, the ICC seems to be struggling. There is always a perplexity to the ICC's work when more than one military faction has committed atrocities; if the ICC chooses to deal with only the criminal conducts by the power opposed to the government in

[374] Mara J. Roberts, 'Conflict Analysis of the 2007 Post-Election Violence in Kenya' in Akanmu G. Adebayo (ed.), *Managing Conflicts in Africa's Democratic Transitions* (Lexington Books 2012).

[375] Human Rights Watch, 'High Stakes: Political Violence and the 2013 Elections in Kenya' (February 2013).

question, as was seen in the situation of Uganda, then the ICC is confined by political considerations and becomes the "ally" to the evil government; if the ICC steadily charges the governmental officials, especially the top leaders, then it will gain no cooperation and be criticised as being biased and contributing to the escalating of the crisis; this was the complaint of the Sudanese government. When the main political parties are in control of the military and enjoy full political support, such as the situation in Kenya, the ICC's ambition to try all the involving persons in power, could possibly go in vain. Since justice from the ICC will not easily be accepted and respected by any of the tried individuals and the supporting power behind them, there remains a continuing conflict in court. The difference could be that in warfare the conflict is fought with weapons, whereas in the court it is fought with verbal disputes. Un-respected justice will unlikely deter crimes. Thus, the deterrent effect of justice at the ICC is worthy of being questioned.

International criminal justice and cultural diversity

The difficulty to achieve effective retribution and deterrence in international criminal cases at the ICC can also be caused by cultural diversities. This phenomenon has created noteworthy problems to criminal justice proceedings. Decades ago, when the US Institute of Justice analysed the results in a victimisation survey, the extreme low rate of immigrant victims reporting certain kind of crimes, such as domestic violence, was disclosed, which was then attributed to some cultural differences in viewing crime.[376] The question on how to deal with such differences becomes an urgent issue for lawmakers and law-enforcers.

Diversity indicates that similar things may mean or be viewed differently between

[376] Robert C. Davis and Edna Erez, 'Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System' (May 1998) *US Institute of Justice.*

people who do not hold the same values. It causes various reactions of people toward certain incidents, hence, may make people draw distinctive or even opposite conclusions on the same thing. The recognition and respect for cultural differences, without any doubt, ensures for everyone an equal level of caring regardless the identities deriving from specific backgrounds. The United Nations Educational, Scientific and Cultural Organisation (UNESCO), cherishes the value of cultural diversity as being guaranteed by human rights law.[377] Cultural diversity, unlike diversity between persons, is shaped by certain traditions and values that are commonly by people in a group. It is one of the decisive aspects that influence people's opinion on the right and the wrong, which forms the view of justice. Justice that is based on the respect of specific culture is easier to be accepted by the people who feel familiar with such culture. Therefore, the effectiveness of justice for people must take culture diversity in consideration. The justice that is designed on unfamiliar cultural factors may not reach the desired goal. If such justice is forced onto the participants of the justice process, it will cause much weaker effects.

Some studies in minorities in formal criminal courts discover many uneasy issues.[378] The first challenge is the linguistic barrier. In modern criminal courts, if any participants of the proceedings find it difficult to understand the meaning of language before the court, certain legal assistance will be offered. However, the real problem is not the translation, but the accuracy of cognising the concepts, values, and spirits therein. When people who do not originally see themselves as members of the western culture, which is the dominant culture in organising courts of justice, they will express a strong negative attitude towards such form of justice, and then receive similar

[377] UNESCO, 'Universal Declaration on Cultural Diversity' (2 November 2001).

[378] William Y. Chin, 'Multiple Cultures, One Criminal Justice System: The Need for a Cultural Ombudsman in the Courtroom' (2005) 53 *Drake Law Review* 651.

negativity from the court and law.

Secondly, the refusal to acknowledge some special cultural traditions relating to the sense of justice by the court through making judgements or legal decisions will elevate the conflict of understanding between cultures to a higher level; the “cultural outsiders” could transfer issues in single cases to the national policies, then believe that they are “targeted” and their culture is “criminalised”. Third, when punishments, as a response to “wrongness” in law, are not able to match the anticipations of a particular culture, the legitimacy of the court and rigorousness of justice will be heavily crippled. If the spiral of culture ignorance continues in the formal justice procedure, the gap in the meaning of justice between law and minority people will become more widened through every case judged.

The relationship between culture and justice can be concluded as a circle. Culture provides intellectual pillars for people who are in its regime. When an unfamiliar form of justice replaces the well-constructed culture in a group or society, problems in the conflict of concept will stand out. Justice without acknowledging cultural difference firstly challenges the identities of certain groups of people, enforces them to take punishment regulated by law as the final consequence to offenders, answers to victims, and offers solutions that may harm a community. The desert may not be something offenders truly deserve.

Furthermore, because the denied cultural tradition by the courts can in turn be utilised by perpetrators as a defence to deny the charges, the deterrent effect of punishment in formal criminal justice for those who insist in their own cultural believes would be very limited. The analysis in earlier parts of this chapter has pointed to some reasons why the ICC’s justice may and will be fragile if it is to signify desert or deter culprit; it hardly touches the root causes of international crimes, struggles to deliver universal condemnation to perpetrators, and disenables to reciprocate the gravity of

international crimes. The conclusion in fact indicates that according to the deterrence theory, the power or threat of punishment at the ICC is not that potential as people could have thought. If the power of threat in punishment is not reliable for the ICC, there must be other directions for accomplishing its ambition to deter.

One suggestion is that the ICC should focus on improving the certainty in imposing punishment in order to ensure the effect of deterrence.[379] But such studies also listed numerous complexities for the ICC to guarantee certainty, especially when it gains little support of the UN Security Council or faces relatively more powerful counties. The point is, since the threat from the ICC is not "frightening" enough, it may have to abandon the motive of the threat. Instead, some studies opine, the ICC needs to seek possibilities of satisfying deterrence from threatening to persuading, and "should aim their denunciatory judgments at strengthening a sense of accountability for international crimes by exposure and stigmatization of these extreme forms of inhumanity".[380]

But considering the current legal frame of the ICC and relevant principles, it is almost impossible to imagine that the ICC would become "softened" and take up the role of a moral instructor. The ICC may have failed in achieving many goals, however, it is the only permanent court of criminal justice in the world insofar, and as Cherif Bassiouni avowed, "[c]ompromise is the art of politics, not of justice".[381] It is true that if the ICC starts to negotiate with perpetrators of international crimes it will lose the role as a permanent court to deal with international crimes. After all, the ICC has vowed

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[379] See, for example, David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473; Christopher W. Mullins and Dawn L. Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) 10 *International Criminal Law Review* 771.

[380] Mirjan Damaska, 'What is the Point of International Criminal Justice' (2008) 83 *Chicago-Kent Law Review* 329, at pp. 344.

[381] M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11.

that international crime perpetration will not "go unpunished".

Then the legal response of the ICC to the most serious crimes must be made more acceptable. The difficulty of achieving this goal is that at the ICC there shall only be one system of justice which lacks the capability to reflect other cultural thoughts. For example, when almost everyone denounced the usage of children into military services, many have also underlined some cultural facts in identifying "child":

> "In contrast to developed nations, many cultures define individuals as adults if they have participated in the culturally appropriate rites of passage. Developmental science has tended to embrace a universal model of childhood and to overlook the fact that 'the child' is a socially constructed idealization that reflects the values and agendas of particular researchers, cultures, and traditions."[382]

Such difference is not to be used as justification of conscripting child soldiers in the military. Lacking certain knowledge of human rights law cannot be the ground for excluding responsibility.[383] Besides, both Lubanga and Katanga in the situation of DRC argued their contribution to disarm and demobilise children from military forces, implying that they did realise that conscripting and enlisting child soldiers is a violation of international law. However, the issue is that using the threshold of certain to identify a child was somehow convenient for the ICC, but it did not apply to local people. The former child soldiers faced extreme difficulties reintegrating to the community because their identity was that of a perpetrator to those who suffered in the civil war. Often, in contrast to the attitude of the ICC, former child soldiers were deemed as extremely dangerous because they were even more fearful than adult soldiers.[384] Whether the

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[382] Michael G. Wessells, 'Children, Armed Conflict, and Peace' (1998) 35(5) *Journal of Peace Research* 635, at pp. 640.

[383] Article 32(2) of the Rome Statute.

[384] Elettra Pauletto and Preeti Patel, 'Challenging Child Soldier DDR Processes and Policies in the Eastern

former soldiers are children or not does not really matter under such circumstances where child soldiers' pain and trauma continue after they were rescued and "purified" by the legal judgements of the ICC.

That is a simple example of issues brought by of how to identify a child between international law and local culture in the situation of DRC. When facing so many countries with highly diverse cultures around the world, the simplified response at the ICC, namely imprisonment and fine, cannot provide a totally satisfying answer. The key issue is that the ICC is not able to represent any specific culture, nor is equipped with any single culture that unifies all the others. In formal criminal justice, punishment is repressive and depriving, and focuses on causing loss to crime perpetrators with explanations to why causing pain to criminal offenders by law makes things right. But punishment has failed to justify itself for making things right again. It is analogous to fighting against Leviathan without Poseidon's mighty trident, which may only hurt one of the monster's heads instead of all. The ICC needs flexibility in its legal proceedings to address the diversity in cultural perspectives.

The gravity of criminal consequences

International crimes often cause more severe consequences than ordinary crimes. The violence in Kenya between 2007 to 2008 affected six of the eight Kenyan Provinces; it caused a large scale of human rights violations, including "reported 1,133 to 1,220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350,000 persons, and 3,561 reported acts causing serious injury".[385] The nature of crimes committed against those victims was vicious. In the investigation by the Office of the

Democratic Republic of Congo' (2010) 16 *Journal of Peace, Conflict and Development* 35.

[385] The Office of the Prosecutor, 'Request for authorisation of an investigation pursuant to Article 15', *Situation of the Republic of Kenya*, ICC-01/09-3 (26 November 2009), para. 56.

Prosecutor, body mutilation of victims, brutal killings such as burning people alive, widespread sexual violence including gang rape, large numbers of population suffering deportation and forcible transfers, and so on, were the most recognisable perpetrations.[386] The length of the crimes being committed, the number of victims, the wide territorial effect, and the brutality of the crimes in Kenya's situation are the distinguishing features that have astonished the international community, notwithstanding the fact that this case is just one piece of the whole picture of the atrocities.

On the other side of Kenya, around Lake Victoria, great tragedies also beclouded human rights values and human conscience. Burundi, like many other African counties, has been suffering long-lasting violence and mass killings. The notorious massacre of citizens, mainly against Hutus, committed by the local government at that time in 1972 caused approximately 100,000 people killed. After the political and ethnical struggling for years, in 1993, the first multi-party election took place in Burundi. Mr. Melchior Ndadaye won about 63 per cent of the votes and became the first president through a democratic path. But the democracy did not bring peace for long. In late 1993, Ndadaye was killed in a failed *coup d'état* by renegade troops of the Tutsi-dominated army before the breaking-out of the Rwandan Genocide, which caused at minimum 50,000 people killed in its aftermath.[387] The situation of Burundi is still on-going; the process of Investigation, where the Prosecution of the ICC concentrates on investigating and collecting evidence relating to the violence between 2015 and 2017, still goes on. In the report of the Prosecutor we read that the pre-election protest against the then and current President and the ruling party aggravated from being peaceful to violent since the

[386] Ibid, para. 62-70.

[387] United Nations Security Council, 'Report of the Security Council Mission to Burundi on 13 and 14 August 1994' (9 September 1994) UN Doc S/1994/1039.

governmental security force upgraded the repression.[388] The aftermath of the repression resulted to a more serious police brutality and occurrence of abuses. The Prosecutor estimated that "more than 430 persons were reportedly killed, at least 3,400 people have been arrested and over 230,000 Burundians forced to seek refuge in neighbouring countries"[389]. The UN Human Rights Council revealed that: "extrajudicial executions, arbitrary arrests and detentions, enforced disappearances, torture and cruel, inhuman or degrading treatment and sexual violence in Burundi since April 2015". This has "entailed serious physical and psychological trauma for the victims".[390] The assessment of the gravity of human rights violations and inhumane acts in this situation may have reached the level of international crimes.

The long-lasting conflict and violence in the Lake Region of Africa, including inter-state warfare, transnational combat, and cross-border non-governmental armed forces, shadows the security and stability of the whole area, and has turned this region into one of the most dangerous places in the world. The special geo-political feature and political environment of this region, the countries in which include Rwanda, Burundi, Democratic Republic of the Congo (DRC), Uganda, Tanzania, Zambia, Republic of Congo, Central African Republic (CAR), South Sudan, Kenya and Sudan, facilitate violence to be transmitted through these countries very easily. As a result, most of the violence and several human rights violations have influenced many countries in the meantime, and created even more tensions among them.

The violence in this area is structured and widespread because it involves combats

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[388] The Office of the Prosecutor, 'Report on Preliminary Examination Activities 2016' (14 November 2016), para. 29.

[389] The Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi' (25 April 2016) < https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-25-04-2016> accessed 15 February 2017.

[390] United Nations Human Rights Council, 'Report of the Commission of Inquiry on Burundi' (11 August 2017) UN Doc A/HRC/36/54.

between both governmental armies and rebel groups. The genocide in Rwanda can be used as an example to indicate the brutality of crimes. The Rwandan genocide is considered to be the most notorious systematic human rights violation after the Second World War, and probably the best-known genocide case after the Holocaust. In the case of the *Prosecutor v Akayesu*, Jean Paul Akayesu was charged with being responsible for killing, beating, mutilating, and committing other inhumane treatments of thousands of people, which resulted in at least 2000 killed.[391] In the testimony of one witness, it is stated that the number of people who were killed was so tremendous that "the entire landscape was becoming spotted with corpses, with bodies, all the way from there, until almost Burundi's border".[392] The United Nations revealed that even though the Rwandan genocide resulted in approximately one million people killed and more than 150 thousand women raped, many governmental officials and soldiers fled in to the territory of the Democratic Republic of Congo (DRC), and eventually directed the war between Rwanda and DRC in 1996.[393] As the conflicts in Rwanda took place, the civil war continued in the whole area; it is hard to draw a conclusion on the number of casualties, injuries, and other crimes against victims, caused by the violence in Rwanda during and after the genocide, particularly if considering the total cost of warfare in the first Congo War.

The examples above provide a glance of the gravity of international crimes. The violence which may constitute international crime affects the life of a huge number of people, causing serious physical damage and property loss. Unlike a single criminal case, international crimes are usually committed by certain groups in which personal

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[391] *The Prosecutor v Jean- Paul Akayesu* (Amended Indictment) ICTR-96-4-I, para. 12-20 (17 June 1997).

[392] *The Prosecutor v Jean- Paul Akayesu* (Judgement) ICTR-96-4-T, Trial Chamber I (2 September 1998), para. 158.

[393] Outreach Programme on the Rwanda Genocide and the United Nations, *Rwanda: A Brief History of the Country* < http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml> accessed 10 April 2016.

criminal acts are influenced and even encouraged by others, making it easier for the perpetrators to lose their rationality in taking action and sympathy to others' feeling. It creates the tendency to commit crime in a society, and makes specific groups of people extremely vulnerable to violence. This is not a feature only shared by the situations at the ICC, but also seen in the situations at the ICTY, ICTR, SCSL, and other *ad hoc* international tribunals. Such feature may have brought some challenges to the formal justice at the ICC: It may not achieve retribution and deterrence while cogitating the need of victim by taking criminal responsibility of several key perpetrators, in the context of the high severity of the crimes; the legal response to the convicted persons at the ICC is not usually reparative to victims, because the damage is too serious to be repaired by the convicted persons' pain; the incapability of the penal system at the ICC to bring adequate justice for victims, perpetrators, and the affected communities is not caused by the gravity of the legal punishment, but by the reality that punishing cannot restore the loss of people who suffered from international crimes.

The severity of conducts in international crimes does not only lie in the result, but also in its nature of roots. For example, the crime of genocide does not necessarily involve a great number of killings, but must be driven by the intention to eradicate completely a certain group of people. In the case law of the International Criminal Tribunal for Rwanda (ICTR), the crime of genocide must be regarded as intending "to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their death in a widespread or systematic manner".[394] But the requirement as "a massive scale" or "a large number" must be considered in the context of the whole population, which means they are relative criteria. Otherwise it would be extremely unfair to those minority people who consist of small amounts of population. Therefore, there are two sides of severity in international crimes: objectively, it reaches

[394] *The Prosecutor v Yussuf Munyakazi* (Appeal Judgement) ICTR-97-36A-A, Appeals Chamber (28 September 2011), para. 141.

a certain level of damage or destruction in regard to the number of people, the time length of crime, and the territorial influence; subjectively, it is so vicious that it damages the fundamental conscience of a human society.

Professor Schabas has examined the feature of international crimes falling in the jurisdiction of the ICC, comparing them with transnational crimes, and implicitly suggests that: "the perpetration [of international crimes] is viewed as naturally or inherently evil".[395] He also indicates that the nature of international crimes has been stipulated in the Preamble of the Rome Statute and that the difference between ordinary crimes and international crimes rests on that the latter is "unimaginable atrocities".[396]

If international crimes are the deepest heinousness for humanity, then penalties in the Rome Statute based on retributivism and deterrence may appear imbalanced. According to retributivism, the most-wicked criminals deserve the most severe punishment. However, the criteria to decide the severity of punishment for criminals may not be stable. For example, Mr Lubanga in the situation of DRC was convicted for war crimes of conscripting and enlisting child soldiers under the age of 15, though Lubanga could have been responsible for more serious crimes. In the Sentencing Decision of the *Lubanga* case, the Trial Chamber I passed 14-year imprisonment to Lubanga, and declared that

> "The crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities are undoubtedly very serious crimes that affect the international community as a whole. […] The crime of using children to participate actively in

[395] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012), at pp. 34.

[396] Ibid, at pp. 30.

hostilities involves exposing them to real danger as potential targets."[397]

Both the Prosecutor and Lubanga appealed the sentence, which was rejected by the Appeals Chamber.[398] From this view, involving children under 15 years old is severe enough to reach the level of international crimes. However, the sentence of 14-year imprisonment cannot distinguish such nature from domestic crimes. In some non-international crimes, such as human trafficking and transnational drug dealing, children may have been treated much worse than being recruited into Lubanga's army, and the perpetrators of those crimes could be sentenced with more serious punishments. Based on what the convicted persons at the ICC received as punishment, it is very difficult to clarify how international crimes are more serious than ordinary crimes.

What is ironic is that Mr Katanga, who was charged with one count of crime against humanity (murder) and four counts of war crimes (murder, attacks against a civilian population as such or against individual civilians not taking direct part in hostilities, destruction of enemy property, and pillaging)[399], he received a joint sentence of 12 years imprisonment.[400] By comparing the charged criminal actions of the two offenders, one may find that the ICC in fact concluded a hardly accepted view that real violence like murder, attacks on civilians, *etc.*, is less wicked than recruiting child soldiers. The desert of international crimes does not match the grave nature when being compared with the possible punishment of ordinary crimes. And there is not a stable

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[397] *The Prosecutor v Lubanga* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/04-01/06 Trial Chamber I (10 July 2012), para. 37.

[398] *The Prosecutor v Lubanga* (Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute") ICC-01/04-01/06A4A6, Appeals Chamber (1 December 2014). According to the Judgement, the period when Mr. Lubanga had been under detention between 16 March 2006 and 10 July 2012 should be deducted from the sentence.

[399] *The Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07, Trial Chamber II (7 March 2014).

[400] *The Prosecutor v Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07, Trial Chamber II (23 May 2014).

balance between crimes of different gravities.[401]

The Trial Chamber II explained its consideration to the mitigating circumstances in the *Katanga case*. After rejecting to acknowledge that Katanga had truly expressed his remorse to the committed crimes, the Chamber listed several reasons for Katanga bearing less culpability; namely, his accessory contribution to the criminal conducts charged, his feasibility to rehabilitation and reintegration due to his young age, and his supportive role in disarming and demobilising child soldiers.[402] Such consideration on Katanga's personal circumstances to mitigate the punishment may be understood as deterrence, that a shorter term of imprisonment could be enough deterrent for further crimes. However, the deterrence will probably only work for Mr Katanga himself but not for other criminals because the mitigation was solely based on this case and on the accused himself. It was difficult for others to imagine a similar treatment. In addition, even the personal deterrence of the punishment at the ICC may turn less meaningful. After all, it is already difficult for any perpetrator to commit international crimes after being isolated from power for years, which is long enough for new political powers to take over his/her position.

From this view, the imprisonment passed by the ICC to international criminals does not need to be long. It is simply essential for the ICC to ponder an ideal length to diminish the perpetrators' capability to continue carrying on human rights violations after being released, which is hardly the case in real life. However, in theory, personal deterrence is not the ultimate target. As it was stated in the decision of the sentence for Katanga, the Chamber insisted that: "the aim of [the sentence] is to deflect those planning to commit similar crimes from their purpose."[403] For that to be achieved,

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[401] Mark Drumbl, 'Punishment and Sentencing' in William A. Schabas (ed.) *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016).

[402] Ibid, para. 124-144.

[403] *The Prosecutor v Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07,

considering the severity of international crimes, heavier punishment could be more appropriate to be a threat.

The severity of international crimes, no matter whether in its nature or in the influence it may have, creates a dilemma in judging the grade of punishment at the ICC. For both retributivism and deterrence, the ICC is not able to display convincing criteria to different sentences given to the perpetrators with predictable stability. Perhaps, this problem is caused by the fact that the punishment and sentencing must be scrutinised from one case to another. But in the opinion of this study, this is a result of replicating the experience of employing retributivism and deterrence at domestic courts into the ICC. On the one hand, it is very difficult to collect enough evidence to testify what really happened in the past, especially when it is essential to reveal all the details at the ICC and to really clarify the truth. Such as in the *Lubanga case*, the Prosecutor could have dug deeper, but eventually he chose a "safer" path. Without a full examination of the truth, the punishment given to perpetrators at the ICC may not be able to reciprocate the gravity of the crimes and prove the just retribution.

On the other hand, if the ICC is able to examine all the necessary information and finally sentence the criminals with very heavy penalties, the possible consequences would be that the real criminals will try everything to resist being prosecuted at the ICC, including threatening to take more criminal actions and causing more harm to innocent people just like what Joseph Kony declared in the situation of Uganda. Thus, the deterrent effect of the ICC's involvement could become a failure. In addition, international crimes are too serious to be dealt with through "ordinary methods"; imprisonment of some individuals will not be helpful or fair enough to restore the damaged social bond and local security. The way to view and respond to international crimes at the ICC needs to be more creative and flexible, just like setting the Prosecution

Trial Chamber II (23 May 2014), para. 38.

as one component of the International Criminal Court. It requires the ICC to re-consider the concepts of retribution and deterrence under the idea of restoration.

3. **The problems in the considerations to victims' needs**

During the negotiations of the Statute of the ICC at the Rome Diplomatic Conference, the emphasis on the importance of victim to the International Criminal Court was an outstanding phenomenon. Former UN Secretary-General, Mr Kofi Annan, stated specifically that: "the overriding interest [of establishing an International Criminal Court] must be that of the victims and of the international community as a whole".[404] His opinion was clearly an appeal that victims share the same interests with the international community and that all countries shall together take actions to protect the rights of victims. All the Participant States supported this appeal. Taking care of victims of international crimes thence became one of the central concerns for the ICC.

Among all documents, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Reparation Principles) that was adopted by the UN General Assembly on 16 December 2005 is undoubtedly the latest and most laudable legal instrument providing systematic and direct legal resource to victims' reparation. It encourages States to take actions to guarantee mainly the victims' three rights: equal and effective access to justice, reparations for the harm suffered, and the right to truth.[405] Its Preamble particularly highlights the requirement regulated in the Rome Statute, so the rules in the Basic

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[404] 'Summary of the 1st Plenary Meeting' (15 June 1998) UN Doc A/CONF.183/SR.1, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, vol. II, UN Doc A/CONF.183/13 (Vol. II), para. 11.

[405] United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* in Resolution 60/147 of 16 December 2005 (21 March 2006) UN Doc A/RES/60/147, Annex, para. 11.

Reparation Principles may be well understood as serving the purpose to imbed its legal provisions into the relevant framework of the ICC.

The excellence of the justice pattern at the ICC, as it was previously introduced, is the extraordinary concern to victims by the Court. Before the sentencing provisions in the Rome Statute, article 75 provides rules of reparations to victims at the ICC. Article 75 reads as follows:

> 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
>
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
>
> 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
>
> 4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.[406]

Sub-article (1) lists three forms of reparation to victims. Restitution and compensation mainly relates to victims' financial concerns, and rehabilitation is about making them capable of returning to the community and finding a rightful place in society. No specific indication of the order to apply these reparations means they shall be equally considered by the ICC. Sub-article (2) manifests some interesting ideas. The wording "may" leads audiences to guess the determination of the ICC in helping victims to attain reparation. However, if analysing with sub-article (4) and (5), which indicate that the Court shall trigger international cooperation and enforcement measures to ensure the success of reparation, such expression can only be interpreted as the ICC will choose either by directing the convicted persons or by ordering the Trust Fund to complete the job. David Donat-Cattin noticed the possible difficulty in achieving effective reparations to victims through the concerned States and perpetrators, and advocated the importance of a subsidiary role of the ICC in such issue.[407] Rule 97 of the *Rules of Procedure and Evidence* regulates the assessment of the reparation, and clarifies that reparations can be made on an individual, collective basis or both.[408] Article 79 of the *Rome Statute* and Rule 98 of the *Rules of Procedure and Evidence* specify the establishment and running of the Trust Fund to diminish the worry of financial problems in reparation.

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[406] Article 75 of the Rome Statute.

[407] David Donat-Cattin, 'Article 75 Reparation to victims' in *Otto Triffterer and Kai Ambos (eds.) The Rome Statute of International Criminal Court: A Commentary* (3rd Rev. edn., Beck/Hart 2016), at pp. 1855 (internal citation omitted).

[408] Rule 97 of the Rules of Procedure and Evidence.

In complying with the obligation to the right to effective justice and the right to truth, the ICC also authorises victims to participate at any stage of the proceedings provided the participation is appropriate [409], by themselves or through legal representatives [410], as observers, narrators or witnesses. It is believed that by participating in the legal proceedings at the ICC, victims and other stakeholders will be able to understand better the substantial and procedural model of the Court. Indeed, to guarantee the procedural right for victims and to licence them with the opportunity to attend hearings and make their statements during the proceedings is to fulfil the obligation of the ICC to the promised rights of victims. For better supporting and facilitating victims to participate in the legal procedure at the ICC, the Office of Public Counsel for Victims (OPCV) was also created in the *Regulations of the Court*.[411]

Other than obtaining reparation and participation into legal proceedings, victims also receive a certain level of protection. According to article 68 of the *Rome Statute*, "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".[412] A Victims and Witnesses Unit shall be organised by The Registrar of the Court for every case to "provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses […] [and] victims".[413] The *Rules of Procedure and Evidence* offers more details in indicating protective measures.[414] All the legal provisions at the ICC have shown that there is a holistic and protective framework to cover the rights of victims.

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[409] Article 68 (3) of the Rome Statute.

[410] Section 3 of the Rules of Procedure and Evidence.

[411] Regulations 80 and 81 of the Regulations of the Court.

[412] Article 68(1) of the Rome Statute.

[413] Article 43 of the Rome Statute.

[414] Rules 87 and 88 of the Rules of Procedure and Evidence.

In short, at the ICC, victims are granted different roles as it may be required by international norms. They have rights to be necessary participants, witnesses to the proceedings, the beneficiaries of physical or mental reparations, and they are the protected objects of the Court.[415]

The troublesome victim participation

In general, the rights of victims at the ICC as promised in relevant laws is procedurally characterised. Under the consideration of maximising the convenience for victims to access justice, victims are authorised to participate in all the proceedings as long as the Court thinks it proper and secure for the victim's interests. The creative regulation of victim participation before the ICC has been applauded by many, and called as a "landmark development",[416] "[o]ne of the major innovations of the ICC Statute"[417], and a "significant step forward"[418]. Indeed, compared to other *Ad Hoc* Tribunals and domestic criminal courts, the ICC has tried much more to care for victims' rights. It is widely believed that by ensuring the victims' right to take part in legal procedures before the Court is one irreplaceable part for achieving justice and delivering it to victims. However, such belief may not be totally correct in some other aspects.

Firstly, it is hardly evident to state that getting victims involved into legal procedures at the ICC is achieving justice. When victims take part in proceedings, they

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[415] The Office of Public Counsel for Victims, 'Representing Victims before the International Criminal Court: A Manual for Legal Representatives'.

[416] Roy S. Lee, 'Victims and Witnesses' in Roy S. Lee and Hakan Friman (eds.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2nd edn, Transnational Publisher 2005), at pp. 456.

[417] Victims' Rights Working Group, 'Victim Participation at the International Criminal Court: Summary of Issues and Recommendations' (2003).

[418] Adrian Di Giovanni, 'The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?' (2005) 2 *International Law and International Relations* 25, at pp. 26.

could express their ideas and opinions on the case and tell their own stories, which allow their voices to be heard by the international community. But in reality, victims make statements before the ICC through legal representatives in hearings. Very few personal opinions have been expressed directly by victims. The indirect participation of victims in the ICC's proceedings will not reach the goal, which will bring victims close enough to justice. As a result, the impact of victim empowerment through participation may even be declined. In addition, because many victims are not familiar with formal criminal justice, the participation of victims to proceedings in most cases has to be managed through the internal organs of the ICC, namely, the Office of Public Counsel for Victims. The consequence of such unfamiliarity of victims of the formal legal procedure at the ICC is that it makes it difficult for them to sense justice, because they are strangers to justice rather than participants. At best, the participation mechanism at the ICC is making external observers the people, who believe in the formal criminal justice procedure, and feel that justice has been done. It is justice for non-victims.

Secondly, the relevant chamber dealing with the case must be the one that gives permission to victims for such participation at any stage, including granting the victims to be present in direct or indirect ways. Participation of victims before the Court may raise many concerns. The issues, such as security of victims under specific circumstances, financial availability, procedural convenience, may lead the Court to the conclusion that the appearance of victims in a case may be improper or risky. It could be difficult for victims and their legal representatives to assent to a decision as such. For example, in the *Ntaganda case*, in answering the request of victims' representatives to participate in the "Status Conference on Disclosure Issues and on the Organisation of the Confirmation Hearing", the Judge underlined the following: that pursuant to article 63(3) of the Rome Statute victims and their legal representatives may only

present their views and concerns "if their personal interests are affected"[419]; and that whether legal representatives of victims can submit a request to question witnesses at this stage is "subject to the directions of the Chamber"[420]; so, eventually the Judge rejected their application for joint participation[421]. This decision may be challenged for many reasons, but this is not the intention of the present study. The Judge could have particular considerations for the whole situation to draw such conclusion to the request to participate. It is the rationale behind this decision that is worthy of paying attention to, that victims are still objects of the ICC's procedure so that their "fate" in proceedings is mastered in other people's hands and subject to the peculiar needs of the Court.

Thirdly, participation of victims before the relevant Chamber at the ICC could be painful, and in effect renders a "second harm". It is not hard to understand that when recalling those memories about war and armed conflicts where brutality and death is often seen and fallen upon the victims and the people they care, it may be useful for the Prosecutor to forego the case at hand; victims will experience a certain level of stress or even depression because such memories are meant to be forgotten. However, the victims' nightmares will be utilised from time to time during the proceedings at the ICC. In the *Ongwen case* in the situation of Uganda, victims were asked to expose much valuable information to the charged crimes as well as Ongwen's personal responsibility therein. As it was confirmed, victims had witnessed intentional attacks on civilian populations in different camps and a mass scale of serious human rights violations, including "murder; torture, sexual slavery, rape, the conscription and use of child soldiers as well as pillage and the destruction of property"[422]. As usually, the victims'

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[419] *The Prosecutor v Ntaganda* (Decision on the "Joint Request to attend the Status Conference to be held on 27 January 2014") ICC-01/04-02/06-230, Pre-Trial Chamber II (27 January 2014), para. 11.

[420] Ibid, para. 13.

[421] Ibid, para. 15.

[422] *The Prosecutor v Dominic Ongwen* (Victims' Pre-Confirmation Brief) ICC-02/04-01/15, Pre-Trial Chamber II (18 January 2016), para. 19.

statements were abbreviated into several concise sentences to clarify the points made by the Prosecutor. However, what hides behind the emotionless and disinterested words are the tears and blood of victims. The impartiality and formal procedures at the ICC do not allow too much room for humane care towards victims in order to avoid "unnecessary bias" to the Judges. Although it is declared that the role of victims in the ICC proceedings is backed by the principle "true justice is achieved when voices of victims are heard and their suffering is addressed"[423], the justice at the ICC is, in fact, "by the law, of the law, and for the law" based on the fact that victims' mourning experience is transferred into evidence, rather than on the benefit of victims' interests.

One example of victim participation is the second review of the sentence in the *Lubanga case*. The Court invited all the possible parties of the case, including the Office of Public Counsel for Victims (OPCV) and Legal Representatives of victims, to submit written materials for the Judge to scrutinise. The review was based on Article 110 of the Rome Statute and Rule 223 of the Rules of Procedure and Evidence, and examined seven specific issues relating to the case, namely, (i) the early and continuing willingness to cooperate with the Court, (ii) the voluntary assistance to enable the enforcement of the Court's judgements and decisions in other cases, (iii) the genuine dissociation from convicted crimes, (iv) the re-socialisation and resettlement for the sentenced person, (v) the risk to arise social instability of an early release of the sentenced person, (vi) the impact of early release of the perpetrator on the victims and their families, and (vii) the individual circumstances of the sentenced person to approve an early release.[424]

The victims' concerns, expressed through the OPCV and the Legal

[423] International Criminal Court, 'Victims before the Court', ICC-PIDS-FS-02-001/11_Eng, at pp. 1.

[424] *The Prosecutor v Lubanga* (Second Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo) ICC-01/04/01/06, Appeals Chamber (3 November 2017).

Representatives, were mainly about the possible danger of the early release of Lubanga to the local society and the security of the local people, particularly the victim participants to the ICC's legal proceedings. The basic attitude of victims in the relevant submissions was that the sentence of Mr Lubanga should not be reduced, considering that his remorse to the crime that he was responsible of, had not been evident, and his reappearance to local society would cause much fear and unease among the victims. This could give rise to the social instability, detrimental influence on the reparation progress. Such opinion reflected the real worries of victims as being described as "fear". On the one hand, it has been suggested that a traditional ceremony would be helpful for the social reconciliation where the participation of the convicted persons is very important for delivering a message of regret and recognition of the wrongness of the crimes of the past. On the other hand, because victims realised that the influence of the sentenced person, Mr Lubanga, was still considerable on his former followers, and that the participation of Mr Lubanga would make the victims' identities revealed and cause retaliation to victims, they argue that the sentence of Mr Lubanga shall not be reduced. But the problem is, as the ICC also understands, Mr Lubanga will not be kept in detention forever. His sentence will expire on 15 March 2020. Now he is serving the rest of his sentence in his home country, and eventually shall be released. What shall the victims do then? Would the fear be diminished when Mr Lubanga returns? The ICC may have postponed the potential risk for some years, but has not solved the problem from its roots. The participation of these victims at the ICC, whether it was done directly or through legal representatives, did not mitigate the distrust and tension between victims and the offender, or between the different communities.

In regard to victims' concerns about social stability and personal safety, the Judges simply suggested that there should be no indication of Lubanga's early release, as this would worsen the local social stability and safety, without clarifying whether the ICC's

judgements have tried to make any contribution to those issues.[425] If the ICC had not reduced the feeling of fear among victims or the risk factors to social stability, the benefits of victim participation at the ICC might have been overrated.

In other words, the participation of victims in the legal proceedings at the ICC is almost for the convenience of the prosecution and the image of the ICC that the permanent court is different from other *ad hoc* tribunals, due to the "extraordinary care" that it offers to victims. The victim participation, however, is based on the related procedure of cases and has to be determined by the Court. It is not dependent on the fact that the victims had truly suffered from the serious human rights violations committed by the local government, by the anti-government armed groups, or even by organised groups of normal citizens with dangerous malice, or sometimes by all of the parties above. The status of victimisation does not need to be confirmed or acknowledged by any court, because it is part of the truth in international crimes. It is true that if the ICC does not take actions for those international crimes, the victims may not even have any chance to express their opinions to the international community.

However, the ICC shall not consider victim participation as a special procedural authorisation for the people who had suffered enough. After all, the real persons whose pain needs to be eased by justice are victims, not the staff of the ICC. The voice of victims shall be heard, not used in order to build the ICC's fame or to make the legal procedure feasible, but for real human care. As it has been emphasised on many occasions by the ICC, victims are the central concern of the Court's work. It shall not be the law that should consider the reasons for victim participation, but the true human conscience. It is time for the ICC to treat victims as one of the people whom it vowed to protect, rather than the object utilised in legal proceedings; it is time for the ICC to

[425] Ibid, para. 62-87.

consider justice as being achieved for whom, rather than justice for what.

The problem of being witnesses and the protection

In domestic court, witnesses are not always victims of the alleged crime. They may be the ones who simply saw the commission of the crime, but have no direct interest in the case. There can be several witnesses in a criminal case, and each one of them may describe the whole situation from different angles. Their words, regarded as the testimony, must be closely relevant to the crime, so that can be used by both the Prosecution and the Defence for their purpose. The statements from witnesses will be restrictedly tested in court so that the alleged persons will not be wrongly convicted. In addition, witnesses cannot express their opinion at their will. They must obey the disciplines of the court, and only provide the information that are wanted by the major "players" in court. The role of witnesses, if assessed in an exaggerated way, is important all because of their words, rather than who they are. It means that witnesses shall be treated like objects but not living beings in court. Of course, their personality shall be tested before or after they give oral evidence. But such test only aims at the credibility of their testimony, which is nothing about their identity.

Victims of the alleged crime are the most direct witnesses. They saw the commission of the crime, and more importantly, experienced the pain. In theory, victims may not be properly deemed as pure witness in legal proceedings because their testimony is hard to stay neutral, but will naturally be influenced by their personal feelings, which create bias in their words. The special feature of victims in a criminal case creates a trouble for the court: On the one hand, victims' words provide the basic information about what happened; on the other hand, all the details in the testimony of victims shall be carefully checked to avoid wrongful verdict. Therefore, victim participation in criminal procedure not only relates to justice itself, but also involves some legal techniques that are used by the two sides of the case for victory. Normally,

victims' requests of participation must comply with pre-existing legal procedure and be transmitted to prosecutors. Similar to the role of witnesses in court, victims can only give the information that are needed by the Prosecution, the Defence, or the Judges. The possibility for victims to speak of their feelings about the crime is extremely confined. The relationship between victims and the criminal court is one of cooperation. They help the court to clarify the details of the case, rather than being assisted by the court to ease their pain. In short, it is the authoritative institutions that execute victims' power and rights, and the role of victims is not more than just people waiting for the judgement and hoping that their request will be fully considered.

At an international level, this mechanism may have to make some amendments due to some unique features of international criminal cases. One significant reason is that the number of victims in an international crime is often too huge, that the neglect of the need of victim in such context calculates injustice. In addition, as it has been stated, the consequence and the nature of international crimes are far more severe than ordinary crimes that are dealt in domestic court. The suffering of victims in international criminal cases, which makes victimisation a social phenomenon, causes long-lasting effect to every victim in the sense of security and the hope toward future. It is different from ordinary crimes in which victims suffer but still know that the whole society is safe. The deep influence of international crimes amplifies the urgency for victims to express their feelings or even emotions. Unfortunately, the platform where victims can play the main role and release the depression does not exist in the legal framework of the ICC.

The special feature of victims in international crimes also requires some changes in the legal process at the ICC. In international criminal cases, victims are often, if not always, the necessary witnesses of the gross violence. It is hardly to find anyone who has witnessed the crime but has not bear the loss caused by the crime. In reality, victims are the best witnesses if personal biases can be confined to an acceptably low level, and

witnesses are all the victims of the crime. When a person is both a victim and a witness, the relationship with the Court becomes complicated. As victims and participants of legal proceedings at the ICC, they are empowered to tell their stories and challenge those perpetrators personally in an environment that they are free from the political or military privileges of the alleged persons. However, as witnesses, it is essential for them to provide the Court effective, valid, and neutral testimonies, especially as the witness-hood is against the Defendant. The problem for the ICC is how to give equal respect to both the characteristics. It is about a question of supporting people with enough tolerance and space for emotional expressions and helping them to hold back the grieves and asking them to be "professional". Some studies discovered the sense of duty among witnesses, who testify before the Chamber for the horrific past atrocities and deaths of other people.[426] The consequence of this mixed motivation of stating at the ICC causes a dilemma: too much respect for personal emotions will contaminate the formal meaning of justice in international criminal law; the efforts to keep the victim-witnesses neutral will only just scratch the surface of hope of fully delivering justice for victims. The ICC now needs to satisfy victims to consolidate its global acceptance and legitimacy; also the victims of international perpetrations need the ICC to regain the sense of security, justice, and dignity. But on the meaning of justice, there exists a prodigious gap between the legalism in Court and the reality of victims.

The protection of victims during their participation is a responsibility of the ICC, not the bonus that is created by the Court in honouring victims. As it has been stated above, one of the great features of the ICC distinguished from ordinary courts is that it shall deliver justice for victims by "[b]ringing the alleged perpetrators of the most serious crimes of international concern before justice" because "[v]ictims are indeed

[426] 'Bearing witness at the International Criminal Court: An Interview Survey of 109 Witnesses' (June 2014) Human Rights Center, University of California, Berkley < https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL(3).pdf> accessed 16 July 2015.

central" to the ICC's work.[427] The importance of victims for the ICC should not only rely on the role they play in the legal proceedings or the support they offer to maintain the image of the Court. Participating in the proceedings in criminal cases is risky, and such risk is multiplied in international criminal cases. Therefore, the ICC must ensure the protection of victims, especially when they take the key role as witnesses. But compared with the power owned by domestic courts to criminal offenders, in the ICC's cases, the balance of power tilts toward those alleged persons on many occasions. It is unforgettable that in 2015 some key witnesses, who survived the 2007-2008 post-election violence in Kenya, were found murdered, though proper means of protection should have equipped witnesses with the ICC's external work. Considering that through mistakes that might have exposed the identities of witnesses during the procedures at the ICC, such sad result had corroborated the worries of the Prosecutor that the protective measures should be largely improved to keep the confidentiality of witnesses and victims uncovered.[428]

Nevertheless, witnesses relevant to the Kenya situation became silent one after the other, and finally led the Court to vacate all the charges against Mr Ruto and Mr Sang. This was due to the interference and political pressures applied on the witnesses, but still leaving an open possibility to resurrect the prosecution in afresh future. The Trial Chamber V(A) of the ICC announced the following to indicate that the case should be terminated, which resulted in a protection of witnesses' interests in effect:

> "The incidence of interference was bolstered and accentuated by an atmosphere of intimidation, fostered by the withering hostility directed

[427] President of the ICC, 'Remarks to the United Nations General Assembly delivering the Court's Annual Report', pp. 5 < https://www.icc-cpi.int/itemsDocuments/171030-stat-presUNGA_ENG.pdf> accessed 7 November 2017.

[428] *The Prosecutor v Ruto and Sang* (Corrigendum of Prosecution's Fourth Request for In-Court Protective Measures for Trial Witnesses dated 24 December 2013), Public Redacted version, ICC-01/09-01/11, Office of the Prosecutor (02 January 2014).

against these proceedings by important voices that generate pressure within Kenya at the community or national levels or both."[429]

Realising that at times the legal procedure regulated by international criminal law could potentially be jeopardised by the lack of cooperation of witnesses, among the ICC's Judges this is considered a tragedy, but not a shame. As mentioned in Judge Eboe-Osuji's reasoning in the Decision above, the aggressive atmosphere from both the pro-conviction and pro-acquittal sides on the case in Kenya had placed tremendous pressure on the witnesses and those victims who were about to confront the high profile persons before the ICC, but the latter had grown overwhelmingly strong to interfere in the normal work of the ICC because of the support from the Kenyan government.[430] Unfortunately, the Court only implicated that under such conditions the validity of witness testimony would be dramatically infringed; thus the legal proceedings had to stop, but the influence on the security of witnesses and victims was not clearly highlighted. From this view, the protection of witnesses and victims is mainly for the foregoing of the legal procedure at Court, and that is probably the only end. "Making use of people's suffering and miserable past" by the ICC could be an overly strong accusation, but could also be an inevitable impression.

The protection of witnesses is a heavy and necessary duty for the prosecution at domestic level. For the ICC, the protection of witnesses who are often also victims is the obligation of the whole organisation. Where there is the urgency to protect, there is always a high risk of being hurt or even killed for both witnesses and victims. For one reason, the expressing of opinions against the alleged persons is in effect challenging the power of the criminal perpetrators; this could damage the very basic un-

[429] *The Prosecutor v Ruto and Sang* (Decision on Defence Applications for Judgments of Acquittal), Public Redacted Version, ICC-01/09-01/11, Trial Chamber V(A) (5 April 2016), at pp. 120.

[430] Ibid, in 'Reasons of Judge Eboe-Osuji', para. 167-173.

challengeable image with which the perpetrators control a political or military group. In addition, to testify before the court at the ICC is the goal to proving the guilty and criminal responsibility of the alleged persons through revealing the truth. A successful testimony against the perpetrators will largely increase the chance of the prosecution to being accepted by the Judges, and consequently result in the conviction of those who were in charge and possessed great power at the time of the atrocities. With being sentenced an applicable penalty, imprisonment with or without a fine, the perpetrators will be deprived of their freedom and political, military, or economic power as a result. This is unquestionably the most undesirable outcome for those perpetrators. The alleged perpetrators would utilise all the resources possible to rebut the prosecution, including denying the alleged crimes logically or by destroying the possible testimonies. The detrimental situation for witnesses has also been recognised by the ICC. For instance, in the *Jean-Pierre Bemba* case, considering the possible danger if the identities of witnesses would go disclosed, the Prosecutor had requested the Chamber for special measures to protect the confidentiality and other sensitive information of witnesses, including (i) image and voice distortion; (ii) continued in-court use of the witness number and pseudonyms in lieu of names; (iii) private or closed sessions for the portions of testimony where the witnesses' identities might be disclosed when they provide information.[431]

One noteworthy aspect of the *Jean-Pierre Bemba* case is that the Defendant also submitted a Request to the Court to employ special protective measures for his invited witnesses at trial. It cited the rationale of Trial Chamber III in the Motion that

> "Balancing its duty to respect the principle of publicity and its

[431] See for example, the "Prosecution's Request for Protective and Special Measures for Witness CAR-OTP-PPPP-0073 at Trial", "Prosecution's Request for Special Measures for Witness CAR-OTP-PPPP-0063 at Trial", "Prosecution's Request for Special Measures for Witness CAR-OTP-PPPP-0045 at Trial", and their public redacted versions.

> obligation to protect victims and witnesses, the Chamber considers that protective measures such as image and voice distortion and the assignment of pseudonyms are generally non-intrusive measures in cases where a witness could be at risk on the account of their testimony at the Court."[432]

The request for special or protective measures for witnesses from the Defence implies that being a witness can become very complex if the hidden political conflicts continue in the concerned case, and the risks for witnesses do not only result from the perpetrators who are being charged or have been convicted. Mr. Jean-Pierre Bemba was the former President of an influential political party in DRC and the Commander-in-Chief of the military branch of the party. The military force under his command was requested by the then President of CAR to defend the Government from the attack of the then rebel group. The rebel group at that time seized power in 2003, and referred the situation in CAR in 2004, which was mainly focused on the violence committed by Mr. Bemba's soldiers. The voluntary referral of the case by the Government of Central African Republic to the ICC creates some imagination to the request for protection of witnesses for Mr. Jean-Pierre Bemba. Nevertheless, it must be noted that to testify at trial for either the Prosecutor or the Defendant at the ICC is inevitably dangerous. As well, this would be surfacing from all the possible powerful stakeholders and become real outside the trial.

For the meaning of justice at the ICC, the calling of witnesses by any the parties in the procedure, and the subsequent testimonies may have been helpful for examining the evidence and clarifying the truth. If seeking such a purpose the ICC will put the called individuals in danger; so, the ICC must take its obligation of protection very

[432] See *the Prosecutor v Jean-Pierre Bemba*, "Motion for Full Protective Measures for Witness D-15", para. 7 and "Defence Request for full protective measures for Witness D04-13", para. 8.

seriously. In terms of the protection of victim as well as witness protection, the Victims and Witnesses Unit must be established to serve and provide the necessary protective measures within the function of the Registry of the ICC,[433] and ensure the long-term and short-term plans for victims and witnesses protection.[434] Those plans, particularly the long-term ones, could be very troublesome as it will involve the .protection undertaken by the ICC, which is always the weak point for the Court. The Appeals Chamber in the *Katanga case* considered the dangerousness of "preventive relocation" of a witness proposed by the Prosecutor where protective measures for them are not approved at the Registry

> '[R]elocation of witnesses is a serious measure that can […] have a "dramatic impact" and "serious effect" upon the life of an individual, particularly in terms of removing a witness from their normal surroundings and family ties and re-settling that person into a new environment. It may well have long-term consequences for the individual who is relocated - including potentially placing an individual at increased risk by highlighting his or her involvement with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that the relocation should be only provisional.'

Recognising these facts and concerns, as stated above, choosing to take up a role that provides the Court with essential information for the case in question requires great bravery; any involvement and approach to the ICC's work could increase the risk of the involved individuals' life. Again, it proves that cooperating with the ICC in its legal proceedings is conflictive to a degree; the difference is that the involved persons -

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[433] Article 43(6) of the Rome Statute.

[434] Rule 17(1)(a)(i) of the Rules of Procedure and Evidence.

victims and witnesses- have to confront those alleged vocally or verbally rather than in action or physically.

The weak function of the reparation mechanism

What is even more dramatic, yet not very surprising, is the development of the case against Mr Ruto and Sang in the situation in Kenya. After the Chamber V(A) of the ICC decided to terminate the case, victims submitted an emotional request to the ICC asking for further reparations through the common legal representative. They asked the ICC to (i) find that the Kenyan government bears all obligation to provide reparations to all victims; (ii) order the Trust Fund for Victims to initiate and provide assistance to all victims; (iii) invite the Kenyan government and the Trust Fund for Victims to submit further types and modalities of providing reparations or assistance in lieu of reparation to all victims, if needed; (iv) make further orders and give other directions with similar nature as it finds fit in the circumstances.[435]

As a response, the Trial Chamber V(A) of the ICC stated that the termination of the case means the end of all related trail proceedings at the Court, so that the ICC is not "the right forum to entertain such views and concerns"[436]. In particular, the Judges pointed out that the legal representatives of the victims in this case "stated that the Chamber lacked jurisdiction over that matter"[437]. The motivation of the victim side behind this Decision was hard to understand and still remains unknown, and probably will stay as a mystery forever. In any case, it unfolds problem in the reparation mechanism at the ICC: reparation for victims is highly dependent on the trial

[435] *The Prosecutor v Ruto and Sang*, 'Victims' Views and Concerns on the Issue of Reparation or Assistance in Lieu of Reparation Pursuant to the Trial Chamber Decision of 5 April 2016 on the Defence Motions on "No Case to Answer"', ICC-01/09-01/11, Legal Representatives of Victims (15 June 2016), para. 54.

[436] *The Prosecutor v Ruto and Sang* (Decision on the Requests regarding Reparations) ICC-01/09-01/11, Trial Chamber V(A) (1 July 2016), para. 7.

[437] Ibid, para. 6.

proceedings of every case, and unless crimes are confirmed and criminals are found guilty, there could be no real reparation granted for victims. Reparation at the ICC is an attachment to the main legal procedures. It is not enough to trigger or initiate reparations for victims when only real damages are proved, because damages must be affirmatively linked to suspected perpetrators' personal responsibility in order to establish criminal accountability. If the effort to the conviction of those perpetrators fails, the hope to receive reparations from the ICC of victims will fail too.

The result of the demand for reparation for victims in the cases where the alleged persons had been convicted does not count to be satisfactory. In the *Katanga case*, Trial Chamber II of the ICC granted each acknowledged victim 250 US dollars as a "symbolic reparation" and offered a collective reparation plan as a further award.[438] Furthermore, the Court also suggested that Mr Katanga might also contribute to the reparation for victims by giving a voluntary apology, provided it would improve the reconciliation between himself, the victims of the crimes, and the affected communities.[439] The Trust Fund for Victims submitted a draft plan to implement the reparation Decision after several months, explaining that the reparation shall be only granted to 297 identified beneficiaries rather than on a community-wide basis.[440] In total, the Trust Fund for Victims decided to complement monetary payment at 1,000,000 US dollar, in which $74,250 should be for individual compensation and $925,750 collective reparation respectively.[441] In regard with the possible contribution of Mr Katanga, the Trust Fund for Victims stated that his apology and will to take part

[438] *The Prosecutor v Katanga* (Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07, Trial Chamber II (24 March 2017), para. 306.

[439] Ibid, para. 315-317.

[440] *The Prosecutor v Katanga* (Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017) ICC-01/04-01/07, Trust Fund for Victims (25 July 2017), para. 57.

[441] *The Prosecutor v Katanga* (Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director's decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24 March 2017 order for reparations) ICC-01/04-01/07, Trust Fund for Victims (17 May 2017).

in the inter-communal traditional ceremony for healing and reconciliation might not be realistic considering his continued detention.[442]

In the *Lubanga case*, a finalised and detailed plan for reparation has not been available yet while this study is being written. Two dimensions of reparation, individual and collective reparation, have been decided and confirmed to be employed into four modalities: restitution, compensation, rehabilitation, and other necessary reparations.[443] The Trial Chamber I opined that individual reparation in the *Lubanga case* might be scheduled within collective reparation due to "the uncertainty as to the number of victims of the crimes"[444] and that such opinion was not overturned by the appeal judgement. The Trust Fund for Victims was requested to prepare an implementation plan for the reparation in this case, and then submitted the filing to the Trial Chamber II on 3 November 2015. In the implementation plan, several important aims in the reparation were emphasised for maximising the effect of the ICC's work onto victims, including: (i) to relieve victims' suffering; (ii) to afford justice by alleviating the consequences of the wrongful acts; (iii) to deter future violations; (iv) to contribute to the effective reintegration of former child soldiers; and (v) to promote reconciliation between the convicted person, the victims and the affected communities.[445] The Trial Chamber II approved the implementation plan on 21 October 2016. As well, it demanded that the Trust Fund for Victims must update the progress made every 3 months.[446] Like the *Katanga case*, Mr Lubanga was recommended to show remorse

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[442] Ibid, para. 131-134.

[443] *The Prosecutor v Lubanga* (Amended Order for Reparation) in 'Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, Annex A', ICC-01/04-01/06 A A 2 A 3, the Appeals Chamber (3 March 2015).

[444] *The Prosecutor v Lubanga* (Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06, Trial Chamber I (7 August 2012), para. 219.

[445] *The Prosecutor v Lubanga* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06, Trust Fund for Victims (3 November 2015), para. 176.

[446] *The Prosecutor v Lubanga* (Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations) ICC-01/04-01/06, Trial Chamber II (21 October 2016), para. 17.

and give an apology to the victims in ways available.[447]

Mr Al Mahdi in the *Mali situation* was convicted of war crimes as a co-perpetrator in attacking the protected architectures. Because the damaged architectures were acknowledged by the UN Educational, Scientific and Cultural Organization (UNESCO) as World Heritage sites in Mali, the attack and destruction of them was recognised by the Trial Chamber VIII; The Trial Chamber VIII said that although it was not as serious as criminal conducts against natural persons, it largely caused harm to people local-wide and/or world-wide as the destroyed sites held special religious and historic meanings.[448] Furthermore, the destruction of World Heritage sites constitutes an insult on the entire human dignity and mutual assistance and concern in different people; potentially it creates a negative influence on the education of justice, peace, and cultural diversity.[449]

It seems that reparation in this case shall be wider, if not global, considering that the crime has brought harm to the world's values as a whole. The Trial Chamber VIII took Mr Al Mahdi accountable for reparation to victims of the crimes, irrelevant to his indigence, which makes him almost totally incapable to any monetary reparation.[450] Nonetheless, as the Chamber assessed, the convicted should be liable for the damage to the protected buildings at 97,000 euro, the consequential economic loss at 2.12 million euro, moral harm to the people concerned at 483,000 euro.[451] As per to the dimensions of reparation, the Chamber established both individual and collective forms. The beneficiaries of the individual reparation were limited to those (i) whose livelihoods

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[447] n. 503, para. 67(viii).

[448] *The Prosecutor v Al Mahd*i (Judgment and Sentence) ICC-01/12-01/15, Trial Chamber VIII (27 September 2016), para. 78.

[449] Ibid, para. 46.

[450] *The Prosecutor v Al Mahdi* (Reparations Order) ICC-01/12-01/15, Trial Chamber VIII (17 August 2017), para. 113-114.

[451] Ibid, pp. 45-52.

exclusively depended upon the Protected Buildings and (ii) whose ancestors' burial sites were damaged in the attack[452]. The Chamber considered that traditional measures would not be optional due to the potential discrimination towards women.[453] The Legal Representative of Victims appealed the screening criterion of "exclusive dependence" in the submissions to the ICC,[454] which remains to be decided in the next legal proceedings while the present study is being written.

One similarity of victims' reparations in the *Katanga case*, the *Lubanga case* and the *Al Mahdi case* is that the convicted persons were recognised as indigent so that the monetary compensation to victims, individually or collectively, would have to depend on the support of the Trust Fund for Victims. In other words, though the convicted persons were obliged to pay the compensation to victims and the communities because of the damages that their criminal actions caused, the real monetary payment will be done by the Trust Fund for Victims. So, although the symbolic reparation needs to be accomplished by the offenders, in fact it is the financial duty for the Court. As one elemental consideration, the ICC assumes that the reparation approaches ordered or organised by its mechanism shall be of a reparative nature for victims. But such good intentions of the ICC may not be of real function or meaning for achieving its aim.

The problem is that it is the perpetrators and their followers who had caused the damage to the victims and to the communities concerned, not the ICC. It should be common sense that the culprits should be the ones repairing the damage or harm they caused, as they are the real perpetrators in the view of the victims. As a third party and a non-stakeholder to the damage, the reparation brought by the ICC has relatively a weak influence on the victims' pain and loss since it is not the one to be blamed and

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[452] Ibid, para. 145.

[453] Ibid, para. 147.

[454] *The Prosecutor v Al Mahdi* (Notice of Appeal) ICC-01/12-01/15, the Legal Representative of Victims (20 October 2017).

condemned. Victims of international crimes suffered the most serious crimes that can be imagined. They need the acknowledgement that the crimes which they suffered are the most unacceptable malevolence to humanity as a whole. It is not the role for the ICC to repair the damage for victims, just like it is not the right entity to take over the liability of perpetrators and to pay the required compensation ordered by its own Chambers. Perhaps, under some specific circumstances, the ICC could give some money to victims in order to recover the physical and material losses to a degree, as a concern of human conscience. But it shall not be recognised or named as "reparation". It is a condolence from all other humans, if the ICC is the appropriate entity to represent all humanity. What could be much worse than physical and material loss for victims is the mental and psychological damage and fear, due to the fact that the former can be restored in a relatively short period by financial support from other international organisations and other countries, but the latter lasts a very long time and is hardly fully remedied. One study on mental health in conflict and post conflict environment reveals that the direct war exposure significantly affects a population's mental health, and some stressful conditions created by warfare may have had paralleled effect onto victims' psychological stability.[455] The effect of international crimes where serious human rights violations and tremendous brutality are always observed could contribute more to victims' loss, but the ICC's reparation is not able to play a considerate role. Reparation must be conducted by those perpetrators, otherwise it will lose its meaning of being reparative.

Another problem of the ICC's reparation is that it is hardly considered enough to victim's pain and loss. As it was shown above in the *Katanga case*, every participant victim will receive $250 from the Fund for Victims, as symbolic reparation. Since such

[455] Kenneth E. Miller and Andrew Rasmussen, 'War Exposure, Daily Stressors, and Mental Health in Conflict and Post-Conflict Settings: Bridging the Divide between Trauma-Focused and Psychosocial Frameworks' (2010) 70 *Social Science and Medicine* 7.

reparation is only available to those who had to be recognised as victims by the Court and applied for participation of legal proceedings at the ICC, the symbolic meaning of reparation seems indeed "symbolic"; it has almost no helpful support in ameliorating the life of the participant victims, let alone any impact on the wider range of victims outside the case. People may argue that the ICC is not the institution or subject to fully repair victims' losses because it is an international court that focuses on justice rather than "charity". If that is to be insisted, then the ICC should quit being the organisation that is involved in any material compensation for victims; sometimes promising reparation to victims but eventually only achieving a negligible proportion can be worse than promising nothing; for doing that it gives the victims hope and yet it ends up depriving them of hope yet once more.

The true reason why the ICC had to face so many unnecessary troubles when making huge efforts to establish the reparation mechanism in and out of its legal procedures is that it does not properly understand its position in dealing with international criminal cases. Indeed, it is merely a criminal court, which shall always stay neutral and impartial to both sides of the cases. From this view, the ICC owes nothing to victims in regard to the damage caused by those criminal offenders. It is a good sign that the ICC is voluntarily caring for the need of victims, and recognises that the interests of victims is an inseparable aspect for the justice that is to be achieved and brought to them. However, such good will has not become an ordinary aim to any domestic criminal court globally, which share a similar culture, tradition, and views on values and justice. Such extraordinary aim for the ICC has created extra problems in restoring the pain and damage for victims as part of justice, especially when the ICC is answering the call of the victims, but in the meantime is incapable of taking care of all their requests. The legal framework of the ICC originates from formal criminal courts at domestic level, which are neither prepared, nor designed, to deal with criminal cases and comfort victims at the same time. So the ICC is not at all able to achieve such aims

without making amendments to its basic structural idea. One principle in reparation should be remembered and upheld: wrong doing can only be undone by the wrong doers. In the case of the ICC, those perpetrators shall be the subjects achieving reparation for the sake of justice for victims, including offering apologies, recognising the wrongness of the crimes, listening to the stories of the victims, revealing the truth to victims and the affected communities, as well as doing their best to help rebuild the livelihood of victims and the damaged social bonds. The ICC's work on reparation might be comforting, but always insufficient in terms of getting the offenders to express their remorse.

4. **Summary**

This chapter discussed the meaning of justice at the ICC, starting from the main two philosophical schools on the view of justice to the main aims of punishing. The current legal mechanism at the ICC cannot be explained by neither the legal moralism or the harm principle, because of the cultural diversity behind international crimes and the huge damage that is caused by international crimes. It is also difficult for the ICC to achieve retribution or deterrence, due to the inadequate capability to deliver the message of condemnation to different groups of people and establish reciprocal treatment to the perpetrators comparing with the harm they caused.

Chapter 4: The Potential Contributions of Restorative Justice to the ICC

The last chapter has examined the problems in the ICC's view of justice. This chapter will analyse that with integrating the idea of restorative justice, the problems can be resolved.

Many countries have experienced or are experiencing a vast scale of human rights violations, especially the violence committed as a consequence of civil war or political violence. Certain mechanisms that help to solve the problems during a transitional period are urgently necessary to end such violence, or to mitigate the effects thereof. Transitional justice has been applied to such circumstances, as it was utilised in South American countries as a pioneer example. Transitional justice then became renown in South Africa countries, which consisted of rebuilding of democracy, re-establishment of rule of law, national memorial, and victim compensations. The Truth and Reconciliation Commission in South Africa acknowledged the potential role of restorative justice to achieving reconciliation, stating the following:

> "We have been concerned […] that […] amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice - a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation."[456]

In this statement, restorative justice is clearly understood as an optional path to seeking justice with a distinguishing feature from formal criminal justice, which is not

[456] Truth and Reconciliation Commission of South Africa, 'Truth and Reconciliation Commission of South Africa Report', vol. I, para. 36.

retributive and applies less punitive methods to treat criminals.

In another truth and reconciliation commission, the TRC of Sierra Leone, restorative justice was identified as a process to bridge truth and reparation and eventually reach and strengthen national reconciliation.[457] Among many aspects of the restorative justice idea, the function of unfolding the truth of past human rights violations is specifically highlighted, and easily leading to a conclusion that restorative justice mainly focuses on truth to satisfy victims. Furthermore, both of the TRCs in South Africa and Sierra Leone recognised that pardon and amnesty to the crime of genocide, war crimes, and crimes against humanity will not be accepted under the requirement of international legal instruments, which is also a principle to comply with the "rule of law"[458]; so, for accomplishing these goals, truth and reconciliation have to be progressed within another mechanism. And such mechanism shall be the restorative justice. The understanding of restorative justice in the field of international criminal justice, combined with the purpose to achieve reconciliation through truth and truth-telling, in practice it may have limited the potential of the restorative justice idea in order to bring more benefits.

1. The acknowledgement of restorative justice at the ICC

Considering that restorative justice is usually seen as the most recognisable part in transitional justice, it is necessary to demonstrate clearly that the major focus of this study is on the relationship of restorative justice and formal criminal justice at the ICC, apart from analysing them in transitional justice. As it has been stated above, formal criminal justice is also one of the components of transitional justice. But the fact that

[457] Truth and Reconciliation Commission of Sierra Leone, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004), vol. I, Chapter 3, para. 30-33.

[458] 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', UN General Assembly Resolution 67/1, UN Doc A/RES/67/1 (30 November 2012), para. 22.

restorative justice and formal criminal justice can co-exist in one system cannot draw a conclusion that there is not any conflict between them.

In many situations where serious human rights violations have been committed to calculate to international crimes, transitional justice does not always include both formal criminal justice and restorative justice. The Truth and Reconciliation Commission in South Africa, for example, was designed to prevent retaliation and promote solution[459] to the crimes in relation to apartheid. Criminal prosecution against the perpetrators of serious human rights violations was not an option in South Africa's TRC process. The TRC in Liberia, which was established in 2005 and is still working, on the other hand, specifically emphasised that it shall provide a forum to "address the issues of impunity" and an opportunity for "genuine healing and reconciliation". [460]

The Commissioners of the Liberia TRC called for both formal criminal justice and restoration, and recommended that criminal prosecution against the "gross human rights violations" at the court of competent jurisdiction, as well as appropriate reparations, are both desirable for ending impunity and achieving reconciliation.[461] However, the transitional justice in Liberia that is based on the TRC mode has not brought any perpetrators of gross human rights violations to justice when this studying is being written.[462] In other words, even the importance of formal justice in transitional justice has been confirmed,[463] judicial mechanism can still be absent. It implies that formal criminal justice may not be an indispensable component to transitional justice

[459] See the Preamble of the Promotion of National Unity and Reconciliation Act 34 of 1995, South Africa.

[460] See Article IV of the Truth and Reconciliation Commission Mandate, Liberia.

[461] Truth and Reconciliation Commission, Republic of Liberia, 'Final Report (volume one): Preliminary Findings and Determinations'.

[462] United Nations Human Rights Committee, 'Concluding Observations on the Initial Report Liberia' (27 August 2018) UN Doc CCPR/C/LBR/CO/1, at pp. 2-3.

[463] See 'Letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General' (19 June 2008) UN Doc A/62/885.

in reality.

Restorative justice approach may not be integral part in transitional justice, though many transitional justice processes have been featured with it. The example of the transition in Central African Republic (CAR) may have evidenced that formal criminal justice can be well set up without being associated with restorative justice. In 2015, a national reconciliation conference, known as the Bangui National Forum, was held from 4 to 11 May. In this conference, several post-conflict issues on the social and national re-build were discussed and decided, including the recommendation to establish "a commission on truth, justice, reparation and reconciliation and the operationali[s]ation of the Special Criminal Court".[464] The Special Criminal Court in Central African Republic was created pursuant to the Organic Law No. 15-003[465] and has been operating since 2015, resulting from the recommendation of the Bangui National Forum. But the establishment of the well operating national mechanism to pursue truth, reparation and reconciliation has been postponed, and there has not been any noteworthy achievement on this aspect when this study is written.

The Independent Expert of the UN Human Rights Council also expressed the worry of the lack of functional restorative justice approach in CAR's transitional justice,[466] though the meaning of restorative justice approach was indicated as seeking truth, justice, reparation and reconciliation.[467] Combing with the conclusion in the last paragraph, it shall be stated that restorative justice and formal criminal justice do not often cooperate in dealing serious human rights violations. Consequently, it worth an

[464] United Nations Secretary-General, 'Report of the Secretary-General on the Situation in the Central African Republic' (29 July 2015) UN Doc S/2015/576, para. 51.

[465] The original name of the law is 'Loi organique No. 15-003 portant création, organisation et fonctionnement de de la Cour Pénale Spéciale, 2015'.

[466] Independent Expert of the UN Human Rights Council, 'Report of the Independent Expert on the situation of human rights in the Central African Republic' (13 August 2018) UN Doc A/HRC/39/70, para. 82.

[467] Ibid.

analysis on the attitude of the ICC in viewing restorative justice, since at domestic level there is not a necessary link between restorative justice and formal criminal justice.

The national practices have not provided a manifest clue to whether restorative justice is accepted by the ICC at all. Since there is not any obvious opposition to the ICC's work in restorative justice, it requires to check the ICC's view on restorative justice. One question that needs to be discussed is the opinion of the ICC on transitional justice and restorative justice. That is because if at domestic level formal criminal justice is not always a necessary option, there may be an even bigger challenge for international justice to be triggered. And a close examination of the ICC's work and restorative justice needs the intervention of the ICC to a state's transitional justice. The challenge for the ICC to play a crucial role in transitional justice is that it is an independent international organisation. The involvement of the ICC's work in the transitional justice of a state depends on many factors, including the jurisdiction over the situations and the admissibility of the cases. Nevertheless, Mr. Luis Moreno Ocampo, the former Prosecutor of the ICC, expressed his opinion on the relation of the ICC and transitional justice in the inaugural paper for the first edition of the *International Journal of Transitional Justice*. He said:

> "The International Criminal Court is part of the transitional justice project because it aims to confront centuries-old methods of behaviour– those of conflict and war, the abuse of civilians, woman and children – and to reshape the norms of human conduct while violence is still ongoing, thus aiming, as stated in the Rome Statute, to contribute to the prevention of future crimes.[468]"

This statement supports the ICC's engagement in transitional justice and its

[468] Luis Moreno Ocampo, 'Transitional Justice in Ongoing Conflicts' (2007) 1 *International Journal of Transitional Justice* 1, at pp. 8.

contribution to the political and democratic reconstruction of a country. The affirmative attitude from the first Prosecutor of the ICC in fact encourages the cooperation with the Court of a state that is under transitional justice or plans to initiate transitional justice. But the wording in this statement does not clearly suggest what role shall the ICC play in transitional justice, and how it interacts with restorative justice idea. Additionally, the remarkable point in this statement that the ICC's intervention "while violence is still ongoing" contributes to the "prevention of future crimes" may not be accurate. This point exaggerates the impact of the ICC to situations of ongoing conflict, and does not pay equal attention to restorative justice.

In the Review Conference of the Rome Statute in 2010 (the Review Conference 2010), Ms. Yasmin Sooka examined the judicial and non-judicial mechanisms in transitional justice.[469] It firstly admits the significance and "complementary" of the TRC mode in confronting impunity and building national reconciliation[470], and then confirms that the elements of justice and peace are both necessary for sustainable peace.[471] In this examination, the ICC conceives the formal criminal justice, at either domestic level or international level, as the elements of "justice", and other aspects in relation to restorative justice (such as truth recovery and reconciliation) as elements of "peace". Such opinion resonates the conclusions[472] presented in the official report of the conference on Fighting Impunity in Peacebuilding Context in 2009, which specifically highlighted the importance of "facilitating inclusive, transparent discussions on transitional justice" and "addressing root causes, facilitating

[469] See Yasmin Sooka, 'Confronting Impunity: The role of Truth Commissions in Building Reconciliation and National Unity' (30 May 2010), for Review Conference of the Rome Statute.

[470] Ibid, para. 2.

[471] Ibid, para. 20.

[472] Netherlands Ministry of Foreign Affairs, 'Beyond Peace versus Justice: Fighting Impunity in Peacebuilding Context' (16-17 September 2009) in the Conference on Fighting Impunity in Peacebuilding Context.

implementation, and ensuring sustainability of transitional justice measures".[473] Although Ms. Sooka was not an official of the ICC, her idea has been upheld by the prosecution of the ICC in some public official statements.

In remarking the role of the ICC in the situation of Colombia, the Deputy Prosecutor of the ICC, Mr. James Stewart, re-affirmed that criminal prosecution, together with truth commission, reparation programs, and institutional reform, constituted the common measures in transitional justice.[474] In addition, he held the position that the work of the ICC shall be seen as "an integral part" of the judicial system of Colombia, because Colombia has already become a State Party of the Rome Statute.[475] This statement did not bring much change to the relationship between the ICC and restorative justice, because it still listed restorative justice (reparation) and formal criminal justice as parallel routes. Especially, it insisted that the national judicial activities should not be assessed within transitional justice mechanism.[476]

However, in explaining the concern of the ICC Prosecutor on the execution of the sentences on the convicted criminals, it required that the suspension, reduction and alternation of the sentences should be assessed with the genuineness of the intent to bring the persons concerned to justice.[477] The reduction and alternation of sentences in Colombia's transition, as it was already reviewed by the Deputy Prosecutor of the ICC, did not constitute a violation of the ICC's legal principles if they were undertaken in restorative ways.[478] It implies that certain restorative measures are tolerable within the

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[473] Ibid, pp. 3-5.

[474] James Stewart, Deputy Prosecutor of the ICC, keynote Speech in the Conference of 'Transitional Justice in Colombia and the Role of the International Criminal Court' (13 May 2015), at pp. 4.

[475] Ibid, at pp. 5.

[476] Ibid, at pp. 9.

[477] Ibid, at pp. 11-13.

[478] Ibid.

understanding of justice at the ICC, notwithstanding the toleration of restorative justice here is not about the internal prosecutorial system of the ICC. A space to acceptance of restorative justice in the ICC's legal framework has been opened.

In the latest review of the role of the ICC in Colombia's transitional justice in 2018, the Deputy Prosecutor provides a much softer re-examination on the compatibility of restorative justice with the ICC's legal framework. Firstly, it confirms that other aspects, "such as truth commission or reparation" are relevant to the ICC.[479] Secondly, it admits that the assessment of the genuineness of the intent to achieving justice needs to be considered in the context of transitional justice.[480] It means that the Prosecutor of the ICC, whom was represented by the Deputy Prosecutor here, realises the importance to set the prosecution against international crimes into the holistic background. The most impressive changes made in this statement by the Deputy Prosecutor of the ICC can be seen in the following:

> "Effective penal sanctions may take different forms, as long as they serve appropriate sentencing objectives of retribution, rehabilitation, restoration and deterrence.
>
> Sentences may achieve these goals in different ways, provided they reflect public condemnation of the criminal conduct and recognition of the suffering of victims, and contribute to deterrence."[481]

Although the statement above relates to the assessment by the ICC of a state's domestic judicial measures against international crimes, it does reflect the general trend to highlight the function of restorative justice at the ICC. If the Prosecutor of the ICC

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[479] James Stewart, Deputy Prosecutor of the ICC, keynote Speech in the Conference of 'Transitional Justice in Colombia and the Role of the International Criminal Court' (30-31 May 2018), at pp. 6.

[480] Ibid.

[481] Ibid, at pp. 15.

accepts that restorative justice idea is compatible with the implication of justice at the ICC, and restoration serves the "appropriate sentencing objectives", it is possible to integrate restorative justice idea into the ICC's work, which is beyond the parallel relation between them.

In the stage of reparation stage in *Lubanga* case, the Office of the Prosecutor in the submission on the principles of reparation suggested to include a wider class of victims in the reparation and to provide restorative justice to the affected community[482], recalling the announcement by the former President of the ICC that the reparation scheme in the Rome Statute "is designed to offer victims a measure of restorative justice through their restitution"[483]. In response, the Trial Chamber I of the Court fully considered different opinions gathered from the prosecution and other Non-Governmental Organisations (NGOs), and made the decision to include restitution, compensation and rehabilitation into the reparation modalities.[484] The decision did not directly refer restorative justice. Instead, it contained the idea of restorative justice in some expressions, such as "restore the victim to his or her circumstances", "restoration of an individual's life", compensation to "moral and non-material damage", the rehabilitation of former child soldiers back to community as well as to address the shame felt by them.[485] Those proposed reparative methods to victims and the affected community signify that the ICC is willingly to utilise restorative justice within its legal mechanism to make the concept of justice more than just a word in court.

Similar attitude can be found in statements by the ICC to the Assembly of States

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[482] *The Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Submissions on the Principles and Procedures to be Applied in Reparations) ICC-01/04.01/06-2867, the Office of the Prosecutor (18 April 2012), para. 6.

[483] The President of the ICC, 'Opening Address', in the Conference on *Reparations before the ICC: Issues and Challenges* (12 May 2011), at the Peace Palace, The Hague.

[484] *The Prosecutor v Thomas Lubanga Dyilo* (Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06-2904, Trial Chamber I (7 August 2012), at pp. 75-81.

[485] Ibid.

Parties. In 2012, the ICC reported the strategies designed to improve the work in relation to victims. In "Objective 1: Communications", it examined the vision of justice set in the Preamble of the Rome Statute and indicated that

> "That vision is of justice in the broadest sense, an end to impunity for the perpetrators of mass atrocities, and the notion that justice is not just punitive but restorative – and hopefully preventative."[486]

The expression on the strategy of communication of the Court with victims categorised the understanding of justice into three aspects. Punitive justice should be recognised as punishing the perpetrators of international crimes; restorative justice, though was not demonstrated clearly in this report, could be interpreted as the non-punitive function of the ICC's work; preventative justice, might be understood as the power of the combination of punitive justice and restorative justice, or a third function inside the ICC's involvement in international criminal cases. It was the first time that restorative justice was acknowledged as one internal element in the spirit of the Rome Statute at the Assembly of States Parties.[487] One may argue that the statement made in this report might have come from the urgent request in the Review Conference of the Rome Statute in 2010,[488] so that it could only be seen as a response to such request, rather than the official confirmation of the position of restorative justice in the meaning of justice at the ICC. This argument may not be accurate, because before the Review Conference 2010, in 2009, the ICC had already considered the value of restorative justice by denoting that

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[486] International Criminal Court, 'Report of the Court on the Revised Strategy in Relation to Victims: Past, Present and Future' (5 November 2012) ICC-ASP/11/40, at pp. 5, footnote 15.

[487] See the statement that "Beneficial communications cast the activities of the Court and the elements of the system in terms of the spirit of the Rome Statute and the vision laid out in its Preamble" in the 'Report of the Court on the Revised Strategy in Relation to Victims: Past, Present and Future', ibid.

[488] Ibid, at pp. 1

> "A key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims."[489]

As the first report on the strategy in relation to victims to the ASP of the ICC, it noticed the increasing attention to victim participation in justice in international community, and managed to acknowledge the demand to investigate the possible function of restorative justice. After the Review Conference 2010, which brought huge impacts to the development of the ICC, the role restorative justice received more emphasis in 2012, as it described above. Furthermore, in the latest ICC report on the implementation of the strategy in relation to victims in 2013, some changes were made but the practices of restorative justice had been improved in many aspects. For example, ICC's Protection Program covered more victims in 2013, and the protection regulated in the Protocol on protection with the Office of the Prosecutor might also applied to the Defence; [490] victim application form had been made simpler [491]; victims could participate the legal proceedings of the ICC through their legal representatives[492]; *etc*. Those changes shifted the lens of the ICC on restorative justice to the more practical aspect. The intent of the ICC to include restorative justice into its legal mechanism does not need more evidence.

The recent report made by the former President of the ICC, Ms. Silvia Fernández

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[489] International Criminal Court, 'Report of the Court on the Strategy in Relation to Victims' (10 November 2009) ICC-ASP/8/45, para. 3.

[490] International Criminal Court, 'Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims' (11 October 2013) ICC-ASP/12/41, para. 24-25.

[491] Ibid, para. 32.

[492] Ibid, para. 33.

de Gurmendi, concluded the work during the term as the President. When talking about restorative justice, the former ICC President confirmed the restorative characteristic of the Rome Statute, but also indicated that the work on practice restorative justice was just to "test" such idea at the ICC.[493] It suggests that, though restorative justice has been carefully examined in order to be utilised in practice at the ICC for many years, the idea is still not familiar to the Court. The ICC may have misunderstood the idea of restorative justice and the core values in it, and thus has not fully invoke the potential of restorative justice in the legal framework. It is also possible that because of the inaccurate understanding of restorative justice, the ICC has already made some mistakes when utilising it.

2. The misinterpretation of restorative justice by the ICC

A big difference in the view of crime between lawyers and criminologists is that the former consider crime as a violation of criminal law, yet the latter conceive crime as a consequence of complex reasons. It is generally agreed that in the regime of criminology, crime is

> "[C]entrally bound up with the state's attempts to impose its will through law; with the meaning of those attempts to lawbreaker, law-enforcer, observer, and victim; and with concomitant patterns of social order and disorder."[494]

In the view of criminology, crime cannot be simplified as the violation of legal provisions. Instead of only concentrating on the question of how to make law more effective, criminologists turn to find answers from a wider perspective; thus, they

[493] The President of the ICC, 'Presidency 2015-2018: End of Mandate Report by President Silvia Fernández de Gurmendi' (9 March 2018), para. 109.

[494] Paul Rock, 'The foundations of Sociological Theories of Crime' in Alison Liebling, Shadd Maruna and Lesley McAra (eds.) *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017), at pp. 26.

started to challenge the formal model of criminal justice. In such context, restorative justice emerged with the "increasing scepticism towards both retributive and rehabilitative models".[495] The idea of restorative justice was first underscored to make a progress in the pitfall of formal criminal justice; the progress involved reducing both the crime rate and recidivism rate; as well, more advantages were gradually discovered with the wide application of restorative justice approaches to real cases, such as mitigating the fear and anxiety among victims, encouraging offenders to accomplish the obligation of restitution and compensation to victims.[496] The original target of restorative justice was not only to satisfy the need of victims, but also to achieve a general success against committing crime.

The ICC also admits the importance of restorative justice. The former President of the ICC, Judge Sang-Hyun Song, stated that: "the ICC is about much more than just punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes."[497] Unlike the development of the studies on restorative justice in criminology, the definition and periphery of such term was not clarified within the work of the ICC. One notion is that restorative justice, in the view of the ICC, is distinct from retributive paradigm. In an earlier statement, Judge Sang-Hyun Song particularly indicated that the reparation scheme at the ICC was "designed to offer victims a measure of restorative justice through their restitution".[498] This address in fact has implied the attitude of the ICC

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[495] Anne Lemonne, 'Alternative Conflict Resolution and Restorative Justice: A Discussion' in Lode Walgrave (ed) *Repositioning Restorative Justice* (Willian Publishing 2003), at pp. 43.

[496] Mark S. Umbreit, Robert B. Coates and Boris Kalanj, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (Criminal Justice Press 1994).

[497] Judge Sang-Hyun Song, 'Remarks at the opening session' in 7th Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law & World Parliamentary Conference of Human Rights, Rome, Italy (10 December 2012).

[498] Judge Sang-Hyun Song, 'Reparations before the ICC: Issues and Challenges' in the Opening Address at Conference organized by REDRESS, Leiden University and Grotius Centre at the Peace Palace, The Hague (12 May 2011).

towards restorative justice, that the reparation mechanism is based on the restorative justice idea, and that exercising reparation to victims could be seen as implementing restorative justice values.

The (then) ICC President, Judge Silvia Fernández de Gurmendi (Judge Fernández) resonates the basic attitude of the ICC towards restorative justice on many occasions. For example, in 2016, she announced what follows, which once again addresses the relationship between the reparation mechanism at the ICC and restorative justice:

> 'This [legal] system [of the ICC] is a unique "hybrid" that combines elements of different legal systems and traditions and includes elements of restorative justice through a system of victims' participations and reparations.'[499]

This statement instead of implying, it directly notes that the ICC's legal framework has included restorative justice by authorising wide-range victim participation and access to reparation. In 2017, such opinion was underlined with a more crystal indication that restorative justice has been integrated into the substantive law of the ICC in the following:

> "The Rome Statute […] has made progress from an exercise of purely retributive justice to a new dimension that includes elements of restorative justice. Accordingly, victims may participate in all phases of the proceedings to express their views and concerns, and to seek reparation in the event of a conviction."[500]

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[499] Judge Silvia Fernández de Gurmendi, 'International Criminal Court Today: Challenges and Opportunities', Keynote Speech at Seminar "International Criminal Court – the Past, the Present and the Future", Helsinki, Finland (9 June 2016).

[500] Judge Silvia Fernández de Gurmendi, 'Complementarities and Convergences between International Criminal Justice and Human Rights Law', at the Opening of European Court of Human Rights' Judicial Year, Strasbourg, France (27 January 2017).

The above statement can be interpreted in the following way: the practices involving victim participation at the ICC shall be attributed to the exercise of restorative justice, but restorative justice approaches may be contingent to the success of conviction of those suspected persons.

The Prosecutor of the ICC has expressed the same idea. In her submission on the reparation process in the *Lubanga case*, she suggested to enlarge the reparation to a wider range of victims in order to ensure the victims' right to collective reparations "consistent with the overall intention to provide restorative justice to affected communities".[501]

From the abovementioned statements, the role of the restorative justice idea for the ICC can be concluded as the single reason to support victim participation and reparation schemes. In other words, the ICC admits that in its formal criminal justice frame that centres on retribution and deterrence, restorative justice idea cannot play a bigger role to include more conversations between victims and the perpetrators or . As a result, restorative justice works only for victims. The narrow view on restorative justice by the ICC has not scrutinised the possibility of restorative justice to make improvements in the paradigms of retribution and deterrence, simply because the ICC considers restorative justice and retribution as being incompatible. However, as it has already been analysed in chapter one, restorative justice is a very inclusive idea, and both retribution and deterrence are available in the restorative justice mechanism. It has been pointed that the ICC has not made great use of the restorative justice approaches. Furthermore, as the reparations to victims in all the current cases at the ICC are of a dominantly monetary compensation nature, the idea of restorative justice has been contaminated with the concept of financial support only, leaving the core value -the

[501] *The Prosecutor v Lubanga* (Prosecution's Submissions on the principles and procedures to be applied in reparations) ICC-01/04-01/06-2867, Trial-Chamber I (18 April 2012), para. 6.

restoration of the damaged social bond- forgotten or dismissed. Perhaps the ICC is afraid to carefully examine the true meaning of restorative justice because it might marginalise the formal criminal proceedings and modify the very basic legal foundations. But such fear has not helped accomplish the kind of justice that the ICC desires due to the difficulties in bringing retribution, deterrence, and restoration. The ICC needs to reconsider restorative justice in a wider and deeper level in the view of justice.

3. Main focuses of the restorative justice

The prime focus: the damaged social bond

It has been broadly indicated that restorative justice is first and foremost victim-centred. Yet such assumption may not be correct, since restorative justice is indeed victim-centred but does not necessarily set victim as its prime focus. As one may remember, the rising of the restorative justice idea was the re-consideration of options to face the shortages within the formal criminal justice. Albert Eglash in his study on restitution in criminal justice categorised formal criminal justice into three dimensions: the retributive justice that addresses the reasons and limits to punish offenders; the rehabilitative justice that examines the social and individual causes directing the commission of crime; and the restorative justice, which, in his opinion, regards the question of how to make offender's actions less harmful for victims.[502] The term "restorative justice" was probably used for the first time in this study in the background of examining restitution as a method to repair the harm to victims. Thus, the harm caused by crime, or in the description of this study, the damaged social bond, should be the prime focus of restorative justice.

[502] Albert Eglash, ''Beyond Restitution: Creative Restitution' in J. Hudson and B. Galaway (eds) *Restitution in Criminal Justice* (Lexington Books 1977).

When focusing primarily on the harm, it would be more persuasive to rationalise the fact that what criminal offenders had done was wrong, rather than hitting the point with strong emotions. This may be easier to understand through legal moralism and the harm principle. The consequence of crime causes damage to the social bond, which is underpinned by generally accepted moral disciplines. In addition, crime, in most cases, cause physical damage to victims and mental harm to a degree. Some of the damage is measurable and the rest is not; only those who experienced the loss are able to feel the rest of the damage. Nevertheless, restorative justice addresses the tension between victims and offenders because of the existence of damage.

Recognising the damaged social bond in criminal cases also guarantees the general acknowledgement that the crime is condemnable. What is important in restorative justice is that it deems crime as an issue that concerns the victim and the offender, as well as the affected community. If the issue is only a private problem at an individual level, the interference of restorative justice will not be powerful enough because both sides can simply make statements from their personal angle. As it has been discussed in the former section, the most effective condemnation to crimes comes from the confirmation of the wrongness thereof by the group where the criminal belongs. In international criminal cases, the general acknowledgement of the wrongness in crimes must reach the community level and the national level, which is better achieved through patient discussions and dialogues among the stakeholders of the crime. This is the reason why it is simple and clear: in formal criminal justice, it is the authorisation of a State that make the decisions in court. Judges and the Prosecution cannot represent the community or any stakeholder, and usually remain the power within the Court. Juries (albert the jury trial was not adopted in the Rome Statute) who are selected in court cannot be stakeholders of the case at all. The only stakeholder who plays a major role in formal criminal justice procedure is the Defendant. But the obligation for the Defendant in formal criminal justice is to prove the irresponsibility to the harm, rather

than recognising the damage that had been made. As a result, in formal criminal justice, one non-stakeholder who represents the dignity of the law and one stakeholder who tries to deny the responsibility endeavour to address the dispute in front of an authority which executes the judicial power of the State. It seems like one crucial point is forgotten: It is the bond between victim, offender, and the community (society) that has been damaged, not the one between the defendant, the Prosecutor, and the Court.

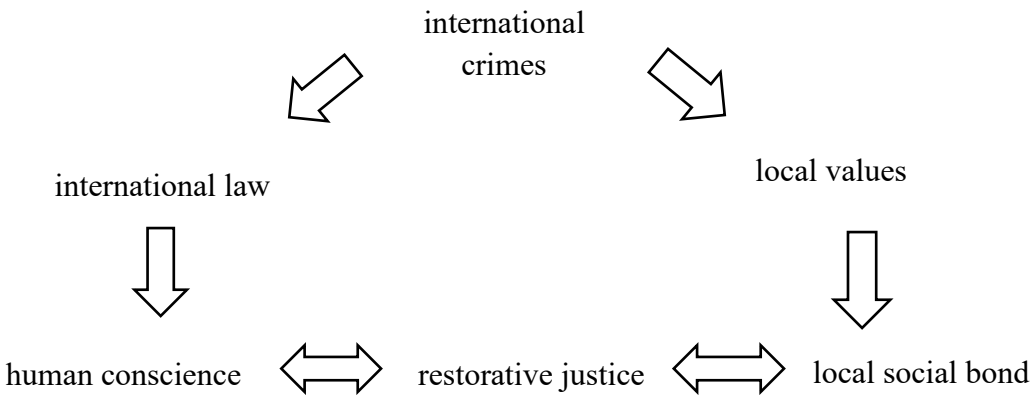
Focussing on the damaged social bond allows restorative justice to connect the proper responses to crime with relevant legal principles. It is a dangerous presumption to isolate restorative justice from law, because in real life the rule of law is a universally acknowledged idea, and legal principles provide basic guidelines to people's behaviour and choices as well as to the standards of judging people's actions. Legal principles reflect some basic values and criteria in morality for all social members through law and legislation process. The values recognised in law and legislation process are the cornerstones for restorative justice. Restorative justice and formal criminal justice are both centred on the idea of justice. They simply interpret justice through different paths. Without the legal principles providing standards in examining the nature of the damage to the social bond and measuring the degree of such damage, restorative justice will become arbitrary and therefore lose its purpose of achieving justice.

The problems of the view in justice at the ICC firstly fall into the lack of connecting international crime and the bond in international community. Dependent on the principle of the rule of law, and at times abiding by the path of legalism, the ICC was established for humanity, holding the ideal purpose to prosecute the perpetrators of international crimes. After people have witnessed great tragedies and atrocities committed to humanity throughout history, the founding of the ICC bears the hope of humanity to prevent international community from being "shattered" [503] by

[503] The Rome Statute, Preamble, para. 1.

international crimes. The rules in the Rome Statute (the substantive law), Rules of Procedure and Evidence (the procedural law), and Elements of Crimes (the supplemental law to the Rome Statute) have learned from the experience of former international tribunals, including the Nuremberg Trials, the Tokyo Trials, the ICTY and ICTR. Thus the legal provisions on which the ICC's work is based shall be seen as embracing the essence of human conscience.[504]

From this view, the laws and legal provisions of the ICC also consider the crimes under its jurisdiction as causing damage to the social bond that connects all humanity with the past and the future. The ICC, as the only permanent international court for the unimaginable atrocities, shall be seen as a lighthouse of human conscience that guides that world, exposes the evil, and scorches the gross violence. However, the ICC has been disposed such a high place, that it has not succeeded in repairing the damaged social bond of the areas affected by serious violence. If the ICC could learn from the restorative justice idea to view justice as restoring the damaged social bond at both international level and local level, interlinking international law with local culture and values, such justice will become more meaningful and tangible.



[504] See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, vol. II, UN Doc A/CONF.183/13 (Vol. II), at pp. 88, 90, 123, 125, 129.

The focus on victim

Restorative justice focuses on the victims' need in a stance different from that of the ICC. In lieu of authorising the victims' right to participate in the legal proceedings, restorative justice considers that listening to victims and sharing their stories is a significant part of the proceedings themselves. It is a fact that in the disputes of criminal cases, victims are actually on the one side of the conflict and criminal offenders on the other side. So the ideal solution to the conflict should be to guarantee victims similar roles or importance in the proceedings. However, victims are not treated properly before the criminal courts; as many criminologists argue, there are efforts to displace the victims from the position where they should belong in the conflict; this is done through administrative programs in which states seek control of the procedure in a pre-institutionalised pattern.[505] As well, it seems to be the real situation, which victims are now facing at the ICC. In compliance with the legal framework of the ICC, victims are authorised with rights to participate in the procedure where their voice is represented, their concerns about the crime are heard and disputed without them being the main role. On some occasions, victims are provided with monetary compensations if the alleged persons are convicted. But at the time of this study being written, the compensations to victims who have been qualified with such identity have not be effectively reparative, since all the compensations are paid by the Trust Fund for Victims. The reason is very simple: in the light of law, international crimes are primarily deemed as the violation of legal provisions, and the victims' personal interests must be subordinated to the dignity of law. Although judging the crime by a third party can bring relatively impartial outcomes, such outcomes may have been the result of sacrificing the active engagement during the proceedings. Restorative justice, on the contrary, believes that a due justice must fully respect victims' need because they have already suffered and experienced

[505] Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan 2006), at pp. 210.

disrespect from the crime and criminals. In the cases dealt with at the ICC, such respect is more necessary to victims because they could not obtain or expect to obtain enough respect from local authorities.

Restorative justice also tries to re-establish the confidence in victims. Many victims of crimes have reported their doubts about life and the future due to the brutal treatment they had received and the status of being victimised. In international crimes, victimisation can be transferred from terrifying experiences to intense suffering through two ways. First, long-lasting torture, threat, poor living conditions, and other serious human rights violations change the attitude of the victim toward life. One victim of the *Mucić et al. case* in ICTY, Mr. Nedeljko Draganić, described the torture, humiliation, and other forms of inhumane treatments against victims in the Čelebići prison camp with his own experience and witnessing during the period when he was detained. In his description, all detainees suffered from a terrible living environment, malnutrition, random beating by wardens, lack of medical assistance, extreme humiliation including forcible drinking of each other's urine.[506] Those memories are not easy to erase or pacify, but usually haunt the victims for considerably long periods of time as was highlighted by the victims in the "Glogova" case in ICTY.[507] The experience of victimisation also creates an atmosphere of distrust toward the police among victims, who have been observed in the International Crime Victims Survey (ICVS).[508] International crimes, which have been acknowledged as "crime of states"[509], will cause victims to lose their faith and confidence in the national authorities and their will and

[506] See the online resource of ICTY < http://www.icty.org/en/sid/197 > accessed 26 April 2016.

[507] *The Prosecutor v Deronjić* (Sentencing Judgement) IT-02-61-S, Trial Chamber II (30 March 2004), para. 210-221.

[508] See Jan Van Dijk, John Van Kesteren and Paul Smit, *Criminal Victimisation in International Perspective: Key findings from the 2004-2005 ICVS and EU ICS* (Boom Jurisdiche Uitgevers 2007).

[509] Nina H.B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press 2000).

capability to achieve justice, and even the hope of living in the whole society. International criminal justice at the ICC may not be able to help victims to re-establish their confidence because it cannot make local societies reliable again. If the ICC fails to take perpetrators into accountability, which is quite normal in formal criminal justice, victims' confidence will again be harmed. That is the place where restorative justice is needed.

Victims of international crimes always feel and carry the fears of the horrifying past. It shall be perceivable that after experiencing the most serious human rights violations or watching large populations being killed, wounded, forcibly displaced, raped, victims' fear to almost everything around them will consistently increase. In the *Akayesu case*, the Trial Chamber I examined the witness testimony and stated the impact of such fear as follows:

> "Many of the eye-witnesses who testified before the Chamber in this case have seen atrocities committed against their family members or close friends, and/or have themselves been the victims of such atrocities. […] The recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context."[510]

In international criminal trials, the focus on the reduction of the impact of fear to victims is limited to the extent that the possible negative effects of re-opening the wound of victims must be carefully considered when calling them to participate. Many victims have to find a way to overcome those fears, to confront the perpetrators before the court for achieving international law's justice. But it does not mean the fear will disappear as

[510] *The Prosecutor v Jean-Paul Akayesu* (Judgement) ICTR-96-4-T, Trial Chamber I (2 September 1998), para. 142.

a result of participation. For those who did have a chance to be involved into related legal proceedings, fear is a daily problem; beyond the charged international crimes there are other influences on victims such as telling the truth in public.[511] It is urgently essential for victims to know that violence, hatred and discrimination will not continue in the future so that they do not need to feel fear any longer. Restorative justice aims at reducing the fear among victims to a further degree through its approaches where victims are empowered in the conversation with perpetrators and backed by their community, morality, law, and making clear of the past and protecting the future.

The focus on offenders

One point that both lawyers and criminologists will agree on is that formal criminal justice utilises offender-centred mechanisms. The action elements and mental elements of crimes regulated in substantive criminal law are observed, theorised, and then codified from criminal behaviours. The investigation of crimes mainly targets revealing the links between what criminals have done and the consequences of their actions. The charges against criminals at trial also rely on their actions and mind-set, which will be debated on the point of how much the alleged persons have contributed to the crime in question. When it is time to decide the sentence for criminals, Judges must scrutinise the severity of the criminal conducts, the gravity of the criminal consequences, and the dangerousness of the convicted. Almost all aspects in formal criminal justice procedure are filled with the endeavour of the wickedness of the offenders and the legitimacy of the treatment of them. In understanding crime, formal criminal justice comprehends it as the unilateral action taken by criminals without linking it with other imperative contextual factors. Thus, criminals are given an identity all based on the information in

[511] Patrick Vinck, Phuong Pham, Suliman Baldo and Rachel Shigekane, 'Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of the Congo' (2008) Human Rights Center, University of California, Berkeley and International Center for Transitional Justice, at pp. 49.

association with the alleged crimes, and only re-figured into some persons recognisable in the case. It is the same situation at the ICC.

Restorative justice depicts the whole identity of offenders by seeing them as living persons rather than just names that are being described by criminal actions. Criminals are still humans, and they have needs that must be respected just like the needs of victims; as well they have stories to reveal. Even for the perpetrators of international crimes respect from justice proceedings is necessary in order to encourage them to engage more with victims and to reach some expected outcomes, including showing sympathy, remorse, and desistence from crime. When criminals feel that they are treated as humans, they would prefer to actively cooperate with the justice procedure rather than resisting it, because enough respect of their needs makes them feel involved and more respectful.[512] Another effect that restorative justice may have on offenders is that it helps offenders to re-identify themselves through interactions with victims in front of other people. In formal criminal trials, offenders are positioned at a specific corner in the court and are bestowed the role as the Defence, subject to procedural principles and restricted from communicating with victims and other stakeholders. Under such circumstances, they incline to understand themselves as one person against the whole state, but not the one who has caused harm to victims and the social bond. The restorative justice approach brings back the comprehensive identity to offenders with their own stories and experiences, making them feel alive and inspired to learn from their responsibilities.

The instance of Dominic Ongwen in the situation of Uganda may have displayed some issues that the ICC cannot take into consideration according to its legal framework. As Mr. Ongwen confessed, he was involved in several incidents of terrible violence

[512] Edmund F. McGarrell (ed), *Returning Justice to the Community: The Indianapolis Juvenile Restorative Justice Experiment* (Hudson Inst 2000).

against Ugandan civilians during the time when he took charge of one military unit under the control of Joseph Kony, the Commander-in-Chief and the self-announced "Holy Spirit" of the LRA. On the other hand, he also claimed that he was a victim of the violence committed by the LRA, that he was abducted "on his way to school" and "[s]tolen from his family and community", and then shifted into a child soldier after trying to survive the torture and beating.[513] In other words, Ongwen believes that he was forced to participate in violence and was shaped into a criminal by years of maltreatment in military training. He admitted his criminal actions, but denied his responsibility in them. The Pre-Trial Chamber II of the Court refused to consider this background, and clearly stated that "this argument [of non-responsibility] is entirely without legal basis, and the Chamber will not entertain it further".[514]

It is correct that the Court did acknowledge that Ongwen still enjoyed protection from international law rendered from the identity of being a former child soldier, but it may seem arguable to totally neglect the implication of such important information. The relationship between childhood maltreatment and abuse to adolescent criminal behaviours has been proved in many studies.[515] Recent studies even discovered that the experience of maltreatment in childhood results in approximately a double possibility for adults to engage in crimes, which is more evident for boys than girls.[516] Based on

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[513] *The Prosecutor v Dominic Ongwen* (Defence Brief for the Confirmation of Charges Hearing), Further Redacted Version, ICC-02/04-01/15 (3 March 2016), para. 2-3.

[514] *The Prosecutor v Dominic Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15, Pre-Trial Chamber II (23 March 2016), para. 150.

[515] See Cathy Spatz Widom, 'Child Abuse, Neglect, and Violent Criminal Behavior' (1989) 27(2) *Criminology* 251; Eliana Gil, *Treatment of Adult Survivors of Childhood Abuse* (Launch Press 1988); Carolyn Smith and Terence P. Thornberry, 'The Relationship between Childhood Maltreatment and Adolescent Involvement in Delinquency' (1995) 33(4) *Criminology* 451; Suman Kakar, *Child Abuse and Delinquency* (University Press of America 1996); Shanta R. Dube, *et al*, 'Childhood Abuse, Neglect, and Household Dysfunction and the Risk of Illicit Drug Use: the Adverse Childhood Experiences Study' (2003) 111(3) *Pediatrics* 564; : David Finkelhor, *et al*, 'Violence, Abuse, and Crime Exposure in a National Sample of Children and Youth' (2009) 124(5) *Pediatrics* 1411.

[516] Janet Currie and Erdal Tekin, 'Does Child Abuse Cause Crime?' (2006) No. w12171, National Bureau of Economic Research, the United States.

those findings, the miserable life after being abducted must have had decisive influence on Ongwen's choice and conduct, which may not exclude his criminal responsibility, but could considered as the mitigating element in judging the wickedness in his criminal motivation. If this case were dealt with the restorative justice idea, Ongwen would be seen as a former military leader, a son to a family, a boy who was abducted and tortured, and a perpetrator who were made by others' criminal acts inflicted on him. Only through this way his identity would become complete, which is more useful to understand who he really is and to conceive the full picture of the life among child soldiers and military leaders.

As a comparison, some former child soldiers received help from the ICC and functioned as witnesses to testify against Ongwen. The Court realised that some witnesses themselves had committed crimes, and attributed those crimes to Ongwen's command.[517] It is not difficult to imagine that one of those witnesses might grow into another Ongwen if they were not rescued, and that the boundary between victim and perpetrator perhaps lies on fortune and timing. Nonetheless, perpetrators of international crimes shall be taken into accountability, whether based on formal criminal justice or the restorative justice idea. Different from the formal procedure at the ICC, restorative justice provides space for those perpetrators to narrate their own stories; it manifests a better view to judge their conducts, and uses their experience to educate people to facilitate the re-integration process for former child soldiers.

Restorative justice and community

The relationship between restorative justice and community has been analysed in the context of achieving peaceful solutions of conflicts. And as it has been discussed

[517] *The Prosecutor v Dominic Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15, Pre-Trial Chamber II (23 March 2016), para. 141-145.

above, restorative justice links international criminal justice with local values, making the ICC's judgements and decisions more attached to the local people. The effectiveness of restorative justice will be extremely weakened if the role of the community is displaced in its proceedings, since community equips justice with collective meanings to which both victims and criminals submit. It does not suggest that restorative justice must be located in or operated by communities as many studies advocate.[518] Rather, the restorative justice process must include communities where the harm to victims and the guilt of offenders are more meaningful than personal issues.

The ICC underscores the role of community in the meaning of justice. But the community often refers to the international community, not the specific community where the crimes occurred. The high position of the ICC in viewing justice is pillared with the inspirational thought that humanity bears the same fate and shares a common future. The emphasis of the ICC on the international community is more or less metaphysical. Restorative justice ponders the significance of communities in fortifying the meaning of justice with more realistic reasons.

Communities too feel the damage alongside the victims. On one point, communities can be the major side subject to the crime committed in its area. The *Al Mahdi case* in the situation of Mali exemplifies the first "non-victim" criminal case at the ICC where Mr Al Mahdi was only convicted with destroying historical buildings. The prosecution did not include violence against natural individuals; however, in the Office of the Prosecutor's report on the situation of Mali it had been observed that killings, torture, executions without proper judgements, rape and other forms of cruel and inhumane treatment to combatants *hors de combat* and the civilian population in

[518] For example, see Howard Zehr and Harry Mika, 'Fundamental Concepts of Restorative Justice' (1997) 1(1) *Contemporary Justice Review* 47; Leena Kurki, 'Restorative and Community Justice in the United States' (2000) 27 *Crime and Justice* 235; Dennis Sullivan and Larry Tifft, *Restorative Justice: Healing the Foundations of Our Everyday Lives* (Criminal Justice Press 2001).

Mali provided reasonable basis to initiate the investigation.[519] The Trial Chamber III confirmed that the crimes of this case were not against persons but solely hurt the collective feeling of the community.[520] Considering the fact that Al Mahdi was one of the members of the community, sentencing him and his followers with participating in the re-construction of the destroyed buildings, through restorative justice, may have been more meaningful and suitable to the community's needs rather than imprisonment, where he can pay neither compensation nor express any remarkable remorse to the community. The Judgement at the ICC of Mr. Al Mahdi, to a degree, may have wasted Al Mahdi's influence on others and the opportunity to restore the emotional loss of the community and its residents; local people had great respect for the destroyed buildings because they represented for them symbols of religious, emotional and spiritual values, much more than simply their physical form.

In addition, it must be noted that the community is a place where people reside, live, and conceptualise security and peace. The environment of a community, especially the sense of safety, order, and mutual trust, is closer to victims than the punishment of criminals at the ICC. Thus, efforts to stabilise and secure the community are a salient aspect of viewing the meaning of justice for local people in post-conflict regions.[521] A survey on the people's attitude towards the social re-construction and their feelings about security establishment in Liberia the following recommendations were made to the local authority: strengthen and professionalise the police system to improve security and stability in the communities, as well as increase access and improve the quality of formal justice together with local dispute resolution mechanisms.[522] A study on the

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[519] The Office of the Prosecutor, 'Situation in Mali: Article 53(1) Report' (16 January 2013).

[520] *The Prosecutor v Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15, Trial Chamber III (27 September 2016), para. 78-81.

[521] Bayard Roberts, *et al*, 'Post-Conflict Mental Health Needs: A Cross-Sectional Survey of Trauma, Depression and Associated Factors in Juba, Southern Sudan' (2009) 9(1) *BMC Psychiatry* 7.

[522] Patrick Vinck, Phuong Pham and Tino Kreutzer, 'Talking Peace: A Population-Based Survey on Attitudes about Security, Dispute Resolution, and Post-Conflict Reconstruction in Liberia' (2011) Human Rights Center,

post-conflict trauma among people in Guatemala shares similar findings, and specifically indicates the necessity to create various values and practices conducive to peaceful non-violent conflict resolution, and reduce the stress caused by intense social relationship at community level.[523] Those field studies are persuasively evident for the importance of community environment to the meaning of justice.

The relationship between victims and offenders, and the connection between different communities have a key impact in making people feel safe in international criminal cases, because those crimes are not normally committed by a single person, but by large numbers of persons against groups or even against the entire community; this has been noted in both the atrocities in former Yugoslavia and in Rwanda. In post-conflict societies, communities are often newly re-established, and people who used to serve different factions now have to live together in order to survive. Co-existence has become a common theme in post-conflict societies.[524] The main concern about justice and peace for people living in such environments is about their feelings towards each other in their daily lives. Under such circumstances, justice that brings some individuals before international trials and sends them to prison may not be enough. People need to feel that the pressure and hostility coming from their neighbourhoods or close communities will not continue to be a problem. This expectation of justice can be achieved through the restorative justice approach but not through the formal criminal

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University of California, Berkeley.

[523] Sonia Anckermann, *et al*, 'Psycho-Social Support to Large Numbers of Traumatized People in Post-Conflict Societies: An Approach to Community Development in Guatemala' (2005) 15 *Journal of Community and Applied Social Psychology* 136.

[524] See Wendy Lambourne, 'Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation' (2000) 31 *Security Dialogue* 357; Béatrice Pouligny, 'Civil Society and Post-Conflict Peacebuilding: Ambiguities of International Programmes Aimed at Building "New" Societies' (2005) 36(4) *Security Dialogue* 495; Susanne Buckley-Zistel, 'Remembering to Forget: Chosen Amnesia as a Strategy for Local Coexistence in Post-Genocide Rwanda' (2006) 76(2) *Journal of the International African Institute* 131; Nancy E. Brune and Thomas Bossert, 'Building Social Capital in Post-Conflict Communities: Evidence from Nicaragua' (2009) 68(5) *Social Science & Medicine* 885; Anders H. Stefansson, 'Coffee after Cleansing? Co-Existence, Co-Operation, and Communication in Post-Conflict Bosnia and Herzegovina' (2010) 57 *Focaal* 62.

justice mechanism.

4. Desert and accountability in restorative justice

Accountability as a criterion for justice

The core idea of the retributivism theory in punishment is that for answering the requirements of justice, criminals must be held responsible for their criminal actions. The penal system arranges different tiers for convicted criminals according to the severity of the crime, and then decides what is the just desert for criminals. Punishment does not need to be agreed by the convicted persons. It simply forces criminals to bear the pain and loss because they caused such consequences to others in the first place. Von Hirsch in his study on the philosophy of criminal law and penalty indicates that the just desert must not strive to seek for internal acceptance on behalf of the criminals for a punishment.[525] Indeed, criminal legislation that strives for the voluntary serving of punishment of criminals is not often observed. On most occasions, sentencing at a criminal court is generally achieved on external criteria whereby people -judges and juries- scrutinise the nature of criminal actions and the dangerousness of the offender. By giving criminals a deserved punishment, formal criminal justice takes them into account to fulfil people's expectations.

Criminal accountability is of external nature. In common sense, accountability refers to an individual person's or an organisation's compliance with public norms which deeply relate to certain common values and traditions of a society. This type of accountability is conceptualised as a normative form that is used to evaluate people's actions from the public view. Another form of accountability, which regulates people's behaviour, is the accountability as mechanism.[526] Accountability as mechanism sets up

[525] A. Von Hirsch, *Censure and Sanctions* (Oxford University Press 1993).

[526] Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010)

a series of rules for conducts and roles for persons, in order to keep an institution operating well. The source of accountability as mechanism may differ from that as virtue, but their common nature is to restrict people's actions from the outside rather than inspire them to seek a certain outcome. From this view, the accountability for criminals in international criminal law is to examine whether their actions are accusable, judged by relevant legal principles and reflected in what criminals shall receive.

Accountability can also be internally motivated. For example, generally all citizens make their decisions and behave accordingly without violating the law or causing harm to others. For most law-abiding people, not to violate the criminal law is not a restriction that comes from external pressure, but simply an instinct in their daily life. People voluntarily, though unconsciously, prove that they are liable to account for their actions by avoiding the commission of any crime. This phenomenon clearly shows that people living in a society take accountability by nature; it cannot be interpreted by their fear of being judged by external criteria. The sense of accountability had been an integral part of human mentality. This dimension of accountability is understood as internal accountability. Richard Mulgan examined the usage of the concept of "accountability" in regard to political practice and individual responsibility, and argued that the implication of accountability should be expended into internal accountability that is more encouraging than constrictive.[527] The encouraging aspect of internal accountability may not be easily sensed since it does not intensify any relationship at individual level or at social level, or result in any severe legal response as the accountability in formal criminal justice does. But when it is required to correct the wrong, internal accountability is more effective than external accountability. The internal accountability is part of the human morality, driving people to avoid causing

33(5) *West Europe Politics* 946.

[527] Richard Mulgan, '"Accountability": An Ever-Expanding Concept?' (2000) 78(3) *Public Administration* 555.

harm to others or to try to restore the harm if it has already been caused, rather than alluring people to deny or escape from the consequences. So internal accountability for criminals is about what they should do but not what they should receive.

Internal accountability sometimes directs people to do things in which risk overweighs benefit for good reasons. For example, in the Second World War, Oskar Schindler, as a member of the Nazi Party, employed Jews in his enamelware and ammunitions factories, and helped to rescue about 1200 Jews from being killed by Nazis; he did that with the knowledge that by doing so he could be "cleansed" under the conditions. In China, another Nazi Party member, John Rabe, after witnessing the astonishing "Nanjing Massacre", made great efforts to record the atrocities of Japanese soldiers and established a safe zone which provided shelter for approximately 200,000 Chinese so that they could be protected from the brutal slaughter. Their actions apparently exceeded the ordinary consideration of "profit and loss", because the possible price for the choices they opted could have been too heavy to be "reasonable". The proper explanation shall be that their internal accountability compelled them to fight against the evil, even if the consequences could be to pay with their own life. Hence, taking internal accountability is not necessarily inferior to be taking external accountability. It may require bravery to correct the wrong and it may be more difficult than passively following external judgement.

Restorative justice aims to achieve such internal accountability for criminal offenders. It depends on making clear of the facts in relation to the crimes.[528] In the restorative justice process, offenders join the group together with victims and other community members and get empowered to face the harm and loss of victims and the negative influence on the community. Through informal discussions and by exchanging

[528] See Larissa Van Den Herik, 'Accountability Trough Fact-Finding: Appraising Inquiry in the Context of Srebrenica' (2015) 62(2) *Netherlands International Law Review* 295.

sincere information, offenders will be able to understand better the real pain of victims, and acknowledge their position in the community and the just desert, without necessarily being isolated from the victims and the community or suffering deprivation of freedom or property; instead they could be making a contribution to the restoration of the damaged social bond and to the re-establishment of the community. Internal accountability motivates offenders to feel responsible towards real humans rather than to bitter rules; in addition, restorative justice evokes such internal accountability of offenders and impels them to fulfil their responsibility through active conducts. This is the reason why restorative justice can make improvements to the formal criminal justice process: inspiring offenders to stand out, not coercing them to deny.

Acceptance of the past

Just desert as one central concept in justice is majorly determined by the past, thus it has a different impact on victims, offenders, and the law. For victims, knowing that offenders will be given just desert and are being punished, may release their eagerness to seek personal vengeance against offenders. But the legal principle of proportionality in punishment limits the way and the degree to punish; this will not bring ultimate satisfaction to victims on the point of seeing offenders fully “pay back”. If just desert is basically driven by negative motivations, including hatred and revenge, then the past that is identified by law for victims will be full of wickedness, and victims will anticipate no more than making offenders suffer the same way victims suffered. When the punishment does not match their anticipation, it is easy for victims to feel that the court has not acknowledged their past. This feeling can be even more furious in crimes of high severity, such as murder, torture and rape. In international crimes where serious crimes occur on a large scale and for long periods of time, negative feelings of victims are harder to ease because the perpetrators’ punishment can never reciprocate the damage they caused. When victims do not have enough chance to express their opinion about the past, which has already become a problem at the ICC, their life and hope will

be obsessed by the past. This is a potential risk in the just desert that the ICC manages to deliver.

For law, especially for international law in the present study, just desert is about people's compliance with, and obedience to legal provisions. From the legal perspective, international crimes offend the dignity of well-established rules and the conscience of humanity. By exercising international law, we, as non-stakeholders, declare that it is painful for all humanity to see what happened to victims so that just desert must not remain un-accomplished. But is it ethical or legitimate that the legal professionals, such as judges and prosecutors, feel close to victims, something that may possibly affect the fairness of the trial for the alleged persons? And if just desert is not made in regard to victims' pain, it can only be on the basis that the law has been violated. Punishment, which does not consider the concerns of victims, only labels perpetrators as "law-breakers" and the "enemy" of international law. The result of punishment at the ICC, therefore, shows that just desert is not about the victims' interests, and that the painful past of victims is not as important as it is announced to be. In other words, the ICC only accepts the past it needs to justify the conceptual desert for the offenders.

It has been proved that the just desert in connection with the power of condemnation of perpetrators of international crimes cannot be functioning well because the perpetrators do not willingly accept it. As it has been discussed above, the alleged persons incline to defend themselves with the denial or alleviation of the charged criminal actions and responsibility. They may acknowledge what they have done in the past deeply in their minds, but they will not reveal their true acknowledgement before the court, because by doing so, they could increase the risk of receiving severe penalties. As a matter of fact, all the convicted people so far at the ICC hereto have expressed remorse to victims and the affected communities, but did not completely waive their right to defend themselves against the charged crimes and the responsibility therein. For instance, Al Mahdi substantially cooperated with the

Prosecutor and made an admission of his guilt to the Court, but reserved his right to defend himself, because he thought that this might result in the exclusion of his criminal responsibility. His cooperative attitude and regretful expression was taken into consideration during the sentencing process, and was recognised as mitigating circumstance to the punishment.[529] Since the acceptance of the past by criminals could reduce the gravity of their sentence technically, the real motivation of the remorse expressed before the Court remains unclear. It is possible that criminals will accept some aspects of the past that the Prosecutor concentrates on, for a mitigated punishment rather than for taking accountability. Furthermore, the Prosecutor does not examine the whole picture of the committed crimes; even when criminals are willing to be accountable to the past, they are not able to fully repair the damage and then expect to be included in reconciliation programs. As a result, restorative justice needs to take a role in the legal proceedings at the ICC to make criminals fully conscious of the past, and to provide space for them to take complete accountability. Only when they start to disclaim the righteousness of their actions in the past it is justifiable to confirm their sincerity in taking accountability.

Solving the dispute and improving performance

In retrospect of the past, formal criminal justice assumes punishment is the just desert for criminals, but fails to explain how inflicting penalty on criminals would repair the damage they caused, and why depriving specific rights from them could be beneficial to victims and communities. After all, isolating criminals from other people and normal life does not bring back the victims' loss or make the wrong right. It is hardly rational to believe that we can un-harm something or someone that has already been harmed by causing pain to the wrongdoer; bringing loss to criminals is not a better

[529] *The Prosecutor v Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15, Trial Chamber III (27 September 2016), para. 98-105.

accountability than offering them a chance to make a contribution to society. But since in criminal courts, in particular the ICC in this study, the legal mechanism has subordinated victims and communities to law, both technically and in reality, the isolation of criminals, as described above, might be most often the form of holding them accountable. Other than re-toning the solemnity of international law at the ICC, retribution could not alternate the tragic situation for victims and local communities through its penal system. The penal system at the ICC solves the guilt and wicked nature by identifying the criminals with deserved endings, but it does not have concrete plans for the aftermath of punishment, which is being served by criminals. To a degree, the consequences of punishing those perpetrators may not be a problem for the ICC to consider.

The restorative justice idea presents to the ICC more obligations by including the aim of creating better ends to perpetrators, victims, and the community. The extra obligation set by restorative justice idea to the ICC is not difficult, but will make the ICC's work closer to the stakeholders. Thus, it may in fact assist the ICC to achieve its promised goals. In the restorative justice mechanism, the just desert is decided by the accountability for both the past and the future. The effectiveness of restoration is dependent on how much criminals truly sense the wrongness of their actions and admit the guilt of the past, so that the justice process is more persuasive than coercive. One significant aim in restorative justice is to reduce the criminals' intention to defy and replace it with a true will to be better. The difficulty of delivering condemnation to the alleged criminals at the ICC can be pacified through the restorative justice mechanism because the latter involves the group to which criminals belong in the justice process and it places them at the focal point together with all the stakeholders. These criminals will receive justification from their people, making the solution more influential. Or the whole group of their people should hear the voices from other groups so that they can better understand the meaning of their actions to others and to the whole society.

Through this way, criminals can regain the trust from their victims and from those whose lives have been affected by the crimes.

The purpose of accountability has three folds.[530] First, taking account of the committed crimes by offenders aims to improve their quality of performance, thus bringing more beneficial results to the society. Unlike formal criminal justice where victims' harm is not repaired, social bond's damage is not restored, and offender's reconciliation is detrimental, restorative justice includes all concerned parties and gives equal space to each one of them ensuring everyone's story is heard and understood. All individuals shall be empowered and encouraged so that victims can obtain satisfaction from offenders, offenders will regain trust from victims, and the community will acquire harmony from both. Hence, everyone's performance will be improved because all are reunited to share the same values and feelings towards each other. Second, the strengthened empathy and improved performance will enhance the legitimacy of criminals' conducts in the future. It is not difficult to perceive that if people have positive feelings for the people of other groups, institutions, or culture, they incline to avoid any harm towards them. Because perpetrators of international crimes do not sense enough attachment to their victims and their communities, they have no deep sense of guilt to commit atrocities against other people; even though they might have realised the illegitimacy of such acts, they can still do so for personal or group interests. Through the restorative justice idea that can be utilised at the ICC, the relation of victims and offenders will be ameliorated, making it easier for the offenders to respect law and then to integrate legal rules into their actions. The constructive influence of restorative justice to reducing recidivism, caring for human rights, and correcting criminals' behaviours has been empirically evidenced in many observations.[531] If criminals

[530] Declan Roche, *Accountability in Restorative Justice* (Oxford University Press 2003), pp. 46-50.

[531] For example, see David Miers, *et al*, 'An Exploratory Evaluation of Restorative Justice Schemes' (2001), UK Home Office Crime Reduction Research Series.

become more respectful to laws and show enhanced understanding for human rights values after experiencing the restorative justice process, then the ICC needs to include some of these good practices in its justice procedure. Third, the outcomes of restorative justice can be better pursuing accountability ends. As it has been analysed above, restorative justice is able to achieve many goals that formal criminal justice cannot. Undoubtedly, more serious crimes cause more severe harm, and more severe harm needs more efforts to restore resulting in greater accountability for criminals. At international level, because the damage to communities and harm to victims are often tremendous compared to ordinary crimes, the need for restoration and the urge for accountability up-grades accordingly. Under this situation, mutual trust and respect between victims and perpetrators and between perpetrators and social rules and laws should function in the justice process in order to forge law compliance to prevent further crime. As Declan Roche argued, "[a]ny discussion of compliance would be incomplete without a discussion of the importance of trust in promoting good decision-making."[532] Since in the formal process at the ICC, trust and respect are not recognised as central values, restorative justice needs to be introduced to play a significant role.

Deterrent effect in restorative justice

The sense of belongingness

As it has already been discussed in the earlier parts of this study, formal criminal justice creates a barrier between criminals and social values that have been recognised and protected by law. Where there exists the formal criminal justice process, there will be a conflictive dispute-resolution, which positions criminals at the opposite side of law and the people whom the law announces to represent. As Karl Marx and Marxists analysed, law and the legal system, in particular criminal law, is structurally twined

[532] Declan Roche, *Accountability in Restorative Justice* (Oxford University Press 2003), pp. 50.

with conflict and oppression due to the basic demand of one social class to rule and control another.[533] Though the Marxist idea on difference, conflict and suppression between classes divided by economic status, has been contradicted by many; criminal law does establish a wall between offenders and victims, and generates "classes" of different people: the "law-violators" and the innocents. Criminals are seen not as part of the society during the trial process; thus, it vanishes the sense of belongingness of criminals with the harmed people and the damaged social bonds. As a result, the deterrence that criminal justice seeks turns less feasible because those, who are being prosecuted or punished are less empathetic and connected to their victims. The ICC that predominately relies on the formal criminal justice process cannot evade such criticism.

Technically, the ICC did not create any classifying or identifying process that may separate people's connection to each other. In most international crimes people belonging to different groups already suffered pre-existent hostilities. For example, in the civil wars, which finally developed into the violence of genocide in both Burundi and Rwanda, the lack of belongingness and the moral detachment between the Hutu and Tutsi people have been observed.[534] However, the problem at the ICC is that it does not respond to those issues. The meaning of justice as the core purpose of the ICC is narrowed. At domestic level, crimes normally do not create a huge impact on the social order or the integrity of the state, but often remain as disputes between individuals, whereby national authorities need to get involved to build an impartial platform of resolution. As a result, the negative outcome of isolating the criminals from normal life and people they care about will not be as big as that of an international court. On the

[533] Richard Quinney, *Critique of the Legal Order: Crime Control in Capitalist Society* (Transaction Publishers 1974).

[534] See René Lemarchand, *Burundi: Ethnic Conflict and Genocide* (Cambridge University Press 1996); Jack David Eller, *From Culture to Ethnicity to Conflict: An Anthropological Perspective on International Ethnic Conflict* (University of Michigan Press 1999); Peter Uvin, 'Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence' (1999) 31(3) *Comparative Politics* 253; Ravi Bhavnani and David Backer, 'Localized Ethnic Conflict and Genocide: Accounting for Differences in Rwanda and Burundi' (2000) 43(3) *Journal of Conflict Resolution* 283.

one hand, punishing perpetrators could enhance the emotional link between perpetrators and their supporters, and could accelerate the disconnecting of offenders group from the victims group. Such danger has called for concerns, when Jean-Pierre Bemba was convicted,[535] and could eradicate the conditions for achieving national reconciliation and social stability for both CAR and DRC, since Jean-Pierre Bemba was the former vice-president of DRC. So, punishing key criminals could result in departing from different groups of people conceptually but not visually. On the other hand, when international crimes are usually committed by one group against another, or by large numbers of people against others, isolation as a corollary of punishment at the ICC seems more problematic. First, isolating merely key criminals from their society does not reflect the severity of the crimes, as vast criminals may not face the same form of justice at all. When criminals do not commit the alleged crimes directly, like the *Jean-Pierre Bemba case*[536], the victims could deem such result as unfair. Second, it is impossible to isolate all criminals from victims, whether in domestic courts or in the ICC. Because such form of isolation means the factual secession of a state, which causes more problems to the situation.

Consequently, the isolative method inside the penal system at the ICC may not be a functional idea at all. Being cognate to the domestic criminal justice but lacking the essential social, cultural, political and powerful support that appears to assist domestic courts to administrate cases, the justice process at the ICC could not duplicate the success of domestic criminal courts from a similar justice mechanism.

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[535] See 'Bemba Arrest Sets Key Precedents: ICC Has So Far Only Indicted Mid-Level Commanders, not those Alleged to Bear Overall Responsibility for Crimes' *Institute for War and Peace Reporting* (29 May 2008) < https://iwpr.net/global-voices/bemba-arrest-sets-key-precedent> accessed 23 July 2016; Laura Seay and Michael Broache, 'A Congolese Warlord Was Just Convicted. So why isn't Everyone Thrilled About it?' *The Washington Post* (24 March 2016) < https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/24/a-congolese-warlord-was-just-convicted-so-why-isnt-everyone-thrilled-about-it/?utm_term=.6f855dc6f870> accessed 23 July 2016.

[536] The *Prosecutor v Jean-Pierre Bemba* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08, Trial Chamber III (21 March 2016).

Restorative justice manages to include criminals and victims together and regards all people who are responsible for the crime equally. It does not isolate criminals at trial or in their treatment. Instead, all criminals must get involved in hearing the stories of victims and express their ideas about the crime. Most conflicts in Africa have been brought forth by different exclusive identifications between groups, which largely undermine the sense of belongingness with others[537]; it is more realistic and effective to achieve deterrence from this view rather than utilising the "threatening image" of punishment. Deterrent justice should not be an end, and deterrence should not be respected as the necessary conclusion of punishment. It is noteworthy that everyone must belong to a group in a modern society, and that no one should be alone living in the world. On many occasions, interacting with others in the community will establish the connections, especially when someone makes contributions to others' lives and toward the construction of community. For raising the sense of belongingness to criminals as well as to victims, the justice process shall call for criminals to serve the victims and communities as their punishment to convey the message of belonging and achieve deterrence.

The power of shame and guilt

The function of shame in restorative justice has been placed at the central part in many related studies. Sometimes shame punishment is viewed as an alternative to incarceration in the penal system to reach the desired ends.[538] Shaming has a long history in punishing criminals.[539] For example, in Ancient Greece, people would

[537] Said Adejumobi, 'Citizenship, Rights, and the Problem of Conflicts and Civil Wars in Africa' (2001) 23 *Human Rights Quarterly* 148.

[538] Aaron S. Book, 'Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration' (1998) 40 *William and Mary Law Review* 653.

[539] Norval Morris, and David J. Rothman (eds.) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1995).

publically shame the criminals if they were judged as being guilty.[540] In Ancient China, a special facial tattoo was used to shame the criminals by discriminating them from others with making permanent symbols onto their appearance.[541] John Braithwaite argues that shaming is an important component in a society's culture for people to understand what is wrongdoing.[542] He examined the shaming effects in formal criminal justice and stated that the form of the shaming process in formal criminal justice is "stigmatising" nature, which pushes criminals to incline from committing a crime again.[543] He further indicated that restorative justice applies another form of shame- "re-integrative" shame, to improve the conscience building for criminals and to achieve re-offending reduction.[544]

The role of shame in justice is not unchallenged. Some researchers have confronted the re-integrative shame theory and argued that it is guilt that relates to empathy and reparation, but shame inclines to provoke more negative emotions causing the rejection of responsibility.[545] In criminal justice the main mission is to prove the guilt of offenders and then to decide the form and severity of punishment. The guilt of criminals that we see in court is determined by others rather than by the criminals themselves. It does not require the criminals to become conscientious about their perpetrations. However, the true guilt that is found by criminals about their wrongful

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[540] Sara Forsdyke, 'Street Theatre and Popular Justice in Ancient Greece: Shaming, Stoning and Starving Offenders Inside and Outside the Courts' (2008) 201(1) *Past and Present* 3.

[541] Carrie E. Reed, 'Tattoo in Early China' (2000) 120(3) *Journal of the American Oriental Society* 360, at pp. 364.

[542] John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989).

[543] Ibid, pp. 67.

[544] Ibid, pp. 87-89.

[545] Karen P. Leith and Roy F. Baumeister, 'Empathy, Shame, Guilt, and Narratives of Interpersonal Conflicts: Guilt-Prone People Are Better at Perspective Taking' (1998) 66(1) *Journal of Personality* 1; Bas Van Stokkom, 'Moral Emotions in Restorative Justice conferences: Managing Shame, Designing Empathy' (2002) 6(3) *Theoretical Criminology* 339; June P. Tangney and Ronda L. Dearing, *Shame and Guilt* (Guilford Press 2003); June P. Tangney, Roy F. Baumeister, and Angie Luzio Boone, 'High Self-Control Predicts Good Adjustment, Less Pathology, Better Grades, and Interpersonal Success' (2004) 72(2) *Journal of Personality* 271.

actions needs self-questioning. True guilt comes from the negation of their past and their criminal actions therein, proceeds to the concern in victims' pain and the respect to legal and social values. On this point, the internal guilt of criminals may be dependent on the feeling of shame. Shame is a painful feeling of humiliation or distress caused by the consciousness of wrong or foolish actions. It can derive from the treatment of others towards us and it can turn into humiliation; otherwise, it may stem from self-consciousness reminding us of the mistakes we committed towards others. From this view, shame does not necessarily direct the rejection of responsibility, as long as criminals do not feel the unbearable humiliation during the justice process.

Furthermore, positivistic research has disclosed a phenomenon that in restorative justice shame is more re-integrative; here the shaming mechanism works well, rather than in formal criminal justice.[546] However, when shame is understood only as other people's disapproval, the criminals would perceive the stigmatising effect, whether it is in restorative justice or formal criminal justice.[547] Therefore, it seems that stigma in bringing shaming cannot be simply avoided, even in restorative justice. The issue that is more important in managing shame in the justice process is how to use shame to promote deterrence to crime rather than resistance to justice. As Howard Zehr stated, "[s]hame is a basic emotion that can be used for good or ill but cannot be ignored".[548] In fact, formal criminal justice, including the legal proceedings at the ICC, does not consider the advantage of shame to ameliorate criminals' behaviour, but weighs more on the shaming influence itself in punishment. The ethical problem of taking shame as a "threat" to prevent crime is not a concern of the present study. From the standpoint of effectiveness in deterrence, formal criminal justice at international tribunals lacks the

[546] Nathan Harris, 'Reintegrative Shaming, Shame, and Criminal Justice' (2006) 62(2) *Journal of Social Issues* 327.

[547] Ibid, at pp. 341.

[548] Howard Zehr, *The Little Book of Restorative Justice* (Skyhorse Publishing, Inc. 2015), at pp. 64.

motivating mechanism to self-conscious shame. For example, the first guilty plea case at the ICTY, the *Erdemović case*, Mr. Erdemović stated in his confession to the Court that he was fully aware of the wickedness of his actions to victims and to the country, and admitted his crime openly even before he was arrested in the Federal Republic of Yugoslavia[549]. His guilty plea cannot be recognised as being driven by pure conscience because he argued for his acquittal based on his confession[550], meaning that at least he had the intention to avoid or to mitigate punishment through a procedural technique. In the first guilty plea case at the ICC, Mr. Al Mahdi showed similar intention when he confessed his crime. In fact, all criminals who ended up in a guilty plea at all international criminal tribunals asked for mitigated punishment. Since they think that their sentences are too heavy for their responsibility in wide-spread, or systematic murders, rapes, abductions, forcible displacements and disappearances, tortures, and other forms of serious violations of human rights and humanitarian law, as well as for the tremendous suffering and loss of their victims, it is hard to justify how much sincerity there was in their confessions.

Why self-motivated shame and guilt is better than externally caused shame in achieving deterrence? It mainly relates to the genuineness of criminals in desistance from crime. One imperative value of a guilty plea is that the alleged understands the guilt and the gravity of it. It is hardly believable that criminals feel guilty without sensing any shame for the violent crimes and the consequences of them that they caused. When feeling shameful, the criminals, who are responsible for extremely serious crimes, do not tend to argue for being less responsible, because they should understand that their sentence could not at all repair the pain and loss of victims of international crimes.

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[549] The Guilty Plea Statement of Dražen Erdemović (20 November 1996) < http://www.icty.org/en/sid/212> accessed 19 February 2017.

[550] *The Prosecutor v Dražen Erdemović* (Appeal Judgement) IT-96-22-A, Appeals Chamber (7 October 1997).

Externally caused shame changes the criminals' words, but self-motivated shame changes their will.

However, it must be noted that self-motivated shame/guilt is very difficult to achieve. At the ICC, alleged criminals are taken into account for crimes that were committed by numerous persons, so the shame of being judged as the enemy of humanity is too painful to be admitted. The restorative justice idea can help the ICC obtain a better chance to achieving self-motivated shame. In the restorative justice approaches, crimes are spoken, shared and discussed by the whole group, and the shame is often borne by all criminals, or even by other stakeholders. More importantly, in restorative justice criminals are treated as normal people, not enemies. What is denied in restorative justice is not the criminals, or the group they serve, but their overall conducts in the past. Criminals must finalise their crime, fully recognise what is wrong, and then leave the shame in the past rather than bearing it continuously. Shame is used to inspire criminals to change their will and ameliorate their actions in the future. That is the true power of shame and guilt that the ICC needs to explore for achieving deterrence.

Forgiveness and hope for future

Forgiveness from victims is not a necessary outcome of justice. In formal criminal justice, victims' feelings are not a concern to the court. The interest in law and the proper treatment of criminals are the focus of formal criminal justice. On ordinary occasions, victims experience a loss from part of themselves, the uncertainty of safety, vulnerability, and the feeling of inequality and injustice.[551] They have to participate in several types of therapeutic programs to recover their pain and trauma caused by

[551] Irene H. Frieze, Sharon Hymer, and Martin S. Greenberg, 'Describing the Crime Victim: Psychological Reactions to Victimization' (1987) 18(4) *Professional Psychology: Research and Practice* 299.

crime.[552] Restorative justice tries to include the care for victims in its process, and creates a pattern in which victims, together with offenders at times, can feel the concerns from others so that their pain can be healed, and their anger and fear can be restored. Forgiveness is acknowledged as an important value in restorative justice, but not a goal that must be obtained. John Braithwaite averred the value of forgiveness in justice to achieve restoration, and pointed out that

> "Forgiveness is the most powerful emotion tool for encouraging the perpetrators of evil and the contributors to evil to own their contribution. Nurturing forgiveness often requires considerable reticence in resorting to selective use of the criminal process."[553]

Even forgiveness is difficult to achieve, there still needs criminal justice procedure to endeavour in bringing about forgiveness. The primary reason for justice to focus on forgiveness is that it benefits victims in many ways. It is not hard to understand that after being victimised, people easily feel negative emotions. Early psychological research revealed some bright effects of forgiveness in diminishing those feelings. According to some scientific observations, forgiveness (i) is helpful for victims to forget the painful experience or their past and frees them from being trapped by some persons and events of the past; (ii) facilitates the reconciliation process and repairs the broken relationships more successfully than the expression of negative emotions; (iii) decreases the possibility that negative feelings will be misdirected to some innocent people in the future; (iv) lessens the subconscious worry about the influence of negative emotions.[554] Hence, forgiveness could contribute to the health and mental stability of

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[552] Frank M. Ochberg (ed.), *Post-traumatic Therapy and Victims of Violence* (Routledge 2014).

[553] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002), at pp. 203.

[554] Richard P. Fitzgibbons, 'The Cognitive and Emotive Uses of Forgiveness in the Treatment of Anger' (1986) 23(4) *Psychotherapy: Theory, Research, Practice, Training* 629.

victims, reduces the painful feelings, and empowers them with hope for the future with bravery to overcome the impact of being victimised.[555] Those benefits can help victims feel less disappointed in the negligence of their needs in formal criminal justice, so the likelihood for victims to take personal actions against offenders, which indicates more permissiveness rather than deterrence to crime, will be refrained to a low degree.

Forgiveness functions as a mediator between victims and offenders. When offenders feel true and self-motivated shame, they will need to go through a process that will transfer the shame to the motivation of being better persons or to behave better. However, the need to release offenders from shame does not mean that victims have moved on from the effects of crime. Victims and offenders may have different views on the crimes especially the effect of crimes that would continue to be a concern for victims even if offenders consider those crimes to be over. The criminals who are ready to alter themselves need the approval from victims. Without forgiveness expressed by victims, there is a risk that criminals may deny their effort in restoration and the necessity of feeling shame, thus undermining the deterrent outcome of justice. But to forgive is a long process that requires patience on behalf of the criminals, who have to wait for the victims to stop blaming them. Studies state: "victims who forgave were more likely to demonstrate perspective taking and emotional concern for their offender than were victims who did not forgive".[556] So the mutual concern between victims and criminals is epochal for both to overwhelm the negative emotions and to ensure the effectiveness of justice.

Recent studies also discovered similar findings on the role that forgiveness plays in criminal justice. It is indicated that forgiveness can be positively linked with the sense

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[555] Robert D. Enright, 'Counseling within the Forgiveness Triad: On Forgiving, Receiving Forgiveness, and Self-forgiveness (1996) 40(2) *Counseling and Values* 107.

[556] Jeanne S. Zechmeister and Catherine Romero, 'Victim and Offender Accounts of Interpersonal Conflict: Autobiographical Narratives of Forgiveness and Unforgiveness' (2002) 82(4) *Journal of Personality and Social Psychology* 675, at pp. 684.

of justice that individuals may be motivated to perceive a general feeling of fairness in social interaction, and when justice belief is thought salient, it can encourage rather than impede forgiveness.[557] In addition, when the feeling of revenge is not viable, the belief of justice is better established among victims and offenders.[558] On this point, if the desire for revenge is detrimental for maintaining the belief of justice, criminal justice must develop a system that will reduce the desire of victims and those who care about them to seek revenge. It is well known that in modern society, seeking personal revenge for criminal offenders is highly discouraged, illegal and forbidden. In restorative justice revenge is also not permitted. When forgiveness increases, there will be less space for revenge because forgiveness and revenge are often opposite emotions for humans. From the viewpoint of evolution, research has concluded that revenge has been a natural response for human ancestors to put an end to aggression. As well, the opportunity to achieve forgiveness in the aftermath of criminal offense is generally higher among those who have a history of association, shared values, similar interests, and good mutual understanding.[559] All the indicators above show that for reaching the end of forgiveness to substantiate the belief of justice, formal criminal justice falls short of capability.

Relevant studies support restorative justice as a better mechanism for forgiveness. Victims are more likely to associate increased forgiveness, benevolence and reduced avoidance and revenge motivations with intimate relationships that are created in restorative justice; also in the de-individualised context of formal criminal justice victims incline to feel the opposite way.[560] The supportive and empowering mechanism

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[557] Peter Strelan, 'The Prosocial, Adaptive Qualities of Just World Beliefs: Implications for the Relationship between Justice and Forgiveness' (2007) 43(4) *Personality and Individual Differences* 881.

[558] Johan C. Karremans and Henk Aarts, 'The Role of Automaticity in Determining the Inclination to Forgive Close Others' (2007) 43(6) *Journal of Experimental Social Psychology* 902.

[559] Michael E. McCullough, Robert Kurzban and Benjamin A. Tabak, 'Cognitive Systems for Revenge and Forgiveness' (2013) 36 *Behavioral and Brain Sciences* 1.

[560] Charlotte V. O. Witvliet, *et al*, 'Retributive Justice, Restorative Justice, and Forgiveness: An Experimental Psychophysiology Analysis' (2008) 44 *Journal of Experimental Social Psychology* 10; Peter Strelan, N. T. Feather and Ian McKee, 'Justice and Forgiveness: Experimental Evidence for Compatibility' (2008) 44(6) *Journal of*

in restorative justice where victims have enough time and respect to speak out their stories as well as the negative emotions therein can facilitate their motivation to move on. Thus the forgiveness received by criminals will truly accomplish the healing effects of crime to victims, communities, and the criminals themselves.

However, there is a noteworthy concern in forgiveness. As it has been analysed, forgiveness shall not be pushed or compelled. If forgiveness is forced upon victims, the restoration will turn into a denial on the part of victims' need or even a humiliation. Philosophical principles have signalled that hasty forgiveness, or forced forgiveness, is sometimes called "cheap grace" and will harass justice.[561] One who understands the victims' feelings must consider the following:

> "Reconciliation [and forgiveness] is not an event. People cannot simply one day decide that they want to forgive and forget. Most of the victims in this community are committed to a process of reconciliation. They are not necessarily demanding vengeance. They are, at the same time, not simply willing to move ahead as if nothing happened. They demand to hear the truth and to be given time to consider it. They are often not willing to forgive unless the perpetrators show remorse and some form of reparation is offered".[562]

Victims have been harmed once by crimes so that it is absolutely understandable that they take a long time to re-establish their confidence in life and in the future. It does not mean that there will be hardly a hope for forgiveness and reconciliation. Empirical survey on the post-conflict social re-construction in Liberia informs that the

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Experimental Social Psychology 1538.

[561] Jeffrie G. Murphy, 'Forgiveness, Self-Respect, and the Value of Resentment' in Everett L. Worthington Jr. (ed.) *Handbook of Forgiveness* (Routledge 2007), at pp. 33.

[562] Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Psychology Press 2001), at pp. 185.

majority of victims have positive opinions about forgiving criminals, which is more frequently an answer compared to "making criminals face trial".[563] Victims of international crimes are stronger than people think, and they know that reparation and healing is better undertaken with their willingness to forgive and reconcile. Nevertheless, as so many countries have mistakenly understood the meaning of restorative justice and conceptualised forgiveness as a policy to restoration, it shall be reminded that as the centre of restorative justice, victims must not be compelled to express forgiveness, even if forgiveness has many positive influences on deterrence. Similar to shame for criminals, true forgiveness is an internal feeling that cannot be imposed externally.

5. Restorative justice ends impunity in international criminal justice

The principle of non-impunity and anti-amnesty: the concept of accountability

According to the *Oxford English Dictionary*, impunity generally means the "exemption from punishment or freedom from the injurious consequences of an action". This definition shows that non-impunity can be regarded as the practicing of punishment, and furthermore such punishment must be executed to the offenders. In the instruments of international law, impunity is defined as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account"[564]. According to this definition, impunity is also associated with "accountability". Non-impunity, thus, could be acknowledged as "taking accountability of the perpetrators of international crimes".

[563] Patrick Vinck, Phuong Pham and Tino Kreutzer, 'Talking Peace: A Population-Based Survey on Attitudes about Security, Dispute Resolution, and Post-Conflict Reconstruction in Liberia' (2011) University of California, Berkeley: Human Rights Center, at pp. 68.

[564] United Nations Economic and Social Council, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (8 February 2005) UN Doc E/CN.4/2005/102/Add.1.

It is supposed that such accountability shall only be taken through formal criminal justice procedure.

The principle of non-impunity to international crimes has obliged states to take necessary actions to bring perpetrators to justice. The International Law Commission adopted and then submitted its final report named *the Obligation to Extradite or Prosecute* at its 66th session in 2014, which answered the question of how to fight against impunity at international level. In that report, the obligation of fighting against impunity for perpetrators of international crimes demands the following: when a perpetrator is responsible for serious violations of international human rights or international humanitarian rights appears in the territory of a state, that state must take necessary judicial actions to either (i) prosecute the perpetrator; (ii) extradite the perpetrator if it has been proven to be more proper for the interest of justice; (iii) submit the perpetrator to a competent international criminal tribunal/court whose jurisdiction the State concerned has recognised.[565] The obligation to extradite or prosecute is based on the requirement of the rule of law that was adopted by the UN General Assembly at its 67th session in 2012 which declares that

> "[I]mpunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose we encourage States to strengthen national judicial systems

[565] The International Law Commission, 'The obligation to extradite or prosecute: Final Report of the International Law Commission' (2014).

and institutions."[566]

The International Law Commission specifically distinguishes the English expression of "the obligation to prosecute or extradite" from its Latin form, *aut dedere aut judicare*,[567] to make clear the obligation of fighting against impunity is not based on the pure retributive desire. If the principle to end the impunity in international crimes does not demand the punishment of criminals, the obligation of states shall be interpreted as taking proper legal actions, in particular prosecutorial actions, to respond to the serious violations of international human rights law and international humanitarian law, even the criminals might not be convicted eventually. Such nature of impunity may provide a breakthrough to examining the relationship of restorative justice and the formal justice proceedings at the ICC. The principle of non-impunity in international criminal law means taking accountability of the perpetrators of international crimes, but not necessarily punishing them.

This interpretation is supported in international legal documents. The UN High Commissioner for Human Rights investigated the political transition in Sri Lanka and the resolutions of human rights violations in the past, and found that the failure of the Government of Sri Lanka to comply with the obligation to end impunity was caused by the insufficiency to address the accountability for the most serious human rights violations and crimes.[568] In the recent report, the Office of the High Commissioner for Human Rights highlighted that ending impunity through strengthening the accountability of those perpetrators of gross human rights violations had received remarkable outcomes in different states and regions; as well, taking account of the

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[566] UN General Assembly, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (30 November 2012) UN Doc A/RES/67/1, para. 22.

[567] The International Law Commission, 'The Obligation to Extradite or Prosecute: Final Report of the International Law Commission' (2014), at pp. 2.

[568] UN High Commissioner for Human Rights, 'Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' (28 September 2015) UN Doc A/HRC/30/61.

atrocities had also prompted national legislations to protect human rights and the wellbeing of local people.[569] On this point, taking accountability of perpetrators of international crimes has been practically connected to the obligation to end impunity.

Academic studies also underscore the importance of recognising accountability as a contributor to the non-impunity principle. The International Commission of Jurists treasures the value of holding human rights violators accountable for their actions in order to put an end to impunity, restore the rule of law and address the need of victims through the provision of justice accompanied by reparative progress.[570] Relevant research on post-war reconstruction indicates that the wide application of impunity has exposed the confirmation of the lack of accountability in many countries, which denied the wrongness of the criminal actions of past regimes and even denied the very existence of those crimes themselves.[571] Taking no accountability of past international crimes, which is a violation of the non-impunity principle, can cause continuous instability to a country, thus undermining the efforts toward sustainable nation building.[572] The lens of non-impunity principle shall not be limited to that perpetrators of international crimes must be punished in accordance with the set penalties in international law. Rather, it requires that the perpetrators must take accountability to the atrocities that they committed to victims and the community.

The principle of non-impunity in international criminal cases is linked with amnesty. Amnesty usually implies that no penalty would be sentenced to the offenders. The *Oxford Dictionary of Law* defines amnesty as "an act erasing from legal memory

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[569] The Office of UN High Commissioner for Human Rights, *OHCHR Report 2016* (May 2017).

[570] The International Commission of Jurists, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7, at pp. 25.

[571] Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661.

[572] Rena L. Scott, 'Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges' (2005) 33(3) *International Journal of Legal Information* 345.

some aspects of criminal conducts by an offender" and it is "wider than a pardon which merely relieves an offender of punishment". According to this definition, amnesty is perhaps the most intolerable form of impunity for perpetrators of international crimes. It may not the case in discussing issues in relation to amnesty in international criminal law.

In the discussions on international law, amnesty may not be understood differently as impunity. The Office of the UN High Commissioner for Human Rights (OHCHR) provided in its publication that amnesty has the legal effects to prospectively bar criminal prosecution and any forms of civil actions against the perpetrator(s) of international crimes, and retrospectively nullify the legal liability of such person(s).[573] The definition of amnesty concluded by OHCHR regards amnesty and impunity for international crimes as having similar effect, though it had distinguished amnesty from official immunity in the later part of the same publication.[574] Official immunity for perpetrators of international crimes is often referred to the situation that officials of a State can be shield from being prosecuted at a foreign court. Amnesty for international crimes, which is usually granted by an authority of a State to its own civilians, triggers the legal effect that other competent national or international court could exercise jurisdiction over the crime and repeal the extraterritorial effect of such amnesty.[575] Normally, in the situations of serious human rights violations and gross violence, impunity is guaranteed to the offenders through national amnesty legislation. In nature, the principle of non-impunity and anti-amnesty in international crimes both insist that there shall not be obstacle to exert criminal prosecution against the perpetrators. For the perpetrators who are not officials of a State, non-impunity and anti-amnesty are of the

[573] UN OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009), at pp. 5.

[574] Ibid.

[575] See *the Prosecutor v Anto Furundžija* (Judgement) IT-95-17/1-T, Trial Chamber (10 December 1998), para. 155.

same legal effect. In this perspective, anti-amnesty is also centred on the accountability that perpetrator must take.

Michael P. Scharf argued for amnesty in dealing with issues in on-going conflict and post-conflict States, and stated that "amnesty is not equivalent to impunity".[576] But his argument did not regard non-impunity as taking accountability. In fact, his argument highlighted the significance of accountability in practicing amnesty:

> "It is a common misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress… [A]mnesty is often tied to accountability mechanisms that are less invasive than domestic or international prosecution. Where amnesty has been traded for peace, the concerned governments have made monetary reparations to the victims and their families, established truth commissions to document the abuses (and sometimes identify perpetrators by name), and have instituted employment bans and purges (referred to as 'lustration') that keep such perpetrators from positions of public trust. While not the same as criminal prosecution, these mechanisms do encompass the fundamentals of a criminal justice system: prevention, deterrence, punishment, and rehabilitation."[577]

It is the capability of amnesty to achieve certain forms of accountability of the atrocity perpetrators that has made many experts to advocate such measure. However, the ICC has its own way to judge the implication of accountability. The capability of amnesty to achieve accountability has not been acknowledged at the ICC.

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[576] Michael P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 33(3) *Symposium* 507, at pp. 512.

[577] Ibid.

The complicated attitude toward amnesty

The way to view non-impunity and anti-amnesty has influenced the work of the ICC Prosecutor. In examining the role of the ICC in the transitional justice in Colombia in 2015, the OTP affirmed that one crucial purpose to establish the ICC was to hold the individuals accountable for the serious crimes they committed,[578] and there could be many ways to achieve such accountability in transitional justice.[579] Amnesty to some crimes could be granted through national practice, however, it should not be issued for the most responsible persons whose acts were involved in Rome Statute crimes.[580] This statement emphasised the importance of holding accountability of the perpetrators for the most serious atrocities, but refused to admit amnesty for the most responsible people as an adequate way. In September 2015, the Special Jurisdiction for Peace (SJP) was established as the judicial component for the transitional justice in Colombia, which is based on the peace agreement signed by the Government of Colombia and the rebellion group. The Prosecutor noticed in the annual Preliminary Examination Report for 2015 that the legal text for SJP had excluded the amnesty for Rome Statute crimes[581], and expressed the will to respect the effort at domestic level to end impunity of international crimes.[582]

In the 2017 Report on Preliminary Examination, the Prosecutor underlined that the Amnesty Law in Colombia enabled granting amnesty for war crimes committed in systematic manner, warning that it might result in the admissibility of the situation in

[578] James Stewart, Deputy Prosecutor of the ICC, keynote Speech in the Conference of 'Transitional Justice in Colombia and the Role of the International Criminal Court' (13 May 2015), at pp. 3.

[579] Ibid, at pp. 8.

[580] Ibid, at pp. 14-15.

[581] The Office of the Prosecutor, 'Report on Preliminary Examination Activities (2015)', para. 148.

[582] Ibid, para. 167.

Colombia at the ICC.[583] In 2018, the Office of the Prosecutor reviewed the transitional justice in Colombia one more time. In the review, the Office of the Prosecutor addressed that the values shrined in the Rome Statute are share by States Parties of the ICC, which "embrace accountability, to put an end to impunity for crimes, such as war crimes and crimes against humanity, and deterrence of the commission of such crimes."[584] As to the transitional justice approaches, the OTP paid specific attention to the changes in the Amnesty Law in Colombia which overruled the granting of amnesty for war crimes of systematic manner in the original text in 2016. The OTP praised the changes, and iterated the importance of being consistent with "the position that OTP takes".[585] Once again, the Office of the Prosecutor announced that amnesty could be granted in transitional justice process, but would never be applied to the crimes within the jurisdiction of the ICC.

The attitude to amnesty has been self-consistent at the ICC. In the situation of Uganda, the granting of amnesty for Joseph Kony and others was examined in Pre-Trial Chamber II's Decision on the admissibility of the case, which indicated that the amnesty legislation in Uganda had limited the capacity of Ugandan authority to pursue proper accountability.[586] The Decision of the Court invoked the discussion on the ICC's impact to peace and justice. During the Review Conference of the Rome Statute in 2010, the topic "Peace and Justice" was discussed in the panel run among several experts, receiving many written contributions as material background. The moderator of the panel listed many disadvantages of enabling amnesty to deal with international

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[583] The Office of the Prosecutor, 'Report on Preliminary Examination Activities (2017)', para. 146.

[584] James Stewart, Deputy Prosecutor of the ICC, keynote Speech in the Conference of 'Transitional Justice in Colombia and the Role of the International Criminal Court' (30-31 May 2018), para. 20-21.

[585] Ibid, para. 130.

[586] *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen* (Decision on the admissibility of the case under article 19(1) of the Statute) ICC-02/04-01/05-377, Pre-Trial Chamber II (11 March 2009).

crimes, including that amnesty "often did not lead the hoped-for peace" in short term, and "failing to address crimes could result in renewed cycle of violence" in long term.[587] Although all the participants of this panel acknowledged that amnesty is not an option for the most serious crimes under the Rome Statute, many also suggested that amnesty could have played significant role in the situation of transitional justice in making peace.[588]

Four experts were invited to give lectures in this panel. Mr. David Tolbert, the President of International Center for Transitional Justice, highlighted the impact of amnesty in peace negotiation to end on-going conflict. He also noted that the Prosecutor should be mindful to the political reality and meanwhile avoid to get involved into politics. It was also suggested by Mr. Tolbert in the discussion panel that some mechanisms other than judicial process could help to achieve reparation, reconciliation and security, which "could be a fundamental complement" to the formal criminal justice for the perpetrators.[589] Mr. James LeMoyne and Mr. Barney Afako respectively spoke of their experience in Colombia and in Uganda, implying their support to amnesty for ending conflict. Mr. LeMoyne pointed out that though justice would make peace long-lasting, there were also some example in which peace was achieved without addressing justice.[590] Mr. Afako emphasised the opinion in local population in hoping that the armed conflict could be ended by granting to the rebels. Among other issues, such as the lack of capability of the ICC to enforce the warrants of arrest again the LRA leaders, Mr. Afako admitted that ICC's indictment had play a key role that LRA leadership

[587] 'Review Conference of the Rome Statute of the International Criminal Court', Official Records, Kampala (31 May – 11 June 2010), at pp. 102.

[588] Ibid, at pp. 103-106.

[589] Ibid, at pp. 103.

[590] Ibid.

decided not to sign the peace agreement.[591] What is noteworthy is that both Mr. LeMoyne and Mr. Afako advocated to utilise flexible measures in the work of peace negotiation process.[592] Mr. Youk Chhang, Director of the Documentation Center of Cambodia, on the contrary, expressed the idea that justice against the offender of serious human rights violations could be late, but should never be delayed.[593] He argued for the role of justice as essential for a broken society and preventive to future crime, and urged real criminal court in dealing with atrocities in the past.[594] One significant reason for the opinion of Mr. Chhang to be different from other panellists' may be the security situations, that Cambodia was facing post-conflict social rebuild, but in Colombia and Uganda armed conflict was still a threat. Different situations made them worry different problems. It did not contest the short term effect of amnesty in peace negotiation, but simply suggested that when social security had been controlled, amnesty for perpetrators of international crime would not be necessary. The general opinion on amnesty that had been reflected in discussing peace and justice in the 2010 Review Conference, according to the panellists' statements, was that notwithstanding amnesty being prohibited under Rome Statute, it should still be carefully weighed based on realistic issues.

The received written materials for the panel also displayed a complicated situation. Many experts steadily support the ICC's position that amnesty should not be granted to the persons responsible for the most serious crimes. For example, professor Juan E. Méndez criticised the idea that peace could be achieved through negotiation which granted amnesty by indicating that any peace process was not initiated in Sudan until

[591] Ibid, at pp. 104.

[592] Ibid, at pp. 103-104.

[593] Ibid, at pp. 105.

[594] Ibid.

ICC decided to intervene the situation.[595] He highlighted the influence of the formal criminal justice at the ICC in preventing violence and in marginalising the alleged persons. He might have missed some points that in the examples listed in his argument, in the situations where the ICC's work was believed as playing an important role, such as Côte d'Ivoire, Georgia, and Sudan, external political and military influence could have played a much bigger role than the ICC. Some recent developments in the security issues in Africa, particularly in Sudan, has shown that ICC's role in preventing violence and marginalising the alleged persons has not been a total success. Nevertheless, his statement did remark one core problem of the ICC's work, that for long-term success the ICC needs all States Parties' sincere cooperation. "If the ICC is contemplated simply as a lever, it will be undermined as some will expect it to be turned on and off as political circumstances dictate."[596]

Another expert, Yasmin Sooka, did not discuss amnesty in international criminal cases. Instead, she analysed combating impunity under such situation. It mentioned in the article that the recent armed conflicts were intrastate struggles, which caused much more damage for civilian population of the State than for other States. The "hit and run" tactics in the intrastate struggles made it very difficult to end the conflict with military interference. Therefore, the intrastate armed conflicts had to be ended with peace deal, granting amnesty to the combatants.[597] However, the solution of ending armed conflicts with granting amnesty had been rejected by the ICC in its work. Furthermore, the aftermath of the signing of a peace deal is more significant because "[a]ttitudes and behaviours do not change from genocidal to collegial just because of a declaration of

[595] Juan E. Méndez, 'The Importance of Justice in Securing Peace', in the Review Conference of the Rome Statute (30 May 2010), RC-ST-PJ-INF.3-ENG-30052010.

[596] Ibid, at pp. 6-7.

[597] Yasmin Sooka, 'Confronting Impunity: The role of Truth Commissions in Building Reconciliation and National Unity', in the Review Conference of the Rome Statute (30 May 2010), RC-ST-PJ-INF.5-ENG-30052010.

peace".[598] The system of impunity would undermine the peace building process, regardless whether a peace agreement had been signed or not. The question in peace building is not "whether to pursue justice and accountability, but rather when and how".[599] The discussion in this article exposed the nature in the debate of "peace and justice": the accountability. Taking the accountability of the perpetrators of international crimes is indisputably welcomed by all people- except for the perpetrators themselves, of course- if there is any chance to achieve justice without sacrificing peace. However, the time and the way to take the perpetrators accountable must be carefully calculated.

The UN Special Rapporteur, Sean Murphy, also discovered the difficulty in taking the accountability of the perpetrators. In the third report on crime against humanity, it informed the UN General Assembly on behalf of the International Law Commission that on the one hand, "[a]mnesties have been found impermissible by regional human rights courts because they preclude accountability under regional human rights treaties".[600] But on the other hand, it also finds that amnesty has been utilised through history in States' practice, even for serious crimes.[601] Treaty law and case law provide evidence to both supporting amnesty and precluding amnesty, making it hard to conclude whether there exists consensus on the absolute prohibition of amnesty in dealing with international crimes. Specifically, it points out that the Protocol II additional to the 1949 Geneva Conventions has clearly encouraged States to end armed conflict with amnesty, which is read as

"At the end of hostilities, the authorities in power shall endeavour to

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[598] Ibid, at pp. 1.

[599] Ibid, at pp. 5.

[600] UN Special Rapporteur, Sean D. Murphy, 'Third Report on Crimes against Humanity' (23 January 2017) UN Doc A/CN.4/704, at pp. 135.

[601] Ibid, at pp. 131-133.

> grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[602]

Professor Schabas examined this treaty law by checking the original draft, but found it not sufficient to exclude amnesty granted to international crimes.[603] It is explained that it is the wisdom in utilising amnesty to solve issues in conflict that must be respected:

> "Human societies have been negotiating peace agreements since the beginning of recorded time. Amnesties have often been part of such transitional justice mechanisms, which existed, after all, long before the modern term 'transitional justice' had been invented. The relevant treaty provisions probably reflect the inherited wisdom derived from these peace processes."[604]

In the analysis on amnesty and international law, professor Schabas checked Sierra Leone's peace agreement which granted amnesty for war crimes, and referred States' attitudes of acquiescing in the amnesty when it was discussed at the UN Security Council in 1999.[605] It was not the peace agreement that international community objected, but the capability to hold the accountability of the most responsible persons for the serious crimes. The Delegate for Sierra Leone admitted that the negotiation between the Government of Sierra Leone and the rebel group was long and painful, but local people had prepared for the coming peace. It was stated by the Delegate of Sierra

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[602] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Para. 5, Art. 6 (8 June 1977).

[603] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at War Crime Tribunals* (Oxford University Press 2012), at pp. 180-181.

[604] Ibid, at pp. 178.

[605] Ibid, at pp. 180-181.

Leone that

> "Despite the destruction of life and property and the maiming committed by the rebels against the people of Sierra Leone, including children as young as six months old, they are prepared to bury the hatchet for the sake of permanent peace. It is a bitter pill to swallow, but that is the price they are prepared to pay for peace."[606]

The Delegate of UK expressed the understanding to Sierra Leone's choice, and noticed that international community must help Sierra Leone to ensure taking accountability of the alleged person.[607] The Delegate of Netherlands disagreed with the amnesty in the Sierra Leone's peace deal, and underlined that without taking accountability of the heinous crimes there would be no lasting peace.[608] The Delegate of US stood at the position to support the peace deal and the amnesty, and in the meantime urged for the pursuit of accountability of the international crimes.[609] The opinion of these three Delegates are typical examples demonstrating the worries in making compromise to amnesty and in fighting against impunity. It must be noted that during the whole process of discussion, the idea of accountability was not challenged by any State Member. Delegates tried to seek the satisfactory way to guarantee to end impunity of international crimes from different angle of understanding accountability, which made them struggle in viewing amnesty. It clearly evident the fact that the concept of accountability is the key to adjust the relationship between amnesty and non-impunity principle in international criminal justice.

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[606] UN Security Council, 4035th Meeting, UB Doc S/PV.4035 (20 August 1999), at pp. 3.

[607] Ibid, at pp. 4.

[608] Ibid, at pp. 13.

[609] Ibid, at pp. 14.

The turning point: pursuing non-impunity beyond punitive response

The accountability has been understood in retributive way, as it has clarified in the early part of this chapter. The retributive ideology at the ICC, especially that held by the Prosecutor, is that the perpetrators must be prosecuted in the formal justice procedure, and when convicted, they must be given the desert set in the Rome Statute. In other words, the accountability at the ICC is based on the penalties in the Rome Statute system, and the Prosecutor is the core in achieving such accountability.

This insistence on the key role of the ICC in pursuing accountability of the perpetrators of international crimes could be helpful in avoiding the ICC from being marginalised in international criminal justice. But if States' practice and local culture have not been respected, such effect might be weakened, because the States whose situations have been intervened by the ICC's work would feel detached from the Court. Now the granting of amnesty cannot be used as a gist by the Defendant in court. The most responsible persons for international crimes must go through prosecution at domestic court or at the ICC, leaving no place for amnesty and very limited space for restorative approaches. As a result, the perpetrators are asked to be accountable for legal principles and the Court, but not for victims and the affected community. The negative side of the ICC's view on accountability has been analysed by scholars. It has been argued that

> "[T]he anti-amnesty norm has been justified predominantly as a component of a battle against impunity, and impunity has been understood virtually entirely in non-consequentialist terms, as a retributive principle of narrowly defined criminal justice according to which the desert of punishment alone grounds a positive duty to prosecute and punish, on deontic grounds. If this positive duty- either alone or in combination with the rights of victims to legal remedy- is

> taken as a serious side constraint to any consequentialist evaluation of policy options for overcoming endemic violence, then the anti-amnesty norm seems… to be fatally weak, intuitively implausible, and very defeasible by the kinds of consequentialist considerations…"[610]

For making the pursuit of accountability more meaningful and more realistic for fulfilling the goal of achieving justice, the ICC must recognise the accountability for the perpetrators of international crimes, and shall take the idea of restoration into the consideration of accountability. Being responsible for international law is just one aspect in non-impunity principle. Restorative justice idea, which has been affirmed by the ICC on different occasions, requires the Court to take one brave step forward.

For fighting impunity, the penal system in international criminal law is not the only path. The UN Human Rights Council proposed that

> "The occurrence of a human rights violation gives rise to a right to receive reparation for or on behalf of the victim or their beneficiaries, and a duty on the part of the State to make reparation and provide a possibility for the victim to seek redress from the perpetrator. The right to the truth entitles the victims, their relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation was officially authorized, as well as the extent and pattern of past violations, and their root causes. It requires States to establish processes that lead to the revelation of the truth about what took place. Such processes contribute to the fight against impunity, the reinstatement of the rule of law and,

[610] Max Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law' (2008) 1(1-2) *Ethics and Global Politics* 1, at pp. 20-21.

> ultimately, reconciliation. Truth-seeking processes also contribute to the prevention of violations through specific recommendations, including on reparations and reforms."[611]

Professor Bassiouni expressed the same idea before the Rome Statute went into force, stating that the elimination of impunity in dealing with international crimes calls for more efforts than those in formal criminal justice, and that "the ICC will not prevent injustice, conflicts, or crimes. It will neither end impunity nor will it consistently achieve justice. The ICC is merely an added means by which to achieve accountability".[612]

Non-impunity does not necessarily mean that criminals of atrocities must be punished in the way stipulated in criminal law, nor does it limit relevant activities to absolute legalism; the obstacle between restorative justice and the ICC, which is placed by impunity/amnesty, should not be problematic anymore. As it has been introduced in the third chapter, restorative justice is not made of a certain pattern or model with constant steps. Rather, it is more about criminal philosophies and concepts.[613] So, theoretically speaking, restorative justice does not pay too much attention to what methods should be used in its process. Restorative justice may be seen as a practice of the philosophy of pragmatism, which may utilise different measures to fulfil one purpose or value.[614] In fact, the proponents of restorative justice do not spend time in recognising the philosophy behind the restorative justice idea. They focus more on the values of restorative justice.

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[611] UN Human Rights Council, 'Report of the Group of Independent Experts on Accountability' (24 February 2017), advance edited version, UN Doc A/HRC/34/66/Add.1 (internal citations omitted).

[612] M. Cherif Bassiouni, 'Combating Impunity for International Crimes' (2000) 71 *University of Colorado Law Review* 409, at pp. 420.

[613] See Susan Sharpe, *Walking the Talk: Developing Ethics Framework for the Practice of Restorative Justice* (Fraser Region Community Justice Initiatives Association 2011).

[614] See William James, *The Meaning of Truth* (Harvard University Press 1975), vol. II.

The first and pivotal value of restorative justice is the engagement of all parties of the criminal case. Many supporters of restorative justice criticise formal criminal justice, as it does not consider victims' needs throughout its procedure. The criticism demonstrates that formal criminal justice puts focus on laws and how certain behaviours break the law. Therefore, it leaves little space for victims to fully participate in the criminal procedure. Furthermore, formal criminal justice positions crime between criminals and States rather than victims who are really harmed by the criminal behaviours, neglecting the requirement of the victims' healing needs.[615] Others argue that formal criminal justice drives offenders away from victims because they concentrate on their "fight" with prosecutors.[616] Also, there are many other stakeholders who may be influenced by the crime but have no opportunity to take part in formal criminal justice. For restorative justice, "[s]takeholder participation is a central component and core value".[617] It encourages all parties to solve the issue caused by the crime positively, rather than denying each other's responsibility. As well, "the goal [of participation and engagement] is to build understanding, to encourage accountability and to provide an opportunity for healing".[618] From this angle, restorative justice reaches further in compliance with the principle of non-impunity, rather than violating it. The improving function of restorative justice to non-impunity principle in international criminal law needs to be executed in association with the power of a well-acknowledged organisation, so that the idea of taking accountability will not be void. In international criminal cases, non-impunity does not forbid the

[615] Dennis Sullivan and Larry Tifft, *Restorative Justice: Healing the Foundations of Our Everyday Lives* (Criminal Justice Press/Willow Tree Press 2001).

[616] Jim Consedine, 'Restorative justice: Healing the effects of crimes' (2 December 2003) at Restorative Justice and Probation Conference, Warsaw, Poland.

[617] 'Restorative Justice and Crime Prevention: Presenting a Theoretical Exploration, an Empirical Analysis and the Policy Perspective' (April 2010), Final Report of the European Project *'Restorative Justice and Crime Prevention'*.

[618] Department of Justice (Canada), 'Values and Principles of Restorative Justice in Criminal Matters'.

possibility for perpetrators to participate in the restorative justice process and meet with victims face to face. Restorative justice may be against amnesty, because the basic idea of amnesty is to erase all criminal accountabilities of the offenders, but restorative justice pursues a complete form of accountability.

Another value of restorative justice is addressing the harm as an aftermath of crime. The process includes both the healing of victims and the listening to offenders. Redressing is different from solving. In restorative justice, addressing an issue often means to recover the damage caused by crime and to calm both the victim and offender with the belief that crime may result from social injustice.[619] For addressing the harm, there should be a peaceful environment in which victims and offenders can describe the crime from their respective view and then heal each other's feelings. This is specifically useful for mental harm caused after the crime was committed. Amnesty may create an environment for victims and perpetrators, which allows the elimination of their legal obligations; however, the elimination of legal obligations could be a big obstacle to the healing process for victims. On the one hand, restorative justice does not prefer the usage of punishment for the offenders, but on the other hand and on the basis of its theory punishment is not naturally paradoxical to the idea and values of restorative justice.[620] In other words, there could be criminal punishment to offenders in restorative justice, if it is the outcome of the peaceful address of the crime. The value of preferring peaceful resolution of the damage of international crimes also fulfils the requirement of non-impunity principle.

The value of respecting the diversity in achieving accountability can ease the confliction between the ICC and amnesty, or even make them mutually compatible

[619] This opinion implies that to fully solve crime it is beneficial to listen the stories of offenders as well. See Daniel W. Van Ness and K. H. Strong, *Restoring Justice: An Introduction to Restorative Justice* (5th edn, Anderson Publishing 2015).

[620] Conrad Brunk, 'Restorative Justice and the Philosophical Theories of Criminal Punishment', in Michael L. Hadley (ed.) *The Spiritual Roots of Restorative Justice* (State University of New York Press 2001), pp. 31.

under the principle of non-impunity. This value broadens the understanding of the ICC on the concept of accountability, making it more than retributivism. Taking accountability of the perpetrators can be retributivism, or deterrent, or rehabilitative. But the ultimate aim of justice through taking accountability shall be restoring the damage caused by the crime. Prosecution of the crimes does not to be sacrificed for accepting amnesty, because it is just the initiative step for justice. In the justice process, flexible approaches can be used at the ICC in accordance with reality, so that the Court does not confine itself from acknowledging States' practice. In this way, the ICC could earn respect of States rather than posing itself over all States. Through mutual respect between the ICC and States, the ICC's work will get more cooperation because people believe the ICC is here for resolving the problems in international criminal cases, not making situations more complicated. In addition, a broader understanding of accountability that asks the perpetrators to repair the damage they caused to victims and the affected community will allow the Court to hear more voice from both victims and the alleged persons. Hence, both victims and offenders will feel that they are valued, and their words matter for the Court. It is helpful for clarify the whole picture of the truth about the crime, thus the justice pursued at the ICC can be more meaningful and tangible for the stakeholders, beyond punitive treatment for the convicted persons and barely compensation for victims.

Other aspects of restorative justice, such as community caring, respectful dialogue, forgiveness, apology, and making amends[621] are all important approaches in taking personal accountability of the perpetrators of international crimes. They are all based on the values that engage stakeholders for restoration through flexible process. These values are all centred at the dignity of human beings and the mutual respect between the stakeholders in international crimes. Because the principle of non-impunity is not

[621] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002).

about punishing but taking accountability of the perpetrators of international crimes, utilising restorative justice in international criminal justice is not the violation of such principle. The considerations that can be added by restorative justice to international criminal justice is that the perpetrators shall be responsible to the people they harmed, which is beyond the criminal responsibility set by law.

In conclusion, under a broader meaning of accountability, restorative justice complies with the legal proceedings of the ICC even according to the principle of non-impunity. Restorative justice makes perpetrators of atrocities accounted in several ways which include legal sentences, participation to community re-building, apology to victims, re-confirming the culture and values in the damaged society, re-integration and reconciliation, *etc*. In fact, restorative justice offers to the ICC more types of accountability in fighting against impunity; in addition it equips the ICC with a "zero tolerance policy"[622] to crimes, which precisely echoes the legal principles of the Rome Statute. Furthermore, blanket amnesty is not tolerated in restorative justice because it harms victims for a second time and grants criminals the un-thinkable privilege of taking no accountability for their crimes.

6. Summary

This chapter firstly indicates that the idea of restorative justice has been accepted and advocated at the ICC in many formal occasions. However, the way to understand restorative justice is wrong. If the ICC can take the idea of restorative justice seriously and utilise restorative justice in a correct way, the difficulties in achieving retribution and deterrence can be overcome. Furthermore, it is necessary for the ICC to evolve its view on justice to a more restorative one. Also, it is urgent for the ICC to consider

[622] Peter Lindström, 'Zero Tolerance Criminal Policy and Restorative Justice' in Elmar G. M. Weitekamp and Hans-Jürgen Kerner (eds.) *Restorative Justice in Context: International Practice and Directions* (Willian Publising 2012).

international crimes as firstly the atrocities against real humans, then as the violations of international law. Humanity shall be at the centre of international justice, but not the words in the provisions of international law.

Conclusion

The first situation that was referred to the ICC by a Member State, the situation of Uganda, did not leave a very positive impression of the ICC to the international community and local Ugandan people. The warrants of arrest against the alleged criminals firstly became a strong factor to convince the warring parties, including the Ugandan government, to consider to end the long-lasting conflict with peace agreement. The involvement of the ICC was used as an important support to disarm the opposition groups and achieve permanent ceasefire eventually. Hence, it was hoped that the ICC would bring peace as well as deliver justice. However, when the alleged criminals realised that it was not possible for them to exchange the privilege of being un-prosecuted at the ICC with the declaration of participating the peace negotiation with the Ugandan government, the ICC's work turned to the obstacle to achieving peace. In many people's opinion, including many scholars, the ICC's insistence of its jurisdiction over the cases in Ugandan situation has caused serious problems to ending the mass violence sooner. One of the most remarkable problem is that whether the ICC, which represents international law mechanism, should compromise to the possible chance to achieve peace and retrieve the issued warrants of arrest, even the formal criminal process had initiated.

The ICC faced a critical issue that had also occurred in the pre-existing *ad hoc* or special court of international crimes: compromising to peace or insisting on justice. The dilemma has been haunted international criminal justice since the difficulties in prosecuting Radovan Karadžić and Ratko Mladić at ICTY, and Charles Taylor at SCSL when they were still in charge of political and military power. The ICC did not choose to compromise with the alleged criminals' requests, and the "justice" of the ICC was believed as ruining the chance for peace. The dilemma has been abstracted as the conflict between peace and justice, which makes peace and justice a couple of

incompatible “trophies” for international criminal justice. The topic of “peace versus justice”, in which restorative justice is seen as the path to peace and the legal mechanism at the ICC is regarded as the platform of justice, has become one of the most difficult problem for the ICC.

However, is it errorless that peace and justice cannot be achieved harmoniously? Or, can the spirit of peace be integrated into the effort to justice at the ICC? The deeper analysis on the situation of Uganda indicates that both peace and justice are very important to local people and the whole country, and it is hard to tell whether peace is more desirable than justice. This discovery is supported by some field studies on the impact of the ICC to Uganda. Those field studies, which aim at clarifying the real attitude of Ugandan people to the crimes prosecuted at the ICC, demonstrate that there needs an approach through which truth-telling, regret and reintegration of former offenders, forgiveness and reparation of victims, community rebuild, just process and deserved punishment for the criminals, can be equally accomplished. These goals all are believed indispensable to both peace and justice. In other words, if it is true that restorative justice attributes to peace and the legal mechanism at the ICC delivers justice, restorative justice and the ICC need to coordinate to achieve those goals. But restorative justice has always been placed to the opposite side of the formal criminal justice at the ICC in almost all the researches. The main problem between restorative justice and the ICC is the so-claimed issue of “impunity/amnesty” for the indicted criminals. What has been upheld among researchers is that restorative justice is based on non-punitive treatment to criminals, which grants huge space to impunity and amnesty; but the principle of non-impunity to international crimes is the fundamental rule in international criminal justice, which leaves no permission to impunity or amnesty. The question is that only a few studies have discussed the relationship between restorative justice, impunity/amnesty, the international criminal justice, and the real function of restorative justice in dealing with international crimes.

The cases at the ICC and at the other international courts display a very complicated picture on what is the effective and satisfying way to solve the mass violence and serious human rights violations, as well as the social restoration issues. Firstly, not every country which experienced mass violence has decided to solve the problems through restorative justice, but impunity or amnesty has been announced. This solution shows that restorative justice and impunity/amnesty are not necessarily linked, because restorative justice aims at reparation, but impunity/amnesty is simply a way for the perpetrators to continue their life without being prosecuted or punished. Impunity/amnesty does not need restorative justice to be triggered, and restorative justice does not always result in impunity/amnesty. On this point, the premise that restorative justice grants impunity/amnesty is not accurate in reality. Secondly, in the countries where impunity/amnesty was announced as a policy to solving the mass violence in the past, peace was not always guaranteed as the outcome. In fact, in many cases, impunity/amnesty might have brought ceasefire temporarily, but eventually did not make peace last. Sometimes the granted impunity/amnesty, especially the blanket amnesty, deteriorates the domestic environment toward peace building and national reconciliation, because peace and reconciliation must be reached from both ends. The granted impunity/amnesty makes criminals think that they have been officially absolved from the crimes they committed, so that they don't need to do anything needed to pacify the feeling of victims or the victims' families. However, to the people who suffered from the crimes, the granted impunity/amnesty to the former criminals, particularly the high-rank criminals, only means unfairness and the continuation of their pain, which undermines the foundation of peace. As a result, granting impunity/amnesty may be able to bring ceasefire between different parties in short term, but will also plant the seeds of hatred among people and the desire of taking vengeance against the national authorities. The statement that restorative justice is able to bring peace because it grants impunity/amnesty shall be rethought carefully. In fact, the core of restorative

justice is that the criminals must take the accountability to what they have done to the victims and the community, which is "zero tolerance" to crime rather than granting impunity/amnesty. The criticism against the ICC which is based on the benefit of impunity/amnesty to peace shall be regarded as pointless.

In the countries where there is only formal criminal justice but no restorative justice approach, the justice proceeds slowly and sometimes results in dissatisfaction for victims, offenders, and the affected community. For one reason, the judgements against alleged criminals are often held by the victors in the conflict. Or the prosecutions and judgements are usually against the defeated, because any attempt to bring justice to the individuals who are in power of ruling has not been successful yet at the ICC. Such reality leaves an image that justice against international crimes relies on political power, and that the ICC has to be aligned with the people who are in charge of the government even they are not innocent. Another reason is that the formal justice process, at both domestic and international level, neither carefully listens to the victims' voice nor pays attention to making the alleged persons feel regret and the victims feel being respected. That is because making the perpetrators feel regret is not as important as collecting evidence to prove their guilt, and making the victims feel being respected is not as significant as using them as witnesses to assist the prosecution. This way to solve the issues resulting from international crimes is never helpful to achieve both peace and justice, for the root causes that "nourish" mass violence and serious human rights violation have remained untouched. To this point, the justice at the ICC is incomplete because the ICC has to weigh the political power of every side in its work; the effort to peace can be hardly achieved through the current legal framework because it has very limited influence to encourage the local people to accept the "peace" that is only made between political parties. The tension among people must be alleviated so that long-lasting peace can become true, on which economic development, democratic system, as well as stable ruling of the government depend on.

Many countries have realised the importance of bringing peace through national reconciliation, and that formal criminal justice process alone cannot achieve such a goal. Consequently, as the most renowned example of solving the tension between different racial groups, the Truth and Reconciliation Commission in South Africa has been learned by numbers of other states. In all the practices of the TRC mode, restorative justice has been claimed as the central and guiding element of the whole process. However, the TRC in South Africa is not seen as a perfect example of restorative justice. During the transition of South Africa, many people were forced to participate the process and asked by the authorities to accept the apologies from the criminals. In addition, the problem that victims' voice was not carefully heard has been often criticised, which, however, turned out the common and fatal problem to almost all the countries that pronounced to activate "restorative justice" to solve the post-conflict issues. For the ruling party and the authority of a country, taking victims and offenders to the table of talks to accomplish the so-called "restorative justice" process is beneficial to leave a positive image to the outside world. But the misused restorative justice can only bring more pain to victims and even criminals if the government cares only its own profit.

The core of restorative justice is "restoration". It requires that all the sides in a crime to participate the talk where truth, feelings, need and plans are communicated between all the "stakeholders". The value of restoration is that the aim of criminal justice is to correct the wrong-doings, and decrease effect of the damage that was caused by the crime. The process of restoration shall be peaceful rather than conflictive, because in restorative justice the wrong-doers must accept their accountability for what they have done. Restorative justice combines peace and justice with the consideration of the need of victims, offenders, and the affected community. Restorative justice is complicated and needs professional commissioners to practice. The reason why restorative justice is often misunderstood in transitions of countries is that the value of

human rights and human dignity has not been fully respected. The TRC in Sierra Leone can be seen as the best example where the two tracks of restorative justice and formal criminal justice "synergised" smoothly. The experience of the Sierra Leone TRC indicates that restorative justice and formal criminal justice can coordinate if both the platforms are operated by professionals, even when dealing with international crimes. The success of Sierra Leone TRC may be further improved if restorative justice and the mechanism of international criminal justice become one, instead of just synergising.

In regard with justice, the ICC also needs to make improvement to its work. There are two main aspects in the ICC's justice: giving the criminals what they deserve, and deterring the commission of international crimes in future. Unfortunately, the ICC has not done satisfying work on either aspect. In measuring the desert for the criminals, it has been widely argued that the punishment to perpetrators of international crimes can never "reciprocate" the damage and wickedness of their crime. Punishing several individuals at the ICC cannot make the wrong right again because the crimes have affected a large number of people in a great extent of time, and at times the crimes have involved many different areas or even different states into chaos and havoc. The serious consequences of international crimes have decided that normal punishment to the perpetrators is not a just resolution. Victims and communities need more reparation than seeing the criminals being sentenced. Furthermore, the complex historical background of many international crimes makes the penal system at the ICC debilitated to convey the sense of condemnation to the alleged and the followers since those crimes have been often committed by all sides in the conflict. As it has stated above, being judged by the "enemies" or the court that is aligned with "enemies" does not make the perpetrators acknowledge the wrongness of the crimes, and weakens the acceptability of the justice at the ICC. The diversity of cultures in different states also exposes the simplified mode of justice at the ICC. Although the ICC has initiated many outreach work to make the people who have suffered the international crimes understand more about the

organisation, the people being willingly to communicate with the ICC may not agree on the ICC's view of justice. The ICC needs to be more flexible to the cultural elements when dealing with international crimes, for that the justice which is close to the local people's custom will go deeper in their mind. Desert and deterrence, or accountability and desistance, tightly connect with each other in resolving the issues in international crimes. The ICC must recognise that the perpetrators shall be taken accountability on the behalf of victims in order to alleviate the tension between them to achieve deterrence; and for achieving deterrence the perpetrators must be given the rightful desert which is assented by both victims and the perpetrators.

The reparation to victims also needs to get improvements. Victims are not able to fully express their feelings and opinions before the ICC, and usually they are asked to make statements on certain issues, which are necessary to the Court, rather than to all other aspects. The protection of victims, especially when they are also key witnesses, is questionable given the incidents in the situation of DRC. The reparation for victims at the ICC may have failed victims in two ways: the dependence on related legal procedures making reparation beyond the legal facets of cases, impossible and the insufficiency in material and mental reparation for victims. The key problem for the ICC in achieving effective and efficient reparation is that it integrates the interests of victims into the sought-after justice but has not considered essential changes of its structural ideas on justice. The justice on which the reparation is determined at the ICC askes the victims to respect what the ICC upholds, but does not appear considerate enough to what may be more important to victims. The apologies and acknowledgement of the crimes from the alleged persons, which is irreplaceably powerful to victims and the other former perpetrators, are more crucial to make victims feel hopeful, to lead other perpetrators feel regret, and to encourage the community reconciled. The symbolic meaning of justice, which has been proclaimed by the ICC as being enlightened by restorative justice, has not shown its true potential.

Restorative justice advocates non-punitive methods to achieve restoration, but it does not exclude all forms of penalty. The clear difference between the legal mechanism at the ICC and restorative justice is that the former is based on the "conflict" between the alleged and the prosecution where the acknowledging of the guilt is at the central of dispute; the latter, however, is conditioned on the acknowledgement of the guilt by both victims and perpetrators where the following resolution of the crimes shall be negotiated for a better future. The ICC needs to consider restorative justice to improve its work, as it has been analysed in this study. In addition, unlike some studies stating that restorative justice may be incompatible to the ICC in law, restorative justice can fully be consistent with the ICC in legal principles and in the spirit of peace and meaning of justice. For those reasons, it is strongly recommended to integrate the core and idea of restorative justice is strongly recommended. Bearing in mind that it is not possible for the ICC to totally change its legal texts to pure restorative justice mode, what needs to be done at the ICC is to give more space and respect to victims so that their voice can be heard, and to permit more direct communication between victims and the accused. Undoubtedly, to make the legal mechanism at the ICC more restorative is challenging, and not all restorative justice approaches can be utilised to resolve the issues in international crimes. What must be emphasised is that being obstinate to current solutions to the problems at the ICC shall not be the future. The ICC needs to change. And restorative justice may be the ideal reference to the ICC.

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