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# On Truth and Ideology in International Criminal Law

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program  
30 higher education credits

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Semester of graduation: HT12

## Table of Contents

Summary .....	4
Sammanfattning.....	5
Abbreviations .....	6
1. Introduction .....	7
1.1. On the matter of truth and ideology in international criminal law .....	7
1.2. Research method and key literature: a deconstructive approach to international criminal law.....	8
1.2.1. <i>The function of the trial as a conveyor of truth</i> .....	8
1.2.2. <i>Outline</i> .....	9
1.2.3. <i>A critical perspective</i> .....	11
2. The right to truth.....	13
2.1. The emergence of a right to truth .....	13
2.1.1. <i>The codified right to truth</i> .....	13
2.1.2. <i>Indications of a customary right to truth</i> .....	14
2.2. What truth? The issue of qualifying the substance of the right .....	18
2.2.1. <i>Truth and reconciliation in the transitional justice paradigm: providing a conceptual framework for the right to truth</i> .....	18
2.2.2. <i>Why truth? Soothing individual tragedy or reconciling a troubled society?</i> .....	19
2.2.3. <i>The promise of non-repetition</i> .....	21
2.2.4. <i>Who's duty?</i> .....	25
2.2.5. <i>The right to truth in a nutshell</i> .....	25
3. The construct of truth and history in international criminal trials.....	26
3.1. The international tribunals provide the truth about the past – incidental effect or key to the legitimacy of international criminal justice? .....	27
3.2. A brief overview of the international tribunals and their respective raison d'être .....	29
3.2.1. <i>The International Military Tribunal Sitting at Nuremberg Germany</i> .....	29
3.2.2. <i>The UN and the project of peace and international criminal justice after the cold war – the establishment of the first ad hoc tribunals</i> .....	29
3.2.3. <i>The International Criminal Court</i> .....	31
3.3. The politics of international criminal law .....	33
3.3.1. <i>The focus on militarised violence</i> .....	34
3.3.2. <i>The private/public dichotomy</i> .....	36
3.3.3. <i>The focus on the individual</i> .....	37
3.4. Principles of justice, procedure and evidence at the international tribunals.....	40

3.4.1. <i>Nullum crimen sine lege</i> .....	40
3.4.2. <i>Collective crime and individual guilt</i> .....	41
3.4.3. <i>Procedure and evidence</i> .....	43
3.5. The truth, the trial and the template .....	47
4. Truth, justice and ideology .....	49
4.1. A critique of ideology .....	49
4.1.1. <i>The international criminal trial’s claim to universal validity and relevance: the process of ideology</i> .....	50
4.1.2. <i>The determined aspect of history obscured in the ideology of contingency of international criminal law – the trial as an agent of ideology</i> .....	51
4.1.3. <i>The narrative of international criminal law and the promise of non-repetition</i> .....	54
4.2. On law and vocabulary: ‘individual accountability’ and ‘fact-finding’ instead of ‘justice’ and ‘truth’ as adequate terminology in international criminal law .....	57
5. Concluding remarks: admitting one’s limits and establishing one’s authority.....	60
<b>Bibliography .....</b>	<b>61</b>

## Summary

The dissertation investigates the character of the historical narrative that is produced at the international tribunals. It revolves around the notions of peace and reconciliation, qualified in the human rights principle of non-repetition and the potential of international criminal law to contribute to these ends. It is held that the collective aspect of the right to truth provides a useful tool, with which the potential of the narrative in preventing future crime can be evaluated.

Following an inquiry into the scope and character of the emerging 'right to truth', the construct of truth and history in international criminal trial is described. The dissertation then deploys the 'right to truth' and the thereby provoked question of the relation between a certain account of the past and the promise of non-recurrence, to analyse the utility of the typical narrative produced at the international tribunals. In the final chapter the concept of ideology is utilised to understand the project of international criminal justice as intrinsically political.

In the final concluding comment it is held that the emancipatory potential of the work of the international tribunals can be fully realised only when the political character of the judicial account of the past is admitted.

## Sammanfattning

Uppsatsen undersöker de internationella tribunalernas uppfattning om, och beskrivning av, det förflutna. Texten rör sig kring begreppen fred och försoning, vilka kvalificeras i människorättsprincipen 'non-repetition', eller 'icke-upprepning', av tidigare förbrytelser. Denna princip väcker frågan om huruvida internationella brottmålsförfaranden kan motverka framtida förbrytelser, genom den historieskrivning de bidrar till.

Inledningsvis presenteras den allt mer omfattande 'rätten till sanning', dess ursprung, utveckling och nutida innebörd. Därpå beskrivs hur det förflutna bearbetas vid de internationella tribunalerna, samt hur denna process påverkar karaktären av, och särdragen i, den rättsliga historieskrivning som därigenom tar form. I samband med denna beskrivning ifrågasätts påståendet att den 'sanning' om det förflutna som befasts vid tribunalerna bidrar till att motverka framtida grova förbrytelser. 'Rätten till sanning', företrädesvis den kollektiva dimensionen av normen, används som en måttstock för denna analys. I det avslutande kapitlet belyses den ideologiska dimensionen av den internationella straffrättens historieförståelse. Det framhålls att ambitionen att hålla individer straffrättsligt ansvariga för vissa särskilt grova brott är ett politiskt projekt och skall förstås som sådant.

Slutligen hävdas att den rättsliga historieskrivningens ideologiska särdrag bör exponeras, för att främja den internationella straffrättens preventiva effekt.

## **Abbreviations**

Force Patriotique pour la Libération du Congo	FPLC
International Committee of the Red Cross	ICRC
International Criminal Court	ICC
International Criminal Tribunal for Rwanda	ICTR
International Criminal Tribunal for the former Yugoslavia	ICTY
The Democratic Republic of the Congo	DRC
The United Nations	UN
Union des Patriotes Congolais	UPC

# 1. Introduction

## 1.1. On the matter of truth and ideology in international criminal law

The project of international criminal law is often defended with reference to the potential function of the international tribunals and their trials, as conveyors of truth. It is argued that establishing a 'neutral' historical record promotes peace and reconciliation in societies scourged by conflict and/or mass violations of human rights.<sup>1</sup> This rhetoric is informed by the transitional justice paradigm: the revealing of the truth about the past is considered to be an essential part of any transitional justice project.<sup>2</sup> Nevertheless, judicial history writing is controversial for several reasons:

- Fair-trial issues and the need to accommodate the rights of the accused.<sup>3</sup>
- The danger of conducting politicised trials (so called show-trials).<sup>4</sup>
- The relational nature of truth and the controversial relation of truth discovery and peace/reconciliation.<sup>5</sup>

The dissertation will approach this last theme of controversy through three main chapters, each necessary to approach the core question of the dissertation: *How does the historical narrative conveyed by the international criminal tribunals resonate with the right to truth and the therewith associated aim of preventing future crime?*

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<sup>1</sup> Milbert Shin Alan Tieger, *Plea Agreements in the ICTY*, 3 *Journal of International Criminal Justice* (2005). Page 670.

<sup>2</sup> Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *Human Rights Quarterly* (2002). Pages 586-588.

<sup>3</sup> Daniel Joyce, *The Historical Function of International Criminal Trials: Re-thinking International Criminal Law*, 73 *Nordic Journal of International Law* (2004). Pages 474-482.

<sup>4</sup> For a fierce case made against conducting a criminal trial for political purposes, see Hannah Arendt, *Eichmann in Jerusalem : a report on the banality of evil* (Penguin Books. 2006 (1963)). *Epilogue*.

<sup>5</sup> Fletcher & Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*.

## 1.2. Research method and key literature: a deconstructive approach to international criminal law

### 1.2.1. The function of the trial as a conveyor of truth

The truth-telling function of the international tribunals and the relevance of the historical narrative constructed in their trials has been asserted and celebrated for at least two decades. In her strong case made for the duty to prosecute international crimes, Diane Orentlicher avers the deterrent effect associated with "[l]aying bare the truth"<sup>6</sup> about past crimes, in combination with the condemnation of such behaviour, in a criminal trial.<sup>7</sup> The truth-telling function of the international criminal trials has also been commended by prominent transitional justice scholars such as Ruti Teitel. Teitel particularly commends the narrative produced at the tribunals, wherein the agency and choice of the individual perpetrator is emphasised, for its ability to convey to societies recovering from grave and systematic abuses of human rights the possibility of change.<sup>8</sup> These enthusiastic voices, asserting the positive effects of judicial history writing, however find their counterparts in a later strain of critical commentators on the promises of international criminal justice.

Martti Koskenniemi has written on the difficulty of evaluating the functions of international criminal justice. He argues that in the light of the uncertain promise of general prevention, as well as the hopeless discrepancy that is associated with meeting out a number of years in prison as punishment for a crime of the caliber of genocide, it is tempting to consider the discovery of the truth about "[w]hat really happened"<sup>9</sup> as a core function of the international criminal trial.<sup>10</sup> Yet, he notes that legal and historical truths are not seldom at odds with each other, an example of which is the over-emphasis of the criminal law paradigm of individual responsibility. Koskenniemi argues that the individualisation of criminal guilt that is necessary in criminal law procedures may sometimes distort – rather than reveal – the truth.<sup>11</sup>

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<sup>6</sup> Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal (1991). Page 2542.

<sup>7</sup> Id. at. Page 2542.

<sup>8</sup> Ruti G. Teitel, *Transitional Justice* (Oxford University Press. 2000). Pages 115-117.

<sup>9</sup> Martti Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck Yearbook of United Nations Law (2002). Page 11.

<sup>10</sup> Id. at. Pages 2-11.

<sup>11</sup> Id. at. Pages 14-15.

Tallgren also delves into the question of the usefulness of international criminal law and the international tribunals. She scrutinises the assertion that the punishment of international crime will have a deterrent effect, preventing the recurrence of crime, and finds no evidence to negate the promise of such an effect, yet cannot find evidence in its favour either.<sup>12</sup> As international criminal law fails to convince Tallgren of its immediate utility, she finds its real function to lie with its symbolism. Tallgren argues that the international criminal trials make comprehensible such crime that may in fact not be comprehensible, creating a consoling narrative of guilt and innocence out of a tangled web of circumstances that lead to the commission of the crime.<sup>13</sup> Koskenniemi and Tallgren share a critical perspective on the way that the narrative produced at the tribunals is presented as a neutral account of the past, when to their mind this narrative is political and should be problematised as such. Their method is deconstructive, whereby the biases and contradictions of international criminal law are exposed.

The above debate provides the topical as well as methodological inspiration to the dissertation. It is questioned what use the truth that is discovered within the walls of the courtroom may be of, outside the context of the trial. How does the political character of this narrative influence its utility? To address this matter, an inquiry into the right to truth provides a useful template, with which the character and effect of the truth discovered at the international tribunals can be assessed.

### **1.2.2. Outline**

The dissertation comprises of three main chapters. The first chapter considers the right to truth in international law. The second chapter explains how a historical account is constructed in international criminal trials. The third chapter utilises the concept of ideology to frame the historical narrative produced in a courtroom as political.

The right to truth is an emerging international norm and much of its scope and implications remain to be clarified. The document that provides the most comprehensive account of the right, is the 2006 'Study on the Right to Truth' provided by the Office of the United Nations High

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<sup>12</sup> Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 *European Journal of International Law* (2002). Page 569.

<sup>13</sup> *Id.* at. Pages 593-594.

Commissioner for Human Rights.<sup>14</sup> This study refers to the origins of the norm, as well as to contemporary developments through case law and international custom. The segment of the norm that is most thought-provoking, in relation to the utility of the historical narrative produced at the international tribunals, is the collective aspect of the right to truth. This side to the norm is mentioned in the study but rather inadequately explained. Nevertheless, drawing on other UN documents, such as the 2009 Human Rights Council resolution on the right to truth,<sup>15</sup> as well as the first report of Pablo de Greiff, Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence,<sup>16</sup> it is concluded that the material scope of the collective right to truth must be understood in conjunction with the human rights principle of non-repetition.

The historical narrative that is produced at the international tribunals lacks a comprehensive analysis. In the third chapter of this dissertation, it is examined first using a feminist method of inquiry into the political aspects of a seemingly neutral legal paradigm, guided by the article 'Feminist Approaches to International Law' by Hilary Charlesworth, Christine Chinkin and Shelley Wright. Following this, the influence of the general rules and principles of international criminal law, as well as of the procedural rules of the trials, on the historical narrative produced in the courtroom is described. Finally, the collective aspect to the right to truth is used to analyse the utility of this particular account of the past.

In the third chapter, Terry Eagleton's definition of the notion of ideology, cited from his monograph 'Ideology – An Introduction', is used as a conceptual framework to understand how international criminal justice can be understood as an *agent of ideology* – and why this may be a problem. This chapter aims to provide a progressive perspective on the too rarely problematised argument that the discovery of the truth of the past will facilitate reconciliation and prevent future violations of human rights.

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<sup>14</sup> UNHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth*, E/CN.4/2006/91, 8 February 2006.

<sup>15</sup> UNHRC, *United Nations Human Rights Council Resolution 12/12 Right to the Truth*, A/HRC/RES/12/12, 9 October 2009.

<sup>16</sup> UNHRC, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/21/46, 9 August 2012.

### 1.2.3. A critical perspective

The inquiry into the process of constructing truth and justice at the international tribunals is inspired by the radical perspective of Susan Marks and others who allude to the contemporary relevance of Marxism for the review of international law. Marks criticises the blunt understanding of history amongst the international legal scholarship, wherein history is perceived as a mass of contingencies,<sup>17</sup> and summarises her critique in the following manner:

*"I have suggested that, as scholars of law, we tend to give considerable attention to vindicating the contingency of history, but rather less attention to its necessary, or determined, aspects. As a result, a form of 'false contingency', as I have called it, is left unchallenged, according to which the injustices of the present order are made to appear as though they were random, accidental and arbitrary. And if they are random, accidental and arbitrary, then the prospects of changing them become every bit as remote as if they were fated. The category of possibility — not just abstract possibility, but real, historical possibility — drops out of sight."*<sup>18</sup>

Applied to the project of international criminal law and the trial business, Marks' theory compels an inquiry into the process of establishing the truth about the past in this context. An international criminal law trial is a vehicle capable of a 'neutral' intervention in conflict and post-conflict societies and is as such a legitimate way of interfering with sovereignty. A triumph for the global human rights movement, as it asserts international human rights standards and delivers justice and truth to the affected societies. At the same time the trial can be viewed as an agent of contingency, obscuring the view of the determined aspects of the conflicts it was meant to explain and bring an element of justice to. Diane Orentlicher argues that courtroom procedures will provide a "[c]omprehensive record of past violations."<sup>19</sup> Is this a valid claim? Marks states: "*False*

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<sup>17</sup> Susan Marks, *False Contingency*, 62 *Current Legal Problems* (2009). Pages 14-16, 20.

<sup>18</sup> *Id.* at. Page 20.

<sup>19</sup> Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*. Page 2546, Note 32.

*contingency is generally true so far it goes, but false as to what it excludes; true in what it says but false in what it leaves unsaid, in its unarticulated assumptions, implications and effects.*"<sup>20</sup>

The dissertation utilises Marks' frustration with the international legal scholars' understanding of history, into a review of how the initial understanding of the past as a mass of contingencies may work reciprocally with the meting out of justice at the international tribunals. The suspicion being that our comprehension of history shapes law and law recreates our understanding of history.

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<sup>20</sup> Marks, *False Contingency*. Page 17.

## 2. The right to truth

### 2.1. The emergence of a right to truth

The process of discovering the truth about the past has been given notable weight and significance in the transitional justice paradigm. However, while the discovery of the truth is commonly interpreted as an agent for peace and reconciliation,<sup>21</sup> it can presently be held that the right to truth has gained legal status, rendering it important beyond its use. In 2006 the Office of the United Nations High Commissioner for Human Rights published a 'Study on the right to the truth'.<sup>22</sup> In conclusion, the study holds that the right to the truth requires that States conduct investigations into past, grave violations of human rights and international humanitarian law. It claims that the norm is an unalienable, non-derogable human right. The Study further contends that this right has both individual and societal dimensions and relates to the duty of the State to safeguard human rights and provide effective remedies to human rights abuses.<sup>23</sup>

#### 2.1.1. The codified right to truth

In the 2006 Study on the right to truth, the norm is noted to trace its establishment back to the laws of armed conflict. As such it originally referred to the right of families to know of the fate of their relatives, as well as the duty of belligerents to search for missing persons.<sup>24</sup> The specific legal rule cited is codified in Additional Protocol I to the Geneva Conventions, which provides the legal right for relatives of missing persons to know the fate of their kin.<sup>25</sup> This right is applicable in international as well as non-international armed conflict.<sup>26</sup> In a process of norm evolution spanning

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<sup>21</sup> Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 *Journal of International Affairs* (2006). Page 23.; Yasmin Naqvi, *The right to the truth in international law: fact or fiction?*, 88 *International Review of the Red Cross* (2006). Pages 262-263.

<sup>22</sup> *Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth*, E/CN.4/2006/91.

<sup>23</sup> *Id.* at. *Summary*.

<sup>24</sup> *Id.* at. Paragraph 5.

<sup>25</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Articles 32-33.

<sup>26</sup> International Committee of the Red Cross: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I, Rules (Cambridge University Press. 2005). Rule 117. Note that Additional Protocol I is applicable to international armed conflict only. The mirroring right in non-international armed conflict is of customary character.

over three decades, the right to truth has recently been asserted once again in an international treaty, namely the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.<sup>27</sup> The Convention holds that *"[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person"*<sup>28</sup>.

The codified assertions of the right to truth referred to above do however not depict the full bodied scope of the right, as already indicated in the brief account of the Study performed by the Office of the Human Rights Commissioner. The right to truth currently vastly transcends the contexts of armed conflict or cases of enforced disappearances, and considers individual victims, as well as whole societies as right-bearers. As such it has been explained in numerous UN documents and reports, in case-law, in the work of truth-commissions and in scholarly reviews.

### **2.1.2. Indications of a customary right to truth**

Customary international law emanates from coherent, consistent State practice and a therewith related belief on behalf of the State that the practice is compelled by a legal obligation.<sup>29</sup> The interpretation given on the right to truth by various human rights organs within the UN, by the General Assembly even, indicates that such a custom has developed regarding the right. This custom places a far-reaching obligation on the state to seek and provide truth to victims of particularly grave crime, which overlaps with and exceeds the codified norm.

In 2005, the 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity'<sup>30</sup> (hereinafter 'updated set of principles'), reasserted the findings of the 1997 report 'The administration of justice and the human rights of detainees: question of impunity

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<sup>27</sup> The convention entered into force on 23 December 2010, following the 20th ratification of the treaty.

<sup>28</sup> International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006 . Article 24(2).

<sup>29</sup> Statute of the International Court of Justice, 18 April 1946. Article 38(1)(b).

<sup>30</sup> UNCHR, *United Nations Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.

of perpetrators of human rights violations (civil and political)<sup>31</sup>. The first principle of the earlier document, confirmed by the second principle of the latter, declares every peoples' inalienable right to the truth about gross violations of human rights – their perpetration and the circumstances that caused them. The disclosure of past events is said to be "[e]ssential to avoid any recurrence of violations in the future".<sup>32</sup> This collective right to truth is complemented in both sets of principles by the individual victim's right to truth – qualified as a matter of families' right to know' about their relatives fate, similar to the codified version of the right to truth.<sup>33</sup>

Considering the sparse exposition on the right to truth provided in the above mentioned documents,<sup>34</sup> the 2006 'Study on the right to truth' provided a much needed clarification on the evolution and content of the international norm. The Study reiterates how the obligations of the Geneva Conventions were extensively interpreted by the Inter American Commission on Human Rights, in the context of the systematic practice of enforced disappearance performed by the military juntas of Latin America. It states that the work of the Inter American Commission, alongside the efforts of human rights activists in the affected countries, lead to the development of a doctrine of a right to truth in case law considering enforced disappearances, extrajudicial killings and torture.<sup>35</sup>

In outlining the views taken by various UN bodies on the scope and function of the right to truth, the 2006 Study on the right to truth highlights the above mentioned standpoint of the updated set of principles of 2005, on the disclosure of truth as a mainstay to combat impunity. The General Assembly resolution 60/147 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

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<sup>31</sup> UNCHR, *United Nations Commission on Human Rights: Sub-Commission on Prevention of Discrimination and Protection of Minorities, The administration of justice and the human rights of detainees: question of impunity of perpetrators of human rights violations (civil and political), Annex II.*, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

<sup>32</sup> Id. at. Principle 1: the inalienable right to truth.; *United Nations Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1. Principle 2: the inalienable right to truth.

<sup>33</sup> Id. at. Principle 4: the victims' right to know.; *United Nations Commission on Human Rights: Sub-Commission on Prevention of Discrimination and Protection of Minorities, The administration of justice and the human rights of detainees: question of impunity of perpetrators of human rights violations (civil and political), Annex II.*, E/CN.4/Sub.2/1997/20/Rev.1. Principle 3: the victims' right to know.

<sup>34</sup> Ultimately providing guidance to the nations on how, and why, they should combat impunity.

<sup>35</sup> *Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth*, E/CN.4/2006/91. Paragraph 8.

Violations of International Humanitarian Law' is furthermore considered, wherein the public disclosure of the truth is regarded as an element of reparation and satisfaction for a victim of such violations.<sup>36</sup>

The work and legacy of truth commissions is also referred to by the Study as having developed and consolidated the right to truth. It particularly draws attention to the truth commissions of El Salvador and Sierra Leone, which explicitly referred to the right as a legal basis for their work.<sup>37</sup> Indeed even without such reference, the common practice of installing truth commissions as a way to further societal reconciliation, to strengthen democracy and the rule of law, in countries where human rights abuses and violations of international humanitarian law had been systematic and widespread, is considered to have contributed to the development of the norm.<sup>38</sup>

Lastly, the Study alludes to case law emanating primarily from South American courts asserting the right to truth in cases of gross violations of human rights. Notably, it cites the truth trials of Argentina, wherein the right to truth in relation to enforced disappearances is considered to be based on the right to mourning, as well as on the right to justice, and is considered instrumental to *"[i]ndividual and societal healing and the prevention of future violations"*<sup>39</sup>

The solidity and coherence of the state practice referenced, indicating an international customary norm providing a right to truth can indeed be questioned. Yasmin Naqvi points out that states often show little interest to disclose the truth about human rights violations committed by their own government. She particularly notes that the common practice of granting amnesty for past crimes in the aftermath of internal conflicts, appears to run contrary to the right.<sup>40</sup> Her critique notwithstanding, Naqvi finally accepts that the right to truth may at least be considered as an emerging customary international norm, albeit with *"[d]iffering contours"*<sup>41</sup>.

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<sup>36</sup> Id. at. Paragraph 9.

<sup>37</sup> Id. at. Paragraph 14.

<sup>38</sup> Id. at. Paragraphs 13-15.

<sup>39</sup> Id. at. Paragraph 23.

<sup>40</sup> Naqvi, *The right to the truth in international law: fact or fiction?* Page 267.

<sup>41</sup> Id. at. Page 267.

It certainly goes beyond the scope of this dissertation to investigate in depth the legal status of the right to truth. While it can be questioned as a fully solidified norm, it can also be defended. It is worth mentioning that subsequent to Naqvi's comments, the General Assembly has proclaimed March 24th to be the 'International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims'.<sup>42</sup> The UN Human Rights Council has also appointed a 'Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence'<sup>43</sup>, following several resolutions by the Council on transitional justice and the right to truth.<sup>44</sup> The relevant question considering the norm is thus arguably not whether it exists, but what it in fact stipulates.

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<sup>42</sup> UN General Assembly, *Resolution 65/196, Proclamation of 24 March as the International Day for the Right to Truth concerning Gross Human Rights Violations and for the Dignity of Victims*, A/RES/65/196, 3 March 2011.

<sup>43</sup> UNHRC, *Resolution 18/7, Special Rapporteur on the Promotion of truth, justice, reparations and guarantees of non-recurrence*, A/HRC/18/L.22, 29 September 2011.

<sup>44</sup> Most prominent amongst them: *United Nations Human Rights Council Resolution 12/12 Right to the Truth*, A/HRC/RES/12/12.

## 2.2. What truth? The issue of qualifying the substance of the right

*”The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them”<sup>45</sup>*

### 2.2.1. Truth and reconciliation in the transitional justice paradigm: providing a conceptual framework for the right to truth

Before continuing to a more detailed analysis of the content of the right to truth it is necessary to linger somewhat on the concept of transitional justice, which arguably provides the conceptual framework in which the content of the 'right to truth' has expanded in scope.<sup>46</sup> It is noted above that transitional justice mechanisms, such as trials and truth-commissions, addressing grave violations of human rights and international humanitarian law are considered to have shaped and solidified the norm. Notably, the notion that truth-seeking promotes societal healing and prevents future violations makes a cogent match with the functional definition of 'transitional justice' proclaimed by the Secretary-General to the UN:

*”[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. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”<sup>47</sup>*

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<sup>45</sup> Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth, E/CN.4/2006/91. Paragraph 3.

<sup>46</sup> United Nations Human Rights Council Resolution 12/12 Right to the Truth, A/HRC/RES/12/12. Paragraphs 1-2.

<sup>47</sup> United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, S/2004/616, 23 August 2004. Paragraph 8.

The Secretary-General thus asserts the importance of investigating past abuse and grievance so as to promote peace and reconciliation for the future. It follows that transitional justice mechanisms should be perceived as simultaneously backward-looking and forward-looking, and it is easy to see how this duality has influenced the scope of the right to truth.

The dual function of transitional justice mechanisms is indeed advocated by Pablo de Greiff, Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence, who released his first report in August 2012.<sup>48</sup> In addressing the foundations of his mandate, de Greiff states that his task is to focus on situations of grave violations of human rights and international humanitarian law.<sup>49</sup> In promoting measures which would bring elements of truth, justice, reparations and of non-recurrence to societies affected by such crimes,<sup>50</sup> the work of the Special Rapporteur is meant to prevent the recurrence of violations and promote reconciliation.<sup>51</sup> While noting that the Human Rights Council has spelled out the sought-after measures as grounded in international obligations incumbent on states (such as the internationally recognized right to truth), the Rapporteur suggests that these legal obligations are best understood in relation to the ends that they are supposed to meet (a functional analysis).<sup>52</sup> This is not a wholly straightforward matter, however. If the right to truth is most accurately understood in the light of its purported functions (such as societal healing and the prevention of future crimes), then an inquiry into the legal obligation demands account to case-specific circumstances, as well as to general theories of peace and reconciliation; not at all an apolitical endeavor.

### **2.2.2. Why truth? Soothing individual tragedy or reconciling a troubled society?**

The legal foundation to the right to truth is fragmented. No single treaty defines the full scope of the right as it has evolved in case law, state practice and treaty law over the course of more than three decades. Because of this, the norm now appears as a merger between the principle of families right to know about the grievances of their kin and the right of a people to know the circumstances of,

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<sup>48</sup> UNHRC, *United Nations Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/21/46, 9 August 2012.

<sup>49</sup> *Id.* at. Paragraph 10.

<sup>50</sup> *Id.* at. Paragraph 10.

<sup>51</sup> *Id.* at. Paragraph 12.

<sup>52</sup> *Id.* at. Paragraph 21.

and causes for, violations of human rights and international humanitarian law amongst them.<sup>53</sup> Given that "[t]ruth is relative to present interest"<sup>54</sup>, and that the material scope of the right to truth is best understood in the light of the purported functions of the norm, this merger, while thematically cohesive, obscures the dissimilar character of the obligation to, for example, reveal the truth to the family of a torture victim, compared to the obligation to reveal the truth about the systematic practices of torture of an oppressive regime to a whole nation.

It is thus argued that the pre-requisite to the right – a single case of an enforced disappearance or grave violations of human rights or international humanitarian law, will shape the material scope of the norm. In the context of an individual right-holder, say a mother of a person subjected to an enforced disappearance, the substance of the right is thus fairly unequivocal: the mother has a right to know the whereabouts of her child, whether her child is alive, the reasons for the disappearance and so forth.<sup>55</sup> In the context of a collective right to truth, the content of the right is not equally unambiguous.

What is the suggested function of providing a society with 'the truth' about past crimes? The collective right to truth implies that in particular circumstances of serious human rights violations, or where international humanitarian law has been grossly violated, society as a whole has a right to know about the "[c]auses and conditions pertaining to [these] gross violations"<sup>56</sup>, due to the collective dimension of victimhood that arises in the face of such crimes.<sup>57</sup> To this end it can be argued that the collective dimension of the right to truth demands reparations, more specifically satisfaction to the victimized collective, in the form of a "[v]erification of the facts and full and public disclosure of the truth"<sup>58</sup>. This conclusion should have implications on any project of truth and justice in the aftermath of mass atrocities and the like. It does not only demand that the truth about the crimes be sought after, but also that it be adequately and publicly proclaimed.

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<sup>53</sup> *Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth*, E/CN.4/2006/91. Paragraph 38.

<sup>54</sup> Naqvi, *The right to the truth in international law: fact or fiction?* Page 251.

<sup>55</sup> *Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth*, E/CN.4/2006/91. Paragraphs 35 and 38.

<sup>56</sup> *Id.* at. Paragraph 38.

<sup>57</sup> *Id.* at. Paragraph 38.

<sup>58</sup> UN General Assembly, *Resolution 60/147 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, Annex*, A/RES/60/147, 21 March 2006. Principle 22(b).

Beyond recognizing the collective dimension of victimhood (a backward-looking perspective on the right), the collective aspect of the right to truth arguably also recognizes the importance of knowledge and awareness of the past for a society aiming at a better future. In its 2009 resolution 12/12 'The right to truth', the Human Rights Council "[r]ecognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights"<sup>59</sup>. The Resolution demonstrates the view of the Council on the right to truth as important for instrumental reasons; the implementation of the right is intended to contribute to the realisation of other rights, as well as to combat impunity for human rights offenders. How, then, is the right to truth meant to further these reiterated functions of the norm? Considering the goal of the protection and promotion of other human rights, an indication is provided by the 2006 'Study on the right to truth', when read in the light of the core human rights principle of non-repetition: "[s]ociety has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, **so that such events do not reoccur in the future.**"<sup>60</sup>

### **2.2.3. The promise of non-repetition**

*"Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."*<sup>61</sup>

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<sup>59</sup> United Nations Human Rights Council Resolution 12/12 Right to the Truth, A/HRC/RES/12/12. Paragraph 1.

<sup>60</sup> Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth, E/CN.4/2006/91. Paragraph 58. Emphasis added.

<sup>61</sup> United Nations Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1. Principle 2: the inalienable right to truth.

The promise of non-repetition lies at the core of the State's obligation to protect and promote human rights.<sup>62</sup> It is also a basic principle of any transitional justice initiative: future violations must be prevented.<sup>63</sup> Just as it is held that victims of gross violations of international human rights law and serious violations of international humanitarian law are entitled to the truth about the facts and circumstances pertaining to the crime, it is argued that the State is under the obligation to provide victims of human rights violations with guarantees of non-repetition.<sup>64</sup> To this end the right to truth has a twofold potential to contribute: the public investigation of past atrocities may have a cathartic effect and bring an element of closure to the affected victims, their families, and to the surrounding society.<sup>65</sup> A circle of social insecurity and vengeance may thus be broken. The sentiment of the principle of non-repetition read in conjunction with the right to truth is nonetheless not confined to societal healing. Rather, as will be suggested below, when investigations into the past disclose not only facts about specific cases of violations, but also the overarching circumstances and causes of grave crime (such as patterns of oppression and violence), the affected society is enabled to effectively ensure the non-repetition of the crimes.

General examples of mechanisms designed to guarantee the non-repetition of violations comprise of efforts to strengthen the independence of the judiciary or ensuring civilian control over the armed forces of a nation.<sup>66</sup> It is interesting to note, however, that when considering case law concerning laws granting amnesties for government officials and belligerents in post-Pinochet Chile and in El Salvador after the civil war, the Inter-American Commission on Human Rights has indicated that a nation's right to truth correlates with the duty of the State to ensure rights for the future.<sup>67</sup> In this context, a society's right to truth has been defined as a "*collective right which allows a society to*

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<sup>62</sup> Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*, 2 *The International Journal of Transitional Justice* (2008). Page 332.

<sup>63</sup> Patrick Burgess, *A new approach to restorative justice – East Timor's Community Reconciliation Process*, in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Eds. Naomi Roht-Arriaza & Javier Mariezcurrena ed. 2006). Page 176.

<sup>64</sup> *Resolution 60/147 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, Annex, A/RES/60/147. Annex, Principle 23.*

<sup>65</sup> Naqvi, *The right to the truth in international law: fact or fiction?* Page 249.

<sup>66</sup> *Resolution 60/147 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, Annex, A/RES/60/147. Principles 23(a)(c).*

<sup>67</sup> . Inter-American Commission on Human Rights, *Right to the Truth*, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=156&IID=1>, Accessed 03 January 2013

*gain access to information essential to the development of democratic systems*”<sup>68</sup>. It follows that in the view of the Commission, amnesty-laws protecting perpetrators of grave violations of human rights and international humanitarian law from prosecution run contrary to the obligation of non-repetition, due to the effective bar it sets on a nations right to truth.

In accordance with the initial suggestion that the material scope of the right to truth is best understood in the light of its purported functions, the appreciation of the collective right to truth as intricately related to the principle of non-repetition must guide the interpretation of the norm to this end. The collective right to truth can thus be considered to require such information about past crimes, so that the collective may learn from the past and is enabled to shape a better future.<sup>69</sup> Arguably, this view is shared by the UN High Commissioner for Human Rights, as indicated by the above quoted section of the 2006 study on the right to truth,<sup>70</sup> as well as by the UN Human Rights Council<sup>71</sup> and its predecessor, the UN Commission on Human Rights.<sup>72</sup> Enter the controversy of what aspects of the past need to be revealed to satisfy the collective right to truth, with the aim of informing a people of issues that need to be addressed, so as to prevent the recurrence of crime.

Having concluded that the material scope of the collective right to truth is relative to the interest of achieving societal reconciliation and prevent future crime, the conflict within the lines of transitional justice scholars is directly relevant to the interpretation of the right to truth.

Louise Arbour distinguishes between two different perspectives on the main business of transitional justice: one identifies the paradigm to mainly deal with direct and flagrant violations of international human rights law (with a bias towards civil and political rights)<sup>73</sup> and international

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<sup>68</sup> Case 10.480, Report N° 1/99, El Salvador, Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez y Carlos Antonio Martínez, (Inter-American Commission on Human Rights). Paragraph 151.

<sup>69</sup> Id. at. Paragraph 153.

<sup>70</sup> *Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth*, E/CN.4/2006/91. Paragraph 58.

<sup>71</sup> *United Nations Human Rights Council Resolution 12/12 Right to the Truth*, A/HRC/RES/12/12. Paragraph 1.

<sup>72</sup> *United Nations Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1. Principle 2: the inalienable right to truth.

<sup>73</sup> Louise Arbour, *Economic and Social Justice for societies in Transition*, 40 *Journal of International Law and Politics* (2007). Page 9.

humanitarian law. The other advocates for transitional justice mechanisms to also focus on violations of economic, social and cultural rights, as well as to approach broader societal issues. Out of the two, Arbour argues that the ‘mainstream’ transitional justice paradigm is geared towards the former, as it traces its roots back to the Nuremberg tribunal and the criminal law paradigm.<sup>74</sup> Arbour however advocates a more comprehensive definition of the concept, where a transitional justice measure ideally also addresses root-causes to systematic violence and other large-scale abuses of human rights.<sup>75</sup> To the mind of Arbour, these root causes often comprise of social and economic injustices, which must be revealed and confronted to achieve reconciliation and true societal transition, in order to prevent the reoccurrence of past abuses.<sup>76</sup>

Noting that the transitional justice paradigm is motivated by the motto coined by the Argentinian truth-commission’s report *Nunca Más* – ‘never again’,<sup>77</sup> Lisa J Laplante makes a case similar to Arbour’s, and criticizes the way that ‘conventional’ transitional justice mechanisms such as truth commissions have not sufficiently examined the root-causes of conflicts - thus providing “[u]ncertain guarantees of non-repetition”<sup>78</sup>. The reservations of Laplante and Arbour as to the usefulness of transitional justice initiatives that systematically disregards social and economical issues are shared by the ‘Analytical study on human rights and transitional justice’ provided by the UN High Commissioner for Human Rights in 2009, wherein it is said that “[p]eace and reconciliation demand comprehensive societal transformation that must embrace a broad notion of justice, addressing the root causes of conflict and the related violations of all rights”.<sup>79</sup>

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<sup>74</sup> Id. at. Pages 1-2.

<sup>75</sup> Id. at. Page 3.

<sup>76</sup> Id. at. Page 8.

<sup>77</sup> Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*. Page 332.

<sup>78</sup> Id. at. Page 333.

<sup>79</sup> UNHCHR, *United Nations High Commissioner for Human Rights, Analytical study on human rights and transitional justice*, A/HRC/12/18, 6 August 2009. Paragraph 59.

#### **2.2.4. Who's duty?**

It is the duty of the State to "[e]nsure the inalienable right to know the truth about violations"<sup>80</sup>. It follows that it is the duty of the State to introduce such procedural and institutional mechanisms that are required to reveal the truth about past crimes. Consequently, whereas the Study on the right to truth considers the international tribunals to be truth-seeking bodies contributing to the aim of truth-discovery,<sup>81</sup> the tribunals themselves are not duty bound to provide information about past crimes to affected societies. One may rather consider the support and cooperation of a state with the international court as a way of ensuring the individual and collective right to truth. Dermot Groome argues along these lines and particularly alludes to the possibility that human rights bodies may demand State parties to the Rome Statute of the International Criminal Court to either investigate or refer cases to the ICC in the interest of revealing the truth about past crimes.<sup>82</sup>

#### **2.2.5. The right to truth in a nutshell**

From the above exposition, the conclusion can be drawn that the right to truth is a fragmented legal norm, tending to the needs of individuals as well as of collectives to know the truth about the commission of grave crimes. It can be argued that the scope of the right is best understood by way of a functional interpretation of the norm. However, the purported functions of the right to truth differ depending whether the right-holder is an individual victim or a whole society.

The collective right to truth arguably aims to provide satisfaction to a victimised collective, to end impunity and to contribute to the realisation of other rights. To this end it is held that the function of the collective right to truth is best understood in correlation with the duty of the State to provide guarantees of the non-recurrence of human rights violations. Such information about past crimes must be revealed, that will enable a society scourged by violence and injustice to create a better future.

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<sup>80</sup> *United Nations Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1. Principle 1: General obligations of States to take effective action to combat impunity.

<sup>81</sup> *Report of the Office of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Study on the right to the truth*, E/CN.4/2006/91. Paragraph 47.

<sup>82</sup> Dermot Groome, *The Right to Truth in the Fight against Impunity*, 29 *Berkely Journal of International Law* (2011). Pages 194-196.

### 3. The construct of truth and history in international criminal trials

It must be said that the right to truth and its demands on states to investigate and reveal the truth about certain crimes cannot be used as a 'checklist' to evaluate the practices of the international tribunals. Criminal law has ways of its own, to paraphrase Arendt. However, the close connection between international criminal law and the transitional justice paradigm – wherein criminal prosecutions play a significant role, encourages an inquiry into whether international criminal justice indeed contributes to justice, accountability and reconciliation. In this dissertation this inquiry is conducted with the right to truth as a point of reference.

As already mentioned, the Office of the High Commissioner for Human Rights considers international criminal trials to be potentially useful mechanisms in providing for the right to truth.<sup>83</sup> The principle that a people has the right to know the truth about the perpetration of grave and systematic crimes clearly overlaps with the mandate of the courts to investigate crimes of this particular character and caliber. Thus, whilst the international tribunals are not legally responsible for providing the truth about past crimes to victims and affected societies, the emerging international norm provides a much needed template against which the fact-finding and truth-telling function of the courts can be evaluated.

Mirroring different aspects of the human rights principle of non-repetition, are the commonly reiterated goals of international criminal law: general prevention or deterrence, collective reconciliation, peace and security.<sup>84</sup> Can these goals be furthered by the truth-discovery and narration of the past that takes place at the tribunals? The following chapter represents an attempt to map out the construct of history at the international tribunals, exploring the legal framework, the legal process and the understanding of history that shapes the trial itself.

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<sup>83</sup> UNHCHR, *United Nations High Commissioner for Human Rights, Implementation of General Assembly Resolution 60/251 of March 2006 entitled 'Human Rights Council': Right to the Truth*, A/HRC/5/7, 7 June 2007. Paragraph 82.

<sup>84</sup> These goals are summarised in Tallgren, *The Sensibility and Sense of International Criminal Law*. Pages 556-566.

### **3.1.The international tribunals provide the truth about the past – incidental effect or key to the legitimacy of international criminal justice?**

*”While everybody is busy with it, does one really know what to do with international criminal justice? And why?”<sup>85</sup>*

Why should the international community invest time and money on conducting international criminal trials? This question has been answered in different ways above. Yet it appears that there is no one, conclusive, answer. The utility of international trials in revealing the truth – the topic of this piece of research – has been both applauded and questioned, because history is contentious and the criminal trial is restricted and biased in its process of constructing a narrative about the past.

A glance at the historical review of the judicial dealing with the truth about the Holocaust provides a good example of this: while the Nuremberg trial promised to reveal the truth about the atrocious policies of Nazi Germany,<sup>86</sup> later historical reviews of the Nuremberg trials, question the downplay of the Holocaust in the indictments.<sup>87</sup> Yet the very response by the Israeli government to Nuremberg’s failure to adequately address the Holocaust is criticized on its part by Hannah Arendt, for lapsing into the conduct of a ‘show trial’. In ‘Eichmann in Jerusalem : a report on the banality of evil’, Arendt questions all attempts by the prosecutor to educate the people of Israel, and indeed the world, about the persecution of the Jews by the means of the Eichmann trial. To the mind of Arendt, criminal justice busies itself with individual guilt or innocence, and should not be used as a theatre for nation-building and history-writing, as any such dramaturgical strategy would impair the weight and relevance of the judgement itself.<sup>88</sup>

In common law systems, and essentially in civil law jurisdictions as well, the comprehensive ‘truth’ about past occurrences is a by-product to a proceeding that primarily revolves around presenting

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<sup>85</sup> Id. at. Page 564.

<sup>86</sup> Robert H. Jackson, Opening Statement before the International Military Tribunal, 1945, <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/>, Accessed 03 January 2013

<sup>87</sup> Koskenniemi, *Between Impunity and Show Trials*. Pages 21-22.

<sup>88</sup> Arendt, *Eichmann in Jerusalem : a report on the banality of evil*. Page 253.

and refuting evidence concerning individual criminal guilt or innocence.<sup>89</sup> In the international criminal law paradigm, this by-product has nevertheless been given an exceedingly exalted position when the legitimacy of the international tribunals is debated. Given that the conduct of these trials does not solely aim to determine individual guilt or innocence, but also to restore peace and aid reconciliation, the discovery of a historical truth about the past (considered an important element to achieve these aims) has been propelled into the centre of the debate on the international criminal justice project.<sup>90</sup> The revelation of the truth by the means of trials is thus not only considered a great achievement *per se*, but is also celebrated because of its potentially significant peace building effects.<sup>91</sup>

Reconciliation is a troubling concept, as it is difficult to define and quantify. When is a society reconciled? Peace is also a contentious term,<sup>92</sup> and so in the following, these broad notions will be considered to be represented in the above described human rights principle of non-repetition. When in the final section of this chapter the narrative produced at the international tribunals is compared to the ideals of the collective right to truth, the main question will consequently be: what potential does the truth that is discovered and established in the name of international criminal justice have to further the principle of non-repetition and thus prevent future crime?

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<sup>89</sup> Naqvi, *The right to the truth in international law: fact or fiction?* Pages 245-246.

<sup>90</sup> *Id.* at. Page 246.

<sup>91</sup> Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harvard Human Rights Law Journal (2003). Page 86.

<sup>92</sup> Galtung argues for the term to encompass both personal violence, as well as structural violence (more on this particular concept under section 3.3.3.), yet this is a notably broad understanding of the notion. Johan Galtung, *Violence, Peace and Peace Research*, 6 Journal of Peace Research (1969). Pages 183-186.

## **3.2. A brief overview of the international tribunals and their respective raison d'être**

### **3.2.1. The International Military Tribunal Sitting at Nuremberg Germany**

In accordance with the London Agreement of 8 August 1945, the International Military Tribunal at Nuremberg was set up by the victorious Allies after the Second World War, to try German war criminals on counts of war crimes, crimes against humanity and crimes against peace.<sup>93</sup> It has been argued that the Nuremberg trial was a mere extension of the war and indeed, the tone and wording of the Nuremberg Charter does not suggest a reconciliatory function of the trial. Rather, it seems that the justice to be done in Nuremberg was intended to be of a retributive character.<sup>94</sup> Yet the American Chief Prosecutor to the tribunal, Justice Robert H. Jackson, concluded in his opening speech that the trials were to discover and establish "*undeniable proofs of incredible events*"<sup>95</sup>, possibly an acknowledgment of the historical function of the trial.

### **3.2.2. The UN and the project of peace and international criminal justice after the cold war – the establishment of the first ad hoc tribunals**

The early 1990s saw an invigorated Security Council interpret anew its mandate and responsibilities. In declaring the violent disintegration of the former Yugoslavia as a threat to international peace and security,<sup>96</sup> the Security Council provided itself with the legal right (under chapter VII of the UN Charter) to establish the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>97</sup> Shortly thereafter, the genocide in Rwanda provoked a similar reaction from the Security Council and the International Criminal Tribunal for Rwanda (ICTR) was set up.<sup>98</sup> Both

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<sup>93</sup> Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August, 1945. Article 6.

<sup>94</sup> William A. Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press. 2006). Page 8.

<sup>95</sup> Jackson, Opening Statement before the International Military Tribunal, 1945, <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/>, Accessed 03 January 2013

<sup>96</sup> UN Security Council, *Resolution 808 (1993) Adopted by the Security Council at its 3175th meeting, on 22 February 1993, S/RES/808 (1993)*, ;UN Security Council, *Resolution 827 (1993) Adopted by the Security Council at its 3217th meeting on 25 May 1993, S/RES/827 (1993)*,

<sup>97</sup> Ilias Bantekas & Susan Nash, *International Criminal Law* (Routledge-Cavendish 3rd ed. 2007). Pages 513-514.

<sup>98</sup> UN Security Council, *Resolution 955 (1994) Adopted by the Security Council at its 3453rd meeting, on 8 November 1994, S/RES/955 (1994)*,

of the tribunals were provided with jurisdiction over war crimes, crimes against humanity and genocide (albeit with some minor definitional variations in their respective statutes).<sup>99</sup> If the ideals of peace, restoration and reconciliation are distinctly lacking in the statute of the Nuremberg tribunal, this is not the case in the UN Security Council Resolutions considering the establishment of the *ad hoc* tribunals. In these documents, matters of peace, restoration and reconciliation are expressly associated with the criminal law proceedings.<sup>100</sup>

In Antonio Cassese's analysis of this development of international criminal law, this paradigmatic change is ascribed to the influence of the human rights movement, which considered criminal accountability as a tool of ensuring compliance with international human rights norms.<sup>101</sup> Cassese argues that the trials conducted at the ICTY and the ICTR were meant to contribute to local peace building whilst having a globally deterrent effect on the potential commission of similar crimes.<sup>102</sup> William Schabas' account of the diplomatic efforts and UN initiatives leading up to the creation of the ICTY however also alludes to the notion of retribution – the idea that it is imperative to punish perpetrators of war crimes and ethnic cleansing – as having been a driving force in the establishment of the *ad hoc* tribunals.<sup>103</sup>

Apart from the ICTR and the ICTY the Security Council has provided for two other *ad hoc* tribunals: the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL). Alongside the *ad hocs*, a number of so-called hybrid courts – essentially national courts with international support, sometimes applying international law, have also been set up.

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<sup>99</sup> Statute of the International Criminal Tribunal for Rwanda (1994) Article 2-4, Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Article 2-4.

<sup>100</sup>Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Page 8. See also the preambles to *Resolution 827 (1993) Adopted by the Security Council at its 3217th meeting on 25 May 1993*, S/RES/827 (1993). and *Resolution 955 (1994) Adopted by the Security Council at its 3453rd meeting, on 8 November 1994*, S/RES/955 (1994).

<sup>101</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press. 2008). Page 325.

<sup>102</sup> *Id.* at. Pages 326-327.

<sup>103</sup> Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Pages 14-18.

### 3.2.3. The International Criminal Court

Whereas the idea of a permanent international criminal court had gained momentum after the successful establishment and work of the ICTY and the ICTR,<sup>104</sup> it was not a novel notion of any kind. Already following the adoption of the Genocide Convention in 1948, the General Assembly of the UN had called for preparations to be made to establish an international court with jurisdiction over the crime of genocide.<sup>105</sup> Shortly after, the General Assembly initiated the process of drafting a statute for an international criminal court.<sup>106</sup> The political reality of the Cold War however prevented any progress.<sup>107</sup>

In 1996, following a number of attempts to draft a statute for a permanent international criminal court, the Security Council set up a ‘Preparatory Committee on the Establishment of an International Criminal Court’ (PrepCom). The work of the PrepCom culminated in the Rome Conference of 1998 and its multilateral agreement on the Rome Statute of the International Criminal Court (the Rome Statute).<sup>108</sup> The court was provided with jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression.<sup>109</sup> Several novel features compared to the legal frameworks of the *ad hoc* tribunals were introduced in the Statute, notably:

- The International Criminal Court may exercise jurisdiction only over crimes committed on the territory of a Party to the Rome Statute, or over a crime committed by the national of a State Party.<sup>110</sup> Jurisdiction may alternatively be exercised in the case of a Security Council referral of a ‘situation’ to the Court.<sup>111</sup>
- The International Criminal Court operates under the principle of complementarity, where a case is not admissible if it can be shown that the case is already being investigated by a state

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<sup>104</sup> Cassese, *International Criminal Law*. Page 329.

<sup>105</sup> Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Page 8.

<sup>106</sup> *Id.* at. Page 9.

<sup>107</sup> *Id.* at. Pages 9-10.

<sup>108</sup> Rome Statute of the International Criminal Court, 17 July 1998.

<sup>109</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 5 (1)(a).

<sup>110</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 12.

<sup>111</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 13.

which has jurisdiction over it, alternatively has already been investigated and dismissed by such a state – provided that the decision not to prosecute is not the result of the state being unable or unwilling to do so.<sup>112</sup>

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<sup>112</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 17.

### 3.3. The politics of international criminal law

In Gerhard Werle's account of the historical evolution of international criminal law he refers to the establishment of the Nuremberg tribunal as the 'Breakthrough', the institution of the *ad hocs* as the 'Renaissance' and of the ICC as the 'Consolidation'.<sup>113</sup> Understanding that the courts themselves were created in very different contexts and for various reasons, it is necessary to ask: the consolidation of what? What ideals have been consolidated into the law of the celebrated project of international criminal justice?

*"A legal system is regarded as different from a political or economic system, for example, because it operates on the basis of abstract rationality, and is thus universally applicable and capable of achieving neutrality and objectivity. These attributes are held to give the law its special authority. More radical theories have challenged this abstract rationalism, arguing that legal analysis cannot be separated from the political, economic, historical and cultural context in which people live. Some theorists argue that the law functions as a system of beliefs that make social, political and economic inequalities appear natural."*<sup>114</sup>

The quote is taken from the introduction to a groundbreaking article proposing a feminist approach to international law over 20 years ago. The point being, bluntly speaking, that the proof is in the pudding: whatever claim international law may have to neutrality and objectivity can be contested by viewing the law itself through a contextual lens – which will expose it as highly political and biased. Charlesworth, Chinkin and Wright focus on the systematic subordination of women that is represented in, and reproduced by, international law. The method of challenging the neutrality of international law as a whole by calling into question its focus, biases, and exclusions (in relation to the context of which it operates) is however also a potent way to expose the character and politics of any of its fragments.

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<sup>113</sup> Gerhard Werle, *Principles of International Criminal Law* (2nd ed.) (Cambridge University Press, 2009). Pages 1-27.

<sup>114</sup> Hilary Charlesworth & Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 *American Journal of International Law* (1991). Page 613.

Above, it has been established that tribunals and trials have been created and used for different purposes in different contexts. Whether the intention be to punish ones enemies, to bring peace to war-torn societies or to establish and enforce basic human rights, international intervention by ‘law’ and criminal law trials carries great legitimacy. It has a flair of neutrality and fairness, as opposed to the connotations of politics and real-political power of other intervention tools, such as economic sanctions and certainly of armed interventions. However, as noted by Charlesworth, Chinkin and Wright: what is neutral on paper is not necessarily neutral when read in its context or analysed as to its effects.<sup>115</sup>

The purpose of the dissertation is to examine the construct of truth and history at the international tribunals. Whereas section 3.4. will deal with certain legal principles and rules relating to the practical process of discovering and presenting the truth in international criminal trials, the present section will focus on the political nature of international criminal law. The same politics that influence the paradigm as a whole will also decide the shape and character of the truth that is discovered by its trials.

The following elaboration does not purport to provide a conclusive analysis of the ideologies and values shaping the trajectory of international criminal justice. It aims to allude to three characteristics of international criminal law which reveal the law’s preconception of history. In brief, three features will be considered: 1) International criminal law focuses on militarised and state orchestrated violence. 2) It adheres to the private/public dichotomy of international law. 3) The paradigm of international criminal law is informed by the liberalist idea of the individualisation of criminal guilt.

### **3.3.1. The focus on militarised violence**

When Antonio Cassese sums up the characteristic elements of international crimes, he asserts that these crimes are all violations of international custom. The customary rules on their part exist so as to protect values “[c]onsidered important by the whole international community [...] not propounded by scholars or starry-eyed philosophers”<sup>116</sup>. Cassese furthermore states that it lies in

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<sup>115</sup> Id. at. Page 613.

<sup>116</sup> Cassese, International Criminal Law. Page 11.

the interest of all people that these crimes be repressed.<sup>117</sup> This is indeed a claim to universal relevance of international criminal justice, a claim which echoes the preamble to the Rome Statute of the International Criminal Court: "[t]he most serious crimes of concern to the international community as a whole must not go unpunished[...]"<sup>118</sup>.

The Rome Statute allows for the jurisdiction of the court over four categories of crimes: genocide, crimes against humanity, war crimes and the crime of aggression.<sup>119</sup> Other acts have indeed been considered to be 'international crimes', such as piracy, terrorism and torture (as its own category).<sup>120</sup> The four crimes of the Rome Statute, apart from arguably sharing the elements proposed by Cassese, also share the common feature of either consisting of military violence (i.e. acts carried out by belligerent parties to armed conflicts), or being state- or mass-orchestrated violence/violations of human rights.<sup>121</sup>

The focus on this type of violence however fails to frame other delict behaviour, such as private corporate practices causing major harm, as outrageous enough to be considered an 'international crime' – even when there is significant harm done and an obvious international element to the liability issue. Thus when the Niger Delta is so severely polluted by oil spills that it will take decades to clean up, the victims whose livelihood is threatened, arguing that Royal Dutch Shell is responsible for the pollution, must seek redress in a civil court in the Hague instead of giving testimony at the International Criminal Court in the same city.<sup>122</sup> Tallgren critically notes that in the process of including some acts under the jurisdiction of the international tribunals and excluding others, certain 'wrongs' are naturalised and excluded from the possibility of judicial intervention

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<sup>117</sup> Id. at. Pages 10-11.

<sup>118</sup> Rome Statute of the International Criminal Court, 17 July 1998. Preamble.

<sup>119</sup> Rome Statute of the International Criminal Court, 17 July 1998. articles 5-8. For an elaboration on their meaning see the 'elements' document.

<sup>120</sup> A. Cassese, *Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?*, 10 European Journal of International Law (1999).

<sup>121</sup> In the case of crimes against humanity, a nexus is required between the primary crime (such as for example torture) and a widespread and systematic attacks against a civilian population. Whereas genocide in theory can be committed by a 'lone wolf' with genocidal intent, it is difficult to imagine such a situation. Rather, as in Rwanda or the former Yugoslavia the crime of genocide was committed by a great number of concerted perpetrators.

<sup>122</sup> BBC, Nigeria oil spills: Shell rejects liability claim, 2012, <http://www.bbc.co.uk/news/world-africa-19905694>, Accessed 03 January 2013.

and political debate.<sup>123</sup> In this perspective a certain humility is called for. International criminal law may target some reprehensible behaviour that it is in the interest of all humanity to repress. The case can however be made that the legal paradigm does not address *all* such behaviour, leaving blank pages in its protocols, with harm unaddressed.

### 3.3.2. The private/public dichotomy

The private/public dichotomy is a recurring theme of feminist critique on international law. The criticism addresses the artificial distinction made between a public sphere and a private sphere of the lives of men and women, where the law is primarily concerned with the former. Charlesworth, Chinkin and Wright argue that this distinction is artificial and pushes many daily grievances of women into a sphere that is left unregulated by international law,<sup>124</sup> thus re-asserting "[m]ale dominance in the international legal order"<sup>125</sup>.

International criminal law adheres to this same distinction, focusing on the repression and redress of harm that takes place in the public realm – rather than on harm that has taken place in the private sphere. Whereas for instance the category of war crimes regulate violence in the public sphere, prohibiting among other things the targeting of civilians in military attacks,<sup>126</sup> it does not attempt to address the general vulnerability of civilians living in a conflict area. The humanitarian crisis in Darfur, now labelled a genocide by the ICC,<sup>127</sup> poses an example of this. The legal rules do not consider the 'incidental' deprivation of these commodities a crime. Only when the civilian population is intently denied these necessities as a part of a genocidal plan, a war crime or a crime against humanity, is the situation addressed as an international crime, worthy of a global cry of outrage.<sup>128</sup>

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<sup>123</sup> Tallgren, *The Sensibility and Sense of International Criminal Law*. Pages 594-595.

<sup>124</sup> Wright, *Feminist Approaches to International Law*. Pages 625-627.

<sup>125</sup> *Id.* at. Page 627.

<sup>126</sup> Rome Statute of the International Criminal Court, 17 July 1998.

<sup>127</sup> Situation in Darfur, Sudan: In the case of the Prosecutor v. Omar Hassan Ahmad al Bashir (ICC-02/05-01/09) Warrant of Arrest for Omar Hassan Ahmad al Bashir, (ICC 4 March 2009).; Situation in Darfur, Sudan: In the case of the Prosecutor v. Omar Hassan Ahmad al Bashir (ICC-02/05-01/09) Second Warrant of Arrest for Omar Hassan Ahmad al Bashir (ICC 12 July 2010).

<sup>128</sup> The Guardian, Darfur: a land scorched by much more than the sun, 2011, <http://www.guardian.co.uk/world/2011/apr/20/darfur-land-crisis>, Accessed 03 January 2013

Another example of the private/public distinction relevant to international criminal law is provided by Charlesworth, Chinkin and Wright, and concerns the definition of the crime of torture. In the Rome Statute, torture is a category of war-crimes, as well as a crime against humanity when committed as a widespread or systematic attack against a civilian population.<sup>129</sup> The authors interpret torture as a crime imagined to have take place in the public sphere, an infringement on the civil and political rights of the victim,<sup>130</sup> thus leaving structural and domestic violence outside the prohibition.<sup>131</sup> Yet whereas the Convention Against Torture (the object of scrutiny of Charlesworth, Chinkin and Wright) requires that the suffering imposed on the victim be inflicted for a certain purpose by a public official (or at least with his or hers acquiescence),<sup>132</sup> the ‘Elements of Crimes’-document, which fleshes out the definition of the crimes of the Rome Statute, expressly states that no such purpose needs to be established to prove the crime of torture.<sup>133</sup> A potential veer away from the arbitrary distinction of public and private in international criminal law.

### 3.3.3. The focus on the individual

International criminal law further focuses on individuals, rather than groups or political and economic structures, in deciding on responsibility for harm done. To the mind of Antonio Cassese, this is one of the most prominent *merits* of the paradigm, as it exonerates the (innocent) collective and targets the single perpetrators.<sup>134</sup> Cassese emphasises that individual criminal responsibility arises when a person has committed a delict intently (or through culpable negligence).<sup>135</sup> Osiel notes that this is a narrow take on causation, compared to the social-sciences, where the scope of responsibility is cast significantly wider.<sup>136</sup> However, the demand for foreseeability in criminal law requires that it be predictable just what behaviour renders criminal responsibility. This principle is

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<sup>129</sup> Rome Statute of the International Criminal Court, 17 July 1998. Articles 8(2)(a)(ii), 8(2)(c)(i), 7(1)(f).

<sup>130</sup> Hilary Charlesworth & Christine Chinkin & Shelley Wright, *Feminist Approaches to International Criminal Law*, 85 *American Journal of International Law* (1991). Page 627.

<sup>131</sup> *Id.* at. Page 629.

<sup>132</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

<sup>133</sup> International Criminal Court Elements of Crimes, 2010. Article 7(1)(f) Crime against humanity of torture.

<sup>134</sup> Antonio Cassese, *On the current trend towards criminal prosecution and punishment of breaches of international humanitarian law*, 9 *European Journal of International Law* (1998). Page 9.

<sup>135</sup> Cassese, *International Criminal Law*. Pages 33-34.

<sup>136</sup> Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 *Human Rights Quarterly* (2000). Page 127.

common to national and international criminal law alike. However, in the latter paradigm, the focus on individual perpetrators is not only a matter of adhering to the rule of law. The case can also be made that it is an expression of a fairly limited understanding of conflicts and violence.

Payam Akhavan's account of the virtues of the judicial intervention in the conflicts of Rwanda and the former Yugoslavia summarises very well the logic to the focus on individual perpetrators: "*At a volatile transition stage, the calculated manipulation of fears and tensions unleashed a self-perpetuating spiral of violence in which thousands of citizens became the unwitting instrument of unscrupulous political elites questing after supremacy.*"<sup>137</sup> This conflict analysis, where individuals are considered the root cause of the mass-atrocities unleashed, leads to the suggested remedy: Akhavan strongly advocates the apprehending and removal of the responsible leaders from positions of power. These individuals must then be stigmatised and their leadership undermined through criminal prosecutions and convictions.<sup>138</sup> On a global scale the intended effect is to instil into world leaders a fear of accountability, thus preventing the reoccurrence of international crimes.<sup>139</sup>

The focus on the individual perpetrators however obscures from view structural violence, where there is no direct personal perpetrator (and no military force is involved) but where structural inequalities such as the uneven distribution of global resources reaps significant numbers of casualties around the globe.<sup>140</sup> Galtung states that "*[e]thical systems directed against **intended** violence will easily fail to capture structural violence in their nets – and may hence be catching the small fry and letting the big fish loose.*"<sup>141</sup>

Another issue related to the focus on individual perpetrators, which is particularly problematic in the context of international criminal law, is the notion of the 'free will' of the perpetrator. Payam Akhavan appears to advocate the prosecution of senior government officials, rather than the 'dirty hands' or 'trigger pullers' on the ground. He views it as problematic to punish the criminal actions

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<sup>137</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 *The American Journal of International Law* (2001). Page 7.

<sup>138</sup> *Id.* at. Page 7.

<sup>139</sup> *Id.* at. Page 8.

<sup>140</sup> Galtung, *Violence, Peace and Peace Research*. Pages 170-171.

<sup>141</sup> *Id.* at. Page 172.

of a people whose morality has been 'inverted' so that it is commonly believed that the crimes committed are in fact not crimes at all, but heroic acts. Moral choice, Akhavan notes, may in many instances not have been available at all.<sup>142</sup> Ruti Teitel, however, avoids the distinction between 'masterminds' and 'trigger-pullers' and argues that the historical record to be derived from a criminal trial conveys the "[k]nowledge, choice and agency"<sup>143</sup> of the perpetrator, thus informing a society of individual responsibility and the possibility of change.<sup>144</sup>

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<sup>142</sup> Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*. Page 12.

<sup>143</sup> Teitel, *Transitional Justice*. Page 116.

<sup>144</sup> *Id.* at. Pages 115-117.

### 3.4. Principles of justice, procedure and evidence at the international tribunals

This section considers the general principles of international criminal law, as they have been applied by the international tribunals and thus shaped the ‘truth’ that is created and discovered by them.

#### 3.4.1. *Nullum crimen sine lege*

The latin maxim *nullum crimen sine lege* is often referred to as the rule of legality: no crime without law.<sup>145</sup> The rule demands for the penal law rule to be clear and unambiguous, as well as publicly promulgated prior to the criminal act. Re-phrased as a prohibition: no one may be held criminally accountable for an act or omission that was not considered a crime at the time of its commission.<sup>146</sup> The Rome Statute declares in its article 22 that the ICC shall conduct its work faithful to these rules.<sup>147</sup> It follows from this principle that the prosecutor will investigate only such behavior that *prima facie* meets the elements of the crime, and will before the court interpret his or her findings as corresponding to these elements.<sup>148</sup>

In the context of international criminal law, the legality principle determines the scope of the prosecutor’s investigation and accordingly has a decisive affect on the historical narrative that is conveyed by the trial. Examples of the implications of the principle are plentiful. It may cause the court to essentially disregard circumstances that may be irrelevant to the issue of individual guilt or innocence, yet which arguably provide a backdrop without which the commission of the crime cannot be understood. Accordingly, the first judgement delivered by the International Criminal Court, in which Tomas Lubanga Dyilo was found guilty of conscription and enlistment of child-soldiers,<sup>149</sup> recognises the civil war in the Ituri region of the Democratic Republic of the Congo (the DRC) as having its origin in “*ethnic tensions and competition for resources*”<sup>150</sup>. Yet the extent to

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<sup>145</sup> Established as a universal human right by the ICCPR. International Covenant on Civil and Political Rights, 16 December 1966. Article 15.

<sup>146</sup> Cassese, International Criminal Law. Pages 36-37.

<sup>147</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 22.

<sup>148</sup> Groome, *The Right to Truth in the Fight against Impunity*. Page 186.

<sup>149</sup> Situation in the Democratic Republic of the Congo: In the case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06) Judgement pursuant to Article 74 of the Statute, (ICC 14 March 2012).

<sup>150</sup> *Id.* at. Paragraph 67.

which the conflict has been exacerbated and perpetuated by the battle over the natural resources of the DRC is doubtlessly not done justice in the judgement. Nor is the extent to which the trade of these resources has financed the conflict itself.<sup>151</sup> The focus of the judgement is on the elements of the crime and the evidence of Lubanga's personal control over the commission of the crime. Root causes to the conflict, such as ethnic tensions or shady diamond trade are given little room in the narrative of Lubanga's individual criminal guilt.

A contrast to the above example of the issues related to the narrow focus of criminal law is provided by Richard Ashby Wilson, who advocates international trials as conveyors of full-bodied accounts about the past. He argues that the international crimes in and of themselves demand the contextualisation of the criminal act and provides his reader with examples from the rich case law of the ICTY. Reading the Tadic judgement,<sup>152</sup> he emphasises how the prosecutor had to provide the court with evidence of a widespread and systematic attack on the Bosnian Muslims, prove knowledge on the side of the perpetrator of this attack, as well as of the nexus between the mass-orchestrated persecution and his individual crime.<sup>153</sup> Similarly, in the Krstic judgement,<sup>154</sup> Ashby Wilson highlights how the count of genocide demanded substantial forensic evidence on the mass killings in Srebrenica and furthermore required the prosecution to establish the killings as a part of a campaign of violence directed at the Bosnian Muslims in the area.<sup>155</sup> In the context of international criminal law, the legality principle thus appears to simultaneously limit and extend the scope of the judicial inquiry.

### 3.4.2. Collective crime and individual guilt

The inquiry into the individual criminal responsibility of the perpetrator also requires consideration of the broader context of the crime. Tieger and Shin note: "[in] criminal litigation in a post-conflict

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<sup>151</sup> For reference reading on 'conflict diamonds' and the DRC see Global Witness, Conflict Minerals in the Democratic Republic of Congo, 2012, <http://www.globalwitness.org/campaigns/conflict/conflict-minerals/democratic-republic-congo>, Accessed 03 January 2013.

<sup>152</sup> Prosecutor v. Tadic (IT-94-1-T), Judgment of Trial Chamber, (ICTY 7 May 1997).

<sup>153</sup> Richard Ashby Wilson, *Judging History: The Historical record of the International Tribunal for the Former Yugoslavia*, 27 Human Rights Quarterly (2005). Page 926.

<sup>154</sup> Prosecutor v. Krstic (IT-98-33-T), Judgment of Trial Chamber, (ICTY 2 August 2001).

<sup>155</sup> Wilson, *Judging History: The Historical record of the International Tribunal for the Former Yugoslavia*. Pages 937-938.

*environment – [...] almost any essential fact to be proven to establish individual guilt is likely to be laden with historical significance*”<sup>156</sup>.

International criminal law grapples with situations of collective crime, where a group of perpetrators concertedly carry out a criminalised act, and it’s difficult to determine more specifically ‘who contributed in what way’. It is also faced with the issue of how to hold a person principally responsible for a crime that he or she did not physically commit, but indeed directed or controlled as a so-called ‘mastermind’ of the crime. The creative innovation of the ‘Joint Criminal Enterprise’ doctrine at the *ad hoc* tribunals arguably attempts to deal with both these issues. According to the doctrine, a person may be criminally liable for the actions of his or her fellow compatriots, if in the context of the realisation of a joint criminal enterprise, a crime is committed by a third person, as a logical extension of the criminal plans of the group.<sup>157</sup> Whereas the ‘Joint Criminal Enterprise’ doctrine has proven useful to frame the criminal responsibility of political and military leaders, it has been criticised as requiring inquiry into matters that are not *de jure* on trial.<sup>158</sup>

It appears that the ICC has chosen a more restrictive interpretation of the notion of ‘commission’ of a crime, utilising the German ‘control over the crime’ doctrine. In this structured way of ascribing criminal guilt, the court needs to establish a line of causation between the crime and the alleged perpetrator.<sup>159</sup> As the court primarily targets high level criminals, this causal line needs to connect the ‘masterminds’ to the ‘dirty hands’. The construct of this causal line has, in the emerging jurisprudence of the ICC, meant the establishment of criminal guilt by co-perpetratorship or indirect-perpetratorship. Much like the extensive inquiries associated with the ‘Joint Criminal Enterprise’ doctrine, these modes of criminal liability still require an in-depth analysis of the greater context in which the crime was committed.

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<sup>156</sup> Alan Tieger & Milbert Shin, *Plea Agreements in the ICTY*, 3 *Journal of International Criminal Justice* (2005). Page 670.

<sup>157</sup> *Prosecutor v. Tadic (IT-94-1-T)*, Judgment of Appeals Chamber, (ICTY 17 July 1999). Paragraphs 189–191.

<sup>158</sup> Writing on the Milosevic trial at the ICTY, Koskeniemi highlights how Prosecutor Carla del Ponte was compelled to paint a comprehensive picture of the political scene of the former Yugoslavia, in order to connect Milosevic with the physical perpetrators of the crimes for which he was indicted. Koskeniemi, *Between Impunity and Show Trials*. Page 16.

<sup>159</sup> *Id.* at. Page 16.

The recently adjudicated Lubanga-case is an example of such an analysis. In this case, Trial Chamber I of the ICC considered evidence ranging from the creation and motivations of the *Union des Patriotes Congolais* (UPC) and the *Force Patriotique pour la Libération du Congo* (FPLC), their power-structures and actions.<sup>160</sup> The Trial Chamber found that Lubanga had acted as the President of the UPC and as the Commander in Chief of the FPLC, wielding ‘ultimate control’ over these organisations.<sup>161</sup> This position, along with the actions taken by the accused to encourage and facilitate the recruitment of child soldiers allowed the court to conclude that he had made an essential contribution to the commission of the crimes for which he was charged.<sup>162</sup> Lubanga was accordingly found guilty of conscripting and enlisting child-soldiers.<sup>163</sup>

### 3.4.3. Procedure and evidence

Rules on procedure and evidence, internal to the conduct of the trial itself may at first glance carry little relevance in a study on the historical narrative produced by the international tribunals. At a second look, a conclusion to the contrary can be made. Whereas the State Parties to the ICC have provided the court with a substantial document on ‘Rules on Procedure and Evidence’,<sup>164</sup> the UN tribunals were left with an open provision leaving it up to the discretion of their judges to establish such rules.<sup>165</sup> The rules on procedure and evidence thus vary in number, detail and scope between the tribunals. They however share common features regulating the conduct of investigations and trials, which influence the narrative of history that will be provided by the same.

#### *Evidence*

William Schabas argues that the approach taken by the UN tribunals on the production and presentation of evidence resembles the adversarial common law model, where the parties are given

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<sup>160</sup> Situation in the Democratic Republic of the Congo: In the case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06) Judgement pursuant to Article 74 of the Statute, (ICC 14 March 2012). Paragraph 1023.

<sup>161</sup> Id. at. Paragraph 1169.

<sup>162</sup> Id. at. Paragraph 1270.

<sup>163</sup> Id. at. Paragraphs 1351-1357.

<sup>164</sup> Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, 2012.

<sup>165</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (1993). Article 15.; Statute of the International Criminal Tribunal for Rwanda (1994). Article 14.

significant freedom as to what evidence they choose to produce.<sup>166</sup> To balance this autonomy, the courts are however provided with the possibility to proprio motu request the production of evidence, as well as to request the appearance of a witness.<sup>167</sup> The Rome Statute departs from the same principle of party autonomy, yet provides the ICC Chambers with the mandate to adjure the production of such evidence that it "[c]onsiders necessary for the determination of truth"<sup>168</sup>. Incumbent upon the ICC Prosecutor is furthermore the duty to investigate incriminating and exculpatory evidence alike.<sup>169</sup> This principle arguably broadens the scope of the evidence produced by the Prosecutor, yet the principle is most likely aimed at realising the rights of the accused, rather than to achieve a more full-bodied historical record.

Furthermore, compared to the intricate common law rules and principles governing the admissibility of evidence, primarily aimed at providing a framework for lay juries, the same rules governing the work of the international tribunals are noticeably lenient.<sup>170</sup> Rather than rendering certain categories of evidence *prima facie* inadmissible, the rules on evidence emphasise the authority of the judges to assess the evidentiary value of the evidence presented to them.<sup>171</sup>

Citing case law from the ICTY, Schabas also establishes that the standard of proof required for a conviction at the UN tribunals is governed by the common law maxim 'beyond reasonable doubt'.<sup>172</sup> This is a high threshold of proof, as emphasized by the ICTY Trial Chamber: "[n]ot even

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<sup>166</sup> Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Page 453.

<sup>167</sup> Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, 2012. Rule 98.

<sup>168</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 69(3).

<sup>169</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 54(1)(a).

<sup>170</sup> Håkan Friman, *Inspiration from the International Criminal Tribunals when Developing Law on Evidence for the International Criminal Court*, 2 *The Law and Practice of International Court and Tribunals* (2003). Page 374.

<sup>171</sup> *Id.* at. Page 374. See also Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, 2012. Rule 89 (C).; Rome Statute of the International Criminal Court, 2010. Article 69(4).

<sup>172</sup> Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Pages 463-467.

*the gravest of suspicions can establish proof beyond reasonable doubt*”<sup>173</sup>, an evidentiary standard shared by the ICC.<sup>174</sup>

### *The judgement’s lack of ambiguity*

The either/or character of criminal law, whereby two competing narratives are positioned against each other in a battle that only one can win, stands in stark contrast to the organic ambiguity of history that may be revealed by other fact-finding bodies such as truth commissions.<sup>175</sup> There is however little room for ambiguity in a judgement establishing whether the indicted person is found guilty or not guilty of the charges. Interestingly enough (and perhaps mindful of its truth-telling function), in acquitting Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity, the ICC chose to comment on this circumstance. In a press release to be found on the webpage of the court, the judgement is summarised, including its exposition on the relation between the final verdict and its relation to the truth about past events in the DRC. In excerpt:

*”The Chamber emphasised, however, that the approach it adopted does not mean that, in its opinion, no crimes were committed in Bogoro on 24 February 2003, nor does it question what the people of this community have suffered on that day. The Chamber also emphasised that the fact of deciding that an accused is not guilty does not necessarily mean that the Chamber finds him innocent. Such a decision simply demonstrates that, given the standard of proof, the evidence presented to support his guilt has not allowed the Chamber to form a conviction ‘beyond reasonable doubt’.”*<sup>176</sup>

### *Plea bargaining*

Related to the issue of establishing the truth about the past in the final judgement is the controversial practice of ‘plea bargaining’ and guilty pleas submitted by the accused at the *ad hoc*

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<sup>173</sup> Simic et al. (IT-95-9-R77), Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, (ICTY 30 June 2000).

<sup>174</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 66(3).

<sup>175</sup> Martha Minow, *Between vengeance and forgiveness: facing history after genocide and mass violence* (Beacon Press. 1998). Page 60.

<sup>176</sup> ICC, ICC Trial Chamber II acquits Mathieu Ngudjolo Chui, 2012, [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr865.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr865.aspx), Accessed 03 January 2013.

tribunals.<sup>177</sup> The matter is contentious particularly because of concerns that this practice will impair the creation of a historical record and ultimately the process of reconciliation, as it will shorten the proceedings and limit the scope of investigations.<sup>178</sup> So-called ‘charge bargaining’, where the accused admits to the commission of one crime in exchange for the prosecutor to drop other charges has been questioned as a practice contrary to the victim’s as well as societies right to truth.<sup>179</sup> The case has however been made to the contrary. It is held that plea agreements facilitate the essential contribution of the perspective of the perpetrator to the establishment of the truth about the past, thus allowing for a more comprehensive account of the past to be presented at the trial.<sup>180</sup> The acknowledgement of guilt on the side of the perpetrator is furthermore considered to further the goal of bringing closure to victims and achieving a lasting peace.<sup>181</sup> Following the statements made by the former President of the Republika Srpska, Biljana Plavsic, where she recanted her admission of guilt, as well as her expressed feelings of remorse originally expressed before the ICTY,<sup>182</sup> the latter ambition has however been revealed as rather fragile.

In the ICC system, the Rome Statute acknowledges the possibility of an admission of guilt, yet demands that the court convicts the accused of the crime only when it is satisfied that the plea, alongside the evidence presented, suffices to establish the guilt of the accused.<sup>183</sup> In the interest of justice, particularly considering the interest of the victims, the court may request further evidence and testimony be given to produce a more ‘complete’ presentation of the case.<sup>184</sup>

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<sup>177</sup> Alan Tieger, *Plea Agreements in the ICTY*. Page 667.

<sup>178</sup> *Id.* at. Pages 670-674.

<sup>179</sup> Naqvi, *The right to the truth in international law: fact or fiction?* Page 171.

<sup>180</sup> Alan Tieger, *Plea Agreements in the ICTY*. Pages 671-672.

<sup>181</sup> *Id.* at. Page 672.

<sup>182</sup> Tidningen VI: Margaretha Nordgren, Mötet med Biljana Plavsic, 2009, <http://vitidningen.episerverhotell.net/templates/PrintPage.aspx?id=10784>, Accessed 13 November 2012.

<sup>183</sup> Rome Statute of the International Criminal Court, 17 July 1998. Articles 65(1)-(2).

<sup>184</sup> Rome Statute of the International Criminal Court, 17 July 1998. Article 65(4).

### 3.5. The truth, the trial and the template

In the introductory part to this chapter, the right to truth is said to provide a template with which the historical narrative produced at the international tribunals can be evaluated. It is suggested that the focal point of such a review should be the collective right to truth and the question it provokes: do the tribunals in their work produce such information about the crimes they are set to adjudicate, that enables a democratic society to prevent future crime, thus furthering reconciliation, peace and security?

The circumstances, the causes and conditions pertaining to the commission of international crimes are arguably investigated at the tribunals. The definition of the crimes demand far-reaching investigations into the character of conflicts, into the scale and systematics of the persecution etcetera. The objective of the tribunals, to target primarily high-level perpetrators also extends the scope and character of the investigations (compared to most domestic criminal law proceedings). The principle of legality however also limits the scope of the historical narrative, marginalising the importance of the circumstances in which the crime took place. Furthermore the focus on individual perpetrators contributes (for good or bad) to the exoneration of the collective.

Perhaps, the issue of the historical narrative produced at the international tribunals relates not so much to what it says, but what it leaves unsaid. The international criminal law paradigm appears oblivious to the debate pertaining to the urgency of addressing root-causes to violence and conflict. This is particularly evident in the sketch of the 'politics of international criminal law'. Mindful of the critics of the limited scope of transitional justice mechanisms, who receive backing from the UN High Commissioner for Human Rights, this is problematic, considering that international criminal trials aim at deterrence and prevention of future atrocities. The problem – if one adheres to the functional perspective of the right to truth and the principle of non-repetition – relates to the way in which the affected societies are not necessarily aided in the difficult task of analysing what 'went wrong' in the past. They merely receive a narrative of individual guilt or innocence. To this end the problem is also one of the possible obstruction of recovery and remedy, as will be elaborated upon in the next chapter.

Dermot Groome's suggestion that a human rights body might demand a referral of a case to the ICC in the interest of realising the right to truth accordingly appears to be based on a halting analysis of

the scope of the norm. Whereas the individual right to truth may indeed be vindicated by courtroom proceedings, considering the collective right to truth, the matter is not equally clear cut.

In the next chapter, utilising the concept of ideology, the political nature of judicial history-writing is further investigated. If not necessarily in providing a comprehensive explanation to the causes and conditions pertaining to the commission of crime, wherein does the utility of the truth discovered in the courtroom really lie?

## 4. Truth, justice and ideology

### 4.1. A critique of ideology

What is ideology? The term has been mentioned at various points in the text without being defined. For the purpose of this section it is necessary to expand on the concept. Terry Eagleton argues that ideology can be understood in a narrow sense and in a wider sense. The wider definition views ideology as a set of ideas explaining and defending ends and means of political action.<sup>185</sup> The narrower sense of the term considers the study of ideology to focus on strategies by which a "[d]ominant power may legitimize itself"<sup>186</sup>. In another, more explicit Marxian analysis of the functions of ideology, it has been defined as the "[m]ystificatory processes whereby social reality reproduces itself"<sup>187</sup>.

In the introductory chapter to the dissertation, it is suggested that whatever understanding of past crimes a society shares, it will shape the legal response to these crimes. This response will then reinforce and recreate the narrative of history that spurred the legal reaction in the first place (see section 1.2.3.). The previous chapter qualified this argument in the context of international criminal law. A certain analysis of the cause of a conflict, of who wields control over a crime, or indeed what action or omission should be qualified as a crime in the first place, will influence the recommended remedy. In this case, the remedy of conducting a trial will then arguably reinforce the initial analysis, by way of the narrative of history that it will inevitably (re-)produce. The notion of ideology is useful to this end because it provides a conceptual frame in which it is possible to understand the project of international criminal justice as intrinsically political – not only in its overt effects, but also in its implications. Thus, the international criminal trials can be understood as agents of ideology, by way of the historical narrative that they produce and sustain.

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<sup>185</sup> Terry Eagleton, *Ideology: an introduction* (Verso. 1991). Pages 6-7.

<sup>186</sup> *Id.* at. Page 5.

<sup>187</sup> Ed. Susan Marks, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008). *Introduction*. Page 7.

#### 4.1.1. The international criminal trial's claim to universal validity and relevance: the process of ideology

*"Truth is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it."*<sup>188</sup>

Analysing the above exposé of the creation of a historical narrative at the international tribunals, it becomes apparent that international criminal law is influenced by a set of ideas that has shaped the trajectory of the paradigm: liberalism, individualism and the rule of law all legitimise the criminal trial as a response to grave violations of human rights law and international humanitarian law. International criminal law is accordingly shaped by a political ideology that favours a certain understanding of the past. The validity of this narrative is dependent on the political inclination of the addressee to the narrative.

In the wider sense of ideology, the trial can be considered to be an expression of the ideas underlying the paradigm. Applied to the purported truth-telling function of the trial, it reveals the limits to the historical narrative that can be derived from the work of the tribunals as political. At worst, the issue to be identified by this analysis is epistemological; perhaps this political narrative, in its focus and blind-spots, deviates too extensively from 'what really happened', turning claims of truth-discovery and justice into a travesty.

The above reiterated, 'neutral' account of the process of ideology in international criminal law considers the process to be an operation that occurs in the space between the political idea and the law. It is a one-way street, whereby the law and its mechanisms are influenced by politics. The critical, narrow, conception of the process of ideology, however, understands this process as a circular operation,<sup>189</sup> and instead of being bothered by epistemology, it focuses on the mysterious way in which ideology sustains the status quo or, indeed, privilege.<sup>190</sup> The critical inquiry into the

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<sup>188</sup> Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, cited in Naqvi, *The right to the truth in international law: fact or fiction?* Page 252.

<sup>189</sup> As indicated by Michel Foucault in the above quote.

<sup>190</sup> Ed. Susan Marks, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press. 2008). Page 8.

process of ideology thus relates to the way in which a certain state of affairs is made to appear natural and how a certain set of ideas is made to seem universally relevant.<sup>191</sup>

An indication of how the process of ideology may work in the rhetoric surrounding the project of international criminal justice can be found in section 3.3.1. of this dissertation. Here, Antonio Cassese is quoted stating that the behaviour framed as international crime in the paradigm of international criminal law, is behaviour which lies in the interest of all humankind to repress – certainly a claim to universal relevance. In this perspective, the limits of the paradigm, exempting from redress grievances experienced by civilians in conflict, or harm caused by multi-national companies, appear neutral, instead of political. The critical conception of ideology further begs the question: who benefits from this limit?

The narrative of history produced by the trials is furthermore a vivid example of the circular character of the process of ideology. The select inquiry into the past prescribed by international criminal law will arguably enforce the understanding of history that brought about the trial as a response to grave human rights violations in the first place. When the ‘problem’ is framed as military violence, ordered and committed by individuals, then a trial addressing this problem as a crime appears as a rational ‘solution’.<sup>192</sup> The trial will then arguably act as an agent of ideology, making this conflict analysis universally applicable, this understanding of the relevance of individual agency appear natural.

#### **4.1.2. The determined aspect of history obscured in the ideology of contingency of international criminal law – the trial as an agent of ideology**

*”Justice demands that the accused be prosecuted, defended and judged, and that all the other questions of seemingly greater import - of ”How could it happen” and ” Why did it happen?”, of ”Why the Jews?” and ”Why the Germans?”, of ”What was the role of other nations?” and ”What was the*

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<sup>191</sup> Id. at. Pages 7-8.

<sup>192</sup> Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*. Pages 7-8.

*extent of co-responsibility on the side of the Allies?” [...] - be left in abeyance. Justice insists on the importance of Adolf Eichmann [...]”<sup>193</sup>*

*”It reduces the complexity and scale of multiple responsibilities to a mere background”<sup>194</sup>*

Koskenniemi notes that when one attempts to understand the commission of grave violations of human rights and international humanitarian law, it varies depending on the situation whether one is best off focusing on individual guilt or structural causes.<sup>195</sup> In other words, no one perspective is *prima facie* false, and credible cases have been made to the advantage of either in the process of arriving at a historical truth.

As mentioned above, the wider sense of ideology provides a useful concept to understand the epistemological controversy related to the historical narrative provided by the international tribunals. In its core it relates to the political nature of the historical analysis provided by the paradigm. Ruti Teitel is arguably a supporter of this ideology, and emphasises the emancipatory potential of the criminal trial and its historical narrative, wherein the agency (and implicitly control) of the individual perpetrator is conveyed.<sup>196</sup> Implicit in this argument is her support for this particular analysis of the past, not only because of the purported positive effect of emancipation, but also because she believes this narrative to be in fact *true*. Teitel’s views however are not uncontroversial and Immi Tallgren describes the conduct of trials involved with international criminal justice as a secular act of faith, obscuring rather than discovering the truth:

*”The seemingly unambiguous notions of innocence and guilt create consoling patterns of causality in the chaos of intertwined problems of social, political, and economic deprivation surrounding the violence. Thereby international criminal law seems to make comprehensible the incomprehensible.”<sup>197</sup>*

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<sup>193</sup> Arendt, *Eichmann in Jerusalem : a report on the banality of evil*. Page 5.

<sup>194</sup> Tallgren, *The Sensibility and Sense of International Criminal Law*. Page 594.

<sup>195</sup> Koskenniemi, *Between Impunity and Show Trials*. Page 15.

<sup>196</sup> Teitel, *Transitional Justice Genealogy*. Pages 115-117.

<sup>197</sup> Tallgren, *The Sensibility and Sense of International Criminal Law*. Pages 593-594.

Tallgren also indicates that this is a not wholly innocent project. The rationalisation and construct of causation in the paradigm, as well as the focus of the international tribunals on state crime and individual guilt could be interpreted as a politically convenient diversion from the fundamental inequalities and injustices of the world.<sup>198</sup> Tallgren's critique of the historical narrative produced by international criminal law of course relates to the Marxist understanding of ideology as a conservatory process, whereby the status quo of social and economic inequality is maintained.<sup>199</sup>

Further support as to the truthfulness of the historical narrative provided by the international tribunals is offered by Richard Ashby Wilson. He applauds the emphasis put on the historical backdrop to the Yugoslavian conflict presented in the Tadic judgement of 1996, yet refers to it as an account particularly laudable for its lack of deterministic tendencies:

*"Up until 1988, the Judgment's history serves as a kind of background, a setting which allows us to understand the conflict in Bosnia more profoundly. It projects a legacy, but not a deterministic one, and not a set of conditions which caused the genocide in Bosnia. Nowhere in this section of the Judgment does the language suggest causal relations or instigating events or factors. Threats are identified, but they remain only threats. The Judgment's historical account does not lead inexorably towards ethnic cleansing and war, since other outcomes were possible. This is not a tractor narrative which Bosnians could not escape, but more the backdrop to a tragic play."*<sup>200</sup>

Ashby Wilson thus commends the judgement for asserting the contingent nature of history, for *correctly* considering the long lasting ethnic tensions in the former Yugoslavia, spurred on by the political instability, and the deteriorating socio-economic situation of the civilian population, as a mere background to the conflict.<sup>201</sup> Susan Marks has however criticised this precise perspective on

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<sup>198</sup> Id. at. Pages 594-595.

<sup>199</sup> See Marks, *International Law on the Left: Re-examining Marxist Legacies*. Pages 7-8.

<sup>200</sup> Wilson, *Judging History: The Historical record of the International Tribunal for the Former Yugoslavia*. Page 930.

<sup>201</sup> Id. at. Pages 930-932.

history commonly taken on by international lawyers, stating that contingency, or as she puts it ‘false contingency’, is false because it obscures necessity.<sup>202</sup> Necessity being the perspective on history that understands historical processes as shaped by limitations, coercion and tendencies.<sup>203</sup> Utilising her critique, the contingent perspective on history represented in the Tadic judgement is problematic because it complicates the understanding of historical necessity, represented in the above recognised elements of social, economic and political insecurity contributing to the occurrence of international crime.

#### **4.1.3. The narrative of international criminal law and the promise of non-repetition**

Marks’ hesitation concerning the epistemological issue of truth and history is particularly interesting when considering Koskenniemi’s reflection on his own statement on how to understand the commission of some particularly heinous crimes, referred to above. As mentioned, he considers neither an inquiry focusing on the guilt of individual perpetrators, nor an investigation into structural root-causes to crime, as a universal method of establishing the ‘real’, historical truth. Rather, Koskenniemi argues that the historical situation should dictate the relevant questions to be asked when one seeks the truth about the past. Following this assertion, he notes that the conduct of a criminal trial is sometimes highly problematic because of its *prima facie* orientation towards individual responsibility. Because of this, the trial may obstruct the process of discovering the historical truth, rather than facilitating it.<sup>204</sup> It follows that the orientation of the international tribunals towards contingency and individual responsibility, instead of necessity and structural causes to crime, will shape the historical narrative produced by their trials. According to Koskenniemi’s line of thought, this narrative will be more or less ‘true’, dependent on the situation. It will, however, consistently undermine and falsify the structural perspective on the commission of international crime.

The reflection of Koskenniemi described above indeed relates to the matter of the utility of the particular narrative of the past that is created at the international tribunals. Throughout the dissertation, this utility has been evaluated with the right to truth and its stipulations in sight. On

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<sup>202</sup> Marks, *False Contingency*. Page 17.

<sup>203</sup> *Id.* at. Page 10.

<sup>204</sup> Koskenniemi, *Between Impunity and Show Trials*. Page 15.

that note it is interesting to remember how above it is held that the promise of the collective right to truth is intricately related to the promise of non-repetition. Implicitly, the collective right to truth appears to relate to the equation of remedy: set adequate diagnosis => prescribe cure. The norm requires information that enables an understanding of past crimes so that these can be prevented in the future. A simple manoeuvre in theory, more complex in practice. An example of this is provided by Mahmood Mamdani, who provides an unforgiving account of the work of the South African Truth and Reconciliation Commission. He argues that the narrow scope of the Commission's inquiry, provided an analysis of the crimes of Apartheid that was detrimental to achieving national unity and reconciliation, contrary to its purported goals.<sup>205</sup> Mamdani's critique is arguably relevant as a counterpose to the claim that international criminal justice may prevent future crime by way of providing a 'neutral' and 'correct' account of the past.

Mamdani stresses that the time limit set on the investigations at the Commission did not target the actual practice of apartheid, but rather the repercussions affecting those challenging it.<sup>206</sup> The limited definition of a 'gross violation of human rights', according to which only political violence in the shape of 'killing, abduction, torture or severe ill-treatment' fell under the investigatory mandate of the Commission furthermore enhanced this aspect.<sup>207</sup> Mamdani asserts: "*[t]he Commission acknowledged only those violations suffered by political activists or state agents. It consequently ignored apartheid as experienced by the broad masses of the people of South Africa.*"<sup>208</sup> Finally, Mamdani draws attention to the paradox that was the consequent of these limitations: while the violence of the discriminatory practices of Apartheid targeted groups rather than individuals, the reparations recommended by the Truth and Reconciliation Commission focused on individual victims, rather than whole communities.<sup>209</sup>

Mamdani's account of the work of the South African Truth and Reconciliation Commission can thus be understood as an example of the consequences of an all too limited analysis of past crimes and grievances: it will lead to a distorted historical narrative and consequently undermine the

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<sup>205</sup> Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 *Diacritics* (2002). Page 34.

<sup>206</sup> *Id.* at. Page 35.

<sup>207</sup> *Id.* at. Page 39.

<sup>208</sup> *Id.* at. Page 38.

<sup>209</sup> *Id.* at. Page 40.

possibility of an adequate remedy. This understanding is corroborated by Marks, who notes that as the crime of Apartheid predominantly consists of forceful, discriminatory redistribution of resources and power, the choice of remedy should naturally be social justice directed at affected groups.<sup>210</sup> Yet because of the incapability of the Commission to address the way in which one group in the South African society had "[p]rospered at the expense of another"<sup>211</sup>, this remedy was never proscribed.<sup>212</sup>

Resembling Mamdani's and Marks' review of the issues related to an all-too narrow definition of the crime of apartheid in South Africa, is Fletcher and Weinstein's analysis of the possibilities and limits to the contribution of criminal justice to reconciliation (and implicitly non-repetition). They argue that legal intervention is insufficient as a response to situations of mass-violence for two reasons. To their minds, criminal justice fails to take into account the guilt of the bystanders and the facilitators of the violence, thus contributing to a "[m]yth of collective innocence"<sup>213</sup>. Perhaps more critically, they suggest that it may hamper social reconstruction, because it fails to "[a]ddress the social phenomena that sabotage individual will during periods of collective violence."<sup>214</sup> Fletcher and Weinstein aver that criminal trials are insufficient as a mean to achieve reconciliation, because they do not recognise the importance of economic, social and political instability as a context providing for the social breakdown in which war or mass violence occur. They assert that for a worthwhile social rebuilding to take place, these issues must be identified and dealt with.<sup>215</sup> Furthermore, the authors hold that when the collective responsibility of so-called bystanders is not attended to (such as in criminal trials with their focus on individual accountability), this *lacunae* in a post-conflict narrative may lead to future violence.<sup>216</sup>

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<sup>210</sup> Susan Marks, *Exploitation as an international legal concept in International Law on the Left Re-examining Marxist Legacies* (Susan Marks ed. 2008).Page 281.

<sup>211</sup> Id. at. Page 281.

<sup>212</sup> Id. at. Page 281. On this topic, please see the article on the shooting of 34 striking miners in South Africa by Azad Essa of Al Jazeera, where he notes that the economic and social 'effects' of Apartheid remain largely intact, with 50% of the country's population living under the poverty line. Aljazeera, Has the post-Apartheid bubble burst?, 2012, <http://www.aljazeera.com/indepth/features/2012/08/2012818212940943734.html>, Accessed 03 January 2013.

<sup>213</sup> Harvey M. Weinstein Laurel E. Fletcher, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 Human Rights Quarterly (2002). Page 580.

<sup>214</sup> Id. at. Page 605.

<sup>215</sup> Id. at. Pages 617-623.

<sup>216</sup> Id. at. Page 636.

#### **4.2. On law and vocabulary: 'individual accountability' and 'fact-finding' instead of 'justice' and 'truth' as adequate terminology in international criminal law**

Fletcher and Weinstein conclude that the utility of the international trials, as well as of national trials in a country coming to terms with a history of mass-violence and oppression, is to hold individuals accountable for their acts. Such accountability is particularly important insofar as it establishes not only guilt and innocence in relation to past crimes, but because the state through the trials asserts a boundary between acceptable behavior and criminal behavior.<sup>217</sup>

Indeed, criminal prosecutions have an important role to play in a post-conflict society. The nature of this role is however contentious. Arendt states that the criminal tribunal *"speaks with an authority whose weight depends upon its limitation"*<sup>218</sup>. Admittedly, in the case of Adolf Eichmann, the issue at hand was not the character of the historical record which could be derived from the judicial process itself, but rather the fact that the trial was actively used as a method of history writing by the Israeli government. Yet Arendt's words appear pertinent still, when addressing the matter of the way the international trials may act as agents of ideology. It is held that the universal relevance of international criminal law can be questioned. The paradigm does not address all ills of mankind and it does not always sufficiently explain the causes pertaining to the commission of the crimes it does tackle. Yet in asserting the opposite, the trial becomes a silent agent of a liberal ideology, a process that may influence the utility of the trial itself.

It is worth mentioning (again) that while geared towards the prosecution of individuals guilty of a limited group of crimes, the value of the contemporary international tribunals is commonly asserted with reference to goals way beyond the point of individual accountability. The ICTR Statute views the court as an agent of reconciliation.<sup>219</sup> Similarly, the ICTY Statute holds that the prosecution of individuals guilty of grave crimes in the former Yugoslavia will bring justice and peace to the war-torn societies.<sup>220</sup> Indeed, the Rome Statute of the ICC is no different and connects the work of the court with the furtherance of peace and security in the world.<sup>221</sup> Yet these far-reaching promises fall

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<sup>217</sup> Id. at. pages 627-628.

<sup>218</sup> Arendt, Eichmann in Jerusalem : a report on the banality of evil. Page 253.

<sup>219</sup> Statute of the International Criminal Tribunal for Rwanda (1994). Preamble.

<sup>220</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (1993). Preamble.

<sup>221</sup> Rome Statute of the International Criminal Court, 17 July 1998. Preamble.

short of explaining more precisely *how* these effects are meant to come about. In this void, claims have been made about the historical narrative produced at the tribunals, and its relevance to a society affected by grave crimes. The trials have been considered to be didactic tools, enlightening post-conflict societies on the nature of crime and conflict.<sup>222</sup> The revelation of the truth about past crimes, in combination with their public condemnation has furthermore been held to have a deterrent effect, preventing future atrocities.<sup>223</sup> The case has however been made to the contrary, with critical voices raised against the trials simplifications of guilt and causation which may potentially obscure perspectives of root-causes to violence, paramount to the understanding of the necessary context to crime.<sup>224</sup> To an extent, the controversies related to the effects of the historical narrative produced at the international tribunals is arguably related to vocabulary.

International criminal justice is a political project. The historical narrative that is produced at the international tribunals is not neutral, it is shaped by a liberal ideology. The proponents of the utility of this narrative nevertheless make their case in the language of ‘truth’ and ‘justice’, two terms claiming neutrality and universal relevance. By framing the work of the tribunals in this way, the ideological character of the trials, as well as of the historical narrative they produce, is obscured. Above, this is described as a process of ideology, whereby certain values are made to seem universal or natural. It can be argued that in the interest of guaranteeing the non-repetition of international crime, this vocabulary should be modified to the more limited terms of ‘individual accountability’ and fact-finding’.

Should the failure to provide societies scourged by conflict and mass violence be considered a short-coming of the international trials, perhaps even bringing into question the legitimacy of the international criminal justice project? Arendt would answer this question in the negative. Rather, she celebrates the limits to the criminal law paradigm, and the authority they render the judgement.<sup>225</sup> It follows from the third chapter of this dissertation that the international criminal trials focus on fact-finding and individual accountability. Following Arendt’s line of thought, the greatness of the trials lies in the vast body of evidence produced in the process of establishing the

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<sup>222</sup> Teitel, *Transitional Justice*. pages 115 - 117.

<sup>223</sup> Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*. Page 2542.

<sup>224</sup> Koskeniemi, *Between Impunity and Show Trials*. Page 15.

<sup>225</sup> Arendt, *Eichmann in Jerusalem : a report on the banality of evil*. Page 253.

commission of a number of heinous acts, as well as with establishment of individual criminal guilt of the indicted person. Indeed, Fletcher and Weinstein assert that while criminal justice should not be considered a *sufficient* remedy in and of itself to a situation of mass violence, it may play an important role in its own right.<sup>226</sup>

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<sup>226</sup> Laurel E. Fletcher, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*. Pages 627-628.

## 5. Concluding remarks: admitting one's limits and establishing one's authority

When claims are made as to the relevance of the truth produced in the courtroom to matters beyond the question of establishing individual guilt, the narrow scope of the criminal law narrative becomes problematic. To claim that a trial can provide a comprehensive record of history, or that it is well suited to provide a conflict-analysis to a people in dire need of an explanation of the reasons for its victimisation, is arguably to make a political claim. Yet, by using the vocabulary of 'truth' and 'justice', the political nature of this claim is distorted. In turn, this assertion will appear natural, and any other explanation on why mass-violence occurs, other theories of causation and so forth, will appear political. This is the work of ideology and it is troublesome for two reasons: 1) It will distort the limits to the trial, and the therewith associated benefits of a meticulous inquiry into the responsibility of an individual for the commission of very grave crimes. 2) It will undermine any historical analysis based on a structural understanding of violence and oppression, taking no account of the fact that whereas some conflicts and crime are best understood as the result of individual choice and agency, others are not.

It is thus argued that admitting one's limits is necessary to establish one's authority. Cherif Bassiouni holds:

*"The ICC will not be a panacea for all the ills of humankind. It will not eliminate conflicts, nor return victims to life, or restore survivors to their prior conditions of well-being and it will not bring all perpetrators of major crimes to justice. But it can help avoid some conflicts, prevent some victimization, and bring to justice some of the perpetrators of these crimes. In so doing, the ICC will strengthen world order and contribute to world peace and security."*<sup>227</sup>

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<sup>227</sup> Quoted in Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court* 32 Cornell International Law Journal (1999). Page 468.

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