

Abbreviated criminal procedures for serious human rights violations which may amount to core international crimes



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Deadline for submission: 1 September 2009

Number of words: 17,579 (max. 18.000)

31.08.2009.

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Acknowledgements

I would like to thank the following individuals for their contributions to this thesis, an effort that was professionally challenging, enlightening and rewarding:

- Cecilie Hellestveit, my supervisor, for her valuable comments, critique and guidance throughout.
- Morten Bergsmo for his help to develop and bring the idea forward from its infancy.
- Ilia Utmelidze for our enlightening discussions on the topic that provided insight and helped it to mature.
- Eric Draluck for his overall assistance to refine the topic and help editorially to bring it to fruition.

1. Introduction

1.1. The problem discussed by and purpose of this thesis

Armed conflicts result in too many atrocities being committed. Once a conflict is over, the criminal justice system of the affected country should ideally hold accountable those responsible for core international crimes. Often, the number of crimes is so high that the criminal justice system simply cannot address all of them through regular criminal procedure. Ensuring a timely response is even more difficult. The obligation to prosecute and punish those responsible for atrocious crimes is enshrined in international law¹ and national codes of criminal procedure, alongside the concurrent human rights obligation to afford a fair trial² to each defendant. In some countries, particularly those in transition from conflicts,³ the criminal justice system lacks the capacity to deal with all the cases, quite apart from the question of political will. This results in a backlog of such cases within the system.

The introduction of abbreviated criminal procedures for core international crimes is a new idea first introduced in a paper on the backlog of core international crimes cases in Bosnia and Herzegovina.⁴ The purpose of this thesis is to examine this topic and to arrive at a set of components and principles under which potential abbreviated criminal procedures for cases of core international crimes may be developed. It will also raise arguments for and against introduction of this mechanism in national law.⁵ The purpose of this mechanism would be to assist states to fulfil their primary obligation to prosecute such core international crimes without compromising principles of due process.

1.2. Outline of the thesis

In order to fulfil the above-stated purpose, this thesis is organised as follows. Chapter 2 provides a brief overview of main developments that created the need to address the

¹ Articles 49, 50, 129 and 146 of the four 1949 Geneva Conventions respectively; Article IV of the 1948 Genocide Convention and most recently the sixth preambular paragraph of the 1998 ICC Statute. See also *Commentary on the Rome Statute of the International Criminal Court*. Edited by Otto Triffterer. Second edition. Munich, (C.H.Beck-Hart-Nomos) 2008, p. 11.

² ICCPR Article 14; ACHR Articles 8, 9 and 10; ECHR Article 6 and ACHPR Article 7. See also Articles 55, 63, 66 and 67 of the ICC Statute.

³ For example, in Bosnia and Herzegovina, Colombia and Rwanda.

⁴ See Bergsmo, Morten ... [et al.]. *Some remarks on the handling of the backlog of core international crimes cases in Bosnia and Herzegovina*. Sarajevo, 2008, 90 pp. (on file with the author).

⁵ The approach is based on the assumption that core international crimes that are being processed at the international level will normally be of such gravity that the abbreviated criminal procedures would not be suitable for them.

backlog of core international crimes cases at the national level. Presentation of the consequences of backlogs on different processes and expectations within the justice sector, victims' communities and political establishment will follow.

Chapter 3 identifies relevant legal procedures and practices to help shed light on the requisite qualities of abbreviated procedures for core international crimes. It starts with consideration of judicial mechanisms developed to expedite international criminal procedures. Processes that cannot properly be referred to as abbreviated criminal procedures, but nevertheless seek to expedite the administrative response to mass-atrocities are also discussed. These processes often exist because full criminal trials for all core international crimes are beyond the capacity of many legal systems. They include traditional plea negotiations, truth and reconciliation commissions and the *gacaca* system of courts in Rwanda. Chapter 3 continues by discussing some national legislative models of abbreviated procedures for ordinary criminal offences. These offences, of course, differ significantly from core international crimes, but the procedures used are potentially similar to what may be used in an abbreviated system for processing core international crimes. The chapter includes a look at the Colombian procedure for dealing with core international crimes committed in its internal armed conflict.

The final section of Chapter 3 spells out some basic features that a potential abbreviated criminal procedure for core international crimes should embody. These procedures should: 1) be prescribed by law and an integral part of the criminal justice system, administered by regular courts without creating extra-judicial mechanisms and additional institutional layers; 2) increase the ability to resolve the large numbers of cases that create backlogs; 3) apply on a voluntary basis and respect basic fair trial principles that cannot be compromised; 4) be transparent and open; 5) be designed as part of the wider transitional justice process which is sensitive to victims' interests and 6) provide for the variety of sanctions with the necessary degree of flexibility.

Chapter 4 sets forth numerous arguments for and against introduction of abbreviated criminal procedures for core international crimes, and ends with a list of guidelines for such procedures, based on these arguments.

Chapter 5 will summarise the content of this thesis and offer some concluding remarks.

1.3. Methodological observations

The present topic is novel and unregulated by law.⁶ Literature is scarce regarding abbreviated criminal procedures for core international crimes. Sociology of law does not yet address it. As a result, the methodological approach of this paper will consist of comparative analysis that examines expedited judicial mechanisms in international criminal procedure, certain processes outside the scope of abbreviated criminal procedures as defined herein, domestic legislation for ordinary crimes, and a country specific approach to core international crimes committed in an internal armed conflict. Deduction from these different approaches will allow for a presentation of what abbreviated criminal procedures for core international crimes may entail. It is therefore a *de lege ferenda* discussion. Arguments for and against the introduction of this new mechanism will allow guiding principles for abbreviated criminal procedures to be formulated.

1.4. Technical clarification of terms⁷

For the purpose of this thesis, some key terms will be given the following meaning. By the expression ‘core international crimes’ (hereinafter CIC), I mean genocide, crimes against humanity and war crimes, such as specified in international legal documents like the Rome Statute of the International Criminal Court.⁸ The term ‘serious human rights violations’ refers to violations of international human rights and humanitarian law which may amount to CIC. ‘Abbreviated criminal procedures’ (hereinafter ACP) are procedures within the criminal justice system that entail a significantly shortened approach to the processing of CIC cases, as opposed to the regular criminal procedure. It does not include certain other processes, as will be discussed below. The term ‘case file’ means there has been a registration and creation of a criminal file within the prosecutor's office. Criminal justice system (hereinafter CJS) is defined as collective institutions through which an accused offender passes until the accusations have been disposed of or punishment concluded.⁹ Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy.¹⁰

⁶ It should be noted that Colombia has an abbreviated legal framework to address core international crimes, discussed more thoroughly in the section 3.5. below.

⁷ For ease of use, abbreviations may be either singular or plural.

⁸ See ICC Statute, Articles 6, 7 and 8, <http://untreaty.un.org/cod/icc/statute/rome.htm> [Visited 24 November 2009].

⁹ *Black's Law Dictionary*. Edited by Bryan A. Garner ... [et al.]. Deluxe Eighth Edition. Minnesota, Saint Paul, (West Group) 2004, p. 403.

¹⁰ See <http://ictj.org/en/tj/#1> [Visited 24 August 2009].

2. The background

In order to contextualise the topic, this chapter gives information about the main developments in international criminal law and procedure that caused backlogs of CIC cases to emerge at the national level (section 2.1.). It further undertakes to present the challenge posed to national CJS by the high number of CIC committed (section 2.2.). In the end, it outlines some of the effects that backlogs have on different processes and expectations within the justice sector, victims' communities and political establishment (section 2.3.).

2.1. Developments in international law

Ever since World War I, there has been a growing acceptance in the world's legal community of the need for accountability of actors involved in serious violations of human rights law and international humanitarian law. After World War II, statutes were adopted to establish international military tribunals at Nuremberg and Tokyo for the just and prompt trial and punishment of the major war criminals.¹¹ During the Cold War period, although wars were waged and atrocities occurred, no international tribunals were established.¹² In the 1990s, however, the United Nations Security Council, acting under Chapter VII of the UN Charter, created two international criminal tribunals, the International Criminal Tribunal for Former Yugoslavia (hereinafter ICTY) and International Criminal Tribunal for Rwanda (hereinafter ICTR).¹³ The perception was that these two *ad hoc* international tribunals, given the competence and impartiality of their international staff, were most suited to deal with the crimes committed in these two countries.

As these tribunals developed, they shifted focus from lower or intermediate level perpetrators up the chain-of-command to the highest level suspects, to senior leaders suspected of being most responsible for crimes within their jurisdictions. By holding senior military and political leaders accountable for crimes, the Tribunals demonstrated that even

¹¹ Article 1 of the IMT Statute, <http://www.jura.uni-muenchen.de/fakultaet/lehrstuehle/satzger/materialien/img1945e.pdf> [Visited 24 August 2009]. See also Article 1 of the IMTFE Statute, <http://userpage.fu-berlin.de/theissen/pdf/IMTFEStatute.PDF> [Visited 24 August 2009].

¹² One such conflict was in Cambodia. In 2001, the Cambodian National Assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime during 1975-1979. See http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf [Visited 22 August 2009].

¹³ S/RES/827 and S/RES/955.

heads of state were not above the law.¹⁴ Due to this evolutionary process, they only touched the tip of the iceberg when it comes to the number of perpetrators actually processed.

It is warranted to use the experience of the ICTY and ICTR to illustrate the main issues, problems and shortcomings of international procedures. According to Antonio Cassese:

[The] two Ad Hoc Tribunals [...] were perceived as being marred by four essential flaws: i) their costly nature; ii) the excessive length of their proceedings; iii) their remoteness from the territory where crimes have been perpetrated and consequently the limited impact of their judicial output on the national populations concerned; iv) the unfocused character of the prosecutorial targets resulting in trials of a number of low-ranking defendants.¹⁵

Cassese goes on to explain the ‘trend’ towards processing the majority of these cases at the national level, based on two grounds. First, national courts in the states concerned have become better equipped to handle such cases without bias. Second, the ‘completion strategy’ adopted by the Security Council intended to close down the two *ad hoc* international tribunals and for national courts to increasingly take over their workload.¹⁶ Further strengthening the trend identified by Cassese is the principle of complementarity, enshrined in the ICC Statute, according to which the International Criminal Court (hereinafter ICC) will not exercise its jurisdiction unless states are either unwilling or unable to prosecute.¹⁷ The trend has thus shifted the burden of CIC prosecutions to the national level and caused the CJS in affected states to become overwhelmed with this complex type of criminal cases.

2.2. Challenges of CIC prosecutions at the national level

Violent conflicts usually involve commission of a high number of CIC involving a large number of perpetrators and their accomplices. These atrocities result in a large scale victimisation of civilians. When a territorial state directly affected by the crimes has a functional CJS, the responsible authorities should investigate and prosecute CIC cases.

¹⁴ See <http://www.icty.org/sid/287> [Visited 25 August 2009].

¹⁵ Cassese, Antonio. *International Criminal Law*. Second Edition. Oxford, (Oxford University Press) 2008, p. 332.

¹⁶ *Id.*, p. 341.

¹⁷ See the tenth preambular paragraph and Articles 1 and 17 of the ICC Statute.

Regardless of the universality principle¹⁸ and other grounds of jurisdiction, the investigation and prosecution of CIC should primarily be undertaken by the authorities in the country where the crimes were committed. This can lead to the subsequent opening of a significant number of case files within the CJS. At the same time, because almost all national CJS work with insufficient resources, the ability to process CIC cases will be limited. As a result, there may be a considerable discrepancy between the actual number of open CIC case files on the one hand, and the number of cases which the national jurisdiction has the capacity to actually process on the other. This will in most situations create a backlog of CIC cases.

A backlog of cases raises several fundamental concerns. First, it is essential that the CJS keeps a complete overview of the number of cases in the backlog. Secondly, it is vital for the public trust in the CIC process that only the best suited cases¹⁹ are prioritised for full investigation and prosecution. If the cases are selected randomly or without apparent reason, expectations of justice are less likely to be met. Thirdly, in many situations the backlog of cases will be so large that a substantial percentage of the cases cannot go forward through the regular trial procedure. Suspects and witnesses alike may die or become too frail to stand or appear at trial. What should be done with these cases? Should they be removed from the CJS and dealt with through a non-judicial mechanism? Perhaps, one may conceive an ACP that enables the CJS itself to process CIC cases in a more time and cost effective manner, as may be required and legitimate.

2.3. The effects of large case backlogs

2.3.1. Justice sector reform

CIC mostly happen in a situation where countries are in a state of war, where the rule of law and democracy are not functioning, or only partly functioning, resulting in a weak or even politically controlled judiciary, characterised by a loss or even non-existing capacity. This is also why these countries are labelled transitional. It means that they are trying to deal with the inglorious past and to re-establish the rule of law and respect for human

¹⁸ Universal jurisdiction is the principle that every country has an interest in bringing to justice the perpetrators of grave crimes, no matter where the crime was committed, and regardless of the nationality of the perpetrators or their victims. See <http://www.amnestyusa.org/international-justice/universal-jurisdiction/page.do?id=1041148> [Visited 22 August 2009]. See also the preamble of the ICC Statute whereby it was pronounced that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

¹⁹ According to the applicable criteria that each country will develop depending upon its unique circumstances.

rights principles. At the same time, they struggle to develop or strengthen the entire justice sector, which demands considerable capacity building.²⁰ Even judges and prosecutors are less confident in their important roles, since they, too, are part of the reform process within the new legal, procedural and institutional set up. A judiciary going through a reform process, or being newly established after the reform, is more vulnerable to creation of a backlog of cases.

2.3.2. Criminal justice system (CJS)

Most legal systems have limited resources available for criminal justice reform and development. Reform and development processes in countries in transition occur concurrently with day to day operations of the CJS in question. Thus, there are competing priorities of work in such systems against the background of budgetary limitations and ever-changing expectations of justice among victims and others. If a country suffers from a severe pattern of violent crime or organized crime, it may be difficult to sustain support for investigation and prosecution of war crimes of the past. Conversely, if victims' demands for criminal justice for atrocities are so high that priority is given to such prosecutions, it is likely to lead to fewer resources for other types of criminality and reform of the CJS. A strong demand for war crimes justice that contributes to a large backlog of cases can, therefore, have a negative impact on criminal justice reform and development.

2.3.3. Public trust in the CJS

Public trust in a CJS correlates to its ability to deal with the cases within it and keep the public informed.²¹ If the impression grows that cases do not move expeditiously and fairly through the CJS, the public will lose confidence. Trust in the CJS is fundamentally important for the public to be willing to fund, cooperate, and use it. If there has been a sustained, but futile effort to build trust in a CJS, for example in the wake of wars or period of authoritarian rule, then the whole effort to create a functional system that protects human rights and the rule of law may suffer a setback.²² And if a CJS has an exceptionally

²⁰ A comprehensive guidebook in Bosnian details issues related to transition in Bosnia and Herzegovina. The executive summary of the guidebook, in English, is available. See *Transitional Justices Guidebook for Bosnia and Herzegovina: Executive summary*. Convened by United Nations Development Programme. Sarajevo, June 2009, <http://www.undp.ba/download.aspx?id=1703> [Visited 23 August 2009].

²¹ Id., pp. 19-20.

²² Id., p. 47.

large backlog of CIC cases that may also affect the overall trust in the ability of the system and undermine the entire transitional process.

2.3.4. Victims and the management of expectation

The role of victims is very important in the overall dynamics of facing the past and re-healing the past wounds of atrocities. They play a crucial role as direct participants in criminal proceedings and in overall processes of transitional justice. Quite often the complexity of conflict creates different victim groups from different sides, each with their own interests and legitimate rights.²³ In many situations where serious human rights violations occurred, marked by exceptional cruelty and its consequences, and where there is a particularly severe victimisation that must be rectified, interest for criminal justice and judicial truth²⁴ is extremely high. Balancing general interests of justice and the competing demands of victims and the public is challenging. Often the existing mistrust towards governments and authorities in general, and its judicial branch in particular, only increases the tensions. Confidence building between victim groups and the judicial institutions is vital, however, especially against the background of a large backlog of cases within a judicial system that, from the victims' perspective, is not doing enough to effectively resolve it. Giving false promises to victims can lead to further misunderstanding of the possibilities that exist both within and outside the criminal justice mechanisms. It is important to provide realistic information about the limitations of the existing mechanisms and try to seek innovative solutions to the problem.

2.3.5. Political support and the national CIC process

Processing CIC cases requires strong political support from the outset, both to ensure that undue political influences do not limit or undermine the process, and that necessary financial and other resources are allocated in a sufficient, timely manner.²⁵ A large backlog of cases, and difficulty to show quantifiable results, can substantially weaken the necessary support of local politicians, representatives of public opinion. Even international donors

²³ For example, right to justice. See *Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity*. Commissioned by the UN Secretary-General for the Commission on Human Rights, (E/CN.4/2004/88), 27 February 2004, paras. 24-56.

²⁴ A process by which a legal and historical record of events and culpability of participants is made for use by the CJS and progeny.

²⁵ *Rule of Law Tools for Post-conflict States: Prosecution Initiatives*. Convened by Office of the United Nations High Commissioner for Human Rights. New York and Geneva, 2006, p. 3. See <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> [Visited 24 August 2009].

supporting the transition process may fall prey to scepticism. This potentiality could subvert the entire prosecution process and bring uncertainty to the prospect of accountability for heinous crimes. Political groups initially seen as pillars of the prosecution process could also turn into sceptics when they see only a limited number of cases find their way from the labyrinths of justice or when there is no visible progress in the matter. The society affected with CIC has a fundamental interest to see that transitional processes bring measurable progress, as this can eventually lead to reconciliation and restoration of a functioning society. Even if these processes are moving forward, slow progress may cause politicians to feel hostage to the inabilities of the justice system, and consequently increase temptation to resolve a backlog of cases by political interventions, that, in turn, could negatively affect the overall development of the rule of law.

3. The concept of ‘abbreviated criminal procedures’ (ACP)

The purpose of this chapter is to identify components of a potential ACP for CIC. It initially describes expedited measures employed in international criminal procedure (section 3.1.). It then goes on to address practices that fall outside the scope of ACP as defined herein, but are still relevant to the discussion (section 3.2.). Some national criminal procedures for ordinary crimes that may have similar characteristics to ACP for CIC will follow (section 3.3.). Common features of these procedures are discussed (section 3.4.). The model for dealing with CIC cases used in Colombia will be presented (section 3.5.). The chapter finally specifies the basic features for a potential ACP for CIC (section 3.6.).

3.1. Expedited measures in international criminal proceedings

There is no such thing as ACP in the international criminal law. Nevertheless, noteworthy efforts have been made to develop means to expedite international criminal proceedings without compromising the fair trial rights of the accused.²⁶ These may serve as an incentive for national actors to understand that innovative approaches may be acceptable and even advisable in dealing with lengthy criminal proceedings for CIC.

Because international criminal proceedings are extremely time consuming and expensive, mainly due to evidentiary requirements,²⁷ judges and prosecutors realized that greater efficiency was imperative. For example, prosecutors in the ICTY pushed for greater use of certain existing mechanisms, and introduction of new ones, in order to remedy the issue, including, *inter alia*, the dossier approach, proof of fact other than by oral evidence, judicial notice of adjudicated facts, joint hearings, the use of electronic tools for the management of evidence and selection of relevant material at the pre-trial stage.²⁸ Another example to combat inefficiency rises from the ICTY Statute. Because it contained few provisions of a procedural character, the judges were empowered to draft Rules of Procedure and Evidence governing the conduct of the proceedings, with an aim of

²⁶ See article by Nice, Geoffrey and Roland, Philippe Vallieres. *Procedural Innovations in War Crimes Trials*. In: *The Dynamics of International Criminal Justice: Essays in Honour of Sir Richard May*. Edited by Hiram Abtahi and Gideon Boas. Leiden, (Martinus Nijhoff Publishers) 2006.

²⁷ *Prosecutor v. Dražen Erdemović, Separate and Dissenting Opinion of Judge Cassese to the Appeal Judgment*, Case No. IT-96-22, 7 October 1997, para. 8. See also *Prosecutor v. Slobodan Milošević, Partial Dissenting Opinion of Judge Shahabuddeen to the Decision on Admissibility of Prosecution Investigator's Evidence in Milošević case*, Case No. IT-02-54, 30 September 2002, para. 2.

²⁸ For detailed elaboration of such mechanisms see article referred to in supra note 26, p. 147 onwards.

safeguarding both fair and expedient trials. As the need for efficiency grew, the Rules were significantly amended.²⁹

Some rules are particularly interesting in the context of ACP for CIC. Rule 89(F) allows for receipt of evidence in written form when this is in the interests of justice. Though the Appeals Chamber made its applicability subject to certain stringent requirements,³⁰ it could nevertheless considerably shorten the procedure if applied in an ACP for CIC. Further, Rule 94 does not require proof of facts of common knowledge or of adjudicated facts and documentary evidence from other proceedings of the Tribunal, but allows the taking of 'judicial notice' of facts, such as for example those characterizing historical and background information not subject to reasonable dispute.³¹ In this regard, the Trial Chamber in *Prosecutor v. Momčilo Perišić* stated, '[W]hen taking judicial notice, the Trial Chamber must balance such interests [i.e. judicial economy and harmonization of the Tribunal's judgments] with the right of the accused to a fair trial.'³²

The lawyers who helped establish the ICC wanted to mitigate the problems of protracted proceedings. Therefore, even before the first judges took up their mandate, this group prepared a report that set forth measures to reduce the length of the proceedings.³³ The report covered all aspects of ICC criminal procedure. Some solutions are extensively used in national jurisdictions to promote judicial economy, such as developing prosecution strategy at the outset or opting for concerted rather than fragmented trials. The report also suggested use of mechanisms provided for in the ICC Statute or Rules of Court previously employed in other international tribunals, such as live witness testimony via video-link or making greater use of judicial notice. It encouraged the ICC overall to develop its own interpretation of the existing imprecise rules and make greater use of written statements and testimony *in lieu* of oral testimony, documentary evidence, and unsworn statements of the accused, providing at all times the sufficient protection of due process.

²⁹ For detailed and taxitive elaboration of the relevant rules and their application, see article by Robinson, Patrick L. *Fair but Expeditious Trials*. In book referred to in supra note 26, p. 176 onwards.

³⁰ *Prosecutor v. Slobodan Milošević, Decision on Interlocutory Appeal on the Admissibility of Evidence- In-Chief in the Form of Written Statements*, Case No. IT-02-54, 30 September 2003.

³¹ *Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts*, Case No. IT-02-54-T, 16 April 2003.

³² *Prosecutor v. Momčilo Perišić, Decision on Motion for Judicial Notice of ICTY Convictions*, Case No. IT-04-81-PT, 25 September 2008, para. 7.

³³ Friman, Hakan ... [et al.]. *Informal expert paper: Measures Available to the International Criminal Court to Reduce the Length of the Proceedings*. ICC-OTP 2003.

It is significant that international lawyers have acknowledged the pressing need to develop mechanisms for more expedient international criminal proceedings. As Geoffrey Nice and Philippe Vallieres-Roland stated in their article, to achieve this goal,

[T]here must be a healthy dose of open-mindedness and greater willingness of international criminal lawyers and judges to depart from preconceived ideas based on *either* common *or* civil law systems. Most significantly perhaps, international criminal courts must be prepared to question the assumption that all evidence must be heard orally if there is to be any chance of trials being concluded expeditiously.³⁴

3.2. Institutes outside the scope of the thesis but nevertheless relevant to the discussion

In this section I will present several processes not embraced by the idea of ACP for CIC. These include traditional plea negotiations (section 3.2.1.), truth and reconciliation commissions (section 3.2.2.) and *gacaca* courts in Rwanda (section 3.2.3.). The extensive use of these processes could be legally, politically and socially acceptable in some countries and situations, particularly where there are no functioning CJS to dictate higher standards of judicial scrutiny. In my opinion, although each reduces the quantum of justice and should not be encouraged in practice except on an exceptional basis, they are important to examine because their objectives are to address backlogs of cases in a qualitatively and institutionally different setting.

3.2.1. Traditional plea negotiations

Traditional plea negotiations (hereinafter TPN) have similarity to the concept of ‘abbreviated criminal procedure’ because their main purpose is to expedite the criminal procedure and save resources. As Michael P. Scharf, in his article *Trading Justice for Efficiency*, said:

[W]hile no single definition of the term is universally accepted, the practice may encompass negotiation over reduction of sentence, dropping some or all of the charges, or reducing the charges in turn for admitting guilt, conceding certain facts, foregoing an appeal or providing cooperation in another criminal case.³⁵

Accordingly, TPN may take the form of a plea bargaining, charge bargaining and fact bargaining between prosecutor and accused, where the latter waives some rights in

³⁴ Supra note 26, p. 144.

³⁵ Journal of International Criminal Justice 2(4), 2004, pp. 1070-1081, at 1070.

exchange for a certain benefit, mostly a reduced sentence. In this voluntary procedure the accused must be fully apprised of the consequences. Negotiation results in a plea agreement. The court may accept the agreement, in which case there will be no main trial and the agreed sentence, even below the statutory minimum, will be imposed. If the court rejects the agreement, the main trial takes place with no consequence to the accused, especially with respect to the presumption of innocence.

In an ACP for CIC context, the features of TPN concerning voluntariness and sentence reduction are worth consideration in order to promote fairness from the perspective of the accused. TPN, however, may have substantial shortcomings. First, TPN may not contribute sufficiently to the reconciliation process through the complete establishment of historical truth. This is especially so with charge bargaining, where, for example, charges for one crime are dropped in exchange for a plea to a lesser crime. A factual basis for the more serious crime may therefore not emerge. In ACP for CIC, the judgment would have to involve the judicial determination of all the facts relevant for the case at issue. Furthermore, a TPN always results in conviction, whereas in ACP for CIC the possibility of acquittal still remains.

The TPN process may not fulfil the interests of victims, particularly if a defendant pleads to a lesser crime. Also, TPN may not fully address victims' needs for reparations or, as indicated above, the creation of an historical record. These are deficiencies that must be avoided for an ACP for CIC to be successful from the perspective of those most harmed by CIC.

Procedurally, TPN may be linked to other problems. This was especially the case in Bosnia and Herzegovina. When TPN was first introduced in its civil law based system, the procedural rights of the accused were not sufficiently safeguarded.³⁶ Also, in many cases, plea agreements were concluded at the end of the main trial.³⁷ The main function of an ACP, abbreviation, was therefore thwarted.

Recently, some writers have tried to introduce the idea of the newly designed plea negotiations so as to include 'the three key restorative-justice elements – truth-telling,

³⁶ For more details, see *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards*. Convened by OSCE Mission to Bosnia and Herzegovina. Second edition. Sarajevo, May 2006.

³⁷ Good example of this practice may be found in the case of *Prosecutor v. Paško Ljubičić*, tried before the Court of Bosnia and Herzegovina.

victim participation and reparation’.³⁸ The term ‘traditional plea negotiations’ was therefore intentionally employed as a means to set apart this old practice from these new ideas that, although not termed ‘abbreviated criminal procedure’, come very close to what this expression is meant to embody.

3.2.2. Truth and reconciliation commissions

Truth and reconciliation commissions (hereinafter TRC) are alternative, non-criminal justice mechanisms. In practice they are bodies set up to establish historical truth about past serious human rights violations occurring over a certain period of time in a given country. According to the definition given by Priscilla B. Hayner, TRC do not focus on a specific event, but attempt to paint the overall picture of certain human rights abuses, or violations of international humanitarian law.³⁹ Consequently, TRC may exist alongside criminal prosecutions and even help generate information that may lead to such prosecutions.

TRC are always vested with some sort of authority that allows them greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report.⁴⁰ However, although they possess some of the qualities inherent to judicial organs, such as impartiality, independence and competence, they are not created as part of the CJS. They cannot pronounce on specific crimes, legally determine the guilt of individual perpetrators, or mete out criminal sanctions. This is generally because they do not afford the required degree of due process guarantees that are indispensable in criminal proceedings where verdicts of guilt are made. Therefore, TRC do not accomplish one of the main tasks of ACP for CIC, namely, to actually process CIC cases. This does not mean that TRC do not serve an important purpose, only that the backlog of open CIC case files cannot be resolved by means of TRC.

TRC are usually temporary and established for a pre-defined period of time, ceasing to exist with the submission of a report of its findings.⁴¹ It would be reasonable to ask whether it would be better to invest in already existing permanent institutions inside the CJS that may only need strengthening, rather than invest in *ad hoc* institutions with

³⁸ Combs, Nancy Amoury. *Guilty Pleas In International Criminal Law: Constructing a Restorative Justice Approach*. Palo Alto, (Stanford University Press) 2007.

³⁹ *Transitional Justice: How emerging democracies recon with former regimes*. Edited by Neil J. Kritz. Washington, D.C., (United States Institute of Peace Press), Volume I (1995), p. 225.

⁴⁰ Ibid.

⁴¹ Ibid.

limited objectives and timeframes. In addition, transitional justice countries have limited resources to build their institutional capacity. Parallelism can create unnecessary competition regarding internal resources and potential international donations. Strengthening the ability to achieve a higher output from existing CJS procedures, perhaps by investing in ACP mechanisms, might be preferable for society in the long-term.

The mandate of a TRC usually sets its purpose and scope of activities. ‘Commissions have generally pursued five goals: creating an authoritative record that acknowledges past abuses; providing redress and platform for victims; making recommendations for institutional reform; contributing to accountability of and justice for perpetrators; and promoting national reconciliation.’⁴² All these goals except, perhaps, recommendations for institutional reform, may also be achieved in the course of an ACP. Perhaps even more is possible. For example, a TRC makes a finding in its final report, but its ultimate impact depends on whether it is acknowledged as the truth by the relevant government. ‘Knowledge that is officially sanctioned, and thereby made “part of the public cognitive scene” ... acquires a mysterious quality that is not there when it is merely “truth”. Official acknowledgement at least begins to heal the wounds.’⁴³ As opposed to the TRC report, a judgment pronounced in an ACP does not require such an acknowledgement. Judicial truth simply cannot be disregarded by the government of a state which aspires to demonstrate adherence to the qualities of rule of law democracy.

3.2.3. *Gacaca* system of courts in Rwanda

Gacaca emerged from a resolution of the new Rwandan government to oppose any idea of amnesty and to choose the path of accountability against the background of the patent inability of its regular courts to deal with an extreme caseload (80,000 detainees awaiting trial in 2005). Although historically it represented the traditional method of community dispute resolution, *gacaca* for CIC is an innovative and considerably shortened approach that embodies elements of both restorative and retributive justice.

Gacaca was set up by the 2001 Organic Law, which was significantly amended in 2004.⁴⁴ Its preamble recognizes the necessity, in order to achieve reconciliation and justice, to permanently eradicate the culture of impunity and enable prosecutions and trials of

⁴² Steven R. Ratner, Jason S. Abrams & James L. Bischoff. *Accountability for Human Rights Atrocities in International Law*. Third edition. Oxford, (Oxford University Press) 2009, p. 263.

⁴³ *Supra* note 39, p. 228.

⁴⁴ Organic Law No. 40/2000 of 26/01/2001 and Organic Law No. 16/2004 of 19/6/2004.

perpetrators and accomplices, aiming for simple punishment and reconstitution of the Rwandese society after genocide. An ACP for CIC should undoubtedly focus on similar goals to those set forth above. *Gacaca* panels are composed of 9 persons of integrity and 5 deputies, at least 21 years old (Art.14)⁴⁵. These are lay judges who receive limited legal training. In total, 170,000 judges sit on approximately 10,000 panels. The scope of the atrocities in Rwanda warrants a dilution of expertise in the composition of panels that cannot be tolerated in an ACP for CIC, which as an integral part of a CJS would require higher standards of professionalism.

Common features exist for all the hearings before *gacaca* courts. As a rule, the hearings in *gacaca* courts are public. Internal decisions and deliberations of judges, however, are made in secret (Art.21). At the hearing, the defendant will always be made cognizant of the charges. The president of the session will give a summary of the nature of the case and evidence establishing guilt. Defendants that do not confess will be given opportunity to give their defence. Witnesses will be heard under oath, as well as evidence from the Public Prosecution if it is summoned to the trial. Any interested person may ask questions and the defendant must answer (Arts. 64 onwards). Once hearings are closed, the court retires for deliberations and makes decisions on the same or following day. The judgments or decisions taken are pronounced publicly.

Excluding the judges' deliberations, the *gacaca* procedure is open and transparent, much as any ACP for CIC should be. The broad participatory nature of *gacaca* will likely be impossible to replicate in the ACP for CIC context where professionals are charged to conduct the proceedings. In addition, certain features of *gacaca* are wholly contrary to fair trial principles that must be embedded in any ACP for CIC, where, for example, no defendant can ever be compelled to testify or denied counsel.

Article 51 classifies the accused in three categories. The first and second categories involve high and medium level actors, respectively, together with their accomplices, while the third category involves persons who only committed offences against property. The first category of the accused falls outside the competence of the *gacaca* courts. However, the law creates punishments for this category because a determination that a person falls within it can in some cases be made during the information-gathering pre-trial stage. Those individuals shall be entitled to the sentencing scheme established for them by the *gacaca* legislation. The community is involved in developing a list of accused individuals and

⁴⁵ Citations to specific articles relate to the 2004 Organic Law.

placing them in the above-mentioned categories. In an ACP for CIC, as in *gacaca*, it may be advisable and even necessary to adopt a classification scheme for different levels of participation in CIC when deciding which cases will be tried in regular procedure and which will go to the abbreviated process.

The *gacaca* law encourages accused persons to make use of the procedure of confessions, guilty pleas, repentance and apologies (hereinafter confessions). Confessions, to be accepted, must give a detailed description of the offence, reveal the co-authors and accomplices, and provide any other information useful to the exercise of the public action. The accused has to apologize to the Rwandan society for the offences that s/he has committed (Art.54). This truth-telling function will serve as a valuable therapeutic modality for those who are damaged by CIC, although such damages will forever remain.

All *gacaca* panels apply the same substantive criminal law applied by the national courts. However, the law provides a special sentencing regime. Defendants falling within the first category, who refused to confess, or whose confessions have been rejected, incur a death penalty or life imprisonment. Those who confessed incur sentences ranging from twenty-five to thirty years of imprisonment (Art.72). Defendants that fall into the second category are entitled to commutation of sentence, depending on whether they confessed and, if they did, whether they did so before or after their name appeared on the list of suspected persons. One half of their significantly reduced prison sentence will be commuted into community service (Art.73). Category three defendants are only responsible for civil reparation (Art.75). Persons convicted of genocide or crimes against humanity are liable to the withdrawal of civil rights (Art.76). The legal remedies available to defendants are opposition, appeal and review of judgment (Art.85). The above provisions illustrate the type of flexible approach to sanctions that an ACP for CIC may emulate.

Gacaca has been widely criticised by human rights NGOs such as Amnesty International and Human Rights Watch.⁴⁶ Main causes of criticism concern the right to legal defence, competence, independence and impartiality, the search for truth, and

⁴⁶ See, for example, *Law and reality: Progress in Judicial Reform in Rwanda*. Report by Human Rights Watch, 24 July 2008, Chapter IX, <http://www.hrw.org/en/node/62097/section/1> [Visited 25 August 2009]. See also Meyerstein, Ariel. *Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality*. In: *Law & Social Inquiry*, Volume 32, Issue 2 (2007), pp. 467–508.

Rwanda's commitment to international obligations.⁴⁷ William A. Schabas, in his article *Genocide Trials and Gacaca Courts*, expresses his concerns as follows:

Yet, the terrible and totally unexpected result of the *gacaca* pilot process was not to provide the fabled 'closure' but rather to reveal that the numbers of those responsible for genocide may have exceeded 100,000 by a factor of 10. Rather than resolve the outstanding cases, and end the blight of mass detentions under appalling conditions, the initial *gacaca* hearings appear to have opened a Pandora's box.⁴⁸

In January 2006, it was reported that 4,162 individuals have been adjudged.⁴⁹ It seems that if *gacaca* is destined to be successful, the pace of adjudications will have to increase exponentially.

3.3. Similar national criminal procedures (for ordinary crimes)

German, Polish and Italian codes of criminal procedure illustrate different national approaches to abbreviated criminal procedures outside the area of CIC. This allows a certain extent of analogy with ACP for CIC. The instruments employed in these selected examples may help serve in the development of an eventual ACP for CIC. The subsequent comparative discussion describes main features of these selected models.

3.3.1. Procedures in German law

Germany uses two abbreviated criminal procedures, penal order and accelerated procedure. These procedures apply to simple offences and require indisputable clarity of evidence. Since CIC cases are much more complex, features of the German models, while illustrative, may not suit an ACP for CIC without modification.

3.3.1.1. Penal order

A penal order is an order issued by a judge that has the same effect as a judgment of conviction following a trial. The German Code of Criminal Procedure envisages the procedure for penal order where public charges are judicially determined through the use

⁴⁷ For details and references see Henry J. Steiner, Philip Alston & Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals*. Third edition. Oxford, (Oxford University Press), p. 1323.

⁴⁸ 3 *Journal of International Criminal Justice* (2005), pp. 879-895, at 881.

⁴⁹ Drumbl, Mark A. *Atrocity, Punishment and International Law*. Cambridge, (Cambridge University Press) 2007, p. 85.

of written proceedings, with no main hearing taking place.⁵⁰ If the prosecutor does not consider a main hearing to be necessary, s/he may file written application to this effect, including the desired legal consequence (Sec.407). If the accused objects, or the judge either deviates from the prosecutor's assessment or wishes to impose a different legal consequence, a main hearing will take place. Otherwise, the judge will comply with the prosecutor's application and issue the penal order (Sec.408). After a penal order is served, an accused may object within two weeks. Without such objection, the order shall be equivalent to a judgment entered into force following the main hearing (Sec.410). If the objection is admissible, a main hearing will be scheduled where the defendant may be represented by counsel (Sec.411).

This procedure may be consistent with a potential ACP for CIC, the specific components of which are set forth below.⁵¹ For example, a brief written procedure *in lieu* of a lengthy hearing based on oral testimony would by definition be 'abbreviated', and prone to help resolve large numbers of cases. Also, defendant's rights to a main hearing and counsel are protected. S/he may choose, however, to waive these rights and shorten the process.⁵² On the other hand, penal orders usually involve lesser offences. Their content does not create the type of detailed record necessary in CIC cases that are inherently more serious. And even though the judge is acting for the benefit of society, the German penal order procedure seems not to address the rights and expectations of victims, a necessary component for a potential ACP for CIC.

3.3.1.2. Accelerated procedure

When the factual situation or the clarity of evidence warrants an immediate hearing, the prosecutor will file an application for an accelerated decision, dispensing with intermediary proceedings, and the main hearing shall be held immediately or on short notice (Sec.417). The charges may be presented by indictment or orally on the record at the beginning of the main hearing. If it is anticipated that imprisonment of at least 6 months may be imposed,

⁵⁰ Criminal Procedure Code (Strafprozeßordnung, StPO), Part Six, Chapter I; translation provided by the Federal Ministry of Justice. See <https://www.unodc.org/tldb/showDocument.do?documentUid=2274> [Visited 22 August 2009].

⁵¹ See section 3.6. below. Whenever a potential ACP for CIC is mentioned, it refers to this section.

⁵² To be valid, a waiver should be unequivocal and voluntary. A voluntary waiver should be informed, knowing and intelligent. See Charged Person Nuon Chea, *Decision on Appeal against Provisional Detention Order of Nuon Chea*, 20 March 2008, (Case file: 002/19-09-2007-ECCC/OCIJ (PTC01)), paras. 23-27. Waiver of trial most often arises in the context of plea agreements, an example of which may be seen in the case of *Prosecutor v. Željko Mejačić et al., Plea Agreement* (Predrag Banović). Case No. IT-02-65-PT, 2 June 2003, para. 15 (c).

defence counsel shall be appointed if the accused is not already represented (Sec.418). A judge's decision regarding this procedure may only be issued until judgment is pronounced in the main hearing, and may not be contested. On refusal, the court may decide to open main proceedings (Sec.419). Oral recitation of charges may be considered unacceptable in a potential ACP for CIC because the factual basis of the indictment will likely be complex. '[An] indictment is pleaded with sufficient particularity only if it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence.'⁵³ In ACP for CIC, as a matter of due process, it stands to reason that the best way to provide the detail necessary for preparation of an adequate defence is with a written indictment.

In the German accelerated procedure, records of an earlier examination as well as of documents containing written statements may be used, so long as defendant, defendant's counsel and the prosecutor consent, provided they were present at the main hearing. However, the judge determines the extent to which evidence shall be taken (Sec.420). In the context of ACP for CIC, using this aspect of the German accelerated procedure would be significant in reducing the time required for adjudication, unless defendant's due process rights of cross-examination would be curtailed. Further, when necessary, a mechanism should be provided to allow either party to offer additional direct and/or rebuttal evidence when the interests of justice require.

3.3.2. Procedures in Polish law

The Polish Code of Criminal Procedure⁵⁴ has several instruments to simplify criminal procedure. I selected two that might have relevance in the CIC context, and that were not addressed by the German models. They are, namely, motion to convict without a trial and voluntary submission to a penalty.

Polish criminal procedure provides that the prosecutor, with consent of the accused, may attach to the indictment a motion that the accused be convicted without a trial (Art.335). The penalty can be significantly reduced in this process. Other penal measures may also be imposed, *inter alia*, deprivation of public rights; prohibition from exercise of or engagement in specific posts professions or economic activities; obligation to redress

⁵³ *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, *Judgment* of 28 November 2007, para. 322.

⁵⁴ Act of 6 June 1997, https://www.unodc.org/tldb/pdf/polish_ccp.pdf [Visited 22 August 2009].

damage; and/or supplementary payment to the injured the public.⁵⁵ This procedure is allowed if evidence of guilt is beyond doubt and the accused is sufficiently repentant so that the objectives of the proceedings will be achieved despite lack of a trial.

Certain elements of this model could be included in a potential ACP for CIC. An unequivocal and voluntary waiver by the accused of the right to trial would satisfy due process. The allowance for imposition of alternative punishment may address the rights of victims, the public, or both. Alternative punishment will reduce the costs of imprisonment.⁵⁶

The Polish procedure also allows for voluntary submission by an accused to a specified penalty or penal measure, without evidentiary proceedings. The accused makes a motion for this to occur, but can only do so until the conclusion of the first examination at the first instance hearing (Art.387). The court may grant the motion only when the circumstances surrounding the offence give no rise to doubt, the state prosecutor and the injured party concur, and the objectives of the proceedings are to be achieved despite the hearing not being conducted in full. When granting the motion the court may regard as admitted the evidence specified in the indictment or documents submitted by a party.

For purposes of a potential ACP for CIC, having the injured party concur in the foregoing procedure helps establish transparency, openness and legitimacy from the victim's perspective. Provided the requirements are met, both Polish procedures exhibit a flexibility that may reduce backlogs, which is also a major aim of ACP for CIC.

3.3.3. 'Giudizio abbreviato' in Italian law

The Italian Code of Criminal Procedure⁵⁷ has a special procedure in which the Preliminary Hearing Judge (hereinafter PHJ), without entering into the main trial phase, delivers a judgment on the basis of the indictment filed by the prosecutor and the material contained in the prosecutor's file. The only necessary requirement for '*giudizio abbreviato*' to take place is the request of the defendant. '*Giudizio abbreviato*' is an option available for any charge, including those punishable by life imprisonment. The request must be expressed after issuance, but before confirmation of the indictment (Art.438). The purpose of this

⁵⁵ Article 39 of the Polish Penal Code, <https://www.unodc.org/tldb/showDocument.do?documentUid=682> [Visited 26 August 2009].

⁵⁶ *Criminal Justice Assessment Toolkit, Custodial and non-custodial measures, Part 3: Alternatives to Incarceration*. Convened by United Nations Office on Drugs and Crime. Vienna, 2006, p. 2.

⁵⁷ The Italian Code of Criminal Procedure (Codice procedura penale) is not available in English. An unofficial translation of relevant sections is located in Annex A. See Italian version at <https://www.unodc.org/tldb/showDocument.do?documentUid=3081> [Visited 22 August 2009].

procedure is to avoid often lengthy main trial proceedings and, in particular, the presentation of the evidence at the trial. The defendant, by accepting to be judged without all the guarantees of a fair trial, gets a reduced sentence in return (Art.442).

There are two exceptions to the issuance of a judgment exclusively on the basis of the prosecutor's file, and they reduce the advantages of '*giudizio abbreviato*' in terms of procedural economy. Either the defendant or the judge may seek acquisition of additional evidence (Arts.438, 441). The prosecutor may then offer evidence in rebuttal or amend the indictment if different facts arise, or a connected crime or aggravated circumstance emerges. If the prosecutor submits new accusations, the accused can ask that the proceedings continue in the ordinary course, including the main trial (Art.441bis).

In this abbreviated procedure, the right to appeal is limited as well. The accused and the prosecutor cannot appeal an acquittal, and the prosecutor cannot appeal a guilty judgment (Art.443).

The preliminary hearing in '*giudizio abbreviato*' in effect becomes the hearing in which the criminal responsibility of the defendant is assessed. The PHJ may become the one who both acquires the evidence and issues the judgment, thus greatly streamlining the procedure. In other regards, this Italian model offers examples relevant when designing a potential ACP for CIC. First, reduced penalties may serve as strong incentives for defendants to be willing to make use of an ACP for CIC, thus increasing the ability to resolve more cases. Second, because the defendant requests such a procedure, the danger of infringement of fair trial principles would be alleviated. Third, while the duration of the procedure would be considerably shortened, the full establishment of facts in the final judicial determination would not be compromised. The possibility remains that either the accused, the prosecutor or the court can seek additional evidence. This promotes the truth-telling element of judicial determination, important to the fairness of the process as a whole.

3.4. Common features of the German, Polish and Italian solutions

Certain common elements that occur in the various models presented above should likely be considered for a potential ACP for CIC. The evidence is mainly presented in written form, but the case could also be decided on hearing. From a practical and realistic standpoint, a hearing is probably more suitable for deciding CIC cases because of their

nature and scope.⁵⁸ However, the length of the procedures is considerably shortened since there are no regular hearings as a general rule, or when written evidence is available and its use is agreed on by the participants. If the consent or the request by the accused for such a procedure is not specifically envisaged, there is always a remedy available, namely, a full trial. The reduction of penalties in some models could also serve as a powerful incentive for an accused to make use of such procedures, especially when the prosecution's case is undoubtedly strong. The possibility of alternative sentences should be available as well to provide an appropriate degree of flexibility.

It would be important that a potential ACP for CIC be regulated by criminal law and administered within the CJS, such as the case with the presented models. This would ensure that case files remain in the CJS, meaning there will be a judicial or prosecutorial record of the decision that possesses a sufficiently detailed determination of the charges and facts in the case at hand. Finally, the right to appeal should be guaranteed.

3.5. The Colombian experience: Can ACP work for CIC?

Colombia has developed a form of ACP for CIC. It did so to address the interests that arose in its unique CIC context. An examination of its ACP for CIC reveals that it is designed for use in situations where the defendant does not intend to contest culpability. The Colombian experience, though born out of its internal conflict, may assist other states that seek to develop their own country specific ACP for CIC systems.

3.5.1. The backlog of core international crimes cases in Colombia

During the Colombian armed conflict, various actors committed atrocities against the civilian population. More than 100,000 people were victimised by different atrocious crimes, including massacres, forced disappearances, sexual violence, torture and arbitrary detention. Approximately 3,000,000 victims were internally displaced.⁵⁹ Consequently, the State needed to address these matters. Peace negotiations between the government and illegal armed groups,⁶⁰ held in 2002, resulted in demobilization of 35 paramilitary groups

⁵⁸ A hearing in a CIC case should always be open to the public to ensure transparency and openness and to protect a defendant's due process rights. See generally ICCPR Article 14.

⁵⁹ See article by Saffon, Maria Paola. *Problematic selection and lack of prioritization: the Colombian experience*. In: *Criteria for Prioritizing and Selecting Core International Crimes Cases*. Edited by Morten Bergsmo. Convened by the Forum for International Criminal and Humanitarian Law. Oslo, PRIO, 2009 (FICHL Publication Series No. 4 (2009)), p. 95. See more about the Forum at <http://www.prio.no/FICJC> [Visited 28 August 2009].

⁶⁰ The ones ascribed to the Colombian Confederation of United Self-Defences, *ibid.*

and over 30,000 individuals belonging to them.⁶¹ A law was also passed, the Justice and Peace Law (hereinafter JPL),⁶² that developed a special framework⁶³ to provide for the investigation and prosecution of CIC perpetrated by demobilized members of illegal armed groups.⁶⁴

The Colombian armed conflict resulted in a large backlog of CIC cases, consisting of the cases brought against demobilized members of armed groups under JPL, outside of it, and cases against non-demobilised individuals to be addressed by ordinary criminal procedure.⁶⁵ By January 2007, there were over 100,000 cases before the Justice and Peace Prosecutor.⁶⁶

3.5.2. The Colombian JPL special procedure

The peace negotiations mentioned above were marked by conflicting interests of different actors. Armed groups were not ready to accept any accountability measures for their criminal acts, threatening to resume violence if such measures were to be imposed. At the same time, national and international NGOs and victims' organizations were strongly opposed to any solution that might result in the eventual impunity or *de facto* or *de jure* amnesties.⁶⁷ The JPL framework sought to address these tensions and incorporated many important elements of an ACP for CIC. Among other things, these include both the victim's right to truth, justice and reparations, and the requirements of peace and individual or collective reintegration into civilian life of the members of armed groups (Art.1).⁶⁸

Within the framework of a potential ACP for CIC, when enacting the required legislation, one possible solution might be to designate special judicial and prosecutorial

⁶¹ Ibid.

⁶² Law No. 975, 25 July 2005, <http://www.coljuristas.org/justicia/Law%20975.pdf> [Visited 22 August 2009].

⁶³ Discussed in a sub-section 3.5.2. below.

⁶⁴ It should be noted here that illegal armed groups, as referred to in the JPL, fought on the side of the government, as well as against the government, as guerillas. The law does not address illegality of membership in these armed groups, *per se*. In this writer's opinion, group membership makes no difference in terms of the government's obligation to equally address all the crimes committed, given the international obligation to prosecute those responsible for CIC and Colombia's determination to apply the law in a neutral fashion with respect to individual criminal acts.

⁶⁵ This thesis addresses JPL process only.

⁶⁶ See article by Kalmanovic, Pablo. *Introduction: law and politics in the Colombian negotiations with paramilitary groups Law in Peace Negotiations*. In: *Law in Peace Negotiations*. Edited by Morten Bergsmo and Pablo Kalmanovic. Convened by Forum for International Criminal and Humanitarian Law. Oslo, PRIO, 2009. (FICHL Publication Series No. 5 (2009)), p. 19. The number indicated may be deceptive because there may be several cases per one perpetrator.

⁶⁷ Id.

⁶⁸ JPL was significantly amended by the rulings of the Constitutional Court, made upon requests and pressures from the civil society, since its application was still seen to result in the lenient treatment of the paramilitaries.

units inside the CJS to undertake the corresponding actions to implement the adopted procedure. In Colombia, JPL created the *Superior Judicial District Courts for Justice and Peace Matters* (Art.32) and the *National Prosecutorial Unit for Justice and Peace* (Art.33), for example. It is also important to set criteria for determination whether the case is suitable for ACP. Not every case will be. JPL set eligibility requirements for individuals to avail themselves its benefits according to a list provided by the government (Art. 10 and 11).⁶⁹

The JPL procedure has additional distinctive elements for an ACP for CIC. First, it has a truth-telling function that is irreplaceable to the victims,⁷⁰ commencing with a *spontaneous declaration and confession* given before the prosecutor delegate. This requires that persons shall describe the circumstances of time, manner, and place in which they participated in the criminal acts committed on occasion of their membership in their armed groups, and for which they avail themselves of this law. To ensure completeness and accuracy, the truthfulness of their confessions are subject to verification.

Second, JPL entails a simplified procedure that saves time and resources while affording due process. A demobilized person shall immediately be placed at the disposal of the judge who, within thirty-six hours, shall schedule and hold a hearing (Art.17) during which the prosecutor shall make a factual indictment. The prosecutor then undertakes to investigate and verify the facts admitted by the accused. On completion of these tasks, s/he will ask the judge to schedule an indictment hearing, within ten days (Art.18). The accused may accept the charges. The determination of whether such acceptance was free, voluntary, spontaneous, and assisted by defence counsel will be made in a public, transparent hearing. Upon such determination, a hearing for sentencing and imposition of penalty shall be scheduled within ten days. If the accused does not accept the charges, the case shall be forwarded to the ordinary criminal procedure (Art.19). The right to defence is guaranteed through the mechanisms of the Public Defender Service (Art.34), yet another minimum guarantee of due process that JPL provides.

Third, JPL procedure involves victims' participation and attends to their respective interests. During the hearing, they can make an express request for an interlocutory proceeding regarding reparations resulting from the criminal conduct. Reparations may

⁶⁹ Eligibility requirements were made stricter by the Constitutional Court ruling; see Ruling C-370 as cited by Pablo Kalmanovic, *supra* note 66, p. 16.

⁷⁰ *Supra* note 23, paras. 14-23. See also Naqvi, Yasmin. *The right to the truth in international law: fact or fiction?* In: *International Review of the Red Cross*, Volume 88, Number 862, June 2006, pp. 245-273.

include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The decision on this request will be incorporated into the verdict (Art.23). The JPL also creates a *Fund for the Reparation of Victims*, made up of all the assets or resources that may be surrendered by persons or illegal armed groups, resources from the national budget, and donations in cash and in kind, both national and foreign (Art.54). Throughout the JPL process, victims also have a right to be heard, to have legal assistance, and to be informed of the course and outcome of the proceedings (Art.37). In this way, the requirement for transparency and openness of the proceedings is facilitated, more so because the law further contemplates means for conservation of archives for historical purposes. These include the duty of memory and specific measures for preserving the archives and facilitating access thereto (Chapter X).

Finally, JPL creates a special sentencing regime whereby execution of sentence determined in the respective judgment shall be suspended and replaced with an alternative sentence of imprisonment of at least five years and not greater than eight years, based on the seriousness of the crimes and defendant's effective collaboration in their clarification (Art.29). Defendant will be required to make a commitment to contribute to her/his re-socialization, to promote activities geared to the demobilization of the armed group of which s/he was a member, as well as not to commit the crimes for which s/he was convicted. These components of reduced and alternative sentences that deter, but also contribute to reconciliation processes, might be further explored within an ACP for CIC.

3.6. Conclusion: basic features for potential ACP for CIC

Based on the information and analysis provided, it is possible to envisage certain basic features that a potential ACP for CIC should possess to serve the public's interest that justice be done in a fair and expeditious manner.

First, in order to comply with the principle of legality⁷¹ such procedures should be prescribed by law and made an integral part of the CJS.⁷² Being part of the CJS will require that ACP be administered by regular courts, without creating extra-judicial mechanisms or additional institutional layers. However, depending on the particular needs of the

⁷¹ Supra note 15, Chapter 2, Sections 2.3.-2.5., pp. 36-52.

⁷² They may be specifically designed to resolve the particular backlog of cases and therefore be introduced through a special legislation. Alternatively, they may be introduced through amendments to the existing legislation.

jurisdiction, some judiciaries may decide to have specially designed panels of judges and/or corresponding prosecutorial units.

There may be differences of opinion regarding the issue of whether ACP should apply to all CIC, or restrictively applied. In any event, the legal regulation should specifically elaborate which categories of CIC may fall under these proceedings, according to clear criteria. Differences in classification were considered in the *gacaca* process in Rwanda. In an ACP for CIC, it may be appropriate to distinguish between more serious CIC cases that violate individual life or physical integrity (murder, extermination, torture, rape) from less serious cases, where the interest violated is property (pillaging or destruction), freedom of movement (displacement of a civilian population or an unlawful deportation) and, maybe, personal liberty (unlawful detention). Furthermore, it is important to distinguish between different modes of individual criminal responsibility of a perpetrator. It may be found that different treatment should be imposed on actors such as masterminds, leaders and superiors, direct perpetrators and those who aided, abetted or induced the commission of these crimes. There is also a spectrum between the different consequences of CIC for victims, ranging, for example, from the destruction of the whole group to the destruction of property.

Second, ACP for CIC should increase the ability of CJS to resolve large numbers of cases that have created a backlog. This entails that the procedure should be simplified to the extent possible. Actual time used for adjudicating a case should be considerably reduced. One way to accomplish this is by limiting oral presentation of evidence, so long as it is in balance with the fair trial rights of the accused.

Third, ACP for CIC must be voluntary and non-coercive, based on fundamental fair trial principles of due process. The defendant must have the opportunity to opt out. Nevertheless, certain deviations in the quantum of due process may be permissible. ‘A defendant is entitled to a fair trial, but not a perfect one.’⁷³

Fourth, ACP for CIC should be transparent and open. Unless absolutely necessary to protect the safety of a witness or a similar interest, the public should have access to all proceedings, including the pronouncement of the final judgment. Extensive use of court outreach and similar methods should be utilized in order to satisfy the public interest in having an appropriate degree of insight in the organization, the course and the outcome of

⁷³ *Lutwak v. United States*, 344 U.S. 604, 619 (1953); Decided 9 February 1953.

such procedure.⁷⁴ For example, when documentary evidence is used, summaries should be made available for public scrutiny and education.

Fifth, ACP for CIC should be designed as a part of a wider transitional justice process. Several main issues should be addressed in this context. The purpose of the process, and its details and outcomes, should be explained to victims' groups and the general public. Beyond mere explanation, the procedure should actively address victims' claims for justice, truth, apologies and reparations. From a societal standpoint, the procedure should help establish judicial truth by creating an historical and legal record with judgments containing factual and legal findings that should not be significantly different than those issued in regular criminal procedure.

Sixth, an ACP for CIC should allow for imposition of a variety of sanctions with the necessary degree of flexibility. There could be the possibility of sentence reduction, alternatives to imprisonment and a combination of sentences and/or sanctions. Flexibility might also include barring certain people from serving in police and security forces for a defined period of time or limiting their participation in the political life of the given country.

⁷⁴ *Rule of Law Tools for Post-conflict States: Maximizing the Legacy of Hybrid Courts*. Convened by Office of the United Nations High Commissioner for Human Rights. New York and Geneva, 2008, p. 18. See <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf> [Visited 20 August 2009].

4. Arguments for and against of ACP for CIC

The purpose of this chapter is to assess the appropriateness of ACP for CIC. To do so, I will commence with arguments in favour (section 4.1.) and continue with arguments against (section 4.2.).⁷⁵ The final aim of this chapter is to offer some guiding principles that I believe should be considered if an ACP for CIC, as described in section 3.6., is to meet the interest of stakeholders in the CIC process (section 4.3.).

4.1. Arguments in favour

4.1.1. ACP for CIC, within existing CJS, is the most fair and realistic way to address the obligation to prosecute and prevent impunity

In light of the fact that large scale conflicts result in tremendous damage and destruction to people and property, it is advisable to keep in mind the scale, gravity and complexity of the atrocities and the identity of victims and perpetrators. Countries have individual statutory obligations to investigate and prosecute all crimes. International instruments such as the 1949 Geneva Conventions, the 1948 Genocide Convention and the 1998 ICC Statute impose on the Contracting Parties a duty to investigate, prosecute and punish individuals responsible for CIC.⁷⁶ The principle of universal jurisdiction provides the reinforcing effect to the obligation to prosecute.⁷⁷ The inability of a CJS to resolve a backlog of CIC cases may cause a failure to fulfil this obligation. Pressure to adequately address the issue may create temptations to use mechanisms outside the existing CJS for dealing with the reported crimes⁷⁸ or to grant amnesties. An ACP for CIC, because it is fair and efficient, can address this serious problem and alleviate concerns that use of such alternative mechanisms might result in factual impunity.

It is very important that these matters be resolved within the CJS. When cases remain in the CJS it helps show that government is willing and capable to deal with past atrocities. Of course, CIC are not the only type of crime amenable to create extraordinary

⁷⁵ Some of the arguments in this section are more political than strictly legal.

⁷⁶ Supra note 2.

⁷⁷ See article by Utmelidze, Ilia. *The time and resources required by criminal criminal justice for atrocities and de facto capacity to process large backlogs of core international crimes cases: the limits of prosecutorial discretion and independence*. In publication referred to in supra note 59, p. 132.

⁷⁸ One example is the Commission for the investigation of the events in an around Srebrenica between 10 and 19 July 1995 as one of the attempts to partly resolve the issue, but where the actual outcome was burdening the system with additional lists of thousands of individuals allegedly involved in those crimes.

situations within the CJS. In many countries there is often an accumulation of non-CIC cases that overload the CJS and create delays in it. In such situations, legal systems attempt to find alternative solutions to deal with backlogs, such as decriminalization.⁷⁹ Due to the nature and gravity of CIC, they cannot be decriminalized like some ordinary offences that are removed from the CJS. An ACP for CIC within the CJS can be an effective way to address the matter of backlogs and prevent the perception and reality of impunity.

4.1.2. ACP for CIC will be trusted by victims and the general public

In order to trust their government, victims and the general public must perceive accountability as serious and genuine. This may be accomplished by an official body with power to deliver justice and the willingness to deal with, and distance itself from, the past atrocities.⁸⁰ There is a high expectation that the government demonstrates it possesses the necessary degree of competence, independence and impartiality. Furthermore, it is important for the victims to have their suffering acknowledged in an independent judicial process. It is equally important that they have an ability to fully enforce their rights and obtain redress.

An ACP for CIC structured along the lines indicated in section 3.6. will go far in establishing victims' trust. As mentioned above, when cases remain in the CJS, it prevents sending the wrong signal to victims and the general public that the government is unwilling or incapable to deal with past atrocities. It may calm their fears that reform processes are ineffective or operating too slow, or that the government is failing to deliver genuine accountability for the crimes occasioned upon them. A properly designed ACP for CIC possesses a sufficient degree of quality of judicial determination that would be hard for anyone to deny in the future.

4.1.3. ACP for CIC allows equitable sharing of limited resources and increases the overall capacity of the CJS

The prolonged existence of a large backlog of CIC cases can have negative effect on the ability of the CJS to deal with other forms of crime, reform of the justice system and capacity building. Other such crimes that societies must cope with include, but are not

⁷⁹ Jehle, Jorg-Martin and Wade, Marianne. *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe*. Berlin, (Springer) 2006, p. 5.

⁸⁰ Because the commission of CIC is quite often affiliated with the government or authorities that either directly perpetrated or failed to protect their people.

limited to, hate crimes, organized crime and corruption. In many transitional countries, the whole justice sector is being reformed. Success of reform is normally evaluated by the progress made on the most sensitive and controversial cases. As a rule, limited or scarce available resources will create an exigency to choose priorities. This translates into a need for reasonable allocation of resources in order to resolve different challenges that justice sector might face.

CIC require a specialized capacity. As seen below, the monetary cost of a full blown CIC trial is enormous. Additionally, extensive investment will have to be made in human and other resources. It will be essential to train legal professionals to meet all the standards of these lengthy and complicated CIC criminal procedures. In addition, these cases often attract the most competent minds. This may result in two layers of professionals within the CJS, one that works on CIC, another that deals with the rest of the justice matters. Such a two-tiered system hinders the ability of the CJS to deliver justice across the system. It cannot reasonably be argued that all resources should be allocated to CIC, nor can CIC receive unlimited logistical support. An ACP for CIC, because it is efficient and streamlined to process cases more quickly, will allow for a more equitable sharing of time, human and other capital that will increase the overall capacity of the CJS.

4.1.4. ACP for CIC would be faster and more cost-effective than full criminal trials

When one considers the costs, length and output of full, non-abbreviated CIC trials, there is an inconsistency. A few statistics evidence this fact. At the ICTY, in 2005, it was estimated that the average trial at first instance took about one year. Some lasted as long as three years. In nine years, the ICTY completed thirty-five trials, involving forty-six individuals. Out of this number, seventeen persons in fifteen cases pleaded guilty.⁸¹ In 2009, the staff of the Tribunal numbered 1,118. Its budget grew from \$276,000 USD in 1993, to \$342,332,300 USD for the 2008-2009 biennial.⁸²

At the national level, the statistics for Bosnia and Herzegovina on the number of started and completed CIC cases, between January 2004 and April 2009, processed at the four levels of government⁸³, show that 133 cases were started⁸⁴ and 91 completed⁸⁵. Data

⁸¹ Supra note 29, p. 169.

⁸² See <http://www.icty.org/sid/325> [Visited 24 August 2009].

⁸³ Bosnia and Herzegovina has a complex administrative organization. It comprises of the state level authorities, two entity levels – Federation of Bosnia and Herzegovina and Republika Srpska, and Brčko District. The CIC are being processed on all these levels of government.

⁸⁴ See the statistics announced by the OSCE Mission to Bosnia and Herzegovina at

has shown that all prosecutors' offices in Bosnia and Herzegovina reported 12,484 persons as possible perpetrators of war crimes in the period between 1992 and 2006⁸⁶. Between 2006 and 2009, the State Court completed an average of seven cases per year.⁸⁷ Even with a dramatic increase in procedural efficiency, it is very doubtful this apparent backlog can be cleared by use of existing criminal procedures, particularly while suspects and witnesses are still alive.

From the above, it follows that, at the international level, the small overall output is perhaps due to cumbersome and over-complex procedures. On the national level, it appears that the problem with output may be due to lack of capacity. In either event, the concept of ACP for CIC presented in this thesis may reduce the overall time required to prosecute many CIC cases and the backlog that results from conducting full trials.

In an ACP, the accused may waive his/her right to a main trial and there is an increased possibility that there will be no appellate proceedings. If so, from a practical standpoint, drafting a judgment may likely be the most time consuming part of the ACP. Logistical problems that often exist, such as the lack of courtrooms or specialized premises, would be considerably alleviated. The need may still arise for witness protection measures, but if written testimony is used, there would be a decreased, if any, need for witness hearings during the trial. Moreover, when judges do not speak the same language as a witness, ACP would save time over simultaneous translations as well as translations of transcripts.

ACP for CIC will allow for advancements at the sentencing stage, too. The relatively few sentences meted out by the ICTY and ICTR are served abroad on the basis of special agreements with the host countries, but the situation is different when it comes to national jurisdictions where countries might still be badly affected by economic problems. The prison sentences in such CIC cases might overstretch the prison capacities.⁸⁸ Imprisonment costs will be shifted to the society. Arguably, there might not be enough money for the victims' claims. Studies have shown that alternative mechanisms of

http://www.oscebih.org/images/WC_Started_0409.jpg [Visited 13 August 2009].

⁸⁵ See *ibid.*, at http://www.oscebih.org/images/WC_Completed_0409.jpg [Visited 13 August 2009].

⁸⁶ 'Proposed Solutions Regarding the Harmonization of Jurisprudence of Courts in the War Crimes Cases in Bosnia and Herzegovina', High Judicial and Prosecutorial Council, 17 July 2007, p. 2.

⁸⁷ *Supra* note 85.

⁸⁸ This was the case in Rwanda. A similar problem exists in Bosnia and Herzegovina. See *Final Report: Examination of the Effectiveness and Efficiency of the Execution of Criminal Sanction*. Convened by Department for International Development. City of publication not provided, April 2006. The report is on file with the author.

punishment can be much less costly than imprisonment.⁸⁹ Thus, use of an ACP for CIC, if it reduces rates and costs of incarceration, may provide long-term benefits for victims.

4.1.5. ACP for CIC may overcome public scepticism

Once a state chooses to implement its obligation to prosecute individuals for alleged CIC, it would represent a defeat if the CJS cannot manage to process such cases. It would also create scepticism regarding its general ability to process all cases. This scepticism can come from the general public, victims, or donors interested in building capacity in transitional countries. The slow pace of resolving backlogs of cases and the overall low number of judgments rendered can also build scepticism, not to mention speculation regarding the independence of the justice sector from political influences, or its outright willingness to address the issue in a serious manner. The general competence to deal with this complex field of law and the ability to organize the work efficiently and effectively may also come into question. In addition, lawyers may feel they lack competence to handle issues with larger social and political implications, and thus be adversely affected.

If CJS introduces mechanisms, such as a well functioning ACP for CIC, this will likely increase the output of its work and begin to tangibly resolve the backlog of CIC cases. The above-mentioned problems and attitude of sceptics can be managed. Overall progress and ability to demonstrate visible and realistic ways of resolving the issue motivates the support of the public, political and donor communities, both to the CJS in general and prosecution in particular.

4.1.6. ACP for CIC may decrease the chances for impunity

If CIC case files cannot be dealt with inside the CJS, due to lack of capacity, but are given to other mechanisms, such as TRC or general amnesties, the chances for impunity will arise. There likely will be a temptation when dealing with large backlogs of CIC cases to argue that alternative mechanisms will better resolve the issues and lessen pressure on the CJS. However, processing CIC cases outside the CJS would be problematic in relation to the principle of individual criminal responsibility. Furthermore, there are strong arguments from the victims concerning their right to justice and legal redress for victimisation and suffering.

⁸⁹ See *ibid.*, supra note 56.

Alternative mechanisms may prove disadvantageous in other ways. Even if political considerations result in their use, backlogs may still remain. Such mechanisms may face similar problems to those of the judiciary. These include the lack of capacity, resources, and inability to address large number of issues during their limited existence. Their methodologies do not involve processing of individual cases or pronouncements of individual criminal responsibility. Since they won't be able to process the judicial backlog and may even generate their own, they foreseeably may apply amnesties to close backlogs, and impunity will result. With regard to amnesties, one commentator has noted that 'there is growing support for the position that amnesties for the core crimes [...] are generally incompatible with international law.'⁹⁰ In short, alternative mechanisms may not avoid impunity. Because of the capacity of ACP for CIC to deal with backlogs in a fair manner, the potential for impunity will be decreased.

4.1.7. ACP for CIC will contribute to truth-telling and creation of a judicial and historical record

It is generally recognized that judicial decisions create an accurate and undeniable historical record of the factual basis of crimes that were committed during the conflict.⁹¹ It establishes, according to the highest judicial standards, the role and involvement of the individuals and organizations in the events. In comparison with any other form of written or oral decisions, a judgment gives the highest degree of attention to important details of atrocities and how they occurred.

One decision that clearly established an undeniable factual basis is the ICTY judgment delivered in *Prosecutor v. Kvočka et al.*, regarding the facts and circumstances surrounding the establishment of Omarska, Keraterm and Trnopolje concentration camps.⁹² Even the genocide in Srebrenica was denied by a certain part of the population at the perpetrators' side. Such denial is absurd after the ICTY judgment in *Krstić* case or the ICJ judgment in the case of *Bosnia and Herzegovina v. Serbia*.⁹³

⁹⁰ Stahn, Carsten. *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*. In: 3 *Journal of International Criminal Justice* (2005), pp. 695-720, at 701.

⁹¹ Schrag, Minna. *Lessons Learned from ICTY Experience*. In: 2 *Journal of International Criminal Justice* (2004), pp. 427-424, at 428.

⁹² *Prosecutor v. Miroslav Kvočka et al., TC Judgment*, Case No. IT-98-30/1-T, 2 November 2001.

⁹³ *Prosecutor v. Radislav Krstić, AC Judgment*, Case No. IT-98-33-A, 19 April 2004. See also *Bosnia and Herzegovina v. Serbia and Montenegro, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment*, ICJ, 26 February 2007.

An ACP for CIC preserves the unique and crucially important role of judicial determination and provides a written record of the past, with the highest standard of proof, for generations to come. This is perhaps the main difference between the ACP and other alternative mechanisms.

4.2. Arguments against

4.2.1. ACP for CIC might not meet important fair trial standards

No one should be punished for CIC without a fair hearing, as a matter of due process.⁹⁴ This is a fundamental consideration of human rights and criminal procedure. Although the interrelated right to be tried without undue delay⁹⁵ is significant, particularly to the incarcerated, a rush to an abbreviated trial has several important shortcomings. It follows that fairness should not be compromised on account of expediency. For example, if an ACP uses previous statements or testimony of a witness, where defendant or counsel was unable to cross-examine, then defendant's right to examine witnesses is denied.⁹⁶ Also, in the haste to process cases, where often the prosecutor has had months or years to accumulate evidence, there is a question concerning defendant's right to have adequate time and facilities to prepare a defence.⁹⁷ Defence counsel in ordinary criminal proceedings complain that 'equality of arms' slants towards the prosecution.⁹⁸ In an abbreviated procedure, the above-mentioned shortcomings will most likely be even more pronounced. Unless these rights can be sufficiently safeguarded, the defendant must receive full trial.

4.2.2. ACP for CIC are not suitable because the crimes are too serious

No crimes are as serious as CIC from an individual and societal point of view. One need only look at a few of these crimes or the acts that constitute them. Genocide. Extermination. Torture. Enslavement. Biological experiments.⁹⁹ These are acts of depravity. It might therefore be very difficult and even unpopular to argue for application

⁹⁴ See supra note 3.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ On equality of arms principle see *Prosecutor v. Dario Kordić and Mario Čerkez, AC Judgment*, Case No. IT-95-14/2, 17 December 2004, paras. 175-177. On defence counsel's claims of inequality see Ellis, Mark S. *Achieving Justice before the International War Crimes Tribunal*. In: 7 *Duke Journal of Comparative & International Law* 519 (1997), Section 5, p. 533.

⁹⁹ See the ICC Statute for the most comprehensive list of CIC.

of ACP to crimes placed in the CIC category. Many in society, not to mention victims, will oppose the concept of ACP for CIC on this basis alone. This is so, even if, as stated in section 3.6. above, certain lines can be drawn to establish sub-categories according to specific criteria. Overall, it is a matter of morality and ethics, and, for this reason, such argument may have merit.

4.2.3. ACP for CIC might create a discriminatory sentencing regime causing adverse consequences

One of the requirements for a potential ACP for CIC is an introduction of a special sentencing regimen as incentive for defendants to participate and to make the process practicable. However, imposition of reduced or alternative sentences for CIC may be seen as inappropriate and unjust. In this regard, such punishment, considering the seriousness and consequences of CIC, could create a perception of insufficiency and cause a strong negative reaction in the public. Opposition from the victims' community might be the most powerful. Politicians, as creatures of public opinion, may feel reluctance to undertake steps needed for legalization of alternative forms of punishment or ACP for CIC in general.

Additionally, introduction of a specialized sentencing regime for CIC cases will in most situations create a vacuum between the sentencing regime for ordinary crimes and CIC. In other words, the murderer in time of peace might get a much harsher sentence than a war time murderer. If CIC are handled so differently, a paradoxical situation will occur that undermines the logic of the whole CJS. It would be extremely difficult to explain to the victims why certain interests are being protected and valued more in peace time than in war.

4.2.4. ACP for CIC might not meet expectations of victims

When it comes to processing of and accountability for CIC, victims' expectations could, arguably, be placed in two categories, one involving process, the other involving punishment. Research conducted in post conflict or conflict regions reflects the preferences of victims:

'The statistics on what victims view as the main purposes of taking action against offenders are fascinating. Sixty-nine percent said that establishing the truth about what happened is a main purpose – in fact, this is the most frequently identified purpose. A further 25 percent answered that enabling people to live together was a main purpose; the same percentage indicated

that taking revenge on the perpetrators was a main purpose (again researchers permitted multiple responses by victim interviewees).¹⁰⁰

The same study also said, ‘Overall, in terms of sanction, 42 percent of victims supported imprisonment and 39 percent payment of money to the victims.’¹⁰¹

Besides the views supporting the victims’ right to truth, trial, justice and punishment, there are others who maintain that, for example, a judicial pronouncement of guilt with all its implications is sufficient for the reinstatement of the victim, regardless of the enforcement of punishment. Some other views profess that one cannot talk about victims before the occurrence of a trial wherein their victimhood is established. Until then, one can only speak about the ‘alleged’ victims and the ‘alleged’ perpetrators.¹⁰²

Moreover, because ACP for CIC does not provide a full trial, some victims may feel they are treated like they have suffered less. They might think that justice is biased and that certain crimes are accorded preferential treatment through prioritisation. Indeed, the family of a murdered person cares little about how their loved one was killed or about the legal classification of the act; in either event a member of the family is forever gone. However, legal classification could cause some of these crimes to be prioritised for full trial while others may be directed into an abbreviated procedure. Victims may feel neglected if perpetrated crimes qualify for an ACP. The potential for differentiation in the treatment and punishment of perpetrators for their crimes makes ACP for CIC both difficult to administer and insufficient to satisfy the needs and expectations of victims.

4.2.5. ACP for CIC might lack consensus or face significant resistance

It may be an extraordinary task for the main actors of the CJS to agree on the application of an ACP for CIC. A large number of lawyers may be keen to preserve the traditional legal thinking that the main effect of criminal law is deterrence and retribution. These lawyers will most likely be oriented towards making perpetrators face full trials and receive maximum sentences. Much effort and debate may be necessary to persuade lawyers to acknowledge that the legal system they belong to and trust is not always able to cope with the challenges before it in a fair, efficient and productive manner.

¹⁰⁰ See supra note 49, p. 43.

¹⁰¹ Id., p. 42.

¹⁰² See more on all the above views in the article by Sanchez, Jesus-Maria Silva. *Doctrines Regarding „The Fight Against Impunity“ and „The Victim’s Right for the Perpetrator to be Punished“*. In: Pace Law Review (2008), Pace University School of Law.

In post conflict countries, the debate on ACP for CIC might easily become a political discussion where it will not be easy to secure necessary support. Many political actors may fear that such an approach will be perceived as a lenient criminal policy towards perpetrators. Their main concern is how to formally end the process of transition while serving the interests of victims, the general public and the rule of law, and the conflicts that often arise between them. Since an ACP for CIC may prove controversial from the point of view of these different groups and interests, politicians may choose not to take a clear position in the matter. However, their need not to be seen as ‘soft’ towards those whose behaviour is condemned by the public creates a paralysing effect that causes inaction rather than action that may undermine necessary political support. Despite their motivations, delay exacerbates the problem of dealing with CIC overall, not to mention completing the transition process.

More than constituting an argument against ACP for CIC, this phenomenon is an explanation as to why ACP for CIC may not occur. Without leadership from the relevant actors, public support cannot be generated and reform will most likely never get off the ground.

4.2.6. ACP for CIC will require amendments to both substantive and procedural law

Substantial changes of law and the introduction of new institutes is a challenging exercise that requires effort and consensus at the legislative, executive and judicial level. Introduction of an ACP for CIC will require significant changes in very sensitive areas of criminal procedure and sentencing policy. If special court panels and prosecutorial units are to be designated solely for the application of ACP, then laws on courts and prosecutors’ offices might also require amendments. Very few jurisdictions presently allow for some sort of accelerated procedure even for ordinary crimes. Although not largely perceived as controversial, the majority of the civil law countries do not even see a need for introduction of a plea negotiations procedure. It would not be surprising, therefore, to see these same countries oppose an ACP for CIC with its innovative features.

However, even if the legal community accepts the possibility as such, introduction of an ACP for CIC might encounter further obstacles at the political level. Some prominent members of political parties in countries in transition, associated with various groups in the former conflict, may pursue a negative agenda when it comes to formulating and implementing an ACP for CIC. In other words, they might apply pressure to create a watered-down procedure in which it is difficult to obtain full accountability for criminal

behaviour, in order to protect their favoured group. There is also a more negative possibility that these same individuals find themselves sitting in a parliament. Such is the case in Bosnia and Herzegovina, where the once conflicting ethnic groups are all represented in parliament. Members of each group are able to block laws they believe adversely affect their vital national interest. In such a situation, there or elsewhere, it would not be surprising that at least one such group might obstruct any proposed legislation that could eventually lead to its members being held accountable for CIC.

Once more, this is not a substantive legal argument against an ACP for CIC, but it rather constitutes a political obstacle that cannot be ignored with respect to prospects for its implementation.

4.2.7. ACP for CIC is uncertain to actually work in practice

ACP for CIC are untested and unproven. The absence of precedent makes it more difficult to know if they will work in practice. Under the best of circumstances, it will be a challenge to make them function. Legal professionals will have to be trained in order to deliver positive results. This may not be an easy task. First, it is a foreign concept to the majority of CJS and may therefore breed scepticism among practitioners, and an unwillingness to use it. Second, to implement change in an institutional system that was functioning in the same constant mode for many years may take too much time. Assuming the resistance to change outweighs other variables, an ACP for CIC may not ever get off the ground.

4.2.8. ACP for CIC might not be capable to resolve the backlog

The possibility exists that, even with an ACP for CIC, some situations will entail a scale of victimisation so large, like in Rwanda, that the number of perpetrators overwhelms the ability of CJS to address this issue in its totality. Even with the procedure in place and all the will needed, the lack of adequate participation by perpetrators, described below, or the simple weight of too many cases will prove that the mechanism is ineffective or has little effect on actually solving the backlog. In such a situation, no system within the CJS will work. As previously discussed, it would not serve the public interest to create a system that will not remedy the problem.

4.2.9. ACP for CIC might be rejected by perpetrators

The political and ideological context may cause perpetrators to reject ACP for CIC. In some cases, suspects for CIC might find themselves going to trials as heroes in the eyes of their governments, political factions, religious or ethnic groups. The possibility that these suspects will actively participate in the ACP can be perceived as treason. They may not regret the crimes they have committed. If they admit the facts, they are betraying their cause. They may also fear that they or their family will be persecuted on account of their admission, especially in places where there is still strong political support for the ideology or political system that stood behind or benefited from perpetration of these crimes. Mark Drumbl catches the spirit of this mentality quite well in the Rwandan context, through interviews conducted with genocide suspects in the central prison of Kigali:

Nearly every interviewee did not believe he or she had done anything “wrong”, or that anything really “wrong” had happened, in the summer of 1994. Detainees who acknowledged that violence had occurred generally believed it was necessary out of self-defence. These detainees did not perceive the massacres as genocidal or in any way manifestly illegal. They saw themselves as honourable citizens tasked to do the dirty work of furthering the interests of the state. Even after years in jail, these detainees had not been disabused of the propaganda fed to them by extremist Hutu leaders, according to which the Tutsi were out to attack them, so, therefore this attack had to be pre-empted by killing all the Tutsi. This violence therefore became legitimized as a preemptive war of survival, not condemned as genocide. Unsurprisingly, then, many detainees saw themselves as prisoners of war, simply ending up on the losing side.¹⁰³

It is ironic, however, that these suspects, with their skewed visions of reality, by rejecting the potential benefits of an ACP for CIC, may thereby subject themselves to a less forgiving outcome of a regular criminal procedure.

4.3. Conclusion: observations on the arguments and positions; guiding principles

As seen above, reasonably compelling arguments can be made on both sides of the issue concerning ACP for CIC, depending on one’s perspective. In attempting to synthesise the positions surrounding this matter, I believe a system that addresses the basic features described in section 3.6. would create an effective, efficient and fair mechanism. In addition, I believe the following guiding principles for an ACP for CIC might be helpful to address and serve the interests of the stakeholders, and increase the prospects for its success.

¹⁰³ Supra note 49, p. 97.

First, the system must be flexible. This will allow the judge, sometimes in consultation with the parties, to fashion the process in a way that best serves the dictates of justice. In other words, one size does not fit all. Flexibility will protect fundamental human rights standards for fair proceedings in a process tailored to meet the requirements of each particular case. For example, in a relatively simple, straightforward matter, the parties may agree that all evidence is submitted in writing. In a more complex case, the judge may decide or a party may request that written evidence be supplemented by oral testimony. The overarching aim is to make the CJS work.

Second, the system should effectively process large backlogs of cases without violating precepts of due process. It must indeed provide more cost-effective and faster justice than the normal procedure while also allowing for the interests of victims to be respected and the historical record to be preserved by detailed, reasoned judicial decisions.

Third, it must be administered within the CJS, that is, the case files must remain within the prosecution service and the judiciary until they are closed, while not dismissing alternative mechanisms in the most extreme cases.

Fourth, it may be necessary to distinguish between the most serious and less serious CIC, and the levels of participation in their commission, without a discriminatory effect.

Fifth, there must be a real risk of normal criminal justice accountability for a suspect to be willing to make use of an ACP for CIC while at the same time providing an incentive to choose the process, perhaps by offering reduced punishments.

Sixth, it must generate sufficient support in the political, legal and other communities of interest in society. To do so, an ACP for CIC must be clearly and precisely defined, predictable and practical, attending to requirements of legitimacy, efficiency and fairness.

5. Concluding remarks

The ultimate purpose of a CJS is to promote the rule of law and thereby further the interest of society. Without the rule of law, citizens can lose faith in their government and political institutions, even in each other. When this happens, the climate ripens for conflict and strife that may in the most extreme circumstances result in the commission of CIC. This is the sad legacy of history. When CIC occur, calls for accountability arise in the aftermath. It is therefore important to create mechanisms that are consistent with the maintenance of the principle of individual criminal responsibility, especially when criminal conduct shocks the conscience. Out of the international resolve to prosecute individuals responsible for these crimes, international tribunals emerged, from Nuremberg to the more recent *ad hoc* tribunals for Yugoslavia and Rwanda, to the ICC.

As seen in this thesis, these recent *ad hoc* tribunals did not cope with the large number of CIC cases within their jurisdiction, and over time prioritised prosecutions to those involving the highest level suspects, the senior leaders suspected of being most responsible for crimes. Over time, a general shift of the duty to prosecute CIC cases occurred from international tribunals to the countries where crimes were committed. Many of these states, however, are in the process of transition from conflict and lack adequate capacity to address the issue of CIC through criminal prosecutions. They, therefore, must make important and difficult decisions as to whether they will deal with these heinous crimes within their CJS or outside of it.

States ideally will choose a path where CIC are processed inside the CJS, but depending upon the circumstances this may not be possible. Individual conflicts and the ramifications that result are never the same in their nature and scale. Each country in conflict has its unique history, circumstances and internal pressures. Different interest groups, such as victims, perpetrators, lawyers, politicians and others have different agendas and expectations. There is an ongoing competition for capacity and resources available to address societal demands. CIC are but one. Resultantly, some states may choose alternative mechanisms, such as TRC, to move their process of transition and rehabilitation of society forward towards completion. These alternative methods are not without shortcomings. This thesis does not deliver judgment about which path is the right one for an individual state to choose for itself. It rather acknowledges the many factors involved in these determinations.

In states that choose to fulfil the international obligation to prosecute CIC and address them within their CJS, the need to develop the capacity of the CJS is paramount.

Most likely, an extreme number of cases will create backlogs. The CJS will therefore have to be nurtured and strengthened to combat backlogs. One means to accomplish this purpose, described in the thesis, may be through adoption of an ACP for CIC which are procedures that entail a significantly shortened approach to the processing of CIC cases, as opposed to the regular criminal procedure of a full trial. Their primary aim is to increase the ability of the CJS to resolve large number of cases that create backlogs, while respecting basic fair trial principles. This latter feature cannot be compromised. In order to achieve the desired aim, these procedures should be prescribed by law and administered by regular courts in a flexible manner, without creating additional institutional layers that can further impede the system. To build public confidence, the process must be transparent and open, serving not only to mete out justice and address the needs of victims, but to educate and assist societies in transition to become whole. The ACP for CIC mechanism must provide for a variety of sanctions with a necessary degree of flexibility. The component of general flexibility is essential throughout the system to deal with peculiarities that will invariably arise in the facts, circumstances, contexts and evidentiary needs of case files. An ACP for CIC must function under the principle that not one size fits all.

There will be arguments in favour and against an ACP for CIC, some strictly legal while others overlap into the political. None should be overlooked or dismissed outright. This thesis examined certain arguments and culled from them guiding principles that may be indispensable in the development of an ACP for CIC. The guiding principles assume that the features for an ACP for CIC, set forth in Section 3.6., would apply. Perhaps, the overarching principle is that the procedure must be flexible and tailored to meet the requirements of each particular case for the purpose of resolving backlogs of cases expeditiously, yet not ignore the rights of defendants or the interests of victims or the society at large. It must garner support of the stakeholders within CJS and other interested parties, and be seen as a reliable tool of the CJS. In exceptional circumstances, alternative mechanisms such as TRC may be appropriate in conjunction therewith. An ACP for CIC must be responsive to different classifications of CIC cases, but not arbitrary. Finally, the procedure must incentivise its use by defendants while maintaining a tangible risk of normal criminal justice accountability.

Design and implementation of ACP for CIC will not be an easy task. Each country that creates an ACP for CIC will have to mould it according to its needs. The Colombian Peace and Justice process is a good example where a state did so. This thesis did not seek to provide concrete answers and solutions for a system that does not yet exist, but set forth

to raise issues for consideration when and if that time comes. It would be gratifying to have a world without CIC, but that is not the reality. When these crimes occur, generally on a large scale, they should not go unaddressed simply because a CJS cannot deal with their number. CIC cases cannot be ignored, even if they must be dealt with outside the CJS. Otherwise, impunity and a potential break down of society may loom. If we desire to live in a civilised world, giving respect to principles of international law, the laws of humanity and the requirements of the public conscience, this is a true test of our character.¹⁰⁴

¹⁰⁴ For a discussion of the principles underlying the Martens Clause as it developed from the 1899 Hague Convention II with Respect to the Laws and Customs of War on Land, then restated in the 1907 Hague Convention IV on the same matter see Cassese, Antonio. *The Martens Clause: Half a Loaf or Simply Pie in the Sky?* In: *European Journal of International Law* (2000), Vol. 11 No. 1, pp. 187-286.

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Annex A

Italian Code of Criminal Procedure

Chapter VI: special proceedings

Title I: abbreviated judgment (giudizio abbreviato)

Art. 438. Preconditions for abbreviated judgement

1. The accused may request that the verdict is reached at the stage of the preliminary hearing on the basis of the available documents, except in the case foreseen under para 5 of this article and art. 441 para 5.
2. The request can be submitted, orally or in written, until the conclusions pursuant to art. 421 and 422 have been formulated¹⁰⁵.
3. The intention of the accused (to submit the request, n.o.a.) is expressed personally or through his legal representative.
4. Upon the request, the judge issues the order disposing the abbreviated judgment
5. Without prejudice for the use as evidence of the documents mentioned in art. 442 para 1 bis, the accused may make his request conditional on the acquisition of additional evidence which is necessary to reach the verdict. The judge will order the abbreviated judgment if the acquisition of additional evidence is assessed to be necessary to reach the verdict and is compatible with the goal of procedural economy in abbreviated judgement, taking into account the materials already acquired and admissible. In this case, the prosecutor may ask for the admission of evidence in rebuttal. Art. 423 remains applicable¹⁰⁶.
6. In case that, under para. 5, the request is rejected, the request can be submitted again until the term set in para 2.

Art. 439 and 440 – deleted

Art. 441. Direction of the abbreviated judgment

1. In the abbreviated judgment, the provisions applicable during the preliminary hearing will be applicable to the extent possible and with the exception of those foreseen under art. 422 and 423¹⁰⁷.
2. The intervention of the civil party after he became aware of the order disposing the abbreviated judgment, is equal to his acceptance of the abbreviated proceedings.
3. Abbreviated judgment takes place in camera; the judge will order that the trial is carried out in public hearing when all accused make request for that.
4. If the civil party does not accept the abbreviated proceedings, art. 75 para 3 does not apply¹⁰⁸.

¹⁰⁵ These are the conclusions formulated at the preliminary hearing by which the prosecutor and the defence argue on the confirmation of the indictment on the basis of the material contained in the case-file.

¹⁰⁶ Article 423 foresees the possibility for the prosecutor to amend the indictment at the preliminary hearing, if during this hearing the facts turn out to be different from those described in the indictment, or a connected crime or aggravated circumstance emerges during the hearing .

¹⁰⁷ Art. 422 foresees the possibility during the preliminary hearing to acquire additional evidence.

5. In case that the Judge evaluates that he would not be able to adjudicate the case on the basis of the available documents, he acquires, even ex officio, the elements which are necessary to adjudicate the case. In this case, art. 423 remains applicable.
6. The acquisition of evidence pursuant to para. 5 of this article and para. 5 of art. 438, will be carried out in accordance with the procedure foreseen in art. 422 para. 2, 3, 4 .

Art. 441 bis. Decisions of the Judge following new accusations during the abbreviated judgment

1. If, in the cases regulated under art. 438 para 5 and 441 para 5, the prosecutor submits new accusations pursuant to art. 423 para 1, the accused can ask that the proceedings continue in the ordinary forms (ie, main trial, n.o.a.)
2. The intention of the accused is expressed in the forms prescribed under art. 438 para 3
3. The Judge, upon motion of the accused or the defence counsel, will give a term not exceeding 10 days, for the formulation of the request under para 1 and 2 or for the integration of the defence, and will suspend the judgment for that period.
4. If the accused asks that the proceedings continue in the ordinary forms, the Judge revokes the order upon which the abbreviated judgment had been disposed and schedules the preliminary hearing or its continuation. The acts carried out pursuant to art. 438 para 5 and 441 para 5, have the same validity than the acts carried out pursuant to art. 422. The request for abbreviated judgment cannot be submitted again. Art. 303 para 2 will apply¹⁰⁹.
5. If the proceedings continue in the form of abbreviated judgement, the accused can ask for the admission of new evidence in relation to the new accusations pursuant to art. 423, even beyond the limits prescribed under art. 438 para 5 and the prosecutor may ask the admission of evidence in rebuttal.

Art. 442. Decision

1. At the end of the evidentiary procedure, the judge adjudicates on the case pursuant to art. 529 and following¹¹⁰.
1 bis. In order to issue the verdict, the judge will base himself on the documents included in the case-file pursuant to art. 416 para 2, the documentation pursuant to art. 419 para 3¹¹¹ and the evidence admitted during the hearing.
2. In case of guilty verdict, the sentence which the judge determines taking into account all circumstances is diminished by 1/3. Life imprisonment is commuted with 30 years of imprisonment. Life imprisonment with daily isolation, in the cases of concurrent crimes and continued crime is commuted to life imprisonment.

¹⁰⁸ This para. prescribes that the civil action for compensation is suspended during the course of the criminal proceedings in case of intervention of the civil party in the criminal proceedings.

¹⁰⁹ Art. 303 is about the terms for pre-trial custody.

¹¹⁰ Art. 529 and following prescribe the type of verdicts and their elements. Basically, the abbreviated judgment ends up with the same kind of sentences that can be taken at the end of a main trial.

¹¹¹ This is the prosecutor case-file containing the material supporting the indictment.

3. The verdict is notified to the accused who did not appear.
4. Art. 426 para. 2 applies (this art. lists the elements of the verdicts, n.o.a.).

Art. 443. Limits of the appeal

1. The accused and the prosecutor cannot appeal against a non-guilty verdict.
2. deleted
3. The prosecutor cannot submit an appeal against guilty verdict, unless the verdict requalifies the offence.
4. The appeal judgement is carried out in the forms prescribed under art. 599 (this art. lists the kind of appeals that are decided in camera, n.o.a.).