



MONASH University

**TRANSITIONAL JUSTICE IN SOUTH AFRICA AND SIERRA
LEONE: A CASE STUDY ANALYSIS**

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Bachelor of Social Science Honours in International Studies

A thesis submitted for the degree of Master of Philosophy at

Monash University in 2018

International Studies

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ABSTRACT

This study explains how the four features of transitional justice, namely: criminal justice, truth telling, reparations and institutional reform apply to nations transitioning from oppression or civil war to democratic states. The two nations discussed are South Africa and Sierra Leone. South Africa transitioned from an oppressive state in 1994 and established the South African Truth and Reconciliation Commission (SATRC). Sierra Leone experienced a 10-year civil war, from 1991-2001, and subsequently created the Sierra Leone Truth and Reconciliation Commission (SLTRC) and the Special Court of Sierra Leone (SCSL) to facilitate a peaceful transition. The two countries are relevant as they both are in the vanguard of transforming judicial procedures of transitional justice, however, for different reasons. Amnesty was a controversial feature for both the SATRC and the SLTRC. In both cases amnesty was granted in exchange for full disclosure of events and to facilitate a peaceful transition.

South Africa's was the first tribunal that focused its judicial process on public participation, guaranteeing absolute transparency. This was done in preference to decree and retribution, as was done in previous transitional justice proceedings, for example, in the Latin American countries. South Africa broke new ground as it emphasised restorative justice to achieve the mandate of reconciliation and peace building. The SATRC was considered a success internationally, as many transitional justice models sought to emulate South Africa's example, Sierra Leone was one such country. However, many South Africans were critical of the SATRC and felt that the amnesty clause conceded too much to perpetrators of human rights violations.

Sierra Leone was also renowned for introducing a number of firsts into transitional justice. It was the first international criminal tribunal that had its legal foundation in an agreement between the UN and a member state. It was also the first tribunal that recognised both national and international law. Finally, it was the first time that international law had to recognise and prosecute crimes for recruiting child soldiers, forced marriages and sexual slavery.

It can be concluded that context is particularly important in transitional justice issues and that the case studies depend on the definition and understanding of transitional justice.

DECLARATION

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

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ACKNOWLEDGEMENTS

I would like to extend my sincerest gratitude to Dr Victoria Graham and Prof Christopher Landsberg, whose constant commitment, insights and input were so valuable and without which I would never have been able to complete this thesis. To them I owe my lasting gratitude. I also thank Ms Ellen Joubert for the editing of this thesis.

To my parents Graham and Vivienne Searle for their eternal love and support.

To the people of Africa, whose constant resilience and enduring fight, has created generations of the fiercest survivors that the world must acknowledge.

*“My heart has joined the Thousand, for my friend stopped running today.” Richard Adams
Watership Down*

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LIST OF ACRONYMS AND ABBREVIATIONS

AC	Amnesty Commission
AFRC	Arms Forces Revolutionary Council
AIDS	Auto Immune Deficiency Syndrome
ANC	African National Congress
APC	All Peoples Congress
CCB	Civil Cooperation Bureau
CDF	Civil Defence Forces
CGE	Commission of Gender Equality
CRLRC	Cultural Religious Linguistics rights Commission
CRTR	East Timorese Commission for Reception, Truth and Reconciliation
CSVR	Center for the Study of Violence and Reconciliation
CVR	Commission de la Verdad y Reconciliation
DFID	Department for International Development
DDR	Demobilisation Disarmament and Reintegration
DRC	Democratic Republic of Congo
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
HIV	Human Immunodeficiency Virus
HRVC	Human Rights Violation Committee
ICASA	Independent Communications Authority of South Africa
ICC	International Criminal Court

ICJ	International Court of Justice
ICL	International Customary Law
ICTJ	International Center of Transitional Justice
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of the former Yugoslavia
IEC	Independent Electoral Commission
IFP	Inkhata Freedom Party
ILC	International Law Commission
IMF	International Monetary Fund
IOM	International Organisation for Migration
IU	Investigations Unit
LGDG	Local Government Development Grants
LPA	Lome Peace Accord
NaCSA	National Commission for Social Action
NEC	National Electoral Commission
NGO	Non-Governmental Organisation
NP	National Party
NPA	National Prosecuting Authority
OAU	Organisation of African Unity
OTP	Office of the Prosecution
P5	Permanent Five
REC	Return Exile Committee
RUF	Revolutionary United Front

SABC	South African Broadcasting Commission
SADF	South African Defence Force
SAPS	South African Police Service
SATRC	South African Truth and Reconciliation Commission
SCSL	Special Court for Sierra Leone
SCU	Serious Crimes Unit
SLP	Sierra Leone Police
SLPP	Sierra Leones Peoples Party
SLRP	Sierra Leones Reparation Programme
SLTRC	Sierra Leone Truth and Reconciliation Commission
STI	Sexually Transmitted Infection
SSR	Security Sector Reform
UK	United Kingdom
UN	United Nations
UNAMSL	United Nations Assisted Mission to Sierra Leone
UNDP	United Nations Development Programme
UNHDI	United Nations Human Development Index
UNHRC	United Nations Human Rights Commission
UNPBF	United Nations Peace Building Fund
UNSC	United Nations Security Council
US	United States

CHAPTER ONE: INTRODUCTION, CONCEPTUALISATION, THEORETICAL OVERVIEW AND METHODOLOGY

“The dark days of the rule of the gun are over. The bright shining light of the law burns back the shadows of impunity in this ravaged country.” David Crane

1.1 Introduction, Background and Rationale

History has proven that when justice is not secured chaos reigns. The study of transitional justice is relevant to assist in securing modern democracies. This study focuses on South Africa and Sierra Leone.

It is important to describe what transpired within South Africa and Sierra Leone in order to gather as much information to determine how to prevent future atrocities and gain insights for recommendations to further proceed. In 1994 South Africa transitioned from a conflict-ridden, apartheid society, where the majority of the population had been marginalised and politically and socio-economically oppressed for decades, to a democracy for the first time in the country’s history. To deal with the many human rights abuses that occurred on all sides during apartheid, the new South African Government on National Unity set up the Truth and Reconciliation Commission (SATRC) in 1994. At the time, the then Minister of Justice, Dullah Omar, referred to it as a “necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.”¹ The TRC had three committees: the Amnesty Committee, the Human Rights Violations Committee and the Reparations Committee. The Amnesty Committee dealt with the criminal justice precepts of transitional justice whereas the Human Rights Violations Committee oversaw the values and imperatives of truth telling. The Reparations Committee dealt with recommendations for reparations.

Sierra Leone experienced a 10-year civil conflict between 1991 and 2002 characterised by corruption, recruitment of child soldiers and intense brutality against civilians. The war left

¹ “Welcome to the Official Truth and Reconciliation Website,” Truth and Reconciliation Commission, 2017, <http://www.justice.gov.za/trc/>, (accessed June 7, 2017).

thousands of people dead, mutilated or raped and the country's infrastructure in a state of ruin.² In July 1999, the government of Sierra Leone and the Revolutionary United Front (RUF) rebel group signed the Lomé Peace Agreement (LPA). Like South Africa, they agreed to establish a SLTRC that began work in late 2002. However, the agreement granted an unconditional blanket amnesty for all parties, a decision that came under intense criticism. In a move that was different to the South African example, a special court was also set up to prosecute those responsible for human rights violations during the conflict. The SCSL started operations in July 2002.

The study of transitional justice is necessary, as individual life needs to be secured by recognising human rights through the mechanisms of justice. Securing life is important as citizens in a society depend on each other to ensure survival and with the installation of security and justice, there is then guaranteed prosperity and quality of life. Transitional justice assists nations, which citizens have been victimised and could not rely on the previous state to secure them or prevent violence. It offers victims a way forward and is a peace building endeavour. The mechanisms of transitional justice: truth telling, criminal justice, reparations and institutional reform, navigate the journey towards peace building, which is essential for individual life to flourish. As Graybill states, “without peace, no other values can exist.”³ Transitional justice advances proponents of democracy, which needs citizen support, thereby supporting societies that can support themselves. Ultimately, individuals can ensure security in life through justice and the new democratic state and therefore life itself can be realised.

This study examines how the different processes of transitional justice were applied in the two different contexts of South Africa and Sierra Leone. First, it is important to define transitional justice.

1.2 Conceptualisation: Transitional Justice

Although discussed more fully in Chapter Two, essentially, transitional justice can be defined, briefly here, as the procedure and requirement through which a collective people, bound by culture,

² “Sierra Leone,” International Center of Transitional Justice 15 years, 2017, <https://www.ictj.org/our-work/regions-and-countries/sierra-leone>, (accessed on June 7, 2017).

³ Lyn Graybill, “To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission” *Human Rights Review* (2001): 4, doi: 10.1007/s12142-001-1030-6

geography and heritage, accesses legal or semi-legal⁴ facilities to secure the right and recognition of fundamental societal and political change. Transitional justice can be understood on a continuum from retributive justice on the one end to restorative justice on the other. Gade defines restorative justice, as, “justice that demands that the accountability of perpetrators be extended to making a contribution to the restorative and well-being of their victims.” This is a different approach to retributive justice that is defined as “in which an impersonal state hands down punishment with little consideration for victims and hardly any for perpetrators.”⁵

Importantly, four key features of transitional justice that come up in the literature are: criminal justice, truth telling, reparations and institutional reform. These four concepts guided the procedures of transitional justice in both South Africa and Sierra Leone and will form the core focus of this study.

Others define transitional justice as including, “the construction of a new reality against the background of profound political memory.”⁶ The constructs of transitional justice are constantly adapting to the specific political and social contexts of the state/s involved.⁷ As a field of inquiry and application, transitional justice is also determined by the additional complicating factors of values, rationales, justifications and moral debate as well as the subjective quality of truth and memories. The features of transitional justice are also accompanied by the concept of the rule of law. The rule of law can be defined as:

A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.⁸

⁴ Christine Bell, “The ‘New Law’ of Transitional Justice,” in *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* Christine Bell (United Kingdom: Oxford University Press), 106.

⁵ Christian B. N. Gade, “Restorative Justice and the South African Truth and Reconciliation Process,” *South African Journal of Philosophy* 32, no. 1 (2013): 11.

⁶ Kingsley Chiedu Mohalu, “Prosecute or Pardon? Between Truth Commissions and War Crimes Trials,” in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009), 75.

⁷ William Schabas, “Transitional Justice and the Norms of International Law,” *Japanese Society of International Law*, October, 8, 2011, http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf, (accessed May, 1 2017).

⁸ “The United Nations and the Rule of Law,” The United Nations, October 28, 2009, <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>, (accessed May, 1 2017).

The rule of law is inherent in the process of democratic transition of states.⁹ The rule of law includes: recognition of supremacy of law, equal treatment of all before the law, accountability/ownership of action to the law, the impartiality of justice, the separation of powers, participation in decision-making, legal certainty, the protection and security of human rights and procedural and legal transparency.¹⁰

The study of transitional justice is characterised by heterogeneity, which could possibly be the reason why a general theoretical language or framework has not been adopted.¹¹ The discipline of transitional justice is emerging as a field of its own; however, the boundaries of the concept “have remained elusive and highly negotiable.”¹²

The term transitional justice is descriptive and does not convey a systematic or standardised application of justice across international borders. Historically American scholars coined the term in the 1990s¹³ and it became popular when analysts attempted to address the events of transition during the dissolution of the Soviet Bloc.¹⁴ It was mainly the work of Latin American truth commissions that took place in El Salvador (1992-1993)¹⁵, Chile (1990-1991)¹⁶ and Argentina

⁹ Elizabeth Andersen, “Transitional Justice and the Rule of Law: Lessons from the Field,” *Case Western Reserve Journal of International Law* 47, no.1 (2015): 306.

¹⁰ Pdraig McAuliffe, “Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?,” *Hague Journal on the Rule of Law* 2 (2010): 129, doi:10.1017/S1876404510200015., “What is the Rule of Law?” World Justice Project, undated, <https://worldjusticeproject.org/about-us/overview/what-rule-law>. (accessed October 1, 2018)

¹¹ Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, “Transitional Justice Theories, An Introduction” in *Transitional Justice Theories*, ed, Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, (United Kingdom: Taylor and Francis Group Routledge, 2014), 2.

¹² Ibid.

¹³ William Schabas, “Transitional Justice and the Norms of International Law,” *Japanese Society of International Law*, October, 8 2011, http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf, (accessed May, 1 2017).

¹⁴ “The International Center of Transitional Justice: 15 years,” The International Center for Transitional Justice, 2017, <https://www.ictj.org/>, (accessed May, 1 2017)., Brianna Brown, “Transitional Justice in Eastern Europe: Present Dilemmas of the Communist,” E- International Relations, April 8, 2015, <http://www.e-ir.info/2015/04/08/transitional-justice-in-eastern-europe-present-dilemmas-of-the-communist-past/>, (accessed on August 16, 2017)., Hannah Franzki and Mari Carolina Olarte, “Understanding the Political Economy of Transitional Justice,” in *Transitional Justice Theories*, ed, Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, (United Kingdom: Taylor and Francis Group Routledge, 2014), 211., Thomas Obel Hansen, “The Vertical and Horizontal Expansion of Transitional Justice; Explanations and Implications for a Contested Field,” (United Kingdom: Taylor and Francis Group Routledge, 2014), 114.

¹⁵ “Truth Commission: El Salvador,” United States Institute of Peace: Making Peace Possible, Undated, <https://www.usip.org/publications/1992/07/truth-commission-el-salvador>, (accessed August 17, 2017).

¹⁶ “Truth Commission: Chile 90,” United States Institute of Peace: Making Peace Possible, <https://www.usip.org/publications/1990/05/truth-commission-chile-90>, (accessed August 17, 2017).

(1983-1984)¹⁷ that created the main platform which highlighted the subsequent criteria, namely: “the right of victims to the truth, the right to have the truth known and acknowledged, the right to reparations and the necessity of institutional reform in order to strengthen the rule of law and democracy.”¹⁸ These principles encountered during the Latin American commissions, underpinned the truth commissions in both South Africa and Sierra Leone. Before the Latin American commissions’ transitions the policy for legal scholars had been victor’s justice like that of the Nuremberg trials after the Second World War.¹⁹

Transitional justice has facilitated the move from totalitarian to democratic societies across the globe, for example, in Argentina, Chile, and the post-conflict societies of Bosnia, Herzegovina, Liberia and the Democratic Republic of Congo (DRC).²⁰ The discussion and evolution of transitional justice cannot be explored without including concepts and principles of international humanitarian law. The relevance is found in the increasing trend of the international community focusing on the normative value of human rights over and above those of the sovereign state. Ending the cycle of violence that has marred so much of human history lies in the hands of these measures of both legal and semi-legal justice that assist in resolving a history of tyrannical systems. Human rights became a trend that rode the “third wave of democracy”²¹ and created the initial vocabulary of transitional justice with notions of security and individual responsibility essential to a civilian population governing a functioning, prosperous system, all of which are the building blocks of a state.

It was during the advent of both the Nuremberg and Tokyo (1945-1948) tribunals, in the wake of World War II, that the issue of creating legislative, punitive measures to assist the process of upholding the pillars of democracy and civilian rule came about.²² The summation of those initiatives over the course of 50 years resulted in the actualisation of the International Criminal

¹⁷ “Truth Commission: Argentine,” United States Institute of Peace: Making Peace Possible, <https://www.usip.org/publications/1983/12/truth-commission-argentina>, (accessed August 17, 2017).

¹⁸ Yasmin Louise Sooka, “The Politics of Transitional Justice” in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009), 29.

¹⁹ Ibid., 26.

²⁰ “United Nations Office of the High Commissioner,” Transitional Justice and Economic, Social and Cultural Rights, 2014, <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>, (accessed May, 1 2017).

²¹ “The International Center of Transitional Justice: 15 years,” The International Center for Transitional Justice, 2017, <https://www.ictj.org/>, (accessed May, 1 2017)., Michal Krotoszynski, “The Transitional Justice Models and the Justifications of Means of Dealing with the Past,” *Oñati Socio-legal Series* 6, no. 3 (2016): 587.

²² Sooka “The Politics of Transitional Justice,” 23.

Court (ICC) in 1998. Two main events that contributed to the realisation of an internationally supported human rights court were the two ad hoc tribunals of the early 1990s of the former Yugoslavia and Rwanda. Through Chapter VII of the United Nations (UN) these tribunals assembled to end impunity and to create measures of accountability that were internationally recognised and respected as law. Becoming increasingly aware of the global indignation, accounts and reports of gross human rights violations, the UN Security Council or P5, (five permanent members; China, France, Russian Federation, the United Kingdom and the United States) determined by Chapter VII of the UN Charter, adopted resolution 1970 on 26 February. This resolution affirmed that the “systematic and widespread attacks against the civilian population may amount to crimes against humanity and demanded an immediate end to violence and the taking of steps to fulfil the legitimate demands of the population.”²³

It has been argued that one of the fundamental features of a functioning society is the actualisation of justice.²⁴ When transitioning from a repressive and violent society towards democracy and the rule of law, societies need to address their past in some way in order to move forward peacefully.²⁵ Transitional justice is a relatively recent interest in the field of international relations and is highly relevant as peace and justice are necessary to establish thriving democracies and sustainable economies. The performance of transitional justice over the course of 25 years has produced numerous routes for nations emerging from repression or conflict towards more democratic governments or citizen rule, these include: truth commissions, domestic trials, international and hybrid tribunals, and traditional justice mechanisms.²⁶

The social and legal implications of democracies *in statu nascendi* depend on methods or mechanisms used to address the heritage of civilian victimisation. The effective functioning of these aspects is vital to securing the provisions of freedom set out in the non-binding Universal

²³ Hennie Strydom and Laurence Juma, “Maintaining International Peace and Security: The Enforcement of International Law,” *International Law*, ed, Hennie Strydom, Christopher Gewers, Laurence Juma, Gerhard Kemp, Oliver C. Ruppel, Werner Scholtz, Franz Viljoen and Patrick Vrancken (South Africa: Oxford University Press, 2016), 213.

²⁴ “The United Nations and the Rule of Law,” The United Nations, October 28, 2009, <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>, (accessed May, 1 2017)

²⁵ Sooka, “The Politics of Transitional Justice,” 21.

²⁶ Chandra Lekha Sriram, “Transitional Justice and Peacebuilding,” in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009), 1.

Declaration of Human Rights for all individuals.²⁷ The impetus behind the structure of the process of transitional justice varies according to moral and political motivations. Therefore, the dialogue that comprises the dynamic of transitional justice is constantly translated along a continuum, negotiating points between retribution (retributive justice) on the one end of the continuum and reconciliation (restorative justice) on the other. Sierra Leone is an example of the former whereas South Africa is an example of the latter.

South Africa is an important case study as it was in the vanguard of choosing participatory justice over decree. It was the first tribunal to conduct its proceedings by engaging with the public. Public participation is a realisation of democracy and the SATRC recognised the will of the citizens through debate, free and fair media and reach, accessing homes throughout the country. The logistics of the SATRC was a success and considering the sheer scale of the investigations and implementations of the mandate of the SATRC, it is a relevant case study to learn about transitional justice. Numerous truth commissions emulated the SATC, Sierra Leone included.

Sierra Leone is an important comparative case as it has made significant contributions in the evolution of international criminal law and international criminal justice; it is the leader as it is the first tribunal to establish its legitimacy in a contract between the UN and itself as a member state.²⁸ It is also a leader in creating provisions for international law to recognise and treat with mandate the recruitment of child soldiers and gender-based crime.²⁹ Also, analysing the shortcomings and considered failures that the SCSL experienced will assist future developments of transitional justice.³⁰

The aim of this study is to explore the complexities of transitional justice through a concise comprehensive discussion detailing case studies from Sierra Leone and South Africa with the application of the four aforementioned features that blueprint transitional justice.

²⁷ Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" *Journal of Conflict Resolution* 49, no. 6 (2005): 925.

²⁸ Shahram Dana, "The Sentencing Legacy of The Special Court for Sierra Leone," *Georgia Journal of International and Comparative Law* 42, no. 3 (2014): 618.

²⁹ Charles Chernor Jalloh, "Special Court for Sierra Leone: Achieving Justice?" *Michigan Journal of International Law* 32 (2011): 445.

³⁰ Abdul Tejan-Cole, "Sierra Leone's 'not-so' Special Court" in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009), 242.

1.3 The Purpose of the Study

The purpose of this study is to examine how nations transition from regimes that commit gross violations on its citizens to a regime that supports the will of its citizens and how transitional justice precepts support peaceful nation building. This study examines the processes of transitional justice and how it applies to both South Africa and Sierra Leone. There are four features of transitional justice identified as: criminal justice, truth telling, reparations and institutional reform.³¹ These four concepts blueprint the processes of transitional justice and guided the procedures of justice in both South Africa and Sierra Leone. This study discusses how the four aforementioned features were utilised to secure the realisation of new governance, recognising human rights and securing democratic rule. This study further examines how the four features of transitional justice assisted the chosen nations in their transition and how the application of each feature resulted in successful peace building.

The overarching research question is:

- What were the challenges of the specific transitional justice mechanisms employed in South Africa and Sierra Leone's transitions from conflict to post-conflict societies?

The research sub-questions are:

- How were the four key features of transitional justice, namely; criminal prosecutions, truth telling, reparations and institutional reform implemented in South Africa?
- How were the four key features of transitional justice, namely; criminal prosecutions truth telling, reparations and institutional reform implemented in Sierra Leone?

³¹ Sooka, "The Politics of Transitional Justice," 29. "What is Transitional Justice?" International Center for Transitional Justice, 2017, <https://www.ictj.org/about/transitional-justice>, (accessed on June 6, 2017)., William Schabas, "Transitional Justice and the Norms of International Law," *Japanese Society of International Law*, October, 8, 2011, http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf, (accessed May 1, 2017), 1-2., "The Rule of Law-Transitional Justice," United Nations Human Rights Office of the High Commissioner, 2017, <http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx>, (accessed May 1, 2017)., Krotoszynski, "The Transitional Justice Models and the Justifications of Means of Dealing with the Past," 589.

Issues surrounding truth and accuracy regarding testimonies of victims and perpetrators may contain inaccurate, missing or incomplete data. However, the commissions have acknowledged these issues and therefore created measures to facilitate this. Witness testimonies are a recognised shortcoming that hindered the true progress of the courts. An example lies in Sierra Leone's SCSL as numerous witnesses were afraid to give testimonies that could be used against them. This applied to perpetrators too. Blanket amnesty under the LPA was given as an answer but it was still clear that many perpetrators did not come forward with their personal accounts.³²

1.4 Literature Review

The literature on transitional justice is extensive and encompasses several academic fields including political science, sociology, law, social work, history and criminal justice. Several journals are devoted exclusively to the topic including: *The International Journal of Transitional Justice*, *Human Rights Review*, *The Modern Law Review*, *International Review of the Red Cross*, *Contemporary Justice Review*, *South African Journal of Philosophy*, *Journal of Human Rights* and *Human Rights Quarterly*.

Lyn Graybill examines how nations manage the transition from former regimes that promoted human rights abuses to one that secures human rights. Graybill defines human rights violations from the *Promotion of National Unity and Reconciliation Act*³³ as “killing, abduction, torture or severe ill treatment.”³⁴ Graybill does a comparative study between South Africa and Rwanda that is the SATRC and the ICTR. The study's objective is to determine which model is best for other countries, which have endured gross human rights violations, to emulate.

Jen Laasko does a comparative analysis between the SATRC and the East Timorese Commission for Reception, Truth and Reconciliation (CRTR).³⁵ The CRTR based its design on the SATRC. Laasko's objectives are similar to Graybill except Laasko focuses on the relevance of truth as a key component in the restorative process whereas Graybill seeks to understand whether the role of

³² Tejan-Cole, “Sierra Leone's ‘not-so’ Special Court” 238.

³³ “Promotion Of National Unity and Reconciliation Act 34 of 1995,” <http://www.justice.gov.za>, December 1, 1995, <http://www.justice.gov.za/legislation/acts/1995-034.pdf>, (accessed May 5, 2019).

³⁴ Lyn Graybill, “To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission” 3.

³⁵ Jen Laasko, “In Pursuit of Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa,” *Social Alternatives Second Quarter* 22, no. 2 (2003): 48.

amnesty for truth or the role of justice is preferable to moving a nation forward. Graybill concludes that the role of the right leader (President Mandela) was responsible for the success of the restorative process.

The precepts of justice used by the SATRC were restorative, with conditional amnesty offered in exchange for full disclosure.³⁶ Like Graybill,³⁷ Bronwyn Leebaw³⁸ examines how nations can transition from a past legacy of gross violations and human rights abuses. Both Leebaw and Gade evaluate the use of restorative process of transitional justice in securing peace building of a nation. Both conclude that although the restorative principles were the best path towards reconciliation, the progress of nation building is hindered by widespread poverty,³⁹ and deep historical injustices.⁴⁰

Sierra Leone's initial emphasis was on restorative justice modeled on the SATRC. The SLTRC focused on public and private hearings to initiate a peace building process. This was the truth telling feature of transitional justice. In what Stein et al⁴¹ refer to as "testimony therapy" truth telling at hearings allows value to be added to the psychological dimension of experiences endured and therefore pave the way towards healing. The reach of the SLTRC was a success as of 149 chiefdoms in Sierra Leone only nine were not covered,⁴² therefore the SLTRC was able to form an accurate portrayal of the events of the war.⁴³

The SCSL was the criminal justice feature of transitional justice. Through Operation Justice the first suspects of those who bore the greatest responsibility⁴⁴ were arrested. This was a significant

³⁶ Christian B. N. Gade, "Restorative Justice and the South African Truth and Reconciliation Process," 11.

³⁷ Lyn Graybill, "To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission" 3.

³⁸ Bronwyn Anne Leebaw, "Restorative Justice for Political Transitions: Lessons from the South African Truth and Reconciliation Commission," *Contemporary Justice Review* 4, no. 3-4 (2001): 267.

³⁹ Ibid, 281.

⁴⁰ Christian B. N. Gade, "Restorative Justice and the South African Truth and Reconciliation Process," 30.

⁴¹ Dan J. Stein, Soraya Seedat, Debra Kaminer, Hashim Moomal, Allen Herman, John Sonnega and David R. Williams, "The Impact of the Truth and Reconciliation Commission on Psychological Distress and Forgiveness in South Africa," *Soc Psychiatry Psychiatr Epidemiol* 43 (2008): 463.

⁴² Thelma Ekiyor, "Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective," in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009), 158.

⁴³ Ibid, 156.

⁴⁴ Charles Chernor Jalloh, "Prosecuting Those Bearing 'Greatest Responsibility': The Lessons of the Special Court for Sierra Leone," *Marquette Law Review* 96 (2013): 865.

shift from restorative justice to retributive justice.⁴⁵ The indictment and arrest of Charles Taylor was a chief success of the retributive aspect of criminal justice in the transitional justice proceedings.⁴⁶

Breaking down the components of transitional justice Wendy Lambourne questions, “What is the purpose of transitional justice?”⁴⁷ In order to analyse and evaluate the value adhered to each principle of transitional justice the focus of Lambourne’s research investigates local communities and indigenous traditional customary practices. Emphasising the notion of interdependence as the primary policy that influenced informal traditional mechanisms of transitional justice, she refers to the traditional gacaca tribunal courts of justice in Rwanda, which would hold the perpetrator responsible for crimes/infringements committed and still disrupt the process of reconciliation. Therefore, the gacaca communal proceedings could be deemed both retributive and restorative. The point that Lombard is making is that hybridity is necessary for justice as opposed to the standardised, formal and fixed application of the Western procedures of legality, judiciary and justice.

Lombard summarises her position by stating:

We should look at creative and locally relevant ways to incorporate principles of both restorative and retributive justice in accountability mechanisms, as well as structures and relationships to support future respect for human rights and the rule of law. Rather than following the pluralist approach of separate institutions, I propose that a more successful approach might be to take a lead from indigenous traditional customary practices in order to design a more syncretic transitional justice mechanism that combines retributive and restorative elements.⁴⁸

Valarie Arnould’s work *Transitional Justice in Peacebuilding: Dynamics of Contestation in the DRC*, is an examination of the process of how nation stakeholders and foreign actors’ diplomatic relationship constructs and resolves the issues, argumentation (legal, philosophical and moral) and dynamics surrounding transitional justice and its application specific to the DRC. Arnould

⁴⁵ Wayne Jordash and Scott Martin, “Due Process and Fair Trial at the Special Court: How the desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone,” *Leiden Journal of International Law* 23 (2010): 585.

⁴⁶ Giulia Bigi, “The Decision of the Special Court for Sierra Leone to Conduct the Charles Taylor Trial in The Hague,” *The Law and Practice of International Courts and Tribunals* 6 (2007): 303.

⁴⁷ Wendy Lambourne, “Transformative Justice, Reconciliation and Peacebuilding,” in *Transitional Justice Theories*, ed, Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, (United Kingdom: Taylor and Francis Group Routledge, 2014), 21.

⁴⁸ Ibid.

elucidates on the relevance of discourse and construction in applying practical instruments of resolve via justice to the diplomatic contestation involving agendas and strategies determined both locally and internationally. Arnould suggests an increased multi-layered reading involving “the dynamics of contestation”⁴⁹ around transitional justice. The emphasis is on the constructs and role-playing of the process of policymaking to assist the transition of regimes. Echoing the stress of participation and thorough analysis of the legislative requirements mentioned, both the International Centre of Transitional Justice (ICTJ)⁵⁰ and the UN Security Council⁵¹ report a foreign-based model applied without due consideration of the fragile process of structuring a national legislative framework, will eventually disintegrate the peace building process.

MacGinty and Richmond discuss the numerous perceptions of what they term the liberal peace process and its incorporation of the intrinsic features (“good governance, human rights, the rule of law and developed open markets”)⁵² symptomatic of Western style structure of rule. The management process of its implementation as a liberal peace-building project has in their assessment, failed. Accordingly, “There are few contemporary cases in post-war reconstruction where the repairing of fractured social relations and reconciliation has been successful.”⁵³ However, they do concede within the post-cold war era a more enlightened approach to the formula of reconciliation has increasingly been introduced and implemented. This is an approach that facilitates culture specific requirements of maintaining peace and with it sincerely rethinking the process of mediation and negotiation, the emphasis being on the social fabric of post-conflict states. Noted among scholars are the reoccurring issues of the hegemonic discourse of the liberal element of the peace building projects and the renewal of perceived arrogance of liberal ideals and its imposition, nostalgic of the liberal imperialism contended with in the 1800s.

Arnould focuses on the DRC as its current justice process involves features of transitional justice (via the construction of truth and reconciliation commissions and self-referral to the ICC) and

⁴⁹ Valerie Arnould, “Transitional Justice in Peacebuilding: Dynamics of Contestation in the DRC,” *Journal of Intervention and Statebuilding* 10, no. 3 (2016): 323, doi: 10.1080/17502977.2016.1199476.

⁵⁰ “The International Center of Transitional Justice: 15 years,” The International Center for Transitional Justice, 2017, <https://www.ictj.org/>, (accessed May, 1 2017).

⁵¹ “The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies,” Inter-Parliamentary Union, August 23 2004, <http://www.ipu.org/splz-e/unga07/law.pdf>, (accessed May, 1 2017).

⁵² Roger Mac Ginty and Oliver Richmond, “Myth or Reality: Opposing Views on the Liberal Peace and Post War Reconstruction,” *Global Society* 21, no. 4 (2007): 491, doi: 10.1080/13600820701562710.

⁵³ Ibid.

obstacles to justice. These obstacles include: unfinished and inadequate transitional justice initiatives that were brought to light through adoption of amnesty laws and collapsed attempts of a hybrid court. One of the main issues was the “repeated integration of notorious human right abuses in the army as part of peace deals.”⁵⁴ This diplomatic dichotomy demonstrates how the numerous role players engage as both promoters and resisters to transitional justice. Promotion involves the government focused on conflict management, civil society focused on reconciliation, international actors focused on state building. Typically measures of justice are implemented in a top-down manner. These measures are often perceived to be an imposition. Therefore domestic role players automatically resist efforts at justice and reconciliation. There is a requirement to embrace the multifaceted nature of justice.

In *The Transitional Justice Models and the Justifications of Means of Dealing with the Past*, Krotoszynski details various typologies explored throughout past transitional justice literature. Of these he includes scholars who explore justice on a range from polarised aspects of retribution, reconciliation and revenge then includes the punitive, amnesty, forgiveness and forgetfulness dimensions that guide or blueprint these features. Krotoszynski suggests three typologies that describe degrees of justice on the continuum ranging from retribution, reconciliation, revenge, forgiveness, amnesty and forgetfulness. These typologies are: the retribution model – whereby past perpetrators are subject to prosecution and legal proceedings of the new regime; the historical clarification model – that describes the nature of the previous regime via testimonies and records to achieve disclosure; and the thick line model – a policy of amnesty is pursued to promote the new regime. Issues of amnesty are referred to and also explored by scholar Antonio Cassese in his *Reflections on International Criminal Justice* and compares notions of justice, amnesia and amnesty. In his work Cassese contends vehemently against using amnesty as an instrument of peace negotiations. He approaches the argument of peace versus justice and concludes in favour of justice, he refers to the etymology of amnesty which is derived from the Greek *amnestia* meaning forgetfulness or oblivion, accordingly, “to try and induce people to forget the traumas that have disfigured their lives is, therefore a vain insult to their human dignity.” He refers to Orentlicher who concludes that amnesty works in opposition to international law.⁵⁵

⁵⁴ Arnould, “Transitional Justice in Peacebuilding: Dynamics of Contestation in the DRC,” 322.

⁵⁵ Antonio Cassese, “Reflections on International Criminal Justice,” *The Modern Law Review* 61, no. 1 (1998): 3.

His work is similar to, yet different to Krotoszynski's work in that it compares the application of these three concepts in degrees of justice and not as constructed typologies.⁵⁶ Cassese describes how amnesty could quickly run to oblivion along the spectrum of polarised concepts of restitution and revenge. Cassese's approach discusses the moral implications of applying these three concepts to numerous case studies that he highlights and the realism of how each notion implicates various different individual cases. It is significantly simpler than Krotoszynski's and yet takes advantage of a simpler language to provoke more meaningful answers to seemingly easy questions. In doing so he assists in highlighting the basic moral bindings of justice versus peace.

There are features to transitional justice that fall beyond the norm of legal discourse (that is the aforementioned criminal justice, truth seeking, reparations and institutional reform), such features are; "memorialization, or tackling distribution inequalities."⁵⁷ In addition, there are the numerous conceptions and meanings of the process of transitional justice and the construction of the language of trial. It is indubitable that there is not a single, universal model, method or means of reconciliation, due to the multifarious nature and conception of transitional justice.⁵⁸ There exist numerous applications of the definitions used by scholars that include; ceremony, rite, service of remembrance, sacrificial practice and ritual or symbolism.⁵⁹

There exists a significant impact of the tribunal process as they engage in a dialogue of construction and reconstruction of symbols and "images" from the past that contribute to the amalgamation of collective memory.⁶⁰ Therefore, this is not a static, objective procedure built on concrete notions of law, rules and principles, in fact it necessitates that law needs to adopt a more fluid framework that includes a platform which allows for rigorous subjectivity and complete sensitivity to the cultural, psychological and temporal context that constructed the need for transition and trial.

⁵⁶ Ibid.

⁵⁷ Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," *Third World Quarterly* 29, no. 2 (2009): 277.

⁵⁸ Laura M. Olson, "Provoking the Dragon on the Patio Matters of Transitional Justice: Penal Repression versus Amnesties," *International Review of the Red Cross* 88, no. 862 (2006): 277.

⁵⁹ Wouter G. Werner, "'We Cannot Allow Ourselves to Imagine what it all Means': Documentary Practices and the International Criminal Court," *Law and Contemporary Problems* 76, no. 3 (2014): 319.

⁶⁰ Ibid., 320., Joachim J. Savelsberg and Ryan D. King, "Law and Collective Memory," *Annual Review of Law and Social Science* 3 (2007): 189-211, doi: 10.1146/annurev.lawsocsci.3.081806.112757.

A current promotion in the development of international law is the use of hybrid courts.⁶¹ The effectiveness of these courts lies in the construction of justice sector reform programmes and its execution in truth telling procedures. Call, views the issues of justice versus peace as a strength to be lauded, this is what he refers to as a “dual legitimacy problem.”⁶² Hybrid courts with their distinguishable yet coherent features of justice assist in creating a facility to build platforms of judicial reform. These platforms tie in with the principal feature of truth telling and its role in transitional justice in that it creates a foundation that institutes historical records and creates a space for memory.⁶³

Understanding the value of memory in recognising patterns and addressing warning signs creates new incentive to renew the dialogue of law and justice.⁶⁴ Transitional justice supports a platform that interferes with cycles of abuse and violence and reinforces commitment towards peace through confrontation and invocation. It facilitates a logic that lies in constantly re-examining something that the current international legislation practices with a nostalgic lethargy.⁶⁵ The characteristic of international law is one of delay, first the international community showed considerable reluctance in cementing the principles in international law within the foreign policies of their constitutions; second, the strategy of the structure of international law was “ad hoc and reactive”⁶⁶ until relatively current developments of a progressive, anticipatory and comprehensible system, and this with the advent of the ICC.

Stephane Beaulac elucidates on this constructivist context of the legal dialogue regarding the “shared consciousness of society.”⁶⁷ He does this by highlighting the distinction between reality and the schematic structures mirrored in one’s mental perceptions built on the precepts of language and cultural discourse. He states that not only does the legal language serve as a representation of reality but it also animates the process of translating, transforming and ultimately transcending the occurrences that exist within or beyond any established rules or legal structures. A 2004 report by

⁶¹ Charles T Call, “Is Transitional Justice Really Just?” *Brown Journal of World Affairs* 11, no. 1 (2004): 106.

⁶² Ibid., 107.

⁶³ Bronwyn Anne Leebaw, “The Irreconcilable Goals of Transitional Justice,” *Human Rights Quarterly* 30, no. 1 (2008): 107.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Beth Van Schaack and Ron Slye, “A Concise History of International Law: Chapter 1 of Understanding International Criminal Law,” 8.

⁶⁷ “The Westphalian Model in Defining International Law: Challenging the Myth,” [www.austlii.edu.au](http://www.austlii.edu.au/au/journals/AJLH/2004/9.html), 2004, <http://www.austlii.edu.au/au/journals/AJLH/2004/9.html>.

the Secretary General of the UN entitled *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, addresses the issues of language and legal discourse, stating that transitional justice policies are political questions instead of technical decisions. The sovereign state is constructed by its own individual constitution. The constitution sets the standards of the rule of law. Societies that have endured oppression and victimisation have to engage with civil society in order to draft new constitutions and revise legislation. Transitional constitutional drafting incorporates within its complex structure the regard for transitional and cultural values and national identity.⁶⁸ International human rights law was created to serve the requirements determined by state actors. Its applicability to international criminal tribunals is hindered due to the static lexigraphy that dictates it. Therefore, it is pressing to uphold the integrity of procedural justice to “break down, rethink, and reformulate human rights law.”⁶⁹

1.5 Theoretical Framework

In his Agenda for Peace to the UN Security Council in 1992, then Secretary-General of the UN Boutros Boutros-Ghali, advocated on behalf of a liberal democratic precedent to policy drafting concerning sustainable development, longstanding peace and promotion of the rule of law.⁷⁰ Since the speech ‘A New Agenda for Peace’ in 1992, made by Ghali, both the practice and study of peace building have emphasised a liberal peace, or the idea that building peace is largely an exercise in building a liberal democratic society with open elections and free markets. John Rawls, in “A Theory of Justice” published in 1971, was the first scholar to present the principles of liberal democracy. This work laid the foundation of restorative justice to blueprint an all-inclusive, open society, which is the hallmark of a functioning democracy.⁷¹

⁶⁸ “The United Nations and the Rule of Law,” The United Nations, October 28, 2009, <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>, (accessed May, 1 2017).

⁶⁹ Daniel Naymark, “Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy,” *Journal of International Law and International Relations* 4, no. 1 (2008): 5.

⁷⁰ “UN Documents: Gathering a Body of Global Agreements,” <http://www.un-documents.net>, undated, <http://www.un-documents.net/a47-277.htm>, Elizabeth King and Robert O. Matthews, “A New Agenda for Peace: 20 Years Later,” *International Journal* 67, no. 2 (2012): 279.

⁷¹ Kora Andrieu, “Political Liberalism after Mass Violence: John Rawls and a Theory of Transitional Justice,” in *Transitional Justice Theories*, 85-104. Belfast: Routledge, 2014, <http://www.corteidh.or.cr/tablas/r32526.pdf>.

The application of Rawls' interpretation of justice is advantageous to this study as Rawls promotes justice in society by examining justice without precedent.⁷² Rawls advocates the liberal democratic principles of universal rights, equality and rule of law through the construction of a notion called the "original position." This is a hypothetical concept built on a phrase called "a veil of ignorance," in which the asymmetrical balance of power determined by a hierarchical society is substituted for an absence of information prioritising ethnicity and race therefore levelling the outcomes of procedural justice to one determined by fairness. The rule of law can then become the principle dialogue to facilitate procedural justice as the liberal democratic requirements of universal appreciation and recognition for human rights lays the foundation of a new script for a social contract.⁷³ Rawls also coined the phrase "burden societies" within the arena of international relations, political discourse and academia.⁷⁴ These two concepts allow societies to engage with the discourse of justice determined by fairness.⁷⁵

Applying Rawls' theory, Andrieu questions the possibility of rebuilding a war-torn society, he emphasises in particular, a liberal society with the capacity to engage in a dialogue of meaning and healing with a substantial political process.⁷⁶ The fragile nature of societies in transition is the focus of Rawls' "Law of Peoples" in which he reiterates his "original position" to set the standard of justice based on universal principles of human rights.

Lisa L Fuller refers to Paul Farmer⁷⁷ who states that addressing forces of injustice requires identifying aspects that increase a citizen's vulnerability in the modern world nation state; these include features of ethnicity, race and immigrant status. Fuller states "the notion of multiple, intersecting vectors of injustice is illuminating." She then links this to transitional justice, as it is relevant in dissecting how injustice manifests. Burden societies are by default characterised by immense stratification based on asymmetrical divisions of power. These societies are engulfed in circumstances determined either or completely historically, economically or socially that inhibit

⁷² Ibid., 99.

⁷³ Ibid., 88.

⁷⁴ Lisa L. Fuller, "Burden Societies and Transitional Justice," *Ethical Theory and Moral Practice* 15, no. 3 (2012): 369-386, doi: <http://www.jstor.org/stable/23254295>.

⁷⁵ Wojciech Sadurski, "Social Justice and Legal Justice," *Law and Philosophy* 3, no. 3 (1984): 329-354, doi: <http://www.jstor.org/stable/3504657>.

⁷⁶ Andrieu, "Political Liberalism after Mass Violence: John Rawls and a Theory of Transitional Justice," 88.

⁷⁷ Paul Farmer, "On Suffering and Structural Violence: Social and Economic Rights in a Global Era," in *Partner to the Poor: A Paul Farmer Reader*, ed, Haun Saussy (Berkeley: University of California Press) cited in Fuller, "Burden Societies and Transitional Justice," 381.

the establishment of “just institutions.”⁷⁸ Although liberal democracy provides the moral foundation on which societies can aspire to reshape distressed states, Fuller contends that Rawls does not offer an adequate framework that these societies can move towards resolving. Fuller contends for a “holistic”⁷⁹ approach as a means at introducing justice through policymakers addressing the full spectrum of human rights violations and not applying the “neat,” clean definitions of human rights as it limits the range of resolve. That is diagnosing burdened societies according to the range of experienced abuses and not to focusing primarily on recognised rights that are violated. Rawls’ Liberal Democratic theory provides a conceptual space from which justice can be viewed and not necessarily adequately addressed.⁸⁰ However, there is a range of scholars in the field of international relations who contribute to Rawls’ ideas on justice from a liberal democratic point of view that will be referred to in this study.⁸¹

Annan, expressed the necessity for justice as the pinnacle of accountability and fairness in the securing, exoneration and acknowledgement of human freedoms through the prevention and prosecution of infringement against persons and property. “Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.”⁸²

1.6 Research Methodology

The research methodology applied as a framework for this study is qualitative, analysing both primary and secondary sources, for example, scholarly analysis provided through journal articles and books on transitional justice and actual recorded cases, accessed and downloaded.

This study is designed around qualitative techniques, this is preferable to quantitative as the four features of transitional justice will be discussed using case studies and scholarly accounts of what

⁷⁸ Fuller, “Burden Societies and Transitional Justice,” 370.

⁷⁹ Ibid., 383.

⁸⁰ Ibid., 381.

⁸¹ Sadurski, “Social Justice and Legal Justice,” 329-354., Fuller, “Burden Societies and Transitional Justice,” 369-386.

⁸² Kai Ambos, Judith Large and Marieke Wierda, *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice* (Springer: Berlin Heidelberg, 2010), 22.

transpired during the tribunals and times of transitions. Truth is described as subjective and especially when emphasising the necessity of memory in connecting with the past a qualitative approach will assist in providing a rich integrated reference from which to best address the research problem.

As noted previously, the study employs case studies. Case study research is descriptive and relies on qualitative data to portray an accurate account about a specific event. Case study research allows the researcher to explore the nature of the events from insights gained from historical analysis and extensive relaying of secondary accounts and observations. Case studies are characterised by an in-depth narrative focused on specific features that the researcher has chosen to investigate. Case studies do not investigate the cause and effect of a phenomenon, generalised truths or make predictions. The researcher does not have control of the studied environment and asks questions of how and why of real-life context.⁸³

The qualitative framework of this study based its outcomes on inductive reasoning. It analysed data of secondary sources that were the product of observations, fieldwork, newspaper articles and academic reports. The inductive reasoning generates broad propositions, which are the foundation that constructs the theoretical framework built on inferences garnered by others in the field. This theoretical framework will relay the facts in a full-bodied and integrated way.

Considerations about researcher subjectivity when referring to experts, policy drafters and scholars is necessary to not only avoid bias, but also to understand the role of the researcher as an instrument in a qualitative design. That is, any descriptive account or scholarly investigation employed within this study has a unique essence belonging to the researcher's individual perspective – the value of which is neither negative nor positive. Instead, it all contributes to the rich networking of ideas, concepts and constructs: a dynamic that can only exist when evaluating social phenomena and its application to the legislative field. Wolcott, in Leedy and Ormrod states that total objectivity while investigating subjects within the field of the humanities is not possible. Instead Wolcott mentions a technique described as “rigorous subjectivity”⁸⁴ in which the researcher must aim to be fair and

⁸³ “Case Study Method,” <https://cirt.gcu.edu,> undated, https://cirt.gcu.edu/research/developmentresources/research_ready/descriptive/case_study, (accessed on May 3, 2019).

⁸⁴ Paul D. Leedy and Jeanne E. Ormrod, *Practical Research: Planning and Design, Ninth Edition*, (United States: Pearson Education Incorporated, 2010), 33.

balanced, present the information wholly and completely and most pertinently, maintaining appropriate levels of sensitivity.

1.7 Scope and Limitation of the Study

The extent of the study of transitional justice is vast and has been thoroughly explored and discussed by many scholars in the field of international relations. This study will focus solely on the two chosen case studies of transitional justice practices in South Africa and Sierra Leone.

1.8 Ethical Considerations

This is a desktop study and no interviews were conducted; therefore, there are no ethical considerations. Although this study does deal with very sensitive issues of personal accounts of victimisation and persecution, all of the information accessed for the study is in the public domain. For example, the information gathered will be accessed from court and hearing transcripts from the websites of the SATC and SLTC.

1.9 Chapter Outline

In Chapter One, the introduction, background, research problem and methodology were explained. This will be followed by Chapter Two, where a general discussion of transitional justice (and its complexities) and current developments will be discussed, including references to international humanitarian law as well as the normative nature of human rights and its role in increasingly challenging the supremacy of the sovereign state. In Chapter Three, the first case study, South Africa, will be analysed using the identified conceptual framework. In Chapter Four, the second case study, Sierra Leone, will be analysed using the same framework. In the concluding chapter, a summary of key findings will be provided as well as suggestions for further research.

CHAPTER TWO: THE LEGISLATIVE FRAMEWORK OF TRANSITIONAL JUSTICE

“If we can cultivate in the world the idea that aggressive war-making is the way to the prisoner’s dock rather than the way to honors, we will have accomplished something toward making the peace more secure.” Robert H. Jackson

2.1 Introduction

As noted in Chapter One the focus of this study is on the four identified components of transitional justice, namely: criminal justice, truth seeking, reparations and institutional reform. Criminal justice refers to legal investigations of those responsible for human rights violations. Prosecutor’s frequently emphasised investigations of the “big fish”⁸⁵: those believed to be the most accountable for systematic mass violations of human rights.⁸⁶ Truth seeking involves commissions of inquiry that prioritise investigating and reporting on key periods of recent abuse. Truth seeking discourse is constructed by official state bodies that assist in treating such abuse with recommendations surrounding transcripts of resolution in order to prevent recurrence of abuse.⁸⁷ Reparations are state sponsored schemes that assist in restoring the physical and emotional wounds inflicted on victims and their families. Usually, reparations involve a mixture of material and symbolic benefits, payments or grants to victims. This may include financial compensation and official apologies.⁸⁸ Institutional reforms describe plans that assist in the transformation of the military,

⁸⁵ “International Center for Transitional Justice: What is Transitional Justice,” <https://www.ictj.org>, 2009, <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>, (accessed September 20, 2017).

⁸⁶ William Schabas, “Transitional Justice and the Norms of International Law,” *Japanese Society of International Law*, October, 8, 2011, http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf, (accessed May 1, 2017), 1-2.

⁸⁷ Thelma Ekiyor, “Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective,” in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009), 159.

⁸⁸ Stephen Winter, “Toward a Unified Theory of Transitional Justice,” *The International Journal of Transitional Justice* 7, no. 2 (2013): 236, doi: [10.1093/ijtj/ijt004](https://doi.org/10.1093/ijtj/ijt004).

police, judiciary and related state institutions. The systems are reformed from oppressive and corrupt rule to that of public service that promote democracy and the rule of law.⁸⁹

These features are interwoven components of post-conflict peace building and together with the rule of law facilitate the process of transition. These elements of transitional justice are considered to be essential for successful transition.⁹⁰ In later chapters, this study will investigate how these concepts were applied in the South African and Sierra Leonean contexts. However, first the nature of transitional justice needs to be better defined, as it is a broad field that incorporates international law, human rights law and humanitarian law. As noted, it does this along a spectrum of retributive justice at one end and restorative justice at another, as the concept of justice is constantly evolving.

The study of transitional justice is applicable to cases stemming from the Latin American countries in the 1980s to today's East Timor, Cambodia, Rwanda and the former Yugoslavia.⁹¹ There are several types of political transitions observed over the past 50 years. Instances that are noteworthy include: the complete military rule in Nicaragua in 1979, the end of a military dictatorship in Greece in 1974 and Argentina in 1982, the electoral defeat of an autocratic regime in Uruguay in 1985 and Chile in 1988, the end of the Cold War and with it superpower support and proxy wars and the end of apartheid.⁹² The factors influencing a political system in transition are: the type of crisis (whether religious, ethnic, political or ideological), the type of atrocities committed, the culture and tradition of a country and the type of transition.

Currently the main institution to secure international justice is the ICC. This is the judicial body that engages in international criminal law (ICL) and is the 50-year long actualisation of treaties, accords, contracts, duties, judicial decisions and general principles since the Nuremberg Trials and Tokyo Tribunal. Before the establishment of the ICC there were numerous ad hoc tribunals, reconciliation councils and criminal tribunals. The truth commissions of South Africa and Sierra Leone are a diversion from the principles and functions of the court as they practice restorative

⁸⁹ Krotoszynski, "The Transitional Justice Models and the Justifications of Means of Dealing with the Past," 591.

⁹⁰ Sooka, "The Politics of Transitional Justice," 29.

⁹¹ "The Future of International Justice," www.bbc.com, December 31, 2017, <http://www.bbc.com/news/uk-42417106>, (accessed January 14, 2018).

⁹² "Introduction to Human Rights Lesson 30 Transitional Justice," You Tube: MOOC Chile, October 6, 2014, https://www.youtube.com/watch?v=EyMLfAm2KO4&index=27&list=LL6ewK4_clGIKRUuaczAtCVO, (accessed January 14, 2018).

justice over retributive. This is the aforementioned continuum that hallmarks transitional justice proceedings.

2.2 Transitional Justice: Deconstructing the Language of Law and Renewing Concepts of Justice

Transitional justice as a study and field of inquiry has developed considerably over the course of the past 15 years.⁹³ The measures established to address human rights through judicial proceedings include: a permanent ICC, two ad hoc international criminal tribunals, (the International Criminal Tribunals for the Former Yugoslavia and Rwanda), several mixed national-international tribunals and three regional human rights courts; the European and Inter-American Courts of Human Rights and the African Court on Human and Peoples Rights. In addition, there exist numerous quasi-judicial and non-judicial human rights instruments that include seven UN treaty bodies and two regional human rights commissions.⁹⁴

The laws that guide the judicial proceedings have also evolved and broadened from standardised legal legislations, with narrow, “decontextualized”⁹⁵ definitions to include broader debates on “peace versus justice”⁹⁶ and “truth versus justice”⁹⁷ and with it the development and inclusion of “the right to truth” and the “right to reparations.”⁹⁸ This is all-inclusive within the increasingly acknowledged platform of human rights within the law.

It has been argued that the foundation of transitional justice commenced with the Nuremberg and Tokyo tribunals and the desire for the prevailing victors to prosecute human rights abuses.⁹⁹ This initiated dialogues and debates centred on the adequate role for international law in framing legislation surrounding retribution.¹⁰⁰ It was not until the third wave of democracy (1974-1990)¹⁰¹

⁹³ Nagy, “Transitional Justice as Global Project: Critical Reflections,” 275.

⁹⁴ Mark Freeman, *Truth Commissions and Procedural Fairness*, (New York: Cambridge University Press, 2006), xiii.

⁹⁵ Nagy, “Transitional Justice as Global Project: Critical Reflections,” 275.

⁹⁶ Sriram, “Transitional Justice and Peacebuilding,” 1.

⁹⁷ Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, “Context, Timing and the dynamics of Transitional Justice: A historical Perspective,” *Human Rights Quarterly* 31, no. 1 (2009): 208.

⁹⁸ Nagy, “Transitional Justice as Global Project: Critical Reflections,” 275.

⁹⁹ Leebaw, “The Irreconcilable Goals of Transitional Justice,” 97.

¹⁰⁰ *Ibid.*, 99.

¹⁰¹ Krotoszynski, “The Transitional Justice Models and the Justifications of Means of Dealing with the Past,” 587.

that comparative studies began to better comprehend notions of transitional justice through debate, dialogue and analysis.

After World War II, international humanitarian law, human rights law and transitional justice reflect a change in global values and priorities from absolute respect of the independent rule of the nation state to an emphasis on safeguarding the rights of the individuals that comprise the civilian body of a sovereign territory. This change in principles led to individuals increasingly becoming subjects of international law. This new international dynamic meant that emerging citizens of the world could pursue justice via international courts like the International Court of Justice (ICJ), the District Court of The Hague and draw customary international law as a legislative source from the ad hoc tribunals such as; Extraordinary Chambers in the Courts of Cambodia (1997- present), International Criminal Tribunal of Rwanda (1994-2015), International Criminal Tribunal for the Former Yugoslavia (1993-2017), Special Court for Sierra Leone (2002-2013) and ad hoc court of East Timor (2000-2006).¹⁰²

The UN General Assembly endorsed the Nuremberg principles in 1946 that resulted in accelerated formation of customary international law,¹⁰³ including the mode of international criminal responsibility that today is recognised as Joint Criminal Enterprise (JCE) liability.¹⁰⁴ There is an extended form of the JCE called JCE III that is a mode of liability that is applicable to the international criminal trials since the decision of the appeals chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1995 Dusan Tadic Case.¹⁰⁵ After the Nuremberg and Tokyo tribunals the UN made a brief mention of creating global punitive hearings in the 1948 Genocide Conventions. However, the desire for a global punitive court was halted during the era of the Cold War.

Robertson attests that it was not until the 1980s that Gorbachev reignited the idea of a global punitive court, as a means to counter terrorism. In addition, state representatives of Trinidad suggested it as a way to battle drug trafficking. The UN General Assembly requested that

¹⁰² “The Hague Justice Portal,” <http://www.haguejusticeportal.net>, 2016, <http://www.haguejusticeportal.net/index.php?id=46>. (accessed January 14, 2018).

¹⁰³ “Introduction to International Law Robert Beckman and Dagmar Butte,” www.ilsa.org, 2009, <https://www.ilsa.org/jessup/intlawintro.pdf>. (accessed on January 14, 2018).

¹⁰⁴ Michael P. Scharf, “Seizing the ‘Grotian Movement’: Accelerated Formation of Customary International Law in Times of Fundamental Change,” *Cornell International Law Journal* 43 (2010): 439.

¹⁰⁵ *Ibid.*, 44.

international criminal laws be resuscitated in the principles, drafts and blueprints in international law. This was accelerated in 1993 in the wake of the creation of a war crimes tribunal for the former Yugoslavia, with considerable support from the public arena. In the subsequent years, the international criminal laws draft was recognised and in 1995 the General Assembly structured a preparatory committee to canvass treaty-based negotiations that was then submitted to a treaty conference in 1998.¹⁰⁶ This was the beginning of the ICC.

2.3 The ICC, ICTR and ICTY

Situated in The Hague in the Netherlands, the ICC pursues global justice through: investigating, indicting, trying and prosecuting suspects, promoting human rights, ending impunity and providing a global platform that facilitates securing all citizens in all nations. The court's proceedings are committed to be fair, independent and transparent. Currently, the president of the ICC is Nigerian-born Chile Eboe-Osuji.¹⁰⁷

The International Criminal Tribunal for Rwanda's (ICTR) mandate is to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994."¹⁰⁸ From its inception in 1995, the ICTR has indicted 93 people suspected of grave violations of international humanitarian law committed in Rwanda in 1994. Those accused include: high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders. The ICTR is in the vanguard of creating a reliable international criminal justice system, particularly acts of: genocide, crimes against humanity and war crimes. It was also the first international tribunal to have carried out verdicts dealing with genocide. It relied on the definition of genocide set forth in the 1948 Geneva Convention and was the first tribunal to interpret and apply it. It was the first to recognise and define rape in international criminal law as an act of genocide. The ICTR delivered its final trial verdict on 20 December 2012 in the Ntirabware

¹⁰⁶ Geoffrey Robertson, *Crimes Against Humanity: A Struggle for Global Justice* (United Kingdom: Penguin, 2006), 420.

¹⁰⁷ "The International Criminal Court," <https://www.icc-cpi.int/>, 2018, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>, (accessed October 1, 2018)

¹⁰⁸ "United Nations International Residual Mechanisms for Criminal Tribunals," <http://unictr.irmct.org>, 2015, <http://unictr.irmct.org/en/tribunal>, (accessed October 1, 2018)

case. The Tribunal's residual responsibility is with the Appeals Chamber. Since October 2014, there was only one case with six separate appeals, pending before the ICTR Appeals Chamber.¹⁰⁹

The ICTY was sanctioned by the UN court of law to prosecute war crimes during the war in the Balkans in the 1990s. In 1993, Resolution 808 of the Security Council was established. It stated that an international criminal tribunal should be established for the former Yugoslavia. The Security Council, acting under Chapter VII of the UN Charter created the Statute of the ICTY, which was adopted in 1993.¹¹⁰ Its mandate “is to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region.”¹¹¹ The tribunal continued from 1993 until December 2017. The ICTY is authorised to try and convict people based on four categories of crimes: grave breaches of the 1949 Geneva conventions, violations of the laws or customs of war, genocide and crimes against humanity. The ICTY is not authorised to convict states for crimes against peace; these crimes are within the jurisdiction of the ICJ. The ICTY ensured that those who were the most responsible for violations committed can be held accountable.¹¹² The ICTY’s development of international law and the international judicial system is significant.

2.3.1 The Inception of the ICC

17 July 1998 marked the commencement of the ICC.¹¹³ Its inception, with 120 national votes, took place in Rome. The process of adoption was complex and took five weeks. The actors involved were divided across three opposing systems of beliefs. These divisions detail the hallmarks of modern international affairs and indicate the asymmetrical power balance that prevents the world from establishing an effective justice system.¹¹⁴

¹⁰⁹ Ibid.

¹¹⁰ “PICT: Projects on International Courts and Tribunals,” <http://www.pict-pcti.org>, undated, <http://www.pict-pcti.org/courts/ICTY.html>, (accessed on January 14, 2018).

¹¹¹ “International Criminal Tribunal for the Former Yugoslavia,” <http://www.icty.org/>, 2017, <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>, (accessed October 1, 2018)

¹¹² Ibid.

¹¹³ “Coalition for the International Criminal Court,” www.coalitionfortheicc.org, 2018, <http://iccnw.org/?mod=icchistory>, (accessed October 1, 2018)

¹¹⁴ Robertson, *Crimes Against Humanity: A Struggle for Global Justice*, 419.

At the signing of this extensive and meticulous document of 128 articles, 21 states abstained and a mere seven opposed. However, these seven happened to contain some of the world's greatest powers like the United States and China and leading countries like India and Israel. It took 60 states to ratify the document and only three of the P5 members were signatories; United Kingdom, Russia and Germany. (The UK became complicit after Prime Minister Tony Blair was elected; however, the previous administration was undesiring of the idea to the point of absconding).¹¹⁵

The speed with which the ICC was signed, drafted and ratified can be partly attributed to the consistent pressure applied by human rights activists and NGOs whose conscientious commitment must not go unnoticed and from which other lobbying groups can take heart and learn lessons.¹¹⁶ It is the speed which is the main measure of success of the ICC and surprising, when compared to the lengthy time consuming drag of most other declarations, statutes and treaties to be realised. The contentions surrounding the principles of the drafting indicate the maligned and extreme views of the 120 countries that took part in its signing.¹¹⁷

One school of thought belonged to 42 nations whose consensus was reached on a court system that would in the end, work. That is, they uniformly advocated for a strong prosecutor whose power was answerable only to mechanisms of transparency and accountability. Together this school impressed with strong conviction the need of the court to be independent of the Security Council and answerable to the precepts of the Universal Declaration of Human Rights. Another move to secure a functioning court lay in granting the prosecutor and court universal jurisdiction¹¹⁸ with the power over the international order to apprehend war suspects anywhere across the globe.¹¹⁹

This did not fare well for the US who did not want to be vulnerable to any independent power with the ability to hold its actions in check.¹²⁰ The US, along with China and initially France, advocated for a court whose main power lay with the Security Council, thereby having the ability to veto any shaming prosecutions. The five weeks of negotiations involved keeping the US with its self-

¹¹⁵ Ibid., 420.

¹¹⁶ "Coalition for the International Criminal Court," www.coalitionfortheicc.org, 2018. <http://iccnow.org/?mod=icchistory>, (accessed October 1, 2018)

¹¹⁷ Robertson, *Crimes Against Humanity: A Struggle for Global Justice*, 419, 422, 423.

¹¹⁸ "The International Criminal Court," <https://www.icc-cpi.int/>, 2018, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>, (accessed October 1, 2018)

¹¹⁹ Robertson, *Crimes Against Humanity: A Struggle for Global Justice*, 421.

¹²⁰ "The United States and The International Criminal Court," <http://www.globalissues.org>, 2005, <http://www.globalissues.org/article/490/united-states-and-the-icc>, (accessed October 1, 2018)

generating agenda on the side, whose marring of the statue still scars the intent and effectiveness of the court, and ending in the US absconding anyway.¹²¹

The third school of thought belonged to those nations whose priorities were tied in with fundamentalist ideology; that of Iraq, Iran, Libya and Indonesia. They refused the notion of a court entirely. Interestingly in the vanguard of this group was India (who held preparatory committee sessions before the conference) and whose full intent displayed itself in the nuclear testing right before the Rome proceedings.¹²²

Another contention in the drafting process arose in the promoting of the court's sole jurisdiction of the UN peacekeepers.¹²³ This armoury is comprised of soldiers belonging to all corners of the earth, including America. The precepts of international justice ensures that the global amalgamation of UN peacekeepers is kept accountable and culpable to an independent court. That is, UN peacekeepers should in the name of genuine justice have the umbrage of US hegemony removed exposing all actions and creating space for transparency. Instances of misbehaviour and even crime have been shrouded in bureaucratic obscurity. This needs addressing.¹²⁴

Perhaps the most tragic aspect and true indication of the fault lines that surrender the heights of human rights ideals into dust is that of the complete and unapologetic nature of Israel's stance towards an institution built on the foundations of the horrors that necessitated it. At the time the Netanyahu government voted against the establishment of the ICC. As a principle guiding the drafting of an article decreed that forced settlement of an occupied territory was a war crime, it conflicted with the settling of 200 000 Jews in the West Bank and Gaza Strip preceding the 1967 six-day war.¹²⁵ Israel was fearful that the decision-makers at the time would be tried. However, this was not a practice of the burgeoning court nor was there evidence that there would be such trials. An article within the statue convicting the practice of population transfers gained relevance in the example of the Serbian Kosovo war where this was an effective tool of ethnic cleansing.¹²⁶

¹²¹ Robertson, *Crimes Against Humanity: A Struggle for Global Justice*, 425.

¹²² Ibid., 421.

¹²³ Ibid.

¹²⁴ Robertson, *Crimes Against Humanity: A Struggle for Global Justice*, 423.

¹²⁵ "A Policy Brief regarding the Forced Population Transfer of Palestinians," <https://www.civiccoalition-jerusalem.org>, October 20, 2016, https://www.civiccoalition-jerusalem.org/uploads/9/3/6/8/93682182/israels_forcible_transfer_of_palestinian_bedouin-forced_displacement_as_a_pillar_of_colonialism_and_apartheid.pdf. (accessed October 1, 2018)

¹²⁶ Ibid.

Ultimately the underlying success of the court lay in transforming the Hague Tribunal into a lasting institution. Even though the court was weakened in its power to infringe upon national sovereignty, there is progress in the systems and workforces whereby the Security Council is empowered to act immediately in the face of future genocidal warnings. Added to this the Rome Statue has concretised international law through securing conceptual advances in universal human rights. For example, crimes defined by human rights violations are now cemented in law as offenses committed during times of relative peace. Article 3 of the 1949 Geneva Convention served as the foundation for individual criminal liability, which reduced the vagueness of vacant promises that heads of state would not prosecute their own people. Importantly sexual violence was identified as an act of war; a crime whose perpetrators could be tried and prosecuted. The Rome statue gives the court jurisdiction referring to the Security Council acting under Chapter VII of the UN Charter, or with permission of the state to which the suspect belongs. Unfortunately, however, the actual placing of heads of state engaging in criminal activities requires a complete alienation of the suspected head from *all* five of those members of the Security Council.¹²⁷

2.3.2 A Current Analysis of the ICC, ICTR and the ICTY

In what Makau Mutua describes as an “altar of international justice”¹²⁸ the ICC and its predecessors the ICTR and the ICTY are an actualisation of the international realm’s commitment to ending impunity.¹²⁹ Mutua¹³⁰ and Roberson¹³¹ describe the necessity of a global criminal court and its diplomatic, legislative amendments to national constitutions. Robertson does a concise culmination of the global appeal for a penal legislative framework initiating from the 1948 Genocide Convention and draft statutes that were produced by the International Law Commission (ILC).¹³² Mutua refers to M. Cherif Bassiouni’s¹³³ work on the legislative history of the ICC, who states that the Nuremburg trials marked the inception of punitive measures within a tribunal

¹²⁷ Ibid.

¹²⁸ Makau Mutua, “The International Criminal Court: Promise and Politics,” *American Society of International Law* 109 (2015): 269.

¹²⁹ Cassese, “Reflections on International Criminal Justice,” 3.

¹³⁰ Mutua, “The International Criminal Court: Promise and Politics,” 269.

¹³¹ Robertson, *Crimes Against Humanity: A Struggle for Global Justice*, 419-426.

¹³² “Introduction to International Law Robert Beckman and Dagmar Butte,” www.ilsa.org, 2009, <https://www.ilsa.org/jessup/intlawintro.pdf>. (accessed on January 14, 2018).

¹³³ Mutua, “The International Criminal Court: Promise and Politics,” 269., M. Cherif Bassiouni, *The Legislative History of the International Criminal Court* (New York: Transnational Publishers, 2005).

structure of victims' testimonies and subsequent persecutions against despotic figures who perpetrated crimes against humanity. During the years 1945-1946 the International Military Tribunal at Nuremberg with its prosecution of the highest-ranking Nazi bureaucrats and spear headers, signaled the beginnings of international criminal law and with it, setting the precepts of a nascent global dialogue of human rights law and humanitarian law.

As Stanley¹³⁴ asserts, the launch of the ICC is a fulfillment of the 50-year long anticipated Nuremberg legacy. She argues that a great deal of the ineptness of today's functioning of the ICC compared to the overall considered success of Nuremberg lies in the failure to generate an acceptable trail of evidence for prosecution. She refers to the failed indictment of Uhuru Muigai Kenyatta of Kenya by the Office of the Prosecutor (OTP) of atrocities for reasons of insufficient evidence, as one poignant example. Accordingly, on 5 December 2014, the OTP of the ICC, Ms Fatou Bensouda from Gambia, filed a notice of withdrawal against Kenyatta who was charged with crimes against humanity; murder, deportation, forcible transfer of population, rape, persecution, and other inhumane acts.¹³⁵

The seeds of criminal accountability sewn via the prosecutors of Nuremberg, who had painstakingly collected and meticulously drafted records of accounts needed to secure convictions in a highly respectable and watertight manner, cannot be reaped within the legal discourse today. Stanley discusses within her research several reasons for the demonstrated disability in the court, the list includes: a non-cooperative state, rogue centred militant groups or military, a mafia style government, order of rule, a contradiction in the procedures that outline the handling of evidence by the court and a nation's crippled capacity to carrying out its administrative duties.

The success of the ICC is contentious with many feeling that the principles that structure this document secure the current international order which does very little in upholding the ideas of universal justice. Once again this prevailing problem of enforcement mechanisms or a lack thereof prevents the mechanics of international law to function effectively.

However, military rulers like Joseph Kony, Thomas Lubanga Dyilo, Bosco Ntaganda and Germain Katanga have all been indicted and successfully transferred to the ICC. In addition, the incremental

¹³⁴ Jennifer Stanley, "From Nuremberg to Kenya: Compiling the Evidence for International Criminal Prosecutions," *Vanderbilt Journal of Transnational Law* 49 (2016): 820.

¹³⁵ *Ibid.*, 821-822.

progress of the ICC was evident, when, in 2005 the US finally stopped evading the necessary procedures needed to infringe upon sovereign integrity and permitted the Security Council to refer the Darfur case to the ICC.¹³⁶ There were criticisms of the ICC's attempts to address the obstacles that deter it from acting promptly in prosecuting and attaining justice, and many more regarding the efficacy of trials and the time taken to secure justice.¹³⁷

The most significant aspect of the ICTY and ICTR as well as the ICC above all other international judicial bodies is that these are criminal courts. Individuals prosecuted and convicted are subject to criminal sanctions; serving jail periods up to life sentences. The ICTY and ICTR had special detention units located at The Hague and in Arusha respectively. Regarding the jurisdiction of the ICTY and the ICTR, they are legally permitted to align their objectives to the national courts of each country. Still, they both take precedence over national courts. This is not permitted in the jurisdiction of the ICC. At any stage of the procedure, the two ad hoc international criminal tribunals may formally request the national courts to defer competence.¹³⁸

The ICC's institutional and administrative structure is unlike the two ad hoc courts. The ICTY and ICTR are established via the UN Security Council Chapter VII of the UN Charter¹³⁹ and the ICC is founded on an international treaty, the Rome Statute.¹⁴⁰ Therefore the court is neither an organ of the UN nor a creation of the UN Chapter VII. It does, however, function with a considerable amount of UN agencies, specifically involving the field operations. The UN and the ICC have a negotiated relationship agreement that determines the legislative bond between the two legal global bodies. Another dissimilarity lies in the stakeholders and in front of third parties from whom judicial and prosecutorial procedures are pursued. To clarify, in the situation of the ad hoc tribunals, every member state of the UN had served as a stakeholder; when UN member states are requested to collaborate with the tribunals, articles 25 and 103 of the UN Charter bind them to do so. Still, if the situation demonstrated contrasting agendas between states and under international

¹³⁶ "International Justice," <https://www.globalpolicy.org>, 2018, <https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-in-the-security-council-6-4.html>, (accessed October 1, 2018)

¹³⁷ Geoffrey Robertson, *Crimes Against Humanity: A Struggle for Global Justice*, 419-426.

¹³⁸ "Pict: Projects on International Courts and Tribunals," <http://www.pict-pcti.org>, undated, <http://www.pict-pcti.org/courts/ICTY.html>. (accessed on January 14, 2018).

¹³⁹ Ibid.

¹⁴⁰ "The Rome Statute of the International Criminal Court," <http://www.icc-cpi.int>, 2002, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf. (accessed on January 14, 2018).

treaties, commitments under the UN Charter prevail. By contrast member parties to the Rome Statute are compelled by less significant statutory provisions, like articles 86 et sequentes¹⁴¹ of the Rome Statute, by virtue of the general international legal principle of pacta sunt servanda¹⁴², as enshrined in article 26 of the Vienna Convention¹⁴³ on the Law of Treaties of 1969.¹⁴⁴

Another distinguishing feature separating the legislative language of the ICC and ICTY and ICTR lies in the prerequisite of the categories of victims based on geography, nationality, ethnicity, religion and political affiliation. The Rome Statute completely terminates the requirements of categories therefore, “offenses are crimes against humanity when committed as part of a widespread or systemic attack directed against any civilian population, with knowledge of the attack,”¹⁴⁵ the Statute requires that assault is charged from “a state or organizational policy.”¹⁴⁶ The ever-evolving language of international law and human rights law has reached its zenith in the Rome Statute specifying securing and protecting the rights of the citizen with the steadily disintegrating notion of the supremacy of the state.

Having discussed the legislative precepts surrounding the ICC, ICTY and ICTR in order to fully encompass a broad understanding of transitional justice and the language of international law, the study will now expand upon the four concepts of transitional justice: criminal justice, truth telling, reparations and institutional reform. These four features are prominent regarding reconciliation courts and restorative justice; the emphasis of which will be explored in both cases, South Africa and Sierra Leone.

2.4 Reparations, Truth Telling, Criminal Justice and Institutional Reform

¹⁴¹ “Merriam-Webster,” <https://www.merriam-webster.com/dictionary/et%20sequentes>, 2017, <https://www.merriam-webster.com/dictionary/et%20sequentes>. (accessed on January 14, 2018). Et sequentes is a literal translation from Latin as “and those that follow.”

¹⁴² “USLegal,” <https://definitions.uslegal.com/p/pacta-sunt-servanda/>, 2016, <https://definitions.uslegal.com/p/pacta-sunt-servanda/> (accessed on January 14, 2018).

¹⁴³ “Oxford Public International Law: Vienna Convention on the Law of Treaties,” <http://opil.ouplaw.com>, June 2006, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>,

¹⁴⁴ Philip Ambach and Klaus U. Rackwitz, “A Model of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court,” *Law and Contemporary Problems* 76 (2014): 124, 125.

¹⁴⁵ David Luban, “A Theory of Crimes Against Humanity,” *The Yale Journal of International Law* 29 (2004): 96-97, url: <http://digitalcommons.law.yale.edu/yjil/vol29/iss1/3>.

¹⁴⁶ Ibid, 97.

The main transitional measures include; truth telling – historically this has been carried out by moral panels called truth commissions; acknowledgement – by all relevant sectors of society, reparations and criminal justice.¹⁴⁷

2.4.1 Reparations

The first of the transitional justice mechanisms to be discussed is reparations. These are actions taken to restore dignity and to facilitate peace. These actions include: economic compensation, mementos – (both public and symbolic), and strategies undertaken to improve the livelihood of victims and their families – (such as giving scholarships and access to health services).¹⁴⁸ Reparations, whether material or symbolic, individual or collective, for example, restitution of a property, employment or medical rehabilitation, symbolic reparations would include erection of commemorative monuments or plaques, ceremonies or statements intended to honour victims; and finally criminal justice which includes the fair investigation, prosecution, conviction of those found guilty and pardon, amnesties and measures of humanity are not excluded. Reparations are a new paradigm of post-conflict restoration uniting elements of traditional forms of peacekeeping, mediation, diplomacy and negotiation.¹⁴⁹ It recognises the restoration of rights to victims.

Reparations are considered to be controversial. Frequently there are not enough resources to implement fully this feature of transitional justice. For example, in Peru, the *Comision de la Verdad y Reconciliacion* (CVR), 2001-2003,¹⁵⁰ proposed that in order to prevent future patterns of violence and victimisation, it was necessary to establish a Comprehensive Reparations Plan over and above prosecutions and institutional reforms. The Comprehensive Reparations Plan would consist of both economic and symbolic measures on both an individual and collective level. Under the plan the CVR aspired to restore the rights of citizens, “provide education and health-related

¹⁴⁷ “Introduction to Human Rights Lesson 30 Transitional Justice,” You Tube: MOOC Chile, 6 October 2014, https://www.youtube.com/watch?v=EyMLfAm2KO4&index=27&list=LL6ewK4_cIGIKRUuaczAtCVQ, (accessed on January 14, 2018).

¹⁴⁸ “Trial International: What is Transitional Justice?” <https://trialinternational.org>, 2017, <https://trialinternational.org/topics-post/transitional-justice/>, (accessed September 20, 2017).

¹⁴⁹ Roger Mac Ginty and Oliver Richmond, “Myth or Reality: Opposing Views on the Liberal Peace and Post-War Reconstruction,” *Global Society* 21, no. 4 (2007): 491, doi: 10.1080/13600820701562710.

¹⁵⁰ “The United States Institute for Peace,” www.usip.org, July 13, 2001, <https://www.usip.org/publications/2001/07/truth-commission-peru-01>, (accessed January 14, 2018),..

reparations and facilitate a solution to the housing crisis.”¹⁵¹ To date, tangible implementation of reparations in this instance has yet to be undertaken. Expectant discontent has ensued among the victim-survivors. This is particularly felt among those who testified to the CVR, expecting reimbursement.¹⁵²

2.4.2 Truth telling

Historically, truth commissions have carried out truth telling as transitional justice mechanism. Truth telling refers to three independent yet interwoven issues namely; the triggers and deterrents of war, actions carried out with intent against human rights, and the carrying out of atrocities during wartime. Mendeloff lists eight aspects of the effects of truth telling the summation of which lies defined in investigations and fact-finding. These eight features are; “encourages social healing and reconciliation, promotes justice, allows for the establishment of an official historic record, serves public education function, aids institutional reform, helps promote democracy and pre-empts as well as deters future atrocities.”¹⁵³ It is important to note, “the healing power of truth-telling is not limited to truth commissions.”¹⁵⁴

The process of seeking, investigating and relaying truth regarding abuses experienced is the initial foray into reconciliation through dialogue and retribution through acknowledgement. It is argued that truth sought and truth gained is fundamental to being human.¹⁵⁵ It is a prerequisite of a functioning society interconnected by respecting rights and recognising dignity. Taking responsibility in demanding the truth protects citizens’ rights from recurring infringements especially if these rights are fought for and forcibly requested from a collective group or civil society, who had suffered marginalisation and disenfranchisement.¹⁵⁶

¹⁵¹ Alex Boraine, “South Africa’s Truth and Reconciliation Commission from a Global Perspective,” in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009), 148.

¹⁵² Ibid.

¹⁵³ David Mendeloff, “Truth-Seeking, Truth-Telling, and Post Conflict Peacebuilding: Curb the Enthusiasm?,” *International Studies Review* 6 (2004): 358.

¹⁵⁴ Ibid., 359.

¹⁵⁵ Ibid.

¹⁵⁶ “Trial International: What is Transitional Justice?” <https://trialinternational.org>, 2017, <https://trialinternational.org/topics-post/transitional-justice/>, (accessed September 20, 2017).

Olson questions, “Truth must be part of the process, but must it be placed in competition with justice? Should truth telling have priority over justice? May not truth be a step in the direction of accountability, not an alternative to it? Must reconciliation and justice always be juxtaposed”¹⁵⁷ She continues to analyse the truth process by referring to the peace through truth versus justice debate. She refers to Chile and South Africa and that truth commissions should replace trials. In fact, the success of the truth process was even expressed through a recommendation that the ICTY should cease and be replaced with truth commissions such as in El Salvador and Chile.¹⁵⁸ Yet Mendez (in Olson) states, “It is far from proven that a policy of forgiving and forgetting automatically deters future abuses.”¹⁵⁹ The primary role of truth commissions as a healing feature is to fulfil an obligation to victims thereby ensuring facts and performing an investigatory role.¹⁶⁰

2.4.3 Criminal Justice

Criminal justice involves naming and employing of punitive means to prosecute gross human rights violators for international crimes. It operates within both a preventative and reparations capacity. An important component of the criminal justice element of transitional justice is the rule of law. The rule of law dictates that all members of society are answerable to the law, specifically the government, officials and agents. This requires strong accountability mechanisms that double as a deterrent tool.¹⁶¹ It is essential for an emerging nation to establish a well- functioning criminal justice system in order to secure an organised society based on the respect for human rights. Corell turns to the examples of Kosovo and East Timor and the administrative structural vacuum during the initial periods of transition that caused organised crime and severe disorder.¹⁶²

During Argentina’s 1984 and Chile’s 1990 political transitions, inheritor regimes considered prioritising pardon over punishment to address the atrocities committed. This is otherwise referred

¹⁵⁷ Olson, “Provoking the Dragon on the Patio Matters of Transitional Justice: Penal Repression versus Amnesties,” 278.

¹⁵⁸ Ibid.

¹⁵⁹ Juan E. Mendez, “Accountability for past abuses,” *Human Rights Quarterly* 19 (1997): 266. Cited in Olson, “Provoking the Dragon on the Patio Matters of Transitional Justice: Penal Repression versus Amnesties,” 278.

¹⁶⁰ Mendeloff, “Truth-Seeking, Truth-Telling, and Post Conflict Peacebuilding: Curb the Enthusiasm?” 359.

¹⁶¹ “Trial International: What is Transitional Justice?” <https://trialinternational.org>, 2017, <https://trialinternational.org/topics-post/transitional-justice/>, (accessed September 20, 2017).

¹⁶² Hans Corell, “Reflections on International Criminal Justice: Past, Present and Future,” *Global Studies Law Review* 12, no. 3 (2013): 627.

to as amnesty. The Argentinean military threatened to overthrow the transitional proceedings if those accused of crimes during the Dirty War¹⁶³ were to face measures of accountability and prosecution. Truth commissions were then established both in Argentina and Chile in preference to measures of accountability.¹⁶⁴

Another example whereby amnesty/impunity are indicative of a possible flaw in criminal justice is Syria. The responsibility to protect is a prerequisite of a functional government. The failure of Syria to protect its civilians from serious international crimes calls to attention two imperatives. First, impunity cannot be an aspect of current criminal justice proceedings and second, to treat impunity seriously all states have to participate in the international criminal justice system.¹⁶⁵

2.4.4 Institutional Reform

This is a feature of transitional justice that redresses the civic facilities that previously sanctioned human rights atrocities. The renewing and rebuilding of a state's administrative capacity involves a responsibility towards citizens to prevent violence. The civic facilities involved include institutions such as police, judiciary and the military, which were often the previous regime's instruments of violence and abuse. When the transition to democracy becomes an actuality, the reform of these institutions is essential.¹⁶⁶ Institutional reform requires the transformation of administrative facilities to those that promote the rule of law.¹⁶⁷ Institutional reform includes justice that incapacitates the previous regime. Other aspects of institutional reform include: vetting, structural reform, oversight, transforming legal framework, disarmament, demobilisation,

¹⁶³ "Argentina Dirty War- 1976- 1983," [https://www.globalsecurity.org, 2017, https://www.globalsecurity.org/military/world/war/argentina.htm](https://www.globalsecurity.org/military/world/war/argentina.htm), (accessed September 11, 2017). The civil war in Argentina consisted of a campaign initiated by the government to weed out insurgents and mutineers. This war was characterized by frequent disappearances, clandestine detention centers, torture and murder. The victims came to be known as "los desaparecidos" or "the disappeared."

¹⁶⁴ Leebaw, "The Irreconcilable Goals of Transitional Justice," 99.

¹⁶⁵ Corell, "Reflections on International Criminal Justice: Past, Present and Future," 628. The second feature that reviews criminal justice with regard to impunity highlights that regrettable fact that many nations are not members of the ICC.

¹⁶⁶ "Institutional Reform," <https://www.ictj.org>, 2018, <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>, (accessed on February 2, 2018)

¹⁶⁷ "The Effectiveness of The South African Truth And Reconciliation Commission in the Context of The Five Pillars of Transitional Justice," <http://uir.unisa.ac.za>, September 2017, http://uir.unisa.ac.za/bitstream/handle/10500/23302/dissertation_motlhoki_sm.pdf?sequence=1&isAllowed=y, (accessed on March 13, 2018).

reintegration and education.¹⁶⁸ It is important to expand on each feature in order to better understand the process of transition.¹⁶⁹

Vetting involves restructuring and recruiting positions of public service while investigating the current personnel and removing those with a history of corruption and abuse. Vetting lies on the retribution side of the restoration, retribution continuum of justice. A poignant example of vetting details the events that transpired in East Germany after the fall of the communist regime. In order to redress the legacy of suppressive communism in East Germany, there were 62 000 criminal trials against 100 000 people of which only 300 were successfully prosecuted. An all-intensive vetting procedure was incorporated into the trials. The vetting procedure focused on the ties of the Stasi police and their meticulously preserved records to screen for future candidates to hold public office. However, after a thorough decentralisation of the government administration, including the public sector, city councils and the universities and an increasing display of the public's commitment to democracy, the thirst for retribution significantly dwindled. There was a new attitude belonging to the public, one with a renewed narrative that guided the legislative principles of the state and its dialogue with its citizens.¹⁷⁰

Structural reform incorporates rebuilding administrations, facilities and institutions in order to establish those that promote integrity, dignity and legitimacy; especially prioritising the rule of law as a principle standard leading the transition. Oversight bodies within public institutions will ensure transparency and accountability. Transforming legal frameworks involves reforming and recreating a new legal framework; this involves adopting constitutional amendments and the securing of human rights.

Disarmament, demobilisation and reintegration are also important for institutional reform and refer to the disbanding of armed agents, through justice sensitive processes as well as the provision of a safe avenue for ex-combatants to re-join society. Institutional reform requires education and training programmes for public officials, state personnel and citizens, directed by international

¹⁶⁸ "Disarmament, Demobilisation and Reintegration in Sierra Leone," <http://www.operationspaix.net>, July 2008, http://www.operationspaix.net/DATA/DOCUMENT/4024~v~Disarmament_Demobilisation_and_Reintegration_in_Sierra_Leone.pdf, (accessed on March 13, 2018)

¹⁶⁹ "Institutional Reform," <https://www.ictj.org>, 2018, <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>, (accessed on February 2, 2018)

¹⁷⁰ Krotoszynski, "The Transitional Justice Models and the Justifications of Means of Dealing with the Past," 591.

humanitarian law principles. Other measures include securing freedom of information, initiatives and campaigns on citizens' rights and verbal and symbolic reform such as memorials and public apologies.¹⁷¹

2.5 Legitimising Transitional Justice

Aspects of legitimacy and its application to transitional justice are vital in assisting with the procedural legal requirements to execute justice. Instability and ultimately chaos is inevitable in the absence of legitimacy.¹⁷² Legitimacy queries the moral, logical and political aspects that validate transitional proceedings, specifically with establishing a new government and the rule of law.¹⁷³

The integrity of a nation is structured according to the will and aspirations of the citizens protected by it.¹⁷⁴ Therefore legitimacy is promoted via the vote of the citizen. This is what Reta describes as the “bonds of authority,”¹⁷⁵ whereby the structures of governance depend on equal recognition of the law by those in power and their supporters.

Legitimacy is determined by public opinions on public hearings aired by national broadcast media and recorded by print media. Examples of transitional justice and large public awareness broadcasts and reports include: Argentina where instalments of truth commission reports sold an average of 200 000 per week; The SATRC broadcasted public proceedings on a weekly television show; the report of Guatemala's Historical Clarification Commission¹⁷⁶ was contended by right wing constituents, however, neither the government nor the military directly denied the results.

¹⁷¹ “Institutional Reform,” <https://www.ictj.org>, 2018, <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>, (accessed on February 2, 2018).

¹⁷² Mac Ginty and Richmond, “Myth or Reality: Opposing Views on the Liberal Peace and Post-War Reconstruction,” 495.

¹⁷³ Demelash Shiferaw Reta, “National Prosecution and Transitional Justice: The Case of Ethiopia,” <http://wrap.warwick.ac.uk/id/eprint/69465>.

¹⁷⁴ Anthony M. Orum, *Introduction to Political Sociology: 4th Edition*, (Chicago: Prentice Hall, 2001), 185, 251. Cited in Reta, “National Prosecution and Transitional Justice: The Case of Ethiopia,” <http://wrap.warwick.ac.uk/id/eprint/69465>, 78.

¹⁷⁵ Reta, “National Prosecution and Transitional Justice: The Case of Ethiopia,” 78.

¹⁷⁶ Mark Freeman and Priscilla B. Hayner, “The Truth Commissions of South Africa and Guatemala,” *International Center for Transitional Justice*, 141-142.

For any leaders, international legitimacy is a valued advantage. The stigmatisation that is accompanied with indictment is a viable threat to accruing sustained political power. This is also referred to as a cost-benefit calculation. This refers to international humanitarian normative standards that influence the behaviour and decisions of state actors and can contribute to the prevention of re-engagement of violence.¹⁷⁷ Prevention is also manipulated by what Akhavan calls a subtle dimension that is more constructivist in its approach – the unconscious inhibitions against crime or a condition of habitual lawfulness. This is the moral concept aspect of deterrence. Akhavan cites Andenaes, who explains that the discourse of social disapproval stipulated within the legal process hinders criminal action and supports conformity, even if the act will go unnoticed or unpunished. This is also referred to as “moral propaganda”¹⁷⁸ a component of the implementation of international criminal justice.

The main issue of the impact of law and legalisation on state behaviour is frequently recognised in terms of compliance. Compliance is an indication of the legitimisation of international law. Accordingly, “while the distinction should not be overstated, legal rules and institutions presume compliance in a way that non-legal rules and institutions do not.”¹⁷⁹ Law and compliance find common ground conceptually, as the principles of legality are the same that define compliance. Mechanisms of compliance like the mechanisms of enforcement in the social contract theory¹⁸⁰ are fundamental to every international relations aspect and particularly to its discipline of the language of international law.¹⁸¹ Compliance is defined as a state of conformity or identity between an actor’s behaviour and a specified rule. It is important to discuss compliance as a concept and within the liberal theoretical framework as it serves as a variable to calculate international agreement to implementation and effectiveness.

¹⁷⁷ Kwanele Pakati, “The Interplay Between Complementarity and Transitional Justice,” L.L.M. (Master of Law) [Unpublished]: University of Johannesburg. Retrieved from <https://ujdigispace.uj.ac.za/> (accessed March 13, 2018).

¹⁷⁸ Payam Akhavan “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, no.1 (2001): 13, url: <http://www.jstor.org/stable/2642034>.

¹⁷⁹ Kal Raustiala and Anne-Marie Slaughter, “International Law, International Relations and Compliance,” *Handbook of International Relations* 2, no. 2 (2002): 538, url: <https://ssrn.com/abstract=347260>.

¹⁸⁰ “Internet Encyclopaedia of Philosophy: Social Contract Theory,” <http://www.iep.utm.edu>, undated, <http://www.iep.utm.edu/soc-cont/>. (accessed September 17, 2018).

¹⁸¹ Schaack and Slye, “A Concise History of International Law: Chapter 1 of Understanding International Criminal Law,” 8.

The role of the tribunal is to promote compliance with a prerequisite of a substantial legal rule.¹⁸² Promoting compliance is a variable with which to measure the effectiveness of tribunals. There is a considerable absence of a well-formulated, “tractable”¹⁸³ examination of the way international tribunals should and do affect state behaviour and how effectiveness is translatable in both comprehension and action.

The language of international law must be analysed in research, as the instruments available via legal language do not contain the punitive precepts to deter effectively the constant stream of human rights violations still raging across the globe today. “Enforcement requires an enforcer, which the international system manifestly does not have.”¹⁸⁴ Payam Akhavan affirms that gauging the strength of preventing illicit behaviour through punitive procedures in a society plagued by broad and incessant habitual violence and high regard for group loyalty that is ranked, as a primary priority is a tenuous endeavour.¹⁸⁵

Another aspect of legitimacy refers to the rights of the violators. According to Naymark “international tribunals must meet violations of (recognised) rights of the accused with adequate, effective remedies.”¹⁸⁶ Rwanda’s *Barayagwiza* case highlights the role of legitimacy and past obstacles of securing the rights of perpetrators within the transitional justice proceedings. Jean-Bosco Barayagwiza was one of the principal actors of the conspiracy to commit genocide against the Tutsis.¹⁸⁷ He was inordinately detained before appearing before the ICTR.¹⁸⁸ This was deemed to be an “abuse of process,”¹⁸⁹ with which the Appeals Chamber issued a stay of proceedings in November 1999. The indiscretion against Barayagwiza was resolved, as within five months the Appeals Chamber had been reconstituted. Then a new president overturned the decision to stay the proceedings, calling instead for an adequate solution to be sought after Barayagwiza’s trial. Subject

¹⁸² Andrew T. Guzman, “International Tribunals: A Rational Choice Analysis,” *University of Pennsylvania Law Review* 157, no. 171 (2008): 174, url: <http://scholarship.law.berkeley.edu/facpubs/194>.

¹⁸³ Ibid.

¹⁸⁴ Raustiala and Slaughter, “International Law, International Relations and Compliance,” 540.

¹⁸⁵ Akhavan, “Beyond Impunity: Can Criminal Justice Prevent Future Atrocities?” 10.

¹⁸⁶ Naymark, “Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy,” 2.

¹⁸⁷ United Nations Mechanism for the International Criminal Tribunals: Legacy Website of the International Criminal Tribunal for Rwanda, [unmict.org](http://www.unmict.org), 2015, <http://www.unmict.org/sites/unmict.org/files/case-documents/ict99-52/trial-judgements/en/031203.pdf>, (accessed September 14, 2017).

¹⁸⁸ United Nations Mechanism for the International Criminal Tribunals: Legacy Website of the International Criminal Tribunal for Rwanda, [unmict.org](http://www.unmict.org), 2015, <http://www.unmict.org/sites/unmict.org/files/case-documents/ict99-52/trial-judgements/en/031203.pdf>, (accessed September 14, 2017).

¹⁸⁹ Ibid.

rulings included financial compensation in the event of his acquittal and a sentence reduction in the case of his conviction. At his conviction, Barayagwiza was sentenced to 35 years imprisonment.¹⁹⁰

The effectiveness and legitimacy of the tribunal was considerably weakened in the opinions of most Rwandans. Added, the Rwandan government warned that it would withhold its support of the ICTR and therefore continue to proceed with an international arrest warrant and extradition application within its jurisdictional powers. The process of reconciliation is challenged by political obstacles that amount to non-cooperation of a nation state and especially regarding ad hoc tribunals focused primarily on executing justice in the situation at hand. It is imperative to remember that stakeholder support is a necessity for the execution of justice and maintaining its perceived legitimacy.¹⁹¹

Another degree that must be considered is fairness. An example of transitional proceedings plagued by issues of fairness (or a lack thereof) is found in the East Timor hybrid court. Accordingly, during the court's initial year and a half, inefficient management undermined the capacity of the court and the team delineated to investigate and prosecute cases, the Serious Crimes Unit (SCU). The committee solely addressed instances of murders and rape perpetrated in 1999, neglecting similar crimes committed during the Indonesia takeover during 1974 and lasting until 1998.¹⁹² Also the legitimacy of the court fell under the scrutiny of public opinion as questions of the rights of violators and their defence given became a concern. The nine public defenders selected are fewer than the prosecutors and were perceived to lack competence. This is evident in that throughout the Special Panel's first 14 trials, public defenders did not call a single defence witness to the stand. There was an improvement, an addition of international mentors for public defenders that aided the prosecutor's defence; however, the fairness of the trials remains questionable.¹⁹³

The procedures of a fair trial are adhered to by international criminal tribunals that recognised the validity of the process and standards delineated as well-established rules of procedure.¹⁹⁴ These

¹⁹⁰ Naymark, "Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy," 5.

¹⁹¹ Ibid.

¹⁹² Call, "Is Transitional Justice Really Just?" 108.

¹⁹³ Ibid.

¹⁹⁴ Freeman, *Truth Commissions and Procedural Fairness*, xiii.

regulations, determined by fairness have been exercised over the course of the past three decades. However, to date there are no remaining accounts of rules and regulations governing procedural fairness for truth commissions.¹⁹⁵ It is not common for scholars, policymakers, journalist and general observers to take an in-depth stance on the features of procedural fairness for truth commissions. The SATRC's terms of reference were the result of extensive parliamentary and public debate on the proponents of procedural fairness, and local courts presented significant rulings on the questions of fair procedure that arose in the commission's course of procedures. There have been intermittent instances whereby the UN Human Rights Commission (UNHRC) has attempted to codify a limited number of significant procedural criteria based on fairness.

Freeman suggests five standardised proponents that guide truth commissions according to the process of fairness. These are; "the taking of statements, the use of subpoena powers, the use of powers of search and procedure, the holding of public hearings and the publication of findings of individual responsibility in a final report."¹⁹⁶ A few of the five features are more prominent than others for example, every truth commission carries out some form of statement taking, yet not all have sought to subpoena testimonies/witnesses or have conducted search and seizure powers. Some commissions are enabled to make findings of individual responsibility, while others do not, and some hold public hearings, others do not. The nature of truth commissions is diverse. No two truth commissions have operated within an identical parameter. Although the diversity of truth commission models has assisted nations in judicial transition albeit with "a low-quality justice system"¹⁹⁷ it is advisable to advance a model that contains the guiding principles of procedural fairness.

2.6 Conclusion

The development of justice and its application to human rights laws specifically to nations transitioning to liberal democratic nations, features: truth-telling, criminal justice, reparations and reform. Beyond that, aspects like: hybridity, collectivisation, locality and memorisation, expand on the concept of individual justice. Since the third wave of democracy the call for accountability

¹⁹⁵ Ibid., xiv,

¹⁹⁶ Ibid., xv.

¹⁹⁷ Ibid.

and truth have come to lead the dialogue that emphasises the role of the citizen over the state. Aspects of legitimacy and importantly the rule of law maintain the integrity of judicial proceedings along with fairness and compliance.

As regards the four identified aspects specifically; there remain many argumentative features pertaining to truth commissions that define transitional proceedings like peace versus justice and the quality of individual experience continues to be gaged on a highly contentious continuum of revenge, amnesty, forgiveness, and reconciliation. Reparations are a feature that offers restoration of dignity via symbolic, material or monetary compensation. Criminal justice determines that those who bear the greatest responsibility for violations committed are held accountable. Issues of amnesty in exchange for truth frequently call the justice proceedings into question leaving the atrocities faced by victims and their families unresolved. Truth is considered to be the predominant feature to maintain the integrity of the victim-perpetrator relationship for reconciliation. However, truth must not come at the price of genuine justice. Features of transitional justice that extend beyond the four main features include: memory, fluidity and fairness. All of this has to be seriously considered when assisting a nation in transition in order to attain the best possible justice for its citizens. The language of transitional justice mediated through international law is in a constant state of flux through inquiry, criticism and historical instances of triumph and failure. The call to have a court that can instil punitive measures was initially conceived during the Nuremberg Trials and then placed on hold during the Cold War, only to be reinstated after approximately 50 years through the implementation of ICTY and ICTR via the UN Charter Chapter VII sanctioned by the UN Security Council. The implementation is a cementing of the desires for international justice for a global populace against intolerant regimes and yet still remains mostly ineffectual and is falling apart at the seams. The legal language lacks the crucial enforcement mechanisms that induce compliance and prevention.

South Africa and Sierra Leone are examples of how truth commissions are an application of transitional justice. These case studies are examined in the following chapters.

CHAPTER THREE: THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

“I would hope that the world would realize that there is no situation that is not transfigurable.”

*Desmond Tutu*¹⁹⁸

3.1 Introduction

This chapter discusses the transitional restorative justice processes of the SATRC regarding the four features of transitional justice as noted in Chapter One namely: criminal justice, truth seeking, reparations and institutional reform. The National Unity and Reconciliation Act 34 of 1995 promulgated the SATRC.¹⁹⁹ This was after the inquiry of various commissions into human rights violations occurring during apartheid and the subsequent passing of the 1993 Interim Constitution.²⁰⁰ The mandate of the SATRC was to bear witness to, record, and in some cases grant

¹⁹⁸ “PBS: Bill Moyers Journal, Desmond Tutu,” [www.pbs.org](http://www.pbs.org/moyers/journal/archives/watch-tutu.html), 2008, <http://www.pbs.org/moyers/journal/archives/watch-tutu.html>, Chairman of the South African Truth and Reconciliation Commission, Arch Bishop Desmond Tutu in an interview with Bill Moyers.

¹⁹⁹ “Truth and Reconciliation Commission (TRC),” <http://www.sahistory.org.za>, 2018, <http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc>, (accessed April 10, 2018).

²⁰⁰ “South Africa- First 20 Years of Democracy, (1994-2014),” South African History Online, January, 15 2014, <http://www.sahistory.org.za/article/interim-south-african-constitution-1993>, (accessed November, 28 2017).

amnesty to the perpetrators of crimes relating to human rights violations, that were politically motivated.²⁰¹ The SATRC was divided into three separate hearings that provided a symbolic platform for forgiveness and healing. These hearings are known as: The Human Rights Violation Committee, the Reparation and Rehabilitation Committee and the Amnesty Committee. The SATRC was respected world-wide, as stated by Boraine (deputy chairperson of the SATRC),²⁰² “the South African model broke new ground and had the most ambitious programme of any commission before or since and there are many insights to be gleaned from this experience.”²⁰³

3.1.1 The Leading Example that is the SATRC

The SATRC has a considerable “footprint”²⁰⁴ that has influenced other transitional justice proceedings. Sometimes referred to as a “velvet political revolution”²⁰⁵ as it was a non-violent transition, that replaced one of the most immoral regimes in modern history with a democratic state.²⁰⁶ Considering the severity of the state-sanctioned violence and oppression of the apartheid government towards the majority of the population many saw the mostly peaceful transition as miraculous.²⁰⁷ Another feature of the commission that distinguished it from other previous international hearings was its participatory process, whereas in the past, transitional justice hearings were defined by decree.²⁰⁸ The SATRC successfully pioneered instituting public testimonies. It indicated an acceptance of the complex and multifaceted nature of truth and thereby it was positioned in the vanguard of procedural justice.²⁰⁹

²⁰¹ “Truth and Reconciliation Commission (TRC),” <http://www.sahistory.org.za>, 2018, <http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc>, (accessed April 10, 2018).

²⁰² Ibid.

²⁰³ Boraine, “South Africa’s Truth and Reconciliation Commission from a Global Perspective,” 150.

²⁰⁴ Sriram, “Transitional Justice and Peacebuilding,” 7.

²⁰⁵ Mohalu, “Prosecute or Pardon? Between Truth Commissions and War Crimes Trials,” 77.

²⁰⁶ Megan Shore and Scott Kline, “The Ambiguous role of Religion in the South African Truth and Reconciliation Commission,” *Peace and Change* 31, no. 3 (2003): 315, 319.

²⁰⁷ “Reminding us of the Miracle of South Africa’s Transition,” <https://mg.co.za>, February 8 2013, <https://mg.co.za/article/2013-02-08-reminding-us-of-the-miracle> (accessed April 11, 2018).

²⁰⁸ Boraine, “South Africa’s Truth and Reconciliation Commission from a Global Perspective,” 138.

²⁰⁹ Rina Kashyap, “Narrative and truth: a feminist critique of the South African Truth and Reconciliation Commission,” *Contemporary Justice Review* 12, no. 4 (2009): 449.

In spite of the success of the commission based on renowned acknowledgement, (given that many countries sought to imitate the South African example)²¹⁰ there remain unresolved issues that characterised the procedures with controversy. The so-called “unfinished compromise of the TRC,”²¹¹ includes concerns of social justice, reparations and economic reform that are still unresolved. In addition, and also identifying strongly with failures of the SCSL, discussed later in Chapter Four, was the granting of amnesties.²¹² Amnesty of political crimes for full, truthful disclosure of events, framed the SATRC proceedings. This is what is termed conditional amnesty,²¹³ which is significantly different to the blanket amnesty that hallmarked the Sierra Leone proceedings, discussed later. It incorporated a prioritising of restorative justice over retributive justice.²¹⁴ Also, the amnesty clause was introduced in the post-amble²¹⁵ of the 1993 Interim Constitution to facilitate political stability.²¹⁶

The international acknowledgement²¹⁷ of the SATRC was partly due to the significant personalities advocating for a peace building process based on the foundations of human rights²¹⁸ and judicial/quasi-judicial²¹⁹ principles of rule of law.²²⁰ People like Archbishop Desmond Tutu²²¹ and President Mandela managed to gain worldwide support and respect for their outlook on politics and the pursuit of a peaceful transition. Mandela’s was a methodology of structuring peace surrounding a revision of the ends justifying the means or as Etekpe puts it a “re-fashioning” of

²¹⁰ Sriram, “Transitional Justice and Peacebuilding,” 7.

²¹¹ Ibid.

²¹² Cassese, “Reflections on International Criminal Justice,” 3.

²¹³ Gade, “Restorative Justice and the South African Truth and Reconciliation Process,” 11.

²¹⁴ Ibid., 12.

²¹⁵ “Address by President Thabo Mbeki to the joint sitting of Parliament to report on the processing of some Presidential Pardons,” <http://www.anc.org.za>, 2018, <http://www.anc.org.za/content/address-president-thabo-mbeki-joint-sitting-parliament-report-processing-some-presidential>, (accessed September 1, 2018).

²¹⁶ Nevin T. Aiken, “The Distributive Dimension in Transitional Justice: Reassessing the South African Truth and Reconciliation Commission’s Ability to Advance Interracial Reconciliation in South Africa,” *Journal of Contemporary African Studies* 34, no. 2 (2016): 192.

²¹⁷ Boraine, “South Africa’s Truth and Reconciliation Commission from a Global Perspective,” 137, 150.

²¹⁸ “South African Constitution 1996,” The South African History Online: Towards a People’s History, 2017, <http://www.sahistory.org.za/article/south-african-constitution-bill-rights>, (accessed June 6, 2017). Currently the South African constitution enshrines basic freedoms under a bill of rights, that was heavily influenced by both the Universal Declaration of Human Rights 1948 and the South African Freedom Charter.

²¹⁹ William Schabas, “Transitional Justice and the Norms of International Law,” *Japanese Society of International Law*, October, 8, 2011, http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf, (accessed May, 1 2017), 4.

²²⁰ The International Center of Transitional Justice: 15 years,” The International Center for Transitional Justice, 2017, <https://www.ictj.org/>, (accessed May, 1 2017).

²²¹ Mohalu, “Prosecute or Pardon? Between Truth Commissions and War Crimes Trials,” 77. Mohalu describes Tutu as the SATRC’s “philosopher king.”

Machiavelli's postulation. He encouraged an endless, determined pursuit of justice and reconciliation. In effect his approach was an uncompromising path towards the establishment of justice and security for all South Africans.²²² These personalities that influenced the structure of this approach distinguished themselves from those who refused even the slightest notion of compromise like Eugene de Kock and Magnus Malan.²²³ Eugene de Kock stated before the SATRC, "My personal attitude and the attitude of some of my members is that we would rather fight bitter and, that we would rather enter a war and run to the mountains before we reach any point of compromise."²²⁴

After his release from prison in 1990, Mandela worked with then President Fredrick W de Klerk of the Nationalist Party (NP). Together, they focused on building a peaceful path to freedom and a multiracial democracy.²²⁵ This was done through a series of negotiations,²²⁶ the passing of laws and ultimately the establishment of the SATRC.²²⁷

The SATRC is regarded globally as an example of how transitional justice interventions can facilitate reconciliation. The SATRC was mandated to recount apartheid abuses as well as promote national unity. It has been over two decades since the establishment of the SATRC and indeed there are significant advances of racial reconciliation. However, there remain clear socio-economic discrepancies due to the legacy of apartheid that the SATRC has failed to adequately address.²²⁸

Having briefly introduced the chapter, it is important first, to discuss the various commissions of inquiries into human rights abuses. The focus will be on the Goldstone Commission and the Skweyiya Commission. These investigations helped propel negotiations between the African National Congress (ANC) and NP. In the findings, the revelation of human rights abuses

²²² Ambily Etekpe, "Role Models in Peace Building in Africa: An Assessment of Selected Characters," *African Journal of Political Science and International Relations* 6, no. 8 (2012): 186-187.

²²³ Joleen Steyn Kotze, "Transitional Justice," in *South African Politics: An Introduction*, ed, Nicola De Jager (Cape Town: Oxford University Press Southern African (Pty) Ltd, 2015), 131., "Magnus Malan," South African History Online, February, 17 2011, <http://www.sahistory.org.za/people/magnus-malan->, (accessed November, 28 2011).

²²⁴ Kotze, "Transitional Justice," 131.

²²⁵ Etekpe, "Role Models in Peace Building in Africa: An Assessment of Selected Characters," 186-187.

²²⁶ "South Africa- First 20 Years of Democracy, (1994-2014)," South African History Online, January, 15 2014, <http://www.sahistory.org.za/article/interim-south-african-constitution-1993>, (accessed November, 28 2017).

²²⁷ "Truth and Reconciliation Commission (TRC)," <http://www.sahistory.org.za>, 2018, <http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc>, (accessed April 10, 2018).

²²⁸ Aiken, "The Distributive Dimension in Transitional Justice: Reassessing the South African Truth and Reconciliation Commission's Ability to Advance Interracial Reconciliation in South Africa," 194.

discredited the apartheid regime.²²⁹ This set the precedent for all-inclusive human rights legislation. The commissions also demonstrated the ANC's commitment to the negotiated agreements.²³⁰ The negotiations resulted in the 1993 interim constitution. This incorporated a bill of rights, making the rights of every individual recognised and enforceable by law.²³¹ This was South Africa's first legislative commitment to social transformation on all aspects of the new nation. It ensured that, going forward it functioned as a fully realised democracy based on principles agreed to by stakeholders.

3.2 Background: Reconciliation Measures Taken Before the Establishment of the SATRC

Apartheid was characterised by the policies of the NP government during its time of white minority rule from 1948-1994. The legislation was focused on extreme racial discrimination. The laws of apartheid created societal divisions that categorised people into one of four racially based groups – black, white, coloured and Asian. These categories determined the social, political and economic rights of an individual. The access to these rights was profoundly unequal. This left a significantly large portion of the country without access to even the most basic rights. Ironically apartheid relied on the subjugation and cheap labour of the majority of the population.²³² This is especially true in the mines where the gold commodity was only profitable if the labour's wages were extremely low.²³³ Apartheid endeavoured to separate the races, for example, making relationships and marriage of mixed races illegal.²³⁴ The inequalities almost permanently divided the country and ranged across a board of – “access to land, employment opportunities, education, income, healthcare, service provision, basic mobility rights, and political rights.”²³⁵

²²⁹ “Goldstone Commission confirms SADF complicity in violence,” <http://www.sahistory.org.za> 2018, <http://www.sahistory.org.za/dated-event/goldstone-commission-confirms-sadf-complicity-violence>, (accessed April 10, 2018).

²³⁰ Kotze, “Transitional Justice,” 131.

²³¹ Alfred Allan and Marietjie M. Allan, “The South African Truth and Reconciliation Commission as a Therapeutic Tool,” *Behavioural Sciences and the Law* 18 (2000): 471.

²³² Lyn Graybill, “To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission” 7.

²³³ Nelson Rolihlahla Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (New York: Back Bay Books, 1994), 63.

²³⁴ “The Prohibition of Mixed Marriages Act Commences,” <https://www.sahistory.org.za>, July 5, 2012, <https://www.sahistory.org.za/dated-event/prohibition-mixed-marriages-act-commences> (accessed October 1 2018)

²³⁵ Aiken, “The Distributive Dimension in Transitional Justice: Reassessing the South African Truth and Reconciliation Commission's Ability to Advance Interracial Reconciliation in South Africa,” 191.

This apartheid system ended when negotiations took place between previously recognised political parties and liberation parties.²³⁶ These negotiations took place between 1990 and 1993 and eventually culminated in the first democratic elections and a change of government in 1994.²³⁷ At the time, widespread incidents of politically based violence across the country, threatened to thwart the process of reconciliation.²³⁸

3.2.1 The Goldstone and Skweyiya Commissions

Relevant during this time were the several commissions of inquiry seeking to address the multitude of human rights violations committed by both state security forces and the liberation movements like the ANC and IFP (Inkatha Freedom Party).²³⁹ Violence and frequent blaming of the actors within each party also hallmarked this time. Five of the main commissions during the years from 1984-1993 were; the 1984 Stuart Commission,²⁴⁰ the 1989 McNally Commission,²⁴¹ the 1991 Goldstone Commission,²⁴² the 1992 Skweyiya Commission,²⁴³ the 1993 Montsuenyane Commission.²⁴⁴ Two of the more relevant commissions were the Goldstone Commission and Skweyiya Commission.

The Goldstone Commission was appointed by then President FW de Klerk who gave the order to investigate the political violence on 24 October 1991. It was also called The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation. Mr Justice Richard Goldstone was the chairman.²⁴⁵ It was established as part of the 1990 National Peace Accord and statutorily drafted in 1991.²⁴⁶

²³⁶ Jen Laasko, "In Pursuit of Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa," 49.

²³⁷ Allan and Allan, "The South African Truth and Reconciliation Commission as a Therapeutic Tool," 466.

²³⁸ Kotze, "Transitional Justice," 130.

²³⁹ Ibid.

²⁴⁰ Ibid, this dealt with the abhorrent handlings of people in the Angola Camps of the ANC.

²⁴¹ Ibid, this sought to prove or disprove the alleged occurrence of hit squads belonging to the apartheid state.

²⁴² Ibid, this investigated the deterrence of peace talks by public violence and intimidation by the apartheid state.

²⁴³ Ibid, this investigated accusations of torture and the appalling handling of ANC detainees and prisoners at the ANC detention camps.

²⁴⁴ Ibid, this investigated reports of human rights violations at the ANC detention camps.

²⁴⁵ "Goldstone Commission confirms SADF complicity in violence," <http://www.sahistory.org.za> 2018, <http://www.sahistory.org.za/dated-event/goldstone-commission-confirms-sadf-complicity-violence>, (accessed April 10, 2018).

²⁴⁶ Janine Rauch, "The South African Police and Truth Commission," *South African Review of Sociology* 36, no. 2 (2005): 211.

The commission summed up its findings, stating that the main contributor responsible for preventing the proceedings was due to the actions of the apartheid state. Throughout its first year the commission did not find any evidence of criminal activities relating to public violence and intimidation. However, in October 1992 the commission increased its investigative force, and positioned the units at Johannesburg, Durban, East London, Port Elizabeth and Cape Town respectively.²⁴⁷ The investigations found evidence of “dirty tricks”²⁴⁸ against the ANC. Consequently, in December President FW de Klerk fired 23 senior officers who were accused of being involved in illegal, clandestine activities.²⁴⁹

Then, in 1992-1993, numerous investigations revealed evidence of more illegal activities.²⁵⁰ A ‘third force’ was responsible. The third force referred to pro-apartheid groups determined to derail the peaceful proceedings.²⁵¹ The ANC alleged that, although working unseen, the third force was instrumental in creating tension between the IFP and the ANC, thereby thwarting efforts at peaceful negotiation and settlement. The Goldstone Commission uncovered the illicit trafficking and dealings of arms to the IFP and the ANC.²⁵²

The main concern was whether or not the NP was sanctioning the actions of the third force. There was evidence in the findings that a rogue military group within the South African National Defence Force (SANDF) was acting independently to disrupt the proceedings. There were also accounts of the 1980s apartheid era death squads. There were many reports of murder and human rights violations including: political assassinations, poisoning, bomb attacks in foreign countries and letter bombs.²⁵³

²⁴⁷ “The Goldstone Commission Report,” [www.sahistory.org.za](http://www.sahistory.org.za/archive/goldstone-commission-report), 2017, <https://www.sahistory.org.za/archive/goldstone-commission-report>, (accessed September 5, 2018).

²⁴⁸ “South Africa’s Dirty Tricks,” www.washingtonpost.com, 2018, <https://www.washingtonpost.com/...dirty-tricks/82ffa55f-57df-4657-b6fa-c9ecde3a913f/>, (accessed September 5, 2018).

²⁴⁹ “Goldstone Commission confirms SADF complicity in violence,” <http://www.sahistory.org.za> 2018, <http://www.sahistory.org.za/dated-event/goldstone-commission-confirms-sadf-complicity-violence>, (accessed April 10, 2018).

²⁵⁰ “The Goldstone Commission Report,” www.sahistory.org.za, 2017, <https://www.sahistory.org.za/archive/goldstone-commission-report>, (accessed September 5, 2018).

²⁵¹ Kotze, “Transitional Justice,” 130.

²⁵² “The Goldstone Commission Report,” www.sahistory.org.za, 2017, <https://www.sahistory.org.za/archive/goldstone-commission-report>, (accessed September 5, 2018).

²⁵³ “Exposing Apartheid Death Squads- A Trail of Murder and Terror,” City Press- News24.com, November, 15 2017, <http://city-press.news24.com/Voices/exposing-apartheid-death-squads-a-trail-of-murder-and-terror-20171114>, (accessed November, 28 2017).

When death squad leader and high-ranking officer of the SANDF, Eugene de Kock testified in front of the SATRC, he was uncompromising in his position and unapologetic for the crimes he had committed.²⁵⁴ Eugene de Kock was also the senior official of Vlakplaas, which saw the torture, and murder of hundreds of South Africans.²⁵⁵ His application for amnesty was denied and on 30 October 1996, de Kock was sentenced to 212 years in prison.²⁵⁶ In 2015, after serving 20 of his 212-year sentence de Kock was granted parole and remains under the supervision of the government.²⁵⁷

Approximately five years before the election, former policemen Butana Nofomela and Dirk Coetzee, exposed the clandestine operations of a secret hit squad of the South African Police (SAP) the – Vlakplaas Unit.²⁵⁸ At the time of the establishment of the Goldstone Commission a former ANC operative turned policeman confessed to his dealings as a specialised death squad member, committing 44 murders, and all that he uncovered about the Vlakplaas Unit. Consequently, Vlakplaas and its commander Eugene de Kock lost all previously loyal ties including senior officials of the SAP and the military.

According to Terry Bell and Dumisa Buhle Ntsebeza:

The records at Vlakplaas had already been incinerated, but there were a myriad of ties throughout the security establishment. So, while dismissing any involvement in human rights abuses, and stating that records of national importance would be retained, the government ordered perhaps the greatest destruction of records in the country's history.²⁵⁹

²⁵⁴ Kotze, “Transitional Justice,” 131.

²⁵⁵ “The Gruesome Truth Behind Vlakplaas and Eugene de Kock,” <https://www.enca.com>, 2016, <https://www.enca.com/media/video/gruesome-truth-behind-vlakplaas-and-eugene-de-kock>, (accessed November 28, 2017).

²⁵⁶ “SA Judge Jails Former State Assassin Eugene de Kock for More than 200 years,” www.sahistory.org.za, 2017, <https://www.sahistory.org.za/dated-event/sa-judge-jails-former-state-assassin-eugene-de-kock-more-200-years>. (accessed September 5, 2018).

²⁵⁷ “Workers have Eugene de Kock removed from Retirement Home,” www.huffingtonpost.co.za, July 21, 2017, https://www.huffingtonpost.co.za/2017/07/21/workers-have-eugene-de-kock-removed-from-retirement-home_a_23040541/. (accessed September 5, 2018).

²⁵⁸ Rauch, “The South African Police and Truth Commission,” 211.

²⁵⁹ Terry Bell and Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid and Truth* (South Africa: Redworks, 2001), 15.

In November 1992 the Goldstone Commission's forces ransacked the Defence Force Intelligence office in Pretoria. They uncovered evidence of more "dirty tricks."²⁶⁰ Consequently, the government of the NP dismissed the senior officers instead and did not protect them (which was the NPs typical response). In April 1993, de Kock and 83 police officers related to Vlakplaas retired with substantial severance packages from the SAP.²⁶¹

Another instance of exposing illicit activities happened in the beginning of 1994. A group of de Kock's former officers gave more incriminatory evidence to the Goldstone Commission about the events occurring at Vlakplaas. For precautionary measures, they were moved to Denmark in a witness protection plan organised by the commission. Then, in March 1994, a few weeks before the country's first election, Judge Goldstone acknowledged a "horrible network of criminal activity"²⁶² that moved within the military-police operations.

Magnus Malan adopted a "total onslaught," "total solution," strategy directed toward any threat facing the apartheid government. During his time, Malan directed the management of the Civil Co-operation Bureau (CCB). This organisation was implicated in an array of civilian murders, including the loss of lives of two anti-apartheid activists, David Weber and Anton Lubowski. In 1995, Malan was charged for the murder of 15 people. These charges were brought against him and other senior officials. The victims included the January 1987 murder of seven children at the home of Victor Ntuli, in KwaMakhuta Township. Supposedly the accused directed the attack by discreetly backing an operation carried out by the IFP. He stated before the TRC that his actions were "legal acts of state."²⁶³

The findings of the Goldstone Commission improved the prospects for the role of the ANC in leading the peace process. This is because the commission proved that the apartheid state was acting to undermine the negotiations by inciting public violence and intimidation. The apartheid state's image was tainted and therefore members of the state were more willing to compromise. The ANC had to then come to the negotiating table with its own prisoners of war.

²⁶⁰ "Goldstone Commission confirms SADF complicity in violence," <http://www.sahistory.org.za> 2018, <http://www.sahistory.org.za/dated-event/goldstone-commission-confirms-sadf-complicity-violence>, (accessed April 10, 2018).

²⁶¹ Ibid.

²⁶² Ibid., 212.

²⁶³ "Magnus Malan," South African History Online, February, 17 2011, <http://www.sahistory.org.za/people/magnus-malan->, (accessed November, 28 2011).

In August 1991, the ANC had committed to freeing all prisoners in the numerous camps in Africa. This became known as the Return Exile Committee (REC). Following the insights of the detainees of the horrific time endured in the prison camps, Mandela established the Skweyiya Commission, to investigate the claims. The findings revealed that human rights violations did occur. The violations in the detention cells included, humiliation, torture and inhumane conditions.²⁶⁴

According to the Skweyiya report:

Some of the witnesses whom we saw have been brutalised and broken. Not only have they endured physical and psychological trauma, but their lives have been shattered by poverty, interrupted education and disability. Yet despite the ordeals they have endured, most are without rancour. They seek, in the main, simple justice: a recognition they have been wronged and assistance to rebuild lives.²⁶⁵

It was essential to uncover the atrocities by all parties so as to allow the truth to facilitate the process of peace through recognition of wrongdoing. Also, investigating the atrocities by all parties assisted the initial mandate of the SATRC, which was to gather information in order to construct a complete and accurate picture of the apartheid years.²⁶⁶ However, before the establishment of the SATRC an interim constitution was adopted in 1993 that enabled political stability for the country and promoted democracy.

3.2.2 The Interim Constitution of 1993

South Africa's transition was marked by the implementation of an interim constitution in 1993.²⁶⁷ This was done through the adoption of the Interim Constitution of the Republic of Southern Africa Act (1993).²⁶⁸ The interim constitution helped to stabilise the country.²⁶⁹ On 13 November 1991, Mandela stated that the first meeting regarding the constitution would be a two-day event from 29 to 30 November 1991, at the World Trade Centre in Kempton Park, Johannesburg, Gauteng. The

²⁶⁴ Kotze, "Transitional Justice," 131.

²⁶⁵ Ibid.

²⁶⁶ Laasko, "In Pursuit of Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa," 49.

²⁶⁷ "South Africa- First 20 Years of Democracy, (1994-2014)," South African History Online, January, 15 2014, <http://www.sahistory.org.za/article/interim-south-african-constitution-1993>, (accessed November, 28 2017).

²⁶⁸ Allan and Allan, "The South African Truth and Reconciliation Commission as a Therapeutic Tool," 471.

²⁶⁹ Aiken, "The Distributive Dimension in Transitional Justice: Reassessing the South African Truth and Reconciliation Commission's Ability to Advance Interracial Reconciliation in South Africa," 192.

Prevention of Public Violence and Intimidation Act legislatively protected the negotiations in 1991.²⁷⁰

On 21 December all parties with the exception of the IFP and the Bophuthatswana government signed a Declaration of Intent. The declaration committed to the realisation of a unified South Africa and multiracial democracy. Each stakeholder focused on establishing a constitution that promoted free participation.²⁷¹ The end result of the negotiations brought about the first democratic election in 1994 with the ANC winning the majority vote.²⁷²

In mid-1995 the South African parliament engaged in public debate with civil society. This resulted in the passing of the Promotion of National Unity and Reconciliation Act 34 of 1995.²⁷³ The SATRC officially began with the passing of this Act. The mandate of the SATRC was to gain as complete a picture as possible of the transgressions that took place during the apartheid years.

3.3 South Africa's Truth and Reconciliation Commission

With the establishment of the SATRC through the Promotion of National Unity and Reconciliation Act 34 of 1995, South Africa was granted the opportunity to heal its social and political divisions. The Act authorised investigations of human rights violations between 1 March 1960 and 5 December 1993.²⁷⁴ The Act reasoned for a truth commission in preference to a tribunal. Reasons for this included; realising the need for forgiveness, reparations, understanding and *ubuntu* (discussed later) so that the SATRC could uplift the well being of South African citizens.²⁷⁵

The promotion of the National Unity and Reconciliation Act created the opportunity for reparations through restorative justice. The emphasis of this Act focused on restorative rather than

²⁷⁰ Rauch, "The South African Police and Truth Commission," 211.

²⁷¹ "South Africa- First 20 Years of Democracy, (1994-2014)," South African History Online, January, 15 2014, <http://www.sahistory.org.za/article/interim-south-african-constitution-1993>, (accessed November, 28 2017).

²⁷² Aiken, "The Distributive Dimension in Transitional Justice: Reassessing the South African Truth and Reconciliation Commission's Ability to Advance Interracial Reconciliation in South Africa," 192. "Democratic elections were held in April 1994, during which the votes of nearly 20,000,000 South Africans firmly established the ANC as the majority party in a new multi-racial Government of National Unity under the leadership of President Mandela."

²⁷³ Boraine, "South Africa's Truth and Reconciliation Commission from a Global Perspective," 138.

²⁷⁴ Annelies Verdoolaege, "Media Representations of the South African Truth and Reconciliation Commission and their Commitment to Reconciliation," *Journal of African Cultural Studies* 17, no. 2 (2005): 181-182.

²⁷⁵ Kotze, "Transitional Justice," 133.

retributive justice. This decision was in part due to the necessity for compromise between the remnants of the apartheid regime and the nascent majority government that had small chance of holding perpetrators accountable. However, the main reason for restorative justice was due to a conscious decision to create a new nation on the foundation of peace through forgiveness and transcendence.²⁷⁶

A restorative lens can be described as a strategy of planned communications networks and better policies focused towards garnering victim support.²⁷⁷ In the new South Africa restorative justice was steadily incorporated in the notion of criminal justice during the 1990s.²⁷⁸ Within the South African context the restorative approach identifies with the African concept of *ubuntu* or humanness. The term *ubuntu* elucidates the notion of dignity attributable to all individuals; this dignity is reciprocated with communal recognition and unity.²⁷⁹ *Ubuntu* has its etymology in the Zulu language, specifically the Zulu word *umuntu* or the person, and is collaborated with “the art of being human.”²⁸⁰ The significance is also found in the Xhosa expression, “*Umuntu ngumuntu ngabanye bantu*,” that translates to “people are people through other people”. This is a feature that blueprints South Africa’s current constitution.²⁸¹ These features also incorporate aspects of reintegration and reconstruction, which facilitate the reparations process.

The term, “restorative justice” only appears three times in the transcripts of public hearings. The full extent of the phrase was not properly explored, in spite of the fact that the hearings were based on the principles of restorative justice. In October 1998 volumes 1-5 of the SATRC report were published; subsequent to the Amnesty Committee finalising its work an additional two volumes were introduced to the report in March 2003. The Report has 4 500 pages in which there is a six-page section on restorative justice.²⁸²

²⁷⁶ Megan Shore and Scott Kline, “The Ambiguous role of Religion in the South African Truth and Reconciliation Commission,” 310.

²⁷⁷ Ibid., 267.

²⁷⁸ Gade, “Restorative Justice and the South African Truth and Reconciliation Process,” 10.

²⁷⁹ Dorothy Driver, “Truth, Reconciliation, Gender: the South African Truth and Reconciliation Commission and Black Women’s Intellectual History,” *Australian Feminist Studies* 20, no. 47 (2005): 219, doi: 10.1080/0816464500090384.

²⁸⁰ Bronwyn Anne Leebaw, “Restorative Justice for Political Transitions: Lessons from the South African Truth and Reconciliation Commission,” *Contemporary Justice Review* 4, no. 3-4 (2001): 272.

²⁸¹ Ibid., 268.

²⁸² Gade, “Restorative Justice and the South African Truth and Reconciliation Process,” 21.

Volume 1 page 126 defines restorative justice as:

Seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against a human being, as injury or wrong done to another person; is based on reparation: it aims at the healing and the restoration of all concerned – of victims in the first place, but also of offenders, their families and the larger community; encourages victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals acting as facilitators; supports a criminal system that aims at offender accountability, full participation of both the victims and offenders and making good or putting right what is wrong.²⁸³

There was one victim hearing when the term was used and two special hearings.²⁸⁴ In the hearing in Kimberly on 10 June 1996, Father Michael Lapsley explained that on 10 April 1990 he received a letter bomb that had been mailed by a government death squad.

Accordingly:

One of the extraordinary things was that I, and the doctors don't know why, I didn't become unconscious – I didn't go into shock. The ceiling of the rooms blew out and there was a hole in the floor and I can still remember what happened – the actual explosion is still – it's still – it's still something with me. I remember pain of a scale that I didn't think a human being could ever experience. I remember going into darkness – being thrown backwards by the force of the bomb ... I thought maybe it would have been better to have died when I realised I had no hands.

The special hearings were when the SATRC took to task the armed forces, the business segment, the religious institutions, and the legal structure.²⁸⁵

A feature of restorative justice lies in the perpetrator facing the victim and offering their culpability. They then request an opportunity to repair or compensate for damage done. This is a process of restitution.²⁸⁶ For example, in 1988 Brian Mitchell was responsible for killing 11 people during the Trust Feed Massacre (this refers to the slaughter of innocent residents in Trust feed, a rural town close to the midlands in Natal, the victims were mostly women and children, the youngest was a four-year old boy). Amnesty was granted to him and he then had an opportunity

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ibid., 19.

²⁸⁶ Ibid., 15.

to offer restitution during a Trust Feed meeting. Khoza Mgojo, who was a SATRC commissioner, initiated this meeting.

According to Mgojo:

It was tense! The police had to be there because we did not know what was going to happen. We were just taking the chance. When Brian Mitchell told his story, the people were fuming with anger, but at the end of it all the people thanked Brian Mitchell for his courage to come and face them. That is where the relationship started between Brian Mitchell and the community. Mitchell promised that he was going to help them by supporting the community, by raising funds somewhere so that maybe a centre for the community could be established. And then the friendship began (which has lasted) up to now. So that is why I say that if people who have done something, if they give back to the people they have injured (i.e. offer restitution), it helps – I saw it with Brian Mitchell.²⁸⁷

Restitution is a feature of restorative justice, which was chosen by the members of the SATRC over retributive justice. Retributive justice would only emphasise vengeance and victimisation.²⁸⁸ This did not align with the SATRC's objective of reconciliation. However, a dismissal of the injured, leads to ruined moral norms and devalued society.²⁸⁹ Revenge is often a final step if one has been denied due process. Truth is important because in itself, truth is supreme and uncontested unlike political opinions; opinions that had divided the country for so many years. The public participation that hallmarked the SATRC proceedings was the first step of the nascent democracy to recognise the will of the people.

The legislation provided for amnesty and reparations. Amnesty was granted in exchange for full disclosure of crimes that were politically motivated. The SATRC's provision for amnesty was to establish "the motives for and the circumstances in which gross violations of human rights have occurred."²⁹⁰ The SATRC's mandate was highly ambitious as the commission wanted to organise an absolute and realistic portrayal of the atrocities that characterised the apartheid years.²⁹¹ This mandate serves to recognise patterns of habitual social violence.²⁹² This then serves to detect and

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Cassese, "Reflections on International Criminal Justice," 3.

²⁹⁰ Patrick Lenta, "What Conditional Amnesty is Not," *Theoria: A Journal of Social and Political Theory* 56, no. 120 (2009): 46.

²⁹¹ Laasko, "In Pursuit of Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa," 49.

²⁹² Derek Summerfield, "Effects of War: Moral Knowledge, Revenge, Reconciliation, and Medicalised Concepts of Recovery," *British Medical Journal* 325 (2002): 1105.

prevent future resurgence of violent behaviour.²⁹³ South Africa did gain significantly more knowledge and information about events that took place during the apartheid years.²⁹⁴ According to Boraine, “introducing an amnesty clause into the truth commission helps to prevent collective amnesia and also introduces the possibility of the reintegration of perpetrators into society.”²⁹⁵ Information that was revealed included the development of a clandestine state-run chemical weapons unit that would have remained hidden if the trial involved the prosecution of offenders.²⁹⁶

The SATRC was established with negotiations, reports and consultations from the array of stakeholders.²⁹⁷ Members included all parties, civil society and the international community. The role of the international community was significant for South Africa’s political transition. This included members of the UN, neighbouring countries and corporations.²⁹⁸ With an annual budget of US\$18 million over the course of two and a half years and a workforce nearing 300 employees operating in four bureaus across the country, the SATRC indicated a significant reorientation in both measure and aspirations from previous truth commissions.²⁹⁹

During its time, the truth commission took testimony from over 21 000 victims and witnesses and of these about 2 000 testified publicly. The hearings focused on individual accounts of abuse and there were special sessions that were focused primarily on institutions structured in a way that supported the apartheid legacy. Sectors of the public that were divided by apartheid that the SATRC addressed included: religious, legal, business, labour, health, media, prisons and the military. From the outset in 1995, the SATRC ran throughout the length and breadth of the entire

²⁹³ “Further Submissions and Responses by the ANC to Questions Raised by the Truth and Reconciliation Commission of South Africa,” <http://www.anc.org.za/>, May 12, 1997, <http://www.anc.org.za/content/further-submissions-and-responses-anc-questions-raised-commission-truth-and-reconciliation>. (accessed September 5, 2018).

²⁹⁴ Dan J. Stein, Soraya Seedat, Debra Kaminer, Hashim Moomal, Allen Herman, John Sonnega and David R. Williams, “The Impact of the Truth and Reconciliation Commission on Psychological Distress and Forgiveness in South Africa,” *Soc Psychiatry Psychiatr Epidemiol* 43 (2008): 463.

²⁹⁵ Boraine, “South Africa’s Truth and Reconciliation Commission from a Global Perspective,” 139.

²⁹⁶ Rauch, “The South African Police and the Truth Commission,” 222.

²⁹⁷ Ibid., 138.

²⁹⁸ “South Africa: Liberation and Reconciliation Role of International Solidarity,” <http://www.anc.org.za>, April 8, 2004, <http://www.anc.org.za/content/south-africa-liberation-and-reconciliation-role-international-solidarity>. (accessed September 5, 2018)., “Submission To The Truth And Reconciliation Commission By Mr F W De Klerk, Leader Of The National Party,” omalley.nelsonmandela.org, 1999, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02303/06lv02331/07lv02332.htm>. (accessed September 5, 2018)., “The United Nations and the struggle for liberation in South Africa,” <http://www.anc.org.za>, undated, <http://www.anc.org.za/docs/misc/1992/roadtodemocracyl.pdf>. (accessed September 5, 2018).

²⁹⁹ Boraine, “South Africa’s Truth and Reconciliation Commission from a Global Perspective,” 138.

country. The commission held space for hearings in cities, towns, rural dwellings and townships. Those appointed to contribute to the research process worked tirelessly, scrutinising every detail to establish a seven-volume report.³⁰⁰

To ensure transparency 17 exclusively South African commissioners were appointed from among civil society nominees including non-governmental organisations (NGOs), political parties and religious institutions.³⁰¹ They were interviewed publicly³⁰² before appointment. The media, both print and electronic, comprehensively covered the commission's proceedings that were televised daily and broadcast live on national radio.³⁰³ The proceedings were accessible to the public, a feature of the South African model.³⁰⁴ Debate regarding the goals, mandates, procedures and outcomes of the SATRC took place illustrating how the South African model was established by participation.³⁰⁵

3.4 The Four Mechanisms of Transitional Justice

Discussed below are the three committees of the SATRC in relation to the four previously identified features of transitional justice. The SATRC had exclusive remit on gross violations of human rights with an additional provision for abuses committed with a political incentive. To attain these objectives, three committees were established; the Amnesty Committee, the Committee on Reparation and Rehabilitation and the Human Rights Violations Committee (HRVC).³⁰⁶

3.4.1 Criminal Justice: The Amnesty Committee

³⁰⁰ P.G. J. Meiring, "Bonhoeffer and Costly Reconciliation in South Africa – Through the Lens of the South African Truth and Reconciliation Commission," *Academic Journal of the Center for Ministerial Development* 38, no. 3 (2017): 19, url: <https://doi.org/10.4102/ve.v38i3.1559>.

³⁰¹ Boraine, "South Africa's Truth and Reconciliation Commission from a Global Perspective," 138.

³⁰² Etekepe, "Role Models in Peace Building in Africa: An Assessment of Selected Characters," 186-187. The population statistics at the time was: Africans- 17.70 million, Whites- 4.20 million, Coloured- 2.30 million and Asians- 0.7 million.

³⁰³ Boraine, "South Africa's Truth and Reconciliation Commission from a Global Perspective," 138-139.

³⁰⁴ Verdoolaege, "Media Representations of the South African Truth and Reconciliation Commission and their Commitment to Reconciliation," 181.

³⁰⁵ Boraine, "South Africa's Truth and Reconciliation Commission from a Global Perspective," 138.

³⁰⁶ Annelies Verdoolaege, "Managing Reconciliation at the Human Rights Violations Hearings of the South African TRC," *Journal of Human Rights* 5 (2005): 62-63.

To recap, criminal justice refers to the measures used to address crimes concerning human rights. Criminal justice works along a spectrum of retributive justice on one side, which focuses on punitive measures like prosecution and tribunals, and restorative on the other, this focuses on amnesty and truth commissions. Its purpose is to recognise the rights of victims through either prosecution or truth telling. In so doing, it also works as a preventative measure. Currently the National Prosecuting Authority (NPA) upholds criminal justice in South Africa.³⁰⁷

The Amnesty Committee's mandate was to give offenders the opportunity to confess their crimes. This act of public confession was intended to restore dignity to offenders. It did this by providing the opportunity to offenders to take responsibility for their actions during apartheid (specifically between the specified dates of 1 May 1960 to 10 May 1994).³⁰⁸ Confession was regarded as a step towards healing. It gave offenders a chance to explain their behaviour.³⁰⁹ In addition the committee served to acknowledge the nature of apartheid and its horrors. In acknowledgement, it created a space for "psychic closure."³¹⁰ Offenders were granted immediate pardon for the crimes they had committed. If the perpetrators were already in prison, amnesty, meant their immediate release.³¹¹

The committee received 7 127 applications for amnesty³¹² (relating to over 14 000 incidents)³¹³ by 14 December 1997 (the last date to receive testimonies). Due to the large number of applications, there was need for additional staff, funds and an extended deadline. Of the several thousand applicants for amnesty a significant number belonged to the former security police officers. The former members of the South African Defence Force (SADF) only submitted a few applications and the committee did not receive a single application from the National Intelligence service.³¹⁴

³⁰⁷ "Welcome to NPA," <https://www.npa.gov.za/>, 2014, <https://www.npa.gov.za/>, (accessed October 1, 2018)

³⁰⁸ Verdoolaege, "Media Representation of South African Truth and Reconciliation Commission and their Commitment to Reconciliation," 185.

³⁰⁹ Alan and Allan, "The South African Truth and Reconciliation Commission as a Therapeutic Tool," 473.

³¹⁰ Leebaw, "Restorative Justice for Political Transitions: Lessons from the South African Truth and Reconciliation Commission," 276.

³¹¹ Robert N. Craft, "The Good Intentions of Violent Perpetrators: A Qualitative Analysis of Testimony from South Africa's Truth and Reconciliation Commission," *Peace and Conflict: Journal of Peace Psychology* 21, no. 3 (2015): 363.

³¹² Meiring, "Bonhoeffer and Costly Reconciliation in South Africa – Through the Lens of the South African Truth and Reconciliation Commission," 19.

³¹³ Rauch, "The South African Police and Truth Commission," 216.

³¹⁴ Leebaw, "Restorative Justice for Political Transitions: Lessons from the South African Truth and Reconciliation Commission," 276.

Those responsible for gross violations of human rights were expected to come forward and cooperate with the committee. Over 1 600 offenders were eligible for amnesty; their positions in government belonging to all levels of seniority, including; ground soldiers, squadron leaders, superiors, representatives in cabinet and even President FW de Klerk.³¹⁵

The Amnesty Committee commenced with its first public hearing in May 1996. Only a small fraction of the proceedings was made public because of the intense media presence.³¹⁶ That is, 5 489 of the 7 115 applications were processed in private chambers, instead of in public. The hearings proceeded in front of a panel of adjudicators, lawyers and judges. Every applicant had a right to legal representation and was given the opportunity to participate fully and to present their case.³¹⁷

During the SATRC hearings, the government mandated the NPA to consider prosecuting offenders. This included offenders who had been denied amnesty and those who had not applied to the SATRC for amnesty. The NPA commenced legal proceedings against those members of the SADF chemical warfare programme, the head Wouter Basson, Ferdie Barnard of the SADF's CCB, and individuals named in the 1992 Bisho massacre.³¹⁸

The lack of success against former Minister of Defence Magnus Malan as well as the failure of the NPA's case against Wouter Basson reinforced the perception, among the police personnel, that prosecution was not a legitimate threat. In light of this, the necessity of the Amnesty Committee was questioned. The prosecution's incompetence was due to the absence of full-time investigators. The main issue was a lack of sufficient resources. The SATRC, NPA and the Amnesty Committee did not have the resources to hold trials.³¹⁹ Prosecution of offenders accrued excessively high costs. To illustrate, the trials of Eugene de Kock and Magnus Malan cost the state over R14 million.³²⁰ The SATRC chairperson Archbishop Desmond Tutu noted this, during its final procedure:

³¹⁵ Craft, "The Good Intentions of Violent Perpetrators: A Qualitative Analysis of Testimony from South Africa's Truth and Reconciliation Commission," 363.

³¹⁶ Verdoolaege, "Media Representation of South African Truth and Reconciliation Commission and their Commitment to Reconciliation," 182.

³¹⁷ Rauch, "The South African Police and Truth Commission," 219.

³¹⁸ Ibid., 222.

³¹⁹ Shore and Kline, "The Ambiguous role of Religion in the South African Truth and Reconciliation Commission," 311.

³²⁰ Erik Doxtader and Charles Villa-Vicencio, *To Repair the Irreparable: Reparation and Reconstruction in South Africa*, (South Africa: David Phillip, 2004), 164.

There are very many, I agree, who should have applied for amnesty and who didn't. (But, if they were charged), the burden on our (justice) system would be quite intolerable and the cost astronomical.³²¹

The Amnesty Committee investigations inquired into the reasons why individuals behaved with extreme violence. These findings assisted in formulating an understanding of resolution, patterned on problem solving, social transformation and peace building.³²² An aspect of the process of gaining insights into what transpired during the apartheid years required the knowledge gained mostly from testimonies. In this regard the SATRC was a success as the objectives of full disclosure and complete portrayal were largely achieved. Whether or not this meant that the country could be reconciled remains to this day questionable.³²³ As Sooka states “Many black South Africans take the view that the beneficiaries of apartheid escaped any accountability for their actions.”³²⁴ Today, there is increasing aggravation and agitations among South Africa’s youth that the past leaders conceded too easily, leaving whites to continue to benefit and blacks to remain in poverty.³²⁵ However, the value of institutionalising memory of a nation’s wounded past is significant. The SATRC’s mandate was to ensure South Africa did not suffer from “collective amnesia, festering guilt and unrelieved pain.”³²⁶ The testimonies that were given ensured that the horrors of apartheid would not be repeated.

The HRVC kept to the mandate of the SATRC, which was to gather as complete a picture as possible, and is described as one of the main contributors in this endeavour.³²⁷

3.4.2 Truth: The Testimonies of The Human Rights Violations Committee

³²¹ Rauch, “The South African Police and Truth Commission,” 222.

³²² Dap Louw and David Edwards, “Psychology: An Introduction for students in Southern Africa,” *Heinemann Higher and Further Education* Pty Ltd 147.

³²³ Kotze, “Transitional Justice,” 137-139.

³²⁴ Sooka, “The Politics of Transitional Justice,” 33

³²⁵ Cori Wielenga, “Comparing Approaches to Reconciliation in South Africa and Rwanda,” *Conflict Trends* (2011): 42,
https://repository.up.ac.za/bitstream/handle/2263/18038/Wielenga_Comparing%282011%29.pdf?sequence=1

³²⁶ Xolela Mangcu, “The power of memory against forgetting,” *New Africa*, (2014): 60.

³²⁷ “Traces of Truth: Documents Relating to the Truth and Reconciliation Commission,” <http://truth.wvl.wits.ac.za>, undated, http://truth.wvl.wits.ac.za/cat_descr.php?cat=2, (accessed April 11, 2018).

To recap, truth seeking refers to commissions of inquiry that prioritise investigating and reporting on key periods of recent abuse. Truth seeking discourses are constructed by official state bodies that assist in treating such abuse with recommendations surrounding transcripts of resolution in order to prevent the recurrence of such abuse.

Truth is a normative concept being subjective and was thus characterised in four different ways: factual truth, narrative truth, social truth and healing and reconciliation truth. Factual or forensic truth describes the accepted statement of events after an investigation has been done and evidence has been gathered to corroborate the statement. Narrative truth is the testimony of one's personal experience. Social truth is the truth revealed once the myths have been discredited and the interactions and dialogue among the community is accepted. Reconciliation truth is truth that is pertinent for a nation to recover from past wounds, also known as restorative or healing truth, it involves reconciliation through recognition and acknowledgement of an individual's pain.³²⁸

Approaching the SATRC hearings required sensitivity, due to the long historical nature of human rights abuses.³²⁹ The characteristics of the SATRC necessitated unique provisions in the dialogue and discourse that structured the trials. The HRVC, allowed a platform where victims could express through language the nature of the abuse that they had endured.³³⁰ It investigated human rights abuses that took place between 1960 and 1994 in an attempt to establish "the identity of the victims, their fate or present whereabouts, and the nature and extent of the harm they had suffered."³³¹

The HRVC operated from 16 April 1996 to 26 June 1997 in 65 areas in South Africa.³³² The HRVC hearings made up the first 44 airings of the Truth Commission. The South Africa Broadcasting Corporation (SABC) broadcasted the hearings. As the hearings progressed and the SATRC's

³²⁸ Ekiyor, "Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective," 159.

³²⁹ Verdoolaege, "Managing Reconciliation at the Human Rights Violations Hearings of the South African TRC," 61.

³³⁰ Melanie Walker and Elaine Unterhalter, "Knowledge, Narrative and National Reconciliation: Storied reflections on the South African Truth and Reconciliation Commission," *Discourse: studies in the cultural politics of education* 25, no. 2 (2004): 293, doi: 10.1080/01596300410001692184.

³³¹ Ruth Picker, "Victims' Perspectives about the Human Rights Violations Hearings," *Center for the study of violence and reconciliation* (2005): 2
<http://www.csvr.org.za/docs/humanrights/victimsperspectivshearings.pdf>

³³² Ibid., 1.

stance on offenders became increasingly severe, there were many issues surrounding the events that happened to victims and victims' relatives that were uncovered.³³³

The HRVC consisted of public hearings and was responsible for gathering written statements from over 22 000 people, by trained officials. The focus of the statements centred on the exact nature and harm endured, whether the harm arose as a direct result of government initiatives, various organisations, groups or individuals. After the victims were identified they were referred to The Reparation and Rehabilitation Committee (discussed below).³³⁴ After gathering all statements and identifying 37 000 human rights violations, the SATRC forwarded 1 819 statements for presentation before the HRVC hearings.³³⁵

The HRVC's mandate was to gather recordings of human rights abuses. The hearings were comprised of three divisions: general HRV hearings, event hearings and institutional hearings. Based on the findings of the HRV committee, the SATRC then determined the features that constituted victimhood. Victimhood was a contentious label that is discussed below with the criticisms of the HRVC.

The HRVC received both praise and criticism. The emphasis on forgiveness and suffering served as a deterrent to those who considered themselves and their role as political activists. The setting was victim-centred and there were those who did not see themselves in this light. Furthermore, those who contributed their testimonies as written statements but were excluded from public testimony, felt that their input was valued less. It took a considerable amount of time and effort to assure those who felt slighted, that the HRVC would thoroughly investigate each testimony and treat it with due respect.³³⁶

The public hearings were successful for two reasons. First, the objective of the commission was achieved, that is "restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims." Second,

³³³ "The TRC Special Report Series," <http://sabctrc.saha.org.za>, 2018, <http://sabctrc.saha.org.za/background.htm> (accessed April 11, 2018).

³³⁴ "The Committees of the TRC- The Truth and Reconciliation Commission," Justice.gov.za, 2017, <http://www.justice.gov.za/trc/trccom.html>, (accessed November 12, 2017).

³³⁵ Shore and Kline, "The Ambiguous role of Religion in the South African Truth and Reconciliation Commission," 314.

³³⁶ "Chapter 1: Analysis of Gross Violations of Human Rights," <https://omalley.nelsonmandela.org>, undated, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02398/08lv02399.htm> (accessed October 1, 2018)

the sheer amount of testimonies along with those from the Amnesty Committee made it impossible to deny the nature of gross human rights violations that characterised apartheid.³³⁷

The general consensus is that in order to create a just society born of reconciliation not vengeance and aggression, the truth is a preferable strategy to oblivion and obscurities. Forgiveness, an integral feature of the SATRC proceedings, is necessitated by truth. Forgiveness, however, is not an automatic response by victims. This is why amnesty, for example, is so contested. Victims need justice, as some wounds are too deep to heal. However, in the sense of looking ahead, creating and developing a society built on justice is to a large extent dependent on restorative features of justice.³³⁸

The HRVC employed courtroom dialogues that were structured according to psychotherapeutic discourse. This focused on the cathartic capacity of recalling memory through storytelling. It referred to religion for forgiveness and confession. Religion also lent support in the form of faith. Faith allowed victims to transcend harmful experiences.³³⁹ Arising from the semantics of these proceedings was an additional feature described by Verdoolaege as “reconciliation discourse.”³⁴⁰ It is this that describes the aforementioned narrative; truth, factual truth, social truth and healing and reconciliation truth.

The reconciliation discourse is a narrative detailing truth whereby South Africans are encouraged to come to terms with an abusive history through, focusing on the actions of the masses and not the individual. This was a hate-the-sin-and-not-the-sinner approach that drew from the religious dimension of the HRVC hearings. Tutu, offered a Christian leaning that created the capacity for healing and redemption. At the commencement of each hearing, he would lead in prayer, illustrating the religious dimension of the SATRC.³⁴¹ The narrative and healing truth process took on words and phrases like: ‘collective memory’, ‘shared history’ and ‘imagining a new

³³⁷ Ibid.

³³⁸ Louw and Edwards, “Psychology: An Introduction for students in Southern Africa,” 1997, 147

³³⁹ Verdoolaege, “Managing Reconciliation at the Human Rights Violations Hearings of the South African TRC,” 61.

³⁴⁰ Ibid.

³⁴¹ Sandra Young, “Narrative and Healing in the Hearings of the South African Truth and Reconciliation Commission,” *Biographical Research Center* 27, no. 1 (2004): 148.

community', 'a new nation'.³⁴² The narrative and discourse was essential to the promotion of national renewal structuring the SATRC.³⁴³

The role of words in constructing a new narrative to lead the minds and attitudes for a new reality is essential, as reconciliation cannot be forced.³⁴⁴ Verdoolaege cites critics who feel that often the term reconciliation comes at the price of not addressing feelings of revenge and retribution. In fact, she agrees and contends that the concept of reconciliation could even have been "imposed"³⁴⁵ on the injured parties. Examples of this strategy include the victims being asked at the end of the proceedings whether they would consider forgiving the perpetrator.³⁴⁶

An example of imposing Christian beliefs is revealed by a testimony by Marius Schoon who lost his wife and daughter due to a parcel bomb sent by government agents. He was unhappy about "the imposition of a Christian morality of forgiveness."³⁴⁷ Another example was a frequent complaint made by victims that, "it's grossly immoral to forgive that which is unforgivable."³⁴⁸

A limitation affecting the hearings was due to the "corroboration process."³⁴⁹ In 1996 the processing of the testimonies was handled as secondary regarding investigations into the events. The Investigation Unit (IU) assigned to the task would focus their resources on verifying the facts of the accounts, not the circumstances involved. Therefore, necessary insights could not be garnered in order to properly learn about state-sanctioned, collective and socialised violence.³⁵⁰

Despite this the ambition of the HRV Committee to investigate human rights violations inflicted during the apartheid era, was successful if the testimonies given before the SATRC were any guide.

³⁴² Nicky Rousseau and Madeleine Fullard, "Accounting and Reconciling on the Balance Sheet of the South African Truth and Reconciliation Commission," *Journal of Multicultural Discourses* 4, no. 2 (2009): 125.

³⁴³ Warren Goldstein, "Revisiting the Truth and Reconciliation's Commission Faith Community Hearing," *Jewish Affairs* (2015): 60. As Goldstein very eloquently states, "Words create worlds. Human beings are unique in the natural world in that we do not only experience reality but we construct it with our words as we try to understand the world around us."

³⁴⁴ Verdoolaege, "Managing Reconciliation at the Human Rights Violations Hearings of the South African TRC," 62.

³⁴⁵ Ibid., Rousseau and Fullard, "Accounting and Reconciling on the Balance Sheet of the South African Truth and Reconciliation Commission," 123.

³⁴⁶ Ibid., 127.

³⁴⁷ Graybill, "To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission" 8.

³⁴⁸ Ibid.

³⁴⁹ "Traces of Truth: Documents Relating to the Truth and Reconciliation Commission," <http://truth.wvl.wits.ac.za>, undated http://truth.wvl.wits.ac.za/cat_descr.php?cat=2 (accessed April 11, 2018).

³⁵⁰ Ibid.

The committee established dignity for victims through acknowledgement, revealing their truth and presenting a platform for reconciliation. The nature and extent of the harm the victims endured as a result of deliberate planning by the state or any other organisation, group or individual was revealed. Once the victims and their stories were acknowledged, they were referred to the Reparation and Rehabilitation Committee.

3.4.3 Reparations: The Committee on Reparation and Rehabilitation

As noted in Chapter Two, reparations are state sponsored schemes that assist in restoring the physical and emotional wounds inflicted on victims and their families. Usually, reparations involve a mixture of material and symbolic benefits, payments or grants to victims. This may include financial compensation and official apologies.

The Reparation and Rehabilitation Committee's aim was to gather the reports from the testimonies produced at the hearings of the HRV and develop policy recommendations on reparation and rehabilitation. This was the responsibility of members from the parliamentary Justice Portfolio Committee. The committee was tasked to address the on-going legacy of gross inequalities and crimes of apartheid. In addition to making recommendations of reparations, the committee also assisted in outreach activities, victim support and public discourse on the themes of truth, justice and reconciliation. Outreach incentives included public meetings, the media (radio, television and the newspapers) and a "Register of Reconciliation" which enabled people to put forward their thoughts on the past for public viewing. Through these initiatives, the committee made reparations possible, however, there were some failings too (discussed below).

The 1998 SATRC report made wide-ranging proposals regarding reparations to victims. These included both financial and symbolic reparations. The report proposed that the financial reparations paid to victims were of an amount of approximately R2 864 400 000. This was over the span of six years, and was to be made available to victims or equally divided among dependents if the victim had died. There were 22 000 victims. Symbolic reparations described erecting monuments, renaming roads, restoring and resurrecting civic facilities. Although symbolic reparations have made significant progress, the recommended financial reparations have not come

to fruition.³⁵¹ Research conducted in 2005, for the Centre for the Study of Violence and Reconciliation, found that for many, “the payment of reparations was expected to alleviate poverty and to help deal with the consequences of the violations. Participants felt that the TRC made a promise to them that it failed to keep.”³⁵²

There was a President’s Fund established by Mandela in July 1998, to oversee the administration of the monetary reparations, under the phrase “urgent interim reparations.”³⁵³ In spite of the R300 million that was set aside, there was only R48.37 million that had been paid out by November 2001. There were approximately 17 100 applicants (from a total of 20 563) to whom about 2-3 thousand Rands were given.³⁵⁴

In February 2001 the government declared that an amount of R800 million would be set aside for final reparations, that is R500 million with an additional R300 million previously put aside for interim reparations. This amount is significantly reduced from what was recommended by the commission. The government was evasive, not stating when the financial reparations would be distributed, only that there would be once-off statements. Reasons for the delay included legislative framework for reparations to the victims, which according to the Department of Justice spokesperson could not be introduced into parliament until 2002.³⁵⁵ Organisations supporting victims and sectors of civil society began to rally against the delay. They insisted that the government act on the SATRC’s 1998 proposal. In June 2002 the Khulumani Support Group situated in the Western Cape appealed to the High Court in Cape Town attempting to compel the government under the 2000 Promotion of Access to Information Act to make available to past victims its reparations policy immediately and to pay out urgent interim reparations. The appeal was denied by the Department of Justice. They explained that the policy was part of a privileged process and it was still in deliberation.³⁵⁶

³⁵¹ “Truth and Justice: Unfinished Business in South Africa,” Human Rights Watch.org, February 2003, <https://www.hrw.org/legacy/backgrounder/africa/truthandjustice.htm>, (accessed November 13, 2017).

³⁵² Ruth Picker, “Victims’ Perspectives about the Human Rights Violations Hearings,” *Center for the study of violence and reconciliation* (2005): 6
<http://www.csvr.org.za/docs/humanrights/victimsperspectivshearings.pdf>

³⁵³ “Truth and Justice: Unfinished Business in South Africa,” Human Rights Watch.org, February 2003, <https://www.hrw.org/legacy/backgrounder/africa/truthandjustice.htm>, (accessed November 13, 2017).

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

The reparations issue is characterised by disappointment because on the whole, the money meant for victims and their families has not reached them. Currently the government after receiving the final report from Thabo Mbeki in 2003 still remains evasive.³⁵⁷ The disillusionment arising from the failures of reparations raises relevant questions about the effectiveness of restorative justice over retributive justice. The economic structure of the country is a significant feature of the restorative process of reconciliation. If the circumstances for the majority of the population is determined by poverty the outcome of restorative justice cannot be achieved.³⁵⁸

Boraine, who with Tutu, when collecting the Dietrich Bonhoeffer Prize for the work of the SATRC, solemnly stated that the commission had failed to make the recommendations of reparations due to legal limitations.³⁵⁹ The SATRC did not have the necessary legal support.³⁶⁰ Both Boraine³⁶¹ and Charles Villa-Vincencio³⁶² believed that wounds would be life-long and the commission had served more as a symbolic representation to facilitate the transition. In doing so the new regime demonstrated its commitment to civilian rule. However, survivors of atrocities cannot be reconciled with their current political freedom and actual lived experiences if it was merely in exchange for the opportunity to tell their story.

3.5 Institutional Reform: Chapter Nine of the Constitution and the SAPS

As noted previously, institutional reforms describe plans that assist in the transformation of the military, police, judiciary and related state institutions. The intention is that systems are reformed

³⁵⁷ “Article on the 'Unfinished Business' of reparations in South Africa in the Pan-African Reparation Perspectives Bulletin,” khulumani.net, July 8, 2014
<https://www.khulumani.net/truth-memory/item/979-article-on-the-unfinished-business-of-reparations-in-south-africa-in-the-pan-african-reparation-perspectives-bulletin.html>, (accessed December 3, 2017).

³⁵⁸ Leebaw, “Restorative Justice for Political Transitions: Lessons from the South African Truth and Reconciliation Commission,” 281.

³⁵⁹ Meiring, “Bonhoeffer and Costly Reconciliation in South Africa – Through the Lens of the South African Truth and Reconciliation Commission,” 19.

³⁶⁰ Mohalu, “Prosecute or Pardon? Between Truth Commissions and War Crimes Trials,” 77.

³⁶¹ Meiring, “Bonhoeffer and Costly Reconciliation in South Africa – Through the Lens of the South African Truth and Reconciliation Commission,” 19.

³⁶² Leebaw, “Restorative Justice for Political Transitions: Lessons from the South African Truth and Reconciliation Commission,” 269. Charles Villa-Vincencio oversaw the drafting of the 1998 TRC report.

from oppressive and corrupt rule to ones committed to public service and that promote democracy and the rule of law.

3.5.1 Chapter Nine of the South African Constitution

The current constitution of South Africa is regarded as supreme and uncontested.³⁶³ This constitution was drawn up by the elected parliament during 1994 and came into effect in 1997.³⁶⁴ To date, South Africa's constitution is recognised globally and commended as one of the most "progressive and comprehensive in the world."³⁶⁵ The numerous civil, political and economic rights that were hard won are legally protected and enforced by the courts.³⁶⁶ Chapter nine of the constitution is an example of legislation supporting institutional reform.³⁶⁷ Chapter nine secures democracy through the creation of commissions and offices that protect and support democracy and human rights.³⁶⁸ These institutions are: The Public Protector, the South African Human Rights Commission (SAHRC), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission), the Commission for Gender Equality (CGE), the Auditor-General, the Independent Electoral Commission (IEC), the Independent Authority to Regulate Broadcasting and the Independent Communications Authority of South Africa (ICASA).³⁶⁹ Of main importance are the Public Protector, the SAHRC and the CRL Rights Commission in the role they play in supporting the newly democratic institutional reform.

³⁶³ Sean Erasmus, *Introduction to South African Law*, (Cape Town: International Colleges Group (ICG) Pty. Ltd, 2011), 34.

³⁶⁴ Victoria Graham, "Birth of a Constitutional State," in *South African Politics: An Introduction*, ed, Nicola De Jager (Cape Town: Oxford University Press Southern African (Pty) Ltd, 2015), 101.

³⁶⁵ Ibid.

³⁶⁶ "South Africa's problems lie in political negligence, not its Constitution," [https://theconversation.com](https://theconversation.com/south-africas-problems-lie-in-political-negligence-not-its-constitution-80474), July 4, 2017, <https://theconversation.com/south-africas-problems-lie-in-political-negligence-not-its-constitution-80474> (accessed April 11, 2018)

³⁶⁷ "Chapter 9: State Institutions supporting Constitutional Democracy," <http://www.justice.gov.za>, Undated <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-09.pdf>. (accessed April 11, 2018)

³⁶⁸ "The Chapter 9 Institutions in South Africa," <http://www.polity.org.za/>, April 2012, <http://www.polity.org.za/article/the-chapter-9-institutions-in-south-africa-april-2012-2012-04-26> (accessed April 11, 2018) "These institutions are independent of government, subject only to the Constitution and the law, and report annually to Parliament."

³⁶⁹ "Chapter 9: State Institutions supporting Constitutional Democracy," <http://www.justice.gov.za>, Undated <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-09.pdf> (accessed April 11, 2018).

The Public Protector Act of 1994 promulgated the Public Protector. The mandate of the Act empowers the Public Protector to investigate misconduct in the state, public administration or any aspect of the government suspected of misdeed or prejudice, for the purposes of supporting and securing the constitution and democracy. This is an independent institution created according to specifications of section 181 of the constitution.³⁷⁰ The Public Protector has the responsibility to be available to all members of South African society.³⁷¹ It does not have enforcement mechanisms beyond accessing information, subpoenaing people and holding hearings.³⁷² In 2016 the percentage level of performance was 62% and in the first half of 2017 53%, this is relatively good as it has reached expectations.³⁷³ The office of the Public Protector under Busisiwe Mkhwebane has set strategies to improve overall performance.³⁷⁴ Accordingly, “the challenges in the form of financial constraints in the face of an ever-expanding mandate have often resulted in an inability ‘to be accessible to all persons and communities’ as prescribed in section 182(4) of the Constitution”.³⁷⁵

The SAHRC was inaugurated in 1995 as an independent chapter nine institution.³⁷⁶ It was promulgated by the Human Rights Commission Act of 1994 and draws its mandate from the South African Constitution, section 184.³⁷⁷ Duties belonging to the commission include promoting, securing and protecting human rights as well as monitoring and assessing human rights. The powers bestowed on the SAHRC are regulated through national legislation in order to investigate and report on human right abuses, mend instances where misconduct has occurred.³⁷⁸ It also assists in research and education. The SAHRC has eight commissioners who are each responsible for a Human Rights Focus Area and a province.³⁷⁹ The human rights focus areas are: migration and

³⁷⁰ Kenneth Sithebe, “Chapter 9 institutions: for the sake of accountability and constitutional democracy,” <https://africlaw.com>, March 31, 2018, <https://africlaw.com/2014/03/31/chapter-9-institutions-for-the-sake-of-accountability-and-constitutional-democracy/> (accessed April 11, 2018).

³⁷¹ Ibid.

³⁷² Graham, “Birth of a Constitutional State,” 113.

³⁷³ “The Annual Report,” <http://www.pprotect.org>, 2017, http://www.pprotect.org/sites/default/files/Annual_report/Public%20Protector%20Annual%20Report%2016-2017.pdf

³⁷⁴ Ibid.

³⁷⁵ Graham, “Birth of a Constitutional State,” 113.

³⁷⁶ “Chapter 9 Institutions - The SAHRC,” <http://leadsa.co.za>, March 7, 2018, <http://leadsa.co.za/articles/7557/chapter-9-institutions-the-sahrc> (accessed April 11, 2018).

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ “South African Human Rights Commission: Office of the Commissioners,” <https://www.sahrc.org.za>, 2016, <https://www.sahrc.org.za/index.php/about-us/commissioners>, (accessed April 11, 2018). Currently the

health, equality and racism, children's rights, access to justice and access to housing, disability and the elderly, rural development and the right to food, natural resources, law enforcement and the environment and education.³⁸⁰

The CRL Rights Commission draws its mandate from the South African Constitution and is an independent chapter nine institution. Overall the CRL Rights Commission is mandated to secure all aspects of the human family, their heritage, traditions and religious beliefs. The role of this commission is to promote equality and tolerance, support non-discrimination and protect the rights of diverse communities.³⁸¹

3.5.2 The South African Police Service (SAPS)

Janine Rauch in her analysis of the policing sector before and after the establishment of the South African democracy concludes that the SATRC failed to effectively reform the SAPS. Creating a new police force was a main priority of the new government. The inception of the SAPS arose during the democratic transition in 1994. It was an amalgamation of 11 apartheid forces, soldiers and intelligence agents from the liberation movements amounting to a force of about 140 000 personnel in the newly established police force. The beliefs and values of the former regime continued to be upheld during the transition. Therefore, there was “a legacy of popular mistrust and a crisis of legitimacy for the criminal justice institutions.”³⁸²

Dismantling the psychology of mistrust and illegitimacy of the past criminal justice and police sector was a key concern. Termed a “liability”³⁸³ the value system belonging to the majority of this civic facility was seen to undermine the establishment of peace. The ANC was transparent about its reform procedures, transforming the structure of the criminal system gradually and incrementally rather than radically. The policies of reformation were not centred on prosecuting

commissioners are Professor Bongani Christopher Majola- chairperson, Devikarani Priscilla Sewpal Jana- Deputy chairperson, Advocate Bokankatla Joseph Malatji, Advocate Mohamed Shafie Ameerma, Advocate Andre Hurtle Gaum, Matlhodi Angelina (Angie) Makwetla, Advocate Jonas Ben Sibanyoni and Andrew Christoffel Nissen.

³⁸⁰ Ibid.

³⁸¹ “Did you know? SA has only “Seven functional” Chapter 9 Institutions,” <https://www.news101.co.za/>, May 17, 2018, <https://www.news101.co.za/did-you-know-sa-has-only-seven-functional-chapter-9-institutions/>, (accessed April 11, 2018).

³⁸² Rauch, “The South African Police and Truth Commission,” 209.

³⁸³ Ibid.

or pinpointing abusers instead allowing all a fresh opportunity to take part in the new democratic dispensation. There was no provision for unconditional amnesty instead full amnesty in exchange for full disclosure.³⁸⁴

At the beginning of 1996 there was already new legislation passed regarding the policing in South Africa and a newly established police service. The ANC gained international donor support for reforms and installed new training procedures. These training procedures focused on the use of force and the respect of human rights. Appointments for the new leadership also took place.³⁸⁵

The role of the SATRC and institutional reform specifically focused on the criminal justice sector and there was the opportunity to address aspects of humanity, the loss of and hope for renewal and what it means to possess humanity and a conscience and with it the capacity to reflect on one's own actions. Essentially, the commission's role stayed true to the Christian narrative concerning institutional reform. As Rauch explains "to prick at the individual and collective consciences of the police and also to shape the path of police reform."³⁸⁶ The South African Police Force was then renamed as the South African Police Service.³⁸⁷

Regarding truth a significant number of policemen were afraid to give full disclosure of events for fear of reprisal and a sense of shame. However, "The threat of possible prosecutions or lustration generated unexpected compliance from the police leadership with the policies of the new government."³⁸⁸ The aim was to make the police service legitimate and acceptable to the majority of South Africans. There was to be a noticeable detachment with the past regime, its value system and practices. What assisted this transition was that a significant number of former senior police officers retired.³⁸⁹

Unfortunately, of the approximately 1 500 applicants who applied for amnesty only about 300 were from security forces, the police and defence forces. Findings from research conducted at the Centre for the Study of Violence and Reconciliation (CSVr) revealed that about 250 of those 300 security force members who applied for amnesty (for an estimated 827 occurrences of human

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Ibid, 214.

³⁸⁸ Ibid.

³⁸⁹ Ibid.

rights violations) were former members of the SAPS. This signalled a failure in the SATRC process, as its mandate was to gather a complete picture of the transgressions committed during the apartheid years.³⁹⁰

The SATRC's final report recommended that provincial governments should not be permitted to exercise unchecked authority over Provincial Police Services. The SATRC report writers seem to have been unaware of the complex constitutional arrangements for national, provincial and local accountability of the new police service, and of the contents of the 1996 South African Police Services Act, which created mechanisms and procedures for the relationship between national and local governments in respect of policing. As such, this recommendation of the SATRC was not implementable.³⁹¹

A limited number of police officials in South Africa, chiefly those in senior positions belonging to the past Security Branch, indeed took part in the procedures of the SATRC. A couple of aspects explain the restricted impact on the potential of the SATRC, including that on police reform specifically. Essentially, the SATRC's goal focused on mass human rights abuses. This limited the chance of exposure for human rights violations against individuals daily, events that characterised regular apartheid policing. Then, the main focus was on abuses that were primarily motivated by a political agenda.³⁹²

Issues like police brutality that plagued the lives of black people daily on a more focused individual scale, for example the indignity of the pass laws, were not addressed by the SATRC, but also even gross human rights violations which were not overtly political in nature were not part of the truth and reconciliation process. In all likelihood a number of police officers, including the regular, local police divisions were engaged in perpetrating some type of abuse on some scale. This was not limited to the components of the security police and riot units. Few of these occurrences were investigated by the SATRC, as they were not defined by the commission's politically motivated legal requirements and the officers were bound by loyalty to each other and not the processes of the SATRC.³⁹³

³⁹⁰ Ibid, 220.

³⁹¹ Ibid, 226.

³⁹² Ibid.

³⁹³ Ibid, 223.

The apartheid years were characterised by deaths during mass demonstrations and gatherings, for example, the Sharpeville massacre and the Bisho massacre. The significantly reduced number of civilians murdered in open community engagements was the consequence of fundamental changes in the legislation for the regulation and conduct of demonstrations and other public meetings, and the quintessential reworking, retraining and restructuring of the policing component of the SAPS. This was the result of the Goldstone Commission in the early 1990s and the continued assistance from numerous international donors, mainly from the EU, particularly Belgium, throughout the initial years of police reform from 1994-1998.³⁹⁴

3.6 Challenges and Perceived Failures of the SATRC

It is argued that one of the failures of the SATRC was an inability to convince the majority of whites about the relevance of its proceedings for the benefit of the future of the country. Although the reach and operation of the commission was a success, through radio, television and the print media, it did not successfully penetrate the mind-set of the white South Africans. Apartheid advantaged white people at the expense of black lives. The commission failed to persuade those previously privileged of the need to address past wounds sanctioned by the apartheid state.³⁹⁵

However, in 1992 the NP, under de Klerk, orchestrated an all-white referendum. This was to measure the white's appraisal of an all-inclusive, multiracial democracy. The question on the referendum was, "Do you support the continuation of the reform process that the state president started on 2 February 1990 and which is aimed at a new constitution through negotiation?"³⁹⁶ The turnout at the polling stations was significant and it was considered a success.³⁹⁷ Local and international organisations along with businesses stated that a "Yes" vote victory would encourage investments, grow the economy, end sanctions, allow capital trade to pour into the country and create jobs and opportunities. Those campaigning for a "Yes" vote victory included; Anglo-American, Barlow Rand, BP, Caltex, First National Bank, Murray & Roberts, Shell, and Standard

³⁹⁴ Ibid, 231.

³⁹⁵ Ibid, 149.

³⁹⁶ "The 1992 Whites only referendum 'For' or 'Against' a negotiated constitution," www.sahistory.org.za, 2017, <https://www.sahistory.org.za/topic/1992-whites-only-referendum-or-against-negotiated-constitution>, (accessed September 5, 2018).

³⁹⁷ "White South Africa votes in 1992 referendum (25 years ago)," You Tube: SABC Digital News, March 16, 2017, <https://www.youtube.com/watch?v=wcQ9GqJUIdY>, (accessed September 5, 2018).

Bank. A Private Sector Referendum Fund was founded to finance the campaign for a “Yes” vote. It raised approximately R1 million. On voting day, 86% of the registered voters turned out and 68.7% (1,924,186) voted “Yes” in all of the 15 regions except one. The “No” vote stood at 875,619. The exception was in Pietersburg (now Polokwane), with a majority “No” vote at 56.8%.³⁹⁸ This referendum contradicts Boraine’s assessment of the whites’ attitude to the SATRC.

Another failure lay in the fact that the entire truth was not captured. A reason put forward by Boraine was because of how the leaders of the South African military were not held fully accountable during their time before the court. During the SATRC hearings the apartheid military leaders such as former Minister of Defence Magnus Malan³⁹⁹ prevaricated and received a not guilty verdict. The TRC’s status diminished, allowing other military leaders to shun the responsibility of the apartheid crimes they had committed, ordered and sanctioned. Added, the SATRC failed to gain a minimum degree of justice for those affected by the death squads that led to their imprisonment, torture and assassinations. This was due to the absence of a paper trail connecting the commands of senior politicians, generals, colonels, captains and ground soldiers and the criminal actions carried out. Finally, the SATRC did not succeed in granting reparations to the aggrieved.⁴⁰⁰

Instances that describe hindrances in the SATRC process were disruptions in the communication process and a characteristic of the leadership to unnecessarily expand the duration allotted to individual, community and national healing, for derailing the proceedings. This is one of the key lessons needed to be garnered for other commissions wishing to model themselves on the SATRC; communication must always happen at a realistic level, victims must be provided with the necessary psychological, physical and emotional support.⁴⁰¹

3.7 Conclusion

³⁹⁸ “The 1992 Whites only referendum ‘For’ or ‘Against’ a negotiated constitution,” www.sahistory.org.za, 2017, <https://www.sahistory.org.za/topic/1992-whites-only-referendum-or-against-negotiated-constitution>. (accessed September 5, 2018).

³⁹⁹ “Magnus Malan,” South African History Online, February, 17 2011, <http://www.sahistory.org.za/people/magnus-malan->, (accessed November, 28 2011).

⁴⁰⁰ Boraine, “South Africa’s Truth and Reconciliation Commission from a Global Perspective,” 149-150.

⁴⁰¹ Ibid.

The transitional restorative processes of the SATRC namely: criminal justice, truth telling, reparations and institutional reform were mechanisms performed to attain the goals described in the Promotion of National Unity and Reconciliation Act 34 of 1995. The act was passed after various commissions of inquiry into human rights abuses and the establishment of the 1993 Interim Constitution. The mandate of the SATRC was to bear witness to, record, prosecute and grant amnesty to perpetrators of human rights violators whose incentive was politically motivated.

The establishment of three committees: the Amnesty Committee, the Committee on Reparation and Rehabilitation and the HRVC were intrinsic to the functioning and success of the SATRC. The mandate of the SATRC was met with the execution of these three committees.

The Amnesty Committee belonged to the criminal justice aspect of transitional justice. The judicial proceedings focused on restoration over retribution, in keeping with the spirit of *Ubuntu*. It did this by providing an opportunity to perpetrators to publicly confess their crimes and in so doing, restoring dignity through responsibility and recognition. These procedures assisted the nation's transition and set the standard, worldwide, for peace building. Confession meant immediate pardon demonstrating the effectiveness of amnesty as a mechanism to encourage participation within the proceedings. The SATRC successfully lead the way in legitimising public testimonies as a judicial process that assisting nations in transition.

The HRVC deals with the truth telling feature of transitional justice. This committee was structured on discourses of resolution and resolve. Truth is subjective and characterised by four features: factual/forensic, narrative, social and healing/reconciliation truth. The nature of the committee required a specialised environment that emphasised sensitivity, forgiveness and suffering. Particularly the nature and extent of harm endured by victims. The religious dimension of the HRVC was criticised for the imposition of forgiveness on the victims.

The Committee of Reparations and Rehabilitation's mandate was to construct policy recommendations on reparations from reports gathered by the testimonies given at the hearings. It had to address the on going legacy of apartheid. Overall the committee has failed to adequately pay reparations to victims and their families. The country's economy and infrastructure is still characterised by major disparities.

Chapter nine of the constitution is a feature of institutional reform in SA's legislation. Chapter nine ensures democracy through the creation of commissions and offices that are mandated to protect human rights. Challenges that face this institution are financial constraints and a constant increasing mandate. Another example of institutional reform is in the policing sector. In spite of a few successful advances, SA has failed to reform the SAPS sufficiently.

The SATRC was considered a success internationally. However, locally the failures are emphasised because they are personally felt. First, the high-ranking military officers were not held accountable. Second, the reparations promised have yet to be paid. The idea of constructing a new nation and moving forward in peace and reconciliation was given through expressing truth and utilising a narrative discourse surrounding healing and forgiveness. The overall consensus is that the wounds endured during apartheid rule from 1948 will take time to heal and the purpose of the SATRC was primarily symbolic. Unfortunately, the conditional amnesty came at the price of justice. To date, democracy has endured within South Africa, which has not collapsed into civil war, and therefore, the ultimate goals of the SATRC were reached.

Having discussed the features of transitional justice of the SATRC the focus of the following chapter will discuss how Sierra Leone transitioned from a civil war to a democracy through the SLTRC and the SCSL.

CHAPTER FOUR: THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE AND THE SPECIAL COURT FOR SIERRA LEONE

*“Those that bear the greatest responsibility”*⁴⁰²

4.1 Introduction

This chapter examines how the four previously identified features of transitional justice: criminal justice, truth telling, reparations and institutional reform, apply to Sierra Leone’s transition from civil war via the SLTRC and the SCSL. First it is necessary to provide a description of the events and the key actors of the war. This is important because the human rights violations that took place during the war were so vast, that they led to the international community’s re-examining of the language of international law. This background will be followed by a discussion of the attempts to stabilise the country and to create peace, through the Abidjan Peace Accord in 1996, the Conakry Peace Plan in 1997 and the Lomé Peace Accord in 1999. The chapter then details the SLTRC and with it the processes of truth telling. Criminal justice is examined through a description of the establishment and events of the SCSL and the indictment of Charles Taylor. Following this is a discussion of the perceived successes and failures of reparations and an examination of institutional reform in Sierra Leone. The chapter concludes stating that since the establishment of the SLTRC and SCSL, the country has experienced peace. The processes of justice of the SCSL ensured that those that bore the greatest responsibility were held accountable. However, in spite of incremental progress the country remains one of the poorest in the world, therefore in spite of the sustained peace institutional reform has not led to economic prosperity.

⁴⁰² Charles Chernor Jalloh, “Prosecuting Those Bearing ‘Greatest Responsibility’: The Lessons of the Special Court for Sierra Leone,” *Marquette Law Review* 96 (2013): 865. Article 1(1) of the Statute of the Special Court for Sierra Leone (SCSL) mandates that the Court has a responsibility to “prosecute those who bear the greatest responsibility” for those who engaged in crimes against humanity.

4.2 A Brief History of the Civil War in Sierra Leone

The decade long civil war in Sierra Leone began in 1991. The war was multi-layered and complex. It resided primarily in the discord between the former army corporal, Foday Sankoh⁴⁰³ – his RUF; other rebel groups such as the Armed Forces Revolutionary Council (AFRC); the government backed militia – the Civil Defence Forces (CDF);⁴⁰⁴ and the government of Sierra Leone. Sierra Leone had a history of corruption that was followed by *coups* and a succession of leaders who were frequently ousted.⁴⁰⁵ There was discord and discontent from the citizens of Sierra Leone towards the ruling class of the country.

The events that led to the commencement of the civil war began in 1991 when former army corporal, Foday Sankoh, initiated a militant campaign against then President Joseph Momoh. Leading the RUF, he seized communities bordering on Liberia. This strike was followed with the establishment of a multiparty system.⁴⁰⁶ Momoh's inability to eradicate the rebel groups formed the basis of Captain Valentine Strasser's successful *coup* in 1992. Subsequently in January 1996 Strasser was ousted in a military *coup* led by his defence minister Brigadier Julius Maada Bio. Then, in February 1996 Ahmad Tejan Kabbah was elected as president and he signed a peace deal with the rebels. In 1997 the peace agreement collapsed and in May, the army removed President Kabbah. Major Johnny Paul Koroma, who was incarcerated and anticipating the verdict of a treason trial, spearheaded the armed junta – the AFRC. Koroma suspended the constitution, banned demonstrations and abolished political parties.⁴⁰⁷

The RUF occupied Sierra Leone from neighbouring Liberia in 1991. The role of Liberia in the civil conflict of Sierra Leone was significant, as Liberia was at the time facing its own civil strife

⁴⁰³ “Who is Foday Sankoh?” <https://www.theguardian.com>, May 17 2000, <https://www.theguardian.com/world/2000/may/17/sierraleone>, (accessed April 4, 2018).

⁴⁰⁴ Boris Kondoch and Rita Sileck, “Special Court for Sierra Leone,” *Conflict Trends*, 1 (2001): 28, url: https://www.files.ethz.ch/isn/139637/ct_2001_1.pdf.

⁴⁰⁵ “BBC News: Sierra Leone Time Profile,” [www.bbc.com](http://www.bbc.com/news/world-africa-14094419) January 4, 2017, <http://www.bbc.com/news/world-africa-14094419>, (accessed June 6, 2017).

⁴⁰⁶ Ismail Rashid, “Student Radicals, Lumpen Youth and the Origins of the Revolutionary Groups in Sierra Leone,” in *Between Democracy and Terror: The Sierra Leone Civil War*, ed., Ibrahim Abdullah (South Africa, UNISA, 2004), 82.

⁴⁰⁷ Ibid.

and the two conflicts were interlocked from the beginning.⁴⁰⁸ Foday Sankoh aligned with the populist rhetoric of Charles Taylor⁴⁰⁹ whom he met and found common ground with in 1980. The two men became supporters of Libya's Muammar Qaddafi who met their needs with arms, guerrilla training, finances and anti-Western ideology. Sankoh would have not succeeded in his crusade without the assistance of both Taylor and the backing of Libya.⁴¹⁰

The RUF, young, embittered and enraged, sought to overthrow the endemic political corruption of the one-party state by the All People's Congress⁴¹¹ of Sierra Leone.⁴¹² The country faced constant widespread poverty and the educational system was weak. They were referred to as the "lumpen class."⁴¹³ They held Momoh responsible for their disempowerment.⁴¹⁴

The RUF did not have a clearly mandated political agenda and civilians were the primary target of their violence.⁴¹⁵ Their political image did not develop past an ambiguous populist statement.⁴¹⁶ The atrocities that characterised the RUF and AFRC's actions are frequently described as inhumane and brutal.⁴¹⁷ These crimes ranged from; forced conscription of child soldiers, rape,

⁴⁰⁸ Beth K. Dougherty, "Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone," *International Affairs* 80, no. 2 (2004): 314.

⁴⁰⁹ "Charles Taylor: Preacher, Warlord, President," [www.bbc.com](http://www.bbc.com/news/world-africa-12392062) September 26, 2013, <https://www.bbc.com/news/world-africa-12392062>, (accessed June 6, 2018).

⁴¹⁰ John L. Hirsch, *Diamonds and the Struggle for Democracy*, (London: Lynne Rienner Publishers, 2001), 31.

⁴¹¹ "Sierra Leone Profile – Timeline," [www.bbc.com](http://www.bbc.com/news/world-africa-14094419) July 13, 2017 <http://www.bbc.com/news/world-africa-14094419> (accessed December 17, 2017). In 1978 a new constitution for Sierra Leone promulgated a one-party state with the All Peoples Congress the only political party recognised legally.

⁴¹² Sara Wharton, "The Evolution of International Criminal Law: Prosecuting 'New' Crimes before the Special Court for Sierra Leone," *International Criminal Law Review* 11 (2011): 221.

⁴¹³ Ibrahim Abdullah, "Bush Path to Destruction: The Origin and Character of the Revolutionary United Front (RUF)," in *Between Democracy and Terror: The Sierra Leone Civil War*, ed., Ibrahim Abdullah (South Africa, UNISA, 2004), 45, 59. The lumpen class refers to youth the majority of whom are male unemployed and uneducated, who deal mostly in the black market or underground economy. Characteristically they are inclined towards illicit behavior, drugs and drunkenness. They are immoral and undisciplined. In the South East district rural Mende, where a great deal of the conflict flared, they were collectively referred to as *Njahungbia Ngonga* signifying riff raff, lumpen and unruly youths.

⁴¹⁴ Ibid.

⁴¹⁵ Kenneth A Rodman, "Justice is Interventionist: The Political Sources of the Judicial Reach of the Special Court of Sierra Leone," *International Criminal Law Review* 13 (2013): 67.

⁴¹⁶ Dougherty, "Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone," 315.

⁴¹⁷ Abdul Tejan-Cole, "Painful peace: Amnesty under the Lomé Peace Agreement in Sierra Leone," *Law, Democracy and Development* 3, no. 2 (1999): 239, 240., Ibrahim Abdullah, "Bush Path to Destruction: The Origin and Character of the Revolutionary United Front (RUF)," in *Between Democracy and Terror: The Sierra Leone Civil War*, ed., Ibrahim Abdullah, (South Africa, UNISA, 2004):59., Jimmy D. Kandeh, "In Search of Legitimacy: The 1996 Elections," in *Between Democracy and Terror: The Sierra Leone Civil War*, ed., Ibrahim Abdullah, (South Africa, UNISA, 2004):123., Lansana Gberie, "The 25 May Coup d'état in Sierra Leone: A Lumpen Revolt?" in *Between Democracy and Terror: The Sierra Leone Civil War*, ed., Ibrahim Abdullah, (South Africa, UNISA, 2004):145., Marda Mustapha and Joseph J. Bangura, ed, *Sierra*

forced marriages, mutilation, murder, theft and violence towards peacekeepers. The nature of these crimes reshaped the language of international law through the provisions made by the SCSL.⁴¹⁸

An illicit arms-for-diamonds trade that was highly lucrative fuelled the war. It sustained both the Liberian and Sierra Leonean wars. The RUF collaborated with rebel leader Taylor and continued after Taylor was elected president of Liberia in 1997. Sankoh answered to Taylor, as Taylor was his benefactor.⁴¹⁹ Taylor initiated the command of mutilating civilians, to prevent, physically, their ability to vote.⁴²⁰ The attempts to defend the civilian population were a failure. Frequently the Sierra Leone government forces would collaborate with the rebels. Together they would share in the spoils of the conflict. The Sierra Leone Army (SLA) officers earned the name sobels: soldiers by day and rebels by night.⁴²¹

Due to the lack of integrity within their own armed forces the government of Sierra Leone outsourced labour from a private South African security company called Executive Outcomes in April 1995.⁴²² Executive Outcomes assisted, armed and trained the Civil Defence Force (CDF) which originally consisted of traditional hunters known as the *kamajors* who had come together as a self-defence militia across communities in Sierra Leone. After the intervention by Executive Outcomes, the CDF operated as a government-backed militia answering to Sam Hinga Norman, deputy defence minister. They engaged in offensive strategies and successfully removed⁴²³ the RUF from Freetown, until Executive Outcomes' withdrawal in 1996.⁴²⁴

The CDF and Executive Outcomes created enough stability during the February 1996 presidential elections and in spite of the RUF terrorising the civilian population, the people were able to elect President Ahmed Tejan Kabbah a former UN official to office. President Kabbah prioritised ending the war and on 30 November 1996 the parties signed the Abidjan Agreement in which the RUF acceded to disarmament in exchange for blanket amnesty and with it, the removal of the

Leone beyond the Lomé Peace Accord, (New York, Palgrave Macmillan 2010): 2., Tejan-Cole, "Sierra Leone's 'not-so' Special Court," 231.

⁴¹⁸ Wharton, "The Evolution of International Criminal Law: Prosecuting 'New' Crimes before the Special Court for Sierra Leone," 225-239.

⁴¹⁹ Rodman, "Justice is Interventionist: The Political Sources of the Judicial Reach of the Special Court of Sierra Leone," 67.

⁴²⁰ Ibid.

⁴²¹ Hirsch, *Diamonds and the Struggle for Democracy*, 32.

⁴²² Ibid., 37.

⁴²³ Mustapha and Bangura, *Sierra Leone beyond the Lomé Peace Accord*, 3.

⁴²⁴ Hirsch, *Diamonds and the Struggle for Democracy*, 37.

Executive Outcomes. This ceasefire did not last and on 25 May 1997 President Kabbah was ousted in a *coup* led by the AFRC's Johnny Paul Koroma who had previously been jailed for another attempted *coup*.⁴²⁵ In October 1997 Koroma signed a peace agreement in Conakry, Guinea, for the instalment of Kabbah in exchange for blanket amnesty. However, the AFRC proved distrustful and resumed hostilities.⁴²⁶ These hostilities were briefly mitigated through the Abidjan Peace Accord.

4.2.1 The Abidjan Peace Accord

The Abidjan Peace Accord was an agreement of peace between the government of Sierra Leone and the RUF signed on 30 November 1996 in Abidjan, Côte d'Ivoire. The two prominent signatories were President Kabbah and Sankoh. In an attempt to stabilise the situation and promote peace it delivered the promise of amnesty⁴²⁷ to RUF rebels on the condition that they sign the agreement. It included with it, the termination of the conflict, creating avenues for the conversion of RUF into a recognised political party and implementing a scheme of socio-economic education and training, reform and restoration.⁴²⁸ Until that time, the RUF had wreaked havoc for five years, killing at least 10 000 people (but more likely in the vicinity of 30 000).⁴²⁹ During the brief time of ceasefire international donors such as the International Monetary Fund (IMF), World Bank and

⁴²⁵ Gberie, "The 25 May Coup d'état in Sierra Leone: A Lumpen Revolt?" 144-145.

⁴²⁶ Mustapha and Bangura, *Sierra Leone beyond the Lomé Peace Accord*, 3.

⁴²⁷ Matiangai Sirleaf, "Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation commission for Liberia," *Florida Journal of International Law* 21 (2009): 222. The common understanding was that the RUF would not concede to any peace agreement if the offer of full amnesty was not on the table. However, the UN stated that they did not pardon the egregious crimes defined by international law, these included: genocide, crimes against humanity and other serious violations of international humanitarian law. Therefore, there existed a provision determined by the UN that meant that the full pardon retained exceptions for punitive measures to be carried out against the RUF. Yet article XXVI of the Lomé agreement made provision for truth-telling mechanisms for both victim and perpetrator and therefore many RUF combatants understood that disclosure was being orchestrated in preference to retributive justice.

⁴²⁸ "The United Nations Peacemaker: Peace Agreement between the Government of the Republic of Sierra Leone and the RUF/SL (Abidjan Peace Agreement)," <https://peacemaker.un.org>, 2018, <https://peacemaker.un.org/sierraleone-peace-agreement-RUF96>, (accessed April 5, 2018).

⁴²⁹ Gberie, "The 25 May Coup d'état in Sierra Leone: A Lumpen Revolt?" 144.

bilateral donors⁴³⁰ invested over half a billion dollars in order to restore the economy and the country's infrastructure.⁴³¹

However, it was evident that neither actor possessed the desire to follow through with commitments to the Abidjan Peace Accord. After signing the agreement, a fragment faction of the RUF blamed Sankoh for attempting to renege on the peace agreement. They dissociated themselves from Sankoh and attempted to replace him as their leader. Sankoh was later arrested in Nigeria, where he fled, after being convicted for treason in Sierra Leone's high court.⁴³² The RUF blamed the government of Sierra Leone for his arrest. The implementation of the Abidjan agreement was not to be realised. This is due to Koroma violently overthrowing Kabbah's government in May 1997.⁴³³ The 25 May *coup* saw approximately 400 000 Sierra Leoneans leave the country to neighbouring Guinea, Liberia and Gambia.⁴³⁴

Following the *coup*, Koroma invited his former adversaries, the RUF, to the capital. This was to establish a governing coalition referred to as the AFRC. Koroma announced that they all belonged to the new junta. Sankoh, who was in detention in Nigeria, was the vice chairman of the AFRC. The RUF moved into the capital positioning themselves strategically and seized Freetown.⁴³⁵

The coalition was met with fierce opposition from the citizens, specifically the students and the international community. The resistance of the students was confronted with "merciless brutality"⁴³⁶ enforced by the junta-RUF alliance with the unfortunate consequence of many casualties. To subdue the fierce opposition to their regime, the junta signed a six-month peace plan on 23 October 1997, in Conakry, Guinea. The parties agreed to the following terms: cessation of hostilities; disarmament and demobilisation; return of refugees; unconditional immunities from

⁴³⁰ "Human Rights Watch: VII: International Response," www.hrw.org, undated, <https://www.hrw.org/reports/1999/sierra/SIERLE99-06.htm>, (accessed June 13, 2018). "In accordance with bilateral security accords, Nigerian and Guinean forces from ECOMOG have been stationed in Sierra Leone since 1995 to help the National Provisional Ruling Council (NPRC) under Valentine Strasser and, later, the Kabbah government fight the RUF rebels."

⁴³¹ Gberie, "The 25 May Coup d'état in Sierra Leone: A Lumpen Revolt?" 144.

⁴³² "World: Africa: Rebel Leader Foday Sankoh Sentenced to Death," <http://news.bbc.co.uk>, October 23, 1998, <http://news.bbc.co.uk/2/hi/africa/200082.stm>, (accessed October 1, 2018)

⁴³³ Mustapha and Bangura, *Sierra Leone beyond the Lomé Peace Accord*, 3.

⁴³⁴ Gberie, "The 25 May Coup d'état in Sierra Leone: A Lumpen Revolt?" 145.

⁴³⁵ Ibid., 144.

⁴³⁶ Mustapha and Bangura, *Sierra Leone beyond the Lomé Peace Accord*, 3.

prosecution; and the restoration of constitutional governance within six months.⁴³⁷ This was known as the Conakry Peace Plan.

4.2.2 The Conakry Peace Plan

The Conakry Peace Plan in 1997 was set up by ECOWAS (Economic Community of West African States). The agreement had a five-man committee. Delegates from both the then Organisation of African Unity (OAU) and the UN served as witnesses to the proceedings. Unlike the Abidjan agreement all parties committed to the reinstatement of Kabbah over a six-month period. The reinstated government would be all-inclusive, having delegates from the previously exiled administration and members from the RUF. However, the peace agreement came to an end before the specified six months after the Economic Community of West African States Monitoring Group (ECOMOG), whose duty was to observe the peace proceedings, banished the junta rule and its militias from Freetown. (In 1990, due to the Liberian conflict, ECOWAS established an armed monitoring group ECOMOG.)⁴³⁸ This was a forceful ejection, which resulted in mob killings of perceived supporters of the military junta in 1998. This also aggravated the acrimony between the soldiers and the junta against the government and civilians. After his restoration, President Kabbah broke up the military and prosecuted the *coup* plotters.

The disbandment of the army and the convictions of *coup* plotters was, strategically, a bad move. Attempts at reconciliation were jeopardised. It created another faction in the war composed of defector soldiers. With the army fractured, the crumbling central government depended on the Nigerian-dominated ECOMOG and the CDF for the defence of the capital. The new security role adopted by ECOMOG was a transition from peacekeepers to prominent players, especially from the perspective of the RUF. The ECOMOG was not capable of guarding the capital city when the joined strengths of RUF and AFRC junta invaded and captured parts of the capital city, Freetown, on 6 January 1999.⁴³⁹ This attack led directly to the LPA.

⁴³⁷ Ibid.
⁴³⁸ “Profile: ECOMOG,” [www.bbc.com](http://news.bbc.co.uk/2/hi/africa/country_profiles/2364029.stm), June 17, 2004, http://news.bbc.co.uk/2/hi/africa/country_profiles/2364029.stm (accessed December 20, 2017).
⁴³⁹ Ibid., 4.

4.3 The Lomé Peace Accord

On 6 January 1999 the RUF led by Foday Sankoh attacked Freetown in an attempt to seize it from ECOMOG. The outcome of these attacks resulted in approximately 6 000 people dead, injured or raped. The RUF named it “Operation - No Living Thing.”⁴⁴⁰ The destruction wrought in just one day brought everyone⁴⁴¹ to a realisation that the hostilities needed to end.⁴⁴² Subsequently, there was a consensus that the only sound solution was to pursue a strategy of steady diplomacy, based on resolution through negotiation and peace building processes.⁴⁴³

The actors invested in the peace talks were members of civil society. These members included: The Sierra Leone Inter-Religious Council, international groups such as the British-led International Contact Group on Sierra Leone, human rights groups and sectors of the government. All sides were invited to the peace talks.⁴⁴⁴ This aspect of inclusion was integral to the talks and indicated the high resolve and deep desire to move forward together. Although insightful this introduced a fresh array of challenges that included strategies of compromise and concessions.

The talks took place in the Togolese Capital, Lomé, for six weeks. The LPA was signed on 7 July 1999. It made provision for complete immunity and power-sharing within the government, assigning four cabinet positions to the rebels. As part of the agreement, Sankoh was given the position of vice president and director of Strategic Mineral Resources. This allotted him power over the very industry fuelling his illicit arms deals.⁴⁴⁵ Therefore, he was not just absolved of the atrocities he had committed but also rewarded for his actions. (There was no legally recognised justice for the gross atrocities he committed, no restitution for the victims, not even

⁴⁴⁰ Rodman, “Justice is Interventionist: The Political Sources of the Judicial Reach of the Special Court of Sierra Leone,” 69.

⁴⁴¹ Ibid. Of the intervening forces, Nigerian led ECOMOG fought an equally merciless three-week counter offensive, successfully capturing Freetown back., “Painful peace: Amnesty under the Lomé Peace Agreement in Sierra Leone,” <http://www.saflii.org>, 1999, <http://www.saflii.org/za/journals/LDD/1999/15.pdf>. The change of presidents in Nigeria due to the abrupt death of the autocrat Sani Abacha and the election of Olusegun Obasanjo meant a change in policy from involvement in ECOMOG to its withdrawal, therefore President Kabbah fearing the significant lack of support quickly conceded to peace negotiations with the RUF.

⁴⁴² Ekiyor, “Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective,” 154.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Rodman, “Justice is Interventionist: The Political Sources of the Judicial Reach of the Special Court of Sierra Leone,” 69.

acknowledgement). However, the ceasefire was soon disrupted and hostilities resumed, indicating the tenuousness of amnesty for a peace strategy.⁴⁴⁶

The LPA consisted of 37 articles and five annexures, this structure was similar to the Abidjan Agreement.⁴⁴⁷ Here again the RUF requested full pardon to negotiate a ceasefire. This blanket amnesty spurred great controversy⁴⁴⁸ as justice was traded off for peace. There was also an agreement⁴⁴⁹ to establish a SLTRC.⁴⁵⁰ It also began the first genuine discourse to post-conflict peace building. The Accord did address issues of disarmament, demobilisation and reintegration (DDR) and even though the RUF resisted disarmament, former combatants were for the most part disarmed by the time the SLTRC commenced. Yet, unfortunately because of this the combatants did not see a reason to contribute to the SLTRC proceedings.⁴⁵¹ The Accord was the first genuine discourse to begin post-conflict peace building. However, the RUF failed again to maintain a ceasefire and resumed attacks on civilians and UN peacekeepers.⁴⁵²

In May 2000 following the signing of the Accord, the RUF rebels captured 500 UN peacekeepers and held them hostage. Consequently, on 12 June 2000 President Kabbah wrote to the Secretary General, Kofi Annan, requesting assistance in prosecuting the RUF.⁴⁵³ The UN Secretary General reacted quickly and responded to Kabbah's request for the establishment of a court to prosecute the RUF. This was the birth of the SCSL. The SCSL was one of a handful of institutions established to assist legal proceedings towards national recovery.⁴⁵⁴ The national judiciary had been eliminated in the war that left the country's infrastructure in a state of ruin and Sierra Leone held the status of

⁴⁴⁶ Ibid., 64.

⁴⁴⁷ Hirsch, *Diamonds and the Struggle for Democracy*, 83.

⁴⁴⁸ "The United Nations Peacemaker: Peace Agreement between the Government of Sierra Leone and the RUF (Lomé Peace Agreement)," <https://peacemaker.un.org>, 2018, <https://peacemaker.un.org/sierraleone-lome-agreement99>, (accessed April 5, 2018). "the United Nations signed as a witness to the agreement with an explicit reservation stating that the United Nations does not accept immunity for war crimes and crimes against humanity." Sooka, "The Politics of Transitional Justice," 34.

⁴⁴⁹ Sirleaf, "Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation commission for Liberia," 222-223. "The blanket amnesty that the warring parties granted themselves in the Lomé Peace Agreement concomitant with the creation of the TRC-SL makes it clear that the warring parties envisioned the truth-telling process to be an alternative mechanism to trials."

⁴⁵⁰ Boraine, "South Africa's Truth and Reconciliation Commission from a Global Perspective," 140.

⁴⁵¹ Ibid., 142.

⁴⁵² James Sloan, "Peacekeepers under Fire: Prosecuting the RUF for Attacks against the UN Assistance Mission in Sierra Leone," *The Law and Practice of International Courts and Tribunals* 9 (2010): 243, doi: 10.1163/157180310X518352.

⁴⁵³ Dana, "The Sentencing Legacy of The Special Court for Sierra Leone," 622.

⁴⁵⁴ Tejan Cole, "Sierra Leone's 'not-so' Special Court," 230.

a failed state.⁴⁵⁵ After a two-year suspension and unfreezing of donor support, the negotiations were completed in January 2002, ensuring the establishment of the SCSL.⁴⁵⁶

4.4 Truth Telling: The Sierra Leone Truth and Reconciliation Commission

As noted in Chapter Three, there are four types of truths that are important aspects of reconciliation. These are: factual or forensic truth, personal or narrative truth, social truth and healing or restorative truth.⁴⁵⁷

Factual or forensic truth is truth that is revealed through evidence. Personal or narrative truth is the retelling of events. Social truth is truth established via an interactive dialogue after myths and lies have been discredited. Healing and restorative truth involves an acknowledgement of the pain that people have endured. Healing truth seeks to replace the narrative of revenge, anger and bitterness with one of hope for forgiveness and restoration.⁴⁵⁸ The SLTRC was mandated to “create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone.” It was intended to “address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.”⁴⁵⁹ Therefore the focus on the SLTRC was on healing and restoration.

The LPA specified the establishment of a Truth and Reconciliation Court.⁴⁶⁰ The SLTRC was intended to be in session for the year 2000 and was confronted with numerous challenges over that time. These challenges included issues of impartiality, politically based allegiances, lack of transparency, donor fatigue and the difficulty in overcoming the divided nature of the public after the war. Following a disorderly beginning, due to political allegiances, an absence of impartiality

⁴⁵⁵ Kenneth A Rodman, “Intervention and the ‘Justice Cascade’: Lessons from the Special Court of Sierra Leone on Prosecution and Civil War,” *Human Rights Review* 16 (2015): 43.

⁴⁵⁶ Rodman, “Justice is Interventionist: The Political Sources of the Judicial Reach of the Special Court of Sierra Leone,” 64.

⁴⁵⁷ Ekiyor, “Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective,” 159.

⁴⁵⁸ Ibid.

⁴⁵⁹ Boraine, “South Africa’s Truth and Reconciliation Commission from a Global Perspective,” 140.

⁴⁶⁰ Kondoch and Sileck, “Special Court for Sierra Leone,” 30.

and lack of transparency, the SLTRC then commenced with active public participation in July 2002. Before the SLTRC commencing, there was first the establishment of the interim secretariat.

4.4.1 The Interim Secretariat and the SLTRC

The first obstacle that the SLTRC had to overcome was establishing an interim secretariat. A feature of the secretariat was impartiality. Impartiality meant practising neutrality when considering commissioners. The role of the commissioners was to set up commissions of inquiry, to investigate human rights abuses. This model was based on the South African one.⁴⁶¹ The SLTRC Act mandated the setting up of a commission guided by an equitable and transparent process. It also emphasised that members of the commission be “persons of integrity and credibility who would be impartial in the performance of their functions” and that they “would enjoy the confidence generally of the people of Sierra Leone.”⁴⁶²

The Act mandated the process for nominations. It stipulated that the UNHCR recommend three international commissioners. It also required the Special Representative of the Secretary General in Sierra Leone, to select four national members. These four elected members would work with an advisory committee and a selection panel. President Kabbah was responsible for overseeing the final selections once the statutory process had been conducted.⁴⁶³ However, the process was interrupted due to a lack of transparency and political alignments, thwarting the independence of the commission.⁴⁶⁴

The independence of the commission was considered tenuous due to the divided nature of the social fabric at that time.⁴⁶⁵ Dominating the mind-set of all actors involved was the potential of the commissions to blame and name guilty parties in lieu of collecting factual truth that would provide evidence to prosecute those who bore the greatest responsibility. These bureaucratic obstacles characterised by affiliations of actors and their political alignments delayed the proceedings and recruitment procedures. A report of the UN Development Programme (UNDP) criticised the

⁴⁶¹ Ekiyor, “Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective,” 154.

⁴⁶² Ibid., 156.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid., 155.

⁴⁶⁵ Ibid., 156.

procedure stating that the secretariat was “redundant and unqualified.”⁴⁶⁶ The difficulties were further emphasised when violence resurfaced.⁴⁶⁷

The independence of the commission was further jeopardised due to international involvement. Its implementation was a development of the UNHRC in Geneva through collaboration with the UNDP office in Freetown. This was to assist with the administrative functions.⁴⁶⁸ The consequences of this collaboration caused bureaucratic postponements and conflicting priorities. There were different priorities that belonged to the agenda of the UNHRC, the UNDP and the citizens of Sierra Leone.

Another challenge was donor fatigue.⁴⁶⁹ This refers to an international donor’s unwillingness to deliver the required funding. This stops the outreach efforts required to assist local communities and peace building efforts. In 2000 the entire SLTRC process was forced into a two-year suspension because of donor fatigue. The United Kingdom, the main donor supporting the proceedings, froze its funding to the UNHRC⁴⁷⁰ because of constant violence resurgence.⁴⁷¹

In July 2002 the SLTRC began its proceedings.⁴⁷² The Truth and Reconciliation Commission Act in February 2000 created the SLTRC under Sierra Leonean law. It established communication plans directed at the public. The objectives were centred around basic education and media relations. Its role was to raise awareness of the commission’s mandate and to distinguish between the SLTRC and the SCSL. Another aspect of the proceedings was the Barray (Town Hall) Phase. This had separate phases; the statement taking phase, the hearings phase and the report writing phase. The Barray phase was conducted in all 12 districts by the administrative team of the SLTRC.

⁴⁶⁶ Beth K. Dougherty, “Searching for Answers: Sierra Leone’s Truth and Reconciliation Commission,” *African Studies Quarterly* 8, no. 1 (2004): 42. Beth refers to a United Nations Development Programme (UNDP) report with the findings that approximately one third of the members selected for the commission were, “unqualified and redundant” and that the “hiring process was seen as politically driven.”

⁴⁶⁷ Ekiyor, “Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective,” 156.

⁴⁶⁸ Ibid., 157.

⁴⁶⁹ Tejan-Cole, “Sierra Leone’s ‘not-so’ Special Court,” 233. This constant feature is also what Tejan-Cole refers to as “donor indifference.”

⁴⁷⁰ Ekiyor, “Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective,” 156.

⁴⁷¹ Christiana Solomon and Jeremy Ginifer, “Disarmament, Demobilisation and Reintegration in Sierra Leone,” *Center for International Cooperation and Security* (2008): 9.

⁴⁷² Marieke Wierda, Priscilla Hayner and Paul van Zyl, “Exploring the Relationship Between the Special Court And the Truth And Reconciliation Commission Of Sierra Leone,” *International Center for Transitional Justice*, 2002, 3, <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Court-TRC-2002-English.pdf>, (accessed March 16, 2018).

This gave the commissioners the chance to investigate all of the questions and issues that concerned local communities. The problems that the commissioners faced, however, included: poor reception, lack of proper communication and too short a time frame. These issues did compromise the overall mission of the Barray phase.⁴⁷³

The statement-taking phase began in December 2002, which took four months. After four months 7 706 statements had been gathered. This phase focused on victims, witnesses, perpetrators and others who gave statements on behalf of those unable to testify. A “sensitization campaign”⁴⁷⁴ was conducted in order to instruct people on the process of the court and to gather their personal testimonies. It was deemed impossible to collect evidence from all victims due to the sheer scale of the atrocities committed. However, those gathering testimonies did manage to gather from most of the chiefdoms; of 149 chiefdoms only nine were not covered due to difficult terrain and lack of adequate transportation. Therefore, the statement-taking phase can be understood as a success.⁴⁷⁵

The hearing phase also took up to four months. In each of the 12 districts the commissioners and the staff engaged in weeklong hearing sessions. This gave both victims and perpetrators the chance to share their experiences through testimonies. These hearings provided the opportunity for many Sierra Leonean’s to engage publicly for the first time about the trauma of war. The participatory process, which had also defined the SATRC proceeding, revealed the impact of truth telling as a transitional justice measure. The Sierra Leone civilians that were terrorised by the brutalities of the RUF, and made victims, were finally legally recognised and through acknowledgment, the country could attempt peace building. It also allowed them to recall their stories and have them recorded, institutionalised their experiences, so as not to be forgotten. This is the value of memory, an extension of the definition of transitional justice. However, not all were happy to testify as noted by a 29-year-old housewife named Hanna, who referred to her testimony at the SLTRC, as simply “add(ing) pepper in my wound.”⁴⁷⁶

Within each district was one day of closed sessions arranged specifically for victims of sexual abuse, or for those who did not want to speak in public. The testimonies were conducted on a one-

⁴⁷³ Ekiyor, “Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective,” 156.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid., 158.

⁴⁷⁶ Gearoid Millar, “Local Evaluations of Justice through Truth Telling^[1]” in Sierra Leone: Postwar Needs and Transitional Justice,” *Human Rights Review* 12, no. 4 (2011): 516, doi: 10.1007/s12142-011-0195-x

on-one basis and anonymity was assured.⁴⁷⁷ The turnout of the hearings phase was moderate. However, a realistic portrayal of the war was gained from the testimonies given.⁴⁷⁸

The SLTRC, which was initially implemented in the LPA, paved the way for the creation of the SCSL. The approach taken in Lomé was one of full amnesty in combination with a truth commission, without the possibility of prosecutions or civil suits and proved to be a failure in peace building strategy. The creation of the SCSL, therefore, represented a shift in the blanket amnesty approach.

Both the SCSL (discussed below) and the SLTRC fulfilled different albeit compatible duties concerning accountability. The SCSL was more retributive and punitive in its duties as it set out to prosecute those who bore the greatest responsibility – whereas the mandate of the SLTRC was to bear witness and to investigate the reasons, description and extent of atrocities endured and perpetrated. So, while both the court and the SLTRC examined patterns of violence the court's jurisdiction was specific to perpetrators and the SLTRC was focused more on truth from testimonies.⁴⁷⁹

In actuality truth commissions were viewed as an investigative aspect of the transitional process. The amount of information accumulated was the gathering of individual statements and tie in with the truth telling feature of transitional justice. Perpetrator testimony could provide vital insights about reasons for such violent and brutal behaviour during the conflict. However, section 21 (2) of the Special Court Act did not give absolute assurance that the information gained by perpetrator testimony would not be given to the SCSL.⁴⁸⁰

Having discussed truth telling, the next section will speak to issues of criminal justice.

⁴⁷⁷ Zoe Marks, "Sexual Violence in Sierra Leone's Civil War: 'Virgination', Rape, And Marriage," *African Affairs* 113, no. 450 (2013): 71.

⁴⁷⁸ Ekiyor, "Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective," 156.

⁴⁷⁹ Marieke Wierda, Priscilla Hayner, Paul van Zyl, "Exploring the Relationship Between the Special Court And the Truth And Reconciliation Commission Of Sierra Leone," *International Center for Transitional Justice*, 2002, 2, <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Court-TRC-2002-English.pdf>, (accessed March 16, 2018).

⁴⁸⁰ Ibid., 8.

4.5 Criminal Justice

Criminal justice refers to the failures of amnesty regarding the LPA and the punitive measures against those who bore greatest responsibility in the SCSL. Also, importantly for transitional justice is the legitimisation of international criminal justice and establishing a legal culture regarding the primacy of fundamental human rights.⁴⁸¹

Criminal justice therefore is applicable to the SCSL as the court, in solidarity with the UN secured justice and assisted in transforming the body of international law. It was vital to processes of reconciliation and peace that the SCSL have characteristics that included strength, credibility and alignment with international standards of justice, fairness and due process of the law.⁴⁸²

4.5.1 Criminal Justice: The Special Court for Sierra Leone

The government of Sierra Leone, and the UN in 2002, through the UNSC Resolution 1315, established the SCSL. The mandate of the 1315 Resolution was to try those who bore the greatest responsibility for human rights violations, committed in Sierra Leone from 30 November 1996.⁴⁸³ This date marked the Abidjan Peace Agreement, therefore, all human rights crimes committed from 1991 to 1996 were not legally recognised.⁴⁸⁴

It was important to preserve the jurisprudence of the court's legacy, as it demonstrated a functioning, efficient administrative model of criminal justice. This was because the national criminal justice system was failing, due to significant philosophical, conceptual, practical and operational issues. The UNSC understood the relevance of creating a model that would have a long sustaining legacy. This model would preserve the rule of law and support democratic

⁴⁸¹ Joseph F Kamara, "Preserving the Legacy for the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone," *Leiden Journal of International Law* 22 (2009): 763, doi: :10.1017/S0922156509990215.

⁴⁸² Wayne Jordash and Scott Martin, "Due Process and Fair Trial at the Special Court: How the desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone," *Leiden Journal of International Law* 23 (2010): 585.

⁴⁸³ Gerhard Anders, "Contesting expertise: Anthropologists at the Special Court for Sierra Leone," *Journal of the Royal Anthropological Institute* 20 (2014): 426.

⁴⁸⁴ Rodman, "Justice is Interventionist: The Political Sources of the Judicial Reach of the Special Court of Sierra Leone," 64.

institutions by providing ethical guidance on moral precedent. In addition, the national bench and bar sought legal expertise from the international influence (discussed below) within the SCSL.⁴⁸⁵ Looking to preserve the court's legacy focuses on three aspects of criminal justice: jurisdiction, procedural matters and case law development.⁴⁸⁶

The SCSL was regarded as a mixed institution due to its statute. It was comprised of both international law and Sierra Leonean law. Initially, there were issues regarding jurisdiction. It was the Appeals Chamber and the Supreme Court of Sierra Leone that settled the jurisdiction issues. The SCSL and the Sierra Leone judiciary were separate and distinct. The Supreme Court of Sierra Leone maintained that the SCSL was separate from the national judiciary as recognised by the constitution.⁴⁸⁷

The first draft of the agreement between the government of Sierra Leone and the UN stated that the SCSL would be comprised of three organs: The Office of the Prosecutor, The Registry and The Chambers. The court had two Trial Chambers and an Appeals Chamber.⁴⁸⁸ Each trial chamber had three judges, two of whom were selected by the UN Secretary General and the other by the government of Sierra Leone. The Appeals Chamber had five judges, three of whom were selected by the UN Secretary General and the other two by the government of Sierra Leone. The selection of international judges was aimed to reassure independence within the proceedings.⁴⁸⁹ The issue of amnesty was dealt with by the Appellate Chamber the highest judicial organ of the SCSL.⁴⁹⁰

However, the structure of the court's nominees was amended at the request of the Sierra Leone government. They requested that the judge be a representative of the Sierra Leonean government, instead of a Sierra Leone citizen. Therefore, the final result had one active Sierra Leonean judge.

⁴⁸⁵ Tejan-Cole, "Sierra Leone's 'not-so' Special Court," 236.

⁴⁸⁶ Kamara, "Preserving the Legacy for the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone," 761.

⁴⁸⁷ Ibid., 764.

⁴⁸⁸ Allieu I. Kanu and Giorgia Tortora, "The Legal Basis of the Special Court for Sierra Leone," *Chinese Journal of International Law* 3, no. 2 (2004): 523, doi: <https://doi.org/10.1093/oxfordjournals.cjilaw.a000533>.

⁴⁸⁹ Kondoch and Sileck, "Special Court for Sierra Leone," 30.

⁴⁹⁰ Kamara, "Preserving the Legacy for the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone," 764.

This was judge George Gelega-King who was selected to sit in the Chambers. It also had a former Sierra Leonean judge, Justice R Bankole-Thompson, selected to one of the Trials Chambers.⁴⁹¹

The Sierra Leone government elected Australian-born lawyer Geoffrey Robertson as its second nominee for the Appellate Chamber. Then, after the establishment of the second trial, Justice Richard Lussick from Samoa was selected as its nominee. According to the original draft, the deputy prosecutor of the Court was to be Sierra Leonean. However, after the subsequent request of the government of Sierra Leone, a Sri Lankan-born British Queen's Counsel, Sir Desmond de Silver was appointed deputy prosecutor. The SCSL's first Chief Prosecutor was the USA's David Crane.⁴⁹² Unfortunately, not only were Sierra Leoneans absent from senior positions of the court there were also no African-born members.⁴⁹³

One of the main successes of the SCSL was its contribution to the development of international criminal law.⁴⁹⁴ This was the first international criminal tribunal whose legal foundation was an agreement between the UN and a member state.⁴⁹⁵ This established a significant precedent for international criminal tribunals.⁴⁹⁶ It was the first time a court recognised and prosecuted forced marriage, the recruitment of child soldiers as well as attacks on UN peacekeepers.⁴⁹⁷ It was also the first recognised tribunal that recognised both national and international law.⁴⁹⁸ The court's definition of an amalgamation featured in both jurisdiction and composition. In spite of this no charges would be laid for any of the crimes under Sierra Leone Law.⁴⁹⁹ Therefore the jurisdiction of the SCSL lay in the international hands of the UN and the three organs of the SCSL – an Office of the Prosecutor, a Registry and The Chambers. According to the Appeals Chamber, "We affirm,

⁴⁹¹ Tejan-Cole, "Sierra Leone's 'not-so' Special Court," 234. Judge Justice R. Bankole -Thompson had left Sierra Leone in the 1980s to lecture in the United States.

⁴⁹² Phoebe Knowles, "The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective," *International Criminal Law Review* 6 (2006): 391.

⁴⁹³ Tejan-Cole, "Sierra Leone's 'not-so' Special Court," 234.

⁴⁹⁴ Friederike Mieth, "Bringing Justice and Enforcing Peace? An Ethnographic Perspective on the Impact of the Special Court for Sierra Leone," *International Journal of Conflict and Violence* 7, no. 1 (2013): 11.

⁴⁹⁵ Dana, "The Sentencing Legacy of The Special Court for Sierra Leone," 618.

⁴⁹⁶ John L. Hirsch, "Peace and Justice: Mozambique and Sierra Leone Compared," in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009): 214.

⁴⁹⁷ Charles Chernor Jalloh, "Special Court for Sierra Leone: Achieving Justice?" *Michigan Journal of International Law* 32 (2011): 445.

⁴⁹⁸ Mieth, "Bringing Justice and Enforcing Peace? An Ethnographic Perspective on the Impact of the Special Court for Sierra Leone," 11.

⁴⁹⁹ Tejan-Cole, "Sierra Leone's 'not-so' Special Court," 233.

as we decided in the Constitutionality Decision, that the Special Court is not a national Court of Sierra Leone and not part of the Judicial system of Sierra Leone exercising judicial powers of Sierra Leone.”⁵⁰⁰

The laws that were given provision in the SCSL draft statute are now recognised as Customary International Law. Customary International Laws are specific features of international law that study the principles of custom. In addition, with general principles of law and treaties, custom is considered by the ICJ, jurists, the UN and its member states to belong to the primary sources of international law. Rules of customary international law bind all states.⁵⁰¹

The SCSL has contributed to the development of substantive international criminal law specifically regarding the recruitment of child soldiers and also gender-based crimes.⁵⁰² An integral feature of the civil war fought in Sierra Leone was the widespread forced recruitment of child soldiers.⁵⁰³ In May 2004 the SCSL decreed that an individual would be held criminally responsible if they recruited children into armed conflict.⁵⁰⁴ The prosecutor focused directly on gender-based crimes and guaranteed that they were to be fully investigated, charged and prosecuted.⁵⁰⁵ Within the Statute of Sierra Leone, defining sexual slavery as a crime against humanity allows for a significant recognition of this type of human rights violation.⁵⁰⁶ The inclusion of this human rights crime in the statute of the SCSL cemented the notion and assisted in developing the international norm recognising sexual slavery as a punishable offence.⁵⁰⁷ In addition, when the Trial Chamber of the SCSL approved the addition of forced marriage to the counts within the indictment charge against leaders of both RUF and AFRC in the proceedings of

⁵⁰⁰ Kamara, “Preserving the Legacy for the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone,” 764.

⁵⁰¹ “Introduction to International Law Robert Beckman and Dagmar Butte,” www.ilsa.org, 2009, <https://www.ilsa.org/jessup/intlawintro.pdf>. (accessed on January 14, 2018).

⁵⁰² Sriram, “Transitional Justice and Peacebuilding,” 9., Wharton, “The Evolution of International Criminal Law: Prosecuting ‘New’ Crimes before the Special Court for Sierra Leone,” 218.

⁵⁰³ Gus Waschefort, “Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone,” *International Humanitarian Legal Studies* 1 (2010): 190.

⁵⁰⁴ Tejan-Cole, “Sierra Leone’s ‘not-so’ Special Court,” 230.

⁵⁰⁵ Valerie Oosterveld, “The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments,” *Cornell International Law Journal* 44 (2011): 50.

⁵⁰⁶ Lyn S. Graybill, “Partial Justice and Reconciliation for Sierra Leone Women but Reparations and Reform Remain Elusive” *Emerald Insight* 32 (2011): 104.

⁵⁰⁷ Sheila Meintjes, “Gender and Truth and Reconciliation Commissions: Comparative Reflections,” in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009): 96, 97, 106, 107.

the SCSL, this furthered the development of international criminal law.⁵⁰⁸ The category of other inhumane acts now contains the addition of forced marriage within the legal definition of crimes against humanity.⁵⁰⁹

A fundamental issue that needed to be addressed was the process of prosecuting juvenile offenders. These were children conscripted as child soldiers.⁵¹⁰ This issue was discussed thoroughly by the government of Sierra Leone and the UN. The UN assumed the responsibility for disarming the offenders.⁵¹¹ It was a debate that all sectors invested in. Civil society wanted children to be prosecuted and NGOs in childcare and rehabilitation programmes objected to the prosecution of minors below the age of 18, as they felt it would disrupt their efforts at rehabilitation. Article 7 of the court extended jurisdiction to people over the age of 15. Those between 15 and 18 were assured special treatment considering their youth and the willingness of the perpetrator to be rehabilitated and reintegrated back into the community.⁵¹²

Operation Justice was an initiative to arrest the first suspects indicted by the SCSL. This plan of action was formulated by SCSL first prosecutor David Crane and assisted by both the United Kingdom and the United States embassies but not by Sierra Leone for the strategic move of keeping the offenders unaware of their impending arrest. The operations performed systematically with one arrest-taking place within an hour of the next. The execution of the arrests was carried out by the Sierra Leonean police force and security supported by UN Assisted Mission to Sierra Leone (UNAMSIL) and including British and American military.

As soon as the court was functioning the SCSL issued arrest warrants for Charles Taylor and 12 Sierra Leonean leaders from the three main armed sectors; the Civil Defence Forces (CDF), the RUF and AFRC, only two were not taken into custody.

The indictment of former deputy defence minister Sam Hinga Norman elicited the most controversy. He belonged to the CDF a militia that fought on behalf of the Sierra Leonean government but was also responsible for the recruitment of child soldiers and collaborating with

⁵⁰⁸ Wharton, "The Evolution of International Criminal Law: Prosecuting 'New' Crimes before the Special Court for Sierra Leone," 227-229.

⁵⁰⁹ Tejan-Cole, "Sierra Leone's 'not-so' Special Court," 230.

⁵¹⁰ Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone," 190, 195.

⁵¹¹ Solomon and Ginifer, "Disarmament, Demobilisation and Reintegration in Sierra Leone," 7.

⁵¹² Kondocho and Sileck, "Special Court for Sierra Leone," 32.

the RUF and AFRC. Unfortunately, the civilian population of Sierra Leone saw Norman as their defender and did not receive news of his indictment well. Consequently, because of fears of violent backlash and reprisal Norman was kept in custody in an undisclosed location and his first court appearance took place in a closed session. Both Norman and Sankoh died before the completion of their trials.

The AFRC trial judgment was issued on 20 June 2007 and considered a success for the Office of the Prosecutor.⁵¹³ The three accused were found guilty and convicted on 11 of the 14 counts listed in the indictment. First accused Alex Tamba Brima along with Santigie Borbor Kanu the third accused, were sentenced to 50 years imprisonment respectively, while Ibrahim Bazy Kamara was sentenced to 45 years imprisonment.

On 2 August 2007 the CDF Trial Judgment was delivered. Then, the CDF Appeal Judgment dispensed on 28 May 2008 and markedly amended the prison terms delivered to Moinina Fofana by an increase of six years and Allieu Kondewa by an increase of 15 and 20 years. Judgment was dispensed to the RUF on 25 February 2009; Issay Sesay was given 52 years imprisonment, Moris Kallon was handed down 40 years imprisonment and August Gbao a 25-year imprisonment. The SCSL fulfilled its expectations regarding the transitional justice feature of criminal justice. The indictments will serve as deterrence to future leaders of conflict. However, the SCSL only prosecuted nine men, leaving unresolved questions of whether criminal justice was properly executed, as noted by Dana:

150,000 human beings slaughtered; 200,000 women raped; thousands of limbs amputated; countless children forced to kill their own parents, forced into sexual slavery, and forced into the battlefields; and 2.6 million persons displaced. These are just some of the gruesome realities of an unforgiving war that consumed Sierra Leone for more than ten years. There is another number of significance: Nine. That is the number of individuals held criminally responsible for these atrocities. After ten years and spending an estimated \$250 million dollars, the Special Court for Sierra Leone (SCSL) convicted and sentenced just nine men.⁵¹⁴

⁵¹³ Karama, "Preserving the Legacy for the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone," 762.

⁵¹⁴ Dana, "The Sentencing Legacy of The Special Court for Sierra Leone," 617.

4.5.2 Criminal Justice: The Role of Liberia and Indictment of Charles Taylor

Charles Taylor's arrest was also met with controversy in spite of the agreement of all actors that he was a key player in creating instability in Sierra Leone. In June 2003 chief prosecutor Crane announced Taylor's 17-count indictment, while Taylor was attending diplomatic peace negotiations, in Accra the capital of Ghana.⁵¹⁵ The negotiations were sponsored by ECOWAS and were mandated to stop the civil war in Liberia. The actors invested in the negotiations were afraid that the call for Taylor's arrest would disrupt the proceedings. Crane justified his announcement by stating that Taylor was a war criminal and should not be accepted into peace talks.⁵¹⁶ Although there was initial dissent, the decision by the SCSL to indict Taylor was approved by the SCSL's Trial Chamber in March 2003.⁵¹⁷

In 2003 Taylor sought exile in the Southeastern city of Calabar in Nigeria after stepping down from the presidency of Liberia.⁵¹⁸ He was arrested in Nigeria and brought before the SCSL in March 2006. There were issues of the potential disturbance that Taylor's presence in the region might create, however, according to Crane "justice will not only be done but it will be seen to be done."⁵¹⁹

On 31 May 2004 the Appeals Chamber of the SCSL ruled that Charles Taylor was not to receive immunity from prosecution even though as contended by his counsel he was the incumbent head of a sovereign state. During that time the prosecutor David Crane issued criminal charges against him. In March 2006 Taylor was arrested in Nigeria during a time of enforced exile and moved to the SCSL. This is argued to be the most important development and success of the SCSL. The

⁵¹⁵ Abdul Rahman Lamin, "Charles Taylor, the Special Court for Sierra Leone and International Politics," in *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, ed, Chandra Lekha Sriram and Suren Pillay (Cape Town: KwaZulu-Natal Press, 2009), 250.

⁵¹⁶ Rodman, "Intervention and the 'Justice Cascade': Lessons from the Special Court of Sierra Leone on Prosecution and Civil War," 48.

⁵¹⁷ Lamin, "Charles Taylor, the Special Court for Sierra Leone and International Politics," 256.

⁵¹⁸ Kamara, "Preserving the Legacy for the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone," 765.

⁵¹⁹ Lamin, "Charles Taylor, the Special Court for Sierra Leone and International Politics," 257.

SCSL then requested the Netherlands and the ICC for the trial to be handled in The Hague. On 20 June 2006, Taylor was transferred to the ICC; the trial began there a year later.⁵²⁰

In June 2007 Taylor was brought before the ICC in The Hague to ensure that his presence in Sierra Leone did not incite his supporters to violence.⁵²¹ Even though the case was in The Hague it was still under the jurisdiction of the SCSL.⁵²² The hearing of evidence commenced on 7 January 2008 and 91 witnesses were called. On 4 May 2009 the Trial Chamber completely disregarded a motion for acquittal filed by the defence.⁵²³ In April 2012 Taylor was convicted of war crimes and crimes against humanity, including aiding and abetting the crimes of murder, rape, conscripting child soldiers, and sexual slavery during Sierra Leone's civil war throughout the 1990s. He was sentenced to serve 50 years in jail. The last time a high-ranking official was tried, convicted and sentenced by an international tribunal was during the Nuremburg trials.⁵²⁴ In October 2013 he arrived in the United Kingdom, Durham, to serve out his prison sentence.⁵²⁵

The indictment, sentencing and imprisonment of Charles Taylor were successful implementations of criminal justice. Criminal justice provides accountability to those who commit crimes against humanity. Crane took a risk in indicting Taylor and was initially met with opposition. However it paid off as Taylor's incarceration has demonstrated to the world that there are consequences for those specific actions.

4.6 Reparations

Reparations to victims are a vital aspect of Sierra Leone's journey with transitional justice. Reparations are a prerequisite feature to assist in the building of peace and stability of a nation in transition. It is also integral to establishing national trust and enhancing rehabilitation. The SLTRC

⁵²⁰ Giulia Bigi, "The Decision of the Special Court for Sierra Leone to Conduct the Charles Taylor Trial in The Hague," *The Law and Practice of International Courts and Tribunals* 6 (2007): 303.

⁵²¹ "Charles Taylor: Preacher, Warlord, President," [www.bbc.com](http://www.bbc.com/news/world-africa-12392062), September 26, 2018, <http://www.bbc.com/news/world-africa-12392062>, (accessed December 20, 2017).

⁵²² Kamara, "Preserving the Legacy for the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone," 762.

⁵²³ Ibid.

⁵²⁴ Kimberly A. Hardtke, "The Actions of One, The Responsibility of A Nation: Charles Taylor's Conviction by The Special Court for Sierra Leone and its Impact on State Responsibility Claims Against Liberia," *Wisconsin International Law Journal* 31, no. 4 (2014): 910.

⁵²⁵ "Is ex-warlord Charles Taylor pulling Liberia's election strings from prison?" <http://www.bbc.com>, October 6, 2017, <http://www.bbc.com/news/uk-41509896> (accessed April 7, 2018).

acknowledged the significant role of reparations in long-term sustainability of peace and stability when it delivered wide-ranging proposals for reparations in its final report. Consistent with this, the UN and the government of Sierra Leone acknowledged reparations as a key aspect needing focused attention that was the driving objective underlying the Year One initiative in August 2008. The focus of this initiative was to develop the institutional capacity required to implement the TRC recommendations. The initiative received a US\$3 million funding grant from the UN Peace Building Fund (UNPBF) and its recipient organisation, the International Organisation for Migration (IOM) and was to be implemented via the National Commission for Social Action (NaCSA), a governmental organisation.⁵²⁶

4.6.1 The Sierra Leone Reparations Programme and the One Year Project

From 2009 - 2013 the Sierra Leone Reparations Programme (SLRP) delivered reparations to approximately 32 000 injured parties including amputees, victims of sexual violence, widows, orphans and those severely wounded. The SLRP was conceived by the TRC of Sierra Leone in 2004 two years after the war. Section 15(2) of the Truth and Reconciliation Commission (TRC) Act 2000 mandated the commission to make recommendations that would address victims' priorities promote recovery and assist in reconciliation. Ultimately, when the SLTRC Report was published in October 2004, following two years of investigation, it recommended that reparation "provide redress to the victims of human rights violations." It is also sought to assist victims in recovery through delivering "service packages and symbolic measures which acknowledge the past and the harm done to victims and gives them the opportunity to move on."⁵²⁷ However, this was not always the case as, as was noted for example in the opinion of Aminata, a young woman trying to raise a family in post war Makeni; the TRC failed to provide anything that was needed. As she said, the TRC "brought money saying they are coming to sponsor people that have been

⁵²⁶ "Report and Proposals for the Implementation of Reparations in Sierra Leone," <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf> (accessed March 23, 2018).

⁵²⁷ "Repairing Post Conflict Sierra Leone: What is Happening to the Reparations programme," <http://www.carl-sl.org/pres/repairing-post-conflict-sierra-leone-what-is-happening-to-the-reparation-programme/> (accessed March 23, 2018).

offended during the war and I have not seen anything, I have not seen them doing any serious thing.”⁵²⁸

The SLTRC recommended an implementation of a comprehensive programme. With the assistance of the international community, more specifically the UNPBF, implementation included the recommendations of the TRC into the wider picture of the Sierra Leone peace building priority plan.⁵²⁹ On 16 December 2005 following 16 years of investigation, inquiry and examination the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation. Sierra Leone was implicit in this procedure.⁵³⁰

One of the main aspects of the SLRP was the formation of a victim’s trust fund. In March 2005, a majority of those attending and contributing to the National Victims Commemorations Conference insisted on the execution of the reparations programme, including the creation of the Trust Fund.⁵³¹ In addition, to assist in executing the reparations programme, an Action Plan Monitoring Group was established. The monitoring group has not recorded any advancement of the scheme besides a multitude of meetings engaged in by numerous key actors invested in the programme, including the recent meeting held with Vice President Berewa in 2016.⁵³²

The IOM was an international actor requested to assist in delivering “programmatic and fiduciary oversight to the country’s newly established Reparations Directorate in the National Commission for Social Action (NaCSA) for designing and implementing the SLRP.”⁵³³ The NaCSA is a

⁵²⁸ Millar, “Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice,” 516.

⁵²⁹ “Support to the Implementation of the Sierra Leone Reparations Programme (SLRP), [https://www.iom.int, undated, https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Support-to-the-Implementation-of-the-Sierra-Leone-Reparations-Programme-SLRP.pdf](https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Support-to-the-Implementation-of-the-Sierra-Leone-Reparations-Programme-SLRP.pdf) (accessed March 23, 2018).

⁵³⁰ “Repairing Post Conflict Sierra Leone: What is Happening to the Reparations programme,” <http://www.carl-sl.org>, 11 August 2016, <http://www.carl-sl.org/pres/repairing-post-conflict-sierra-leone-what-is-happening-to-the-reparation-programme/> (accessed March 23, 2018).

⁵³¹ Ibid.

⁵³² Ibid.

⁵³³ “Support to the Implementation of the Sierra Leone Reparations Programme (SLRP), [https://www.iom.int, undated, https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Support-to-the-Implementation-of-the-Sierra-Leone-Reparations-Programme-SLRP.pdf](https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Support-to-the-Implementation-of-the-Sierra-Leone-Reparations-Programme-SLRP.pdf) (accessed March 23, 2018).

governmental organisation and a chief player implementing reparations. In September 2018, the NaCSA began distributing the “long outstanding”⁵³⁴ funds to 8 045 widows of war.⁵³⁵

In August 2008 the UN and the government of Sierra Leone implemented the Year One project in addition to the SLRP. The objective of the project was directed towards enhancing the “institutional capacity needed to implement the TRC recommendations.”⁵³⁶ The Year One project was granted US\$3 million from the UNPBF and the IOM. The funding grant was to be installed through the NaCSA.⁵³⁷ The grant was governed by specific provisions including the proviso that the grant be implemented within the duration of one year and that 75% had to be given directly to the victims.

Unfortunately, the time stipulation hindered the capacity of the programme but was necessary due to the amount of resources allotted to the reparations programme. Aspects of the programme that were affected included the incomplete registration that failed to encompass all victims and the failure to compose “a fully-conceptualised framework”⁵³⁸ that could assist in the legislation and policymaking process. In spite of this, the programme proved valuable as both experience and insights were gained as valuable lessons from all parties involved and invested.

The categories of reparations applied via the Year One plan to victims comprised of: educational support (excluding those attending the DDR programme), free fistula surgery, HIV/AIDS and STI testing, free health care and counselling and psychological support.⁵³⁹ Benefits of the SLRP included, *inter alia* cash grants, medical treatments, vocational training and symbolic reparations via building institutional capacity for rehabilitation in the community. In addition, the IOM constantly delivered technical assistance and legal expertise to better enable the NaCSA’s ability to apply the SLRP.

⁵³⁴ “War Widows in Sierra Leone: NaCSA to the rescue,” <http://www.thepatrioticvanguard.com>, September 14, 2018, <http://www.thepatrioticvanguard.com/war-widows-in-sierra-leone-nacsa-to-the-rescue>, (accessed October 1, 2018).

⁵³⁵ “Sierra Leone begins reparation exercise for war widows,” <http://apanews.net>, September 5, 2018, <http://apanews.net/en/news/sierra-leone-begins-reparation-exercise-for-war-widows>, (accessed October 1, 2018).

⁵³⁶ “Report and Proposals for the Implementation of Reparations in Sierra Leone,” <https://www.ictj.org>, December 2009, <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf> (accessed March 23, 2018).

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹ Ibid.

From 2013-2014 the NaSCA delivered an all-inclusive package to 1 300 amputees and those classified as severely wounded. The packages were comprised off rehabilitation grants that were “accompanied by adequate income generation and financial management training.”⁵⁴⁰

In spite of efforts undertaken by all stakeholders a portion of the TRC recommendations still remain to be carried out. The reason for this is the allocation of limited resources on both a national and international level.⁵⁴¹ However, the IOM continues to support the NaSCA Reparations Directorate’s capacity through advocacy, promotion and delivery.

In a 2016 broadcast on the UN Radio breakfast show; the Deputy Commissioner of NaCSA stated that they had already started implementing aspects of the reparation. While the Sierra Leone Court Monitoring Program commended the work of the commission citing their role in post-conflict reconstruction, it also wanted to establish the distinction between typical governmental responsibility and reparations. The repainting of schools and hospitals continues to be primarily a governmental duty, while giving victims (whose ability to create wealth for themselves was dramatically reduced) and their families complete access to education and health facilities at no cost may be treated as reparation. Both roles are to be performed by the government but must not be confused or lumped together.⁵⁴²

Currently the Reparations Programme has a lot of work needing to be done in order to truly impact and improve the lives of victims. Those who suffered and were physically incapable of living a normal life have been relocated. However, the onus is on the government to determine a more aggressive course of action for reparations to noticeably make a difference.⁵⁴³ According to Suma,

The victims need free access to medical facilities, their children need to be given free quality education, those who can no longer work need to be given their monthly pension, and those who can, needs to be capacitated etc. However, as the Program stands now, there is so much to do. The SLCMP, therefore, wants to urge the Government and all

⁵⁴⁰ “Support to the Implementation of the Sierra Leone Reparations Programme (SLRP)”, <https://www.iom.int>, undated, <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Support-to-the-Implementation-of-the-Sierra-Leone-Reparations-Programme-SLRP.pdf> (accessed March 23, 2018).

⁵⁴¹ “Report and Proposals for the Implementation of Reparations in Sierra Leone,” <https://www.ictj.org>, December 2009, <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf> (accessed March 23, 2018).

⁵⁴² “Repairing Post Conflict Sierra Leone: What is Happening to the Reparations programme,” <http://www.carl-sl.org>, 11 August 2016, <http://www.carl-sl.org/pres/repairing-post-conflict-sierra-leone-what-is-happening-to-the-reparation-programme/> (accessed March 23, 2018).

⁵⁴³ Ibid.

stakeholders to put their hands-on deck so as to speed up the implementation of the reparations.⁵⁴⁴

4.7 Institutional Reform in Post-Conflict Sierra Leone

In the wake of the civil war, Sierra Leone was in a dire condition socially, politically and economically. According to the UN Human Development Index it has ranked as one of the last of 182 countries from 2000.⁵⁴⁵ The war demolished the network of infrastructure, civic facilities and institutions that promoted public services. The government was confronted with an institutional vacuum. However, on the positive side, the public was willing to work towards rehabilitation and restructuring and to engage in preventive measures to ensure that the violence did not re-emerge.⁵⁴⁶

The security sector reform process of Sierra Leone is essential to securing peace in the country. Security sector reform (SSR) is a nation-wide, state owned endeavour with the objective to safeguard justice and security. SSR is responsible for keeping the institutions of justice, military and law accountable to the citizens and state; deliver affordable, effective services and function within the rule of law.⁵⁴⁷ The main objective of the security sector is to protect citizens. Strengthening the national security facilitates serves as a significant preventative measure to deter future conflict.⁵⁴⁸ Sierra Leone's frail security sector in 1991 failed to defend to country against the advancing rebels.⁵⁴⁹

Strengthening the Sierra Leone Police (SLP) force was at the forefront of post war restructuring. In 1998⁵⁵⁰ the government initiated a Police Charter, which explained the position of the SLP in relation to the citizens and government, highlighting safety, responsibility, protecting human

⁵⁴⁴ Ibid.

⁵⁴⁵ Solomon and Ginifer, "Disarmament, Demobilisation and Reintegration in Sierra Leone," 6.

⁵⁴⁶ Katherine Casey, Rachel Glennerster and Edward Miguel, "Healing the Wounds: Learning from Sierra Leone's Post-War Institutional Reforms," *NBER Working Paper Series* (2012): 8 www.nber.org/papers/w18368.

⁵⁴⁷ "Introduction to Security Sector Reform," www.unitar.org, 2019, <https://www.unitar.org/event/full-catalog/introduction-security-sector-reform-ptp201601e>, (accessed May 1, 2019).

⁵⁴⁸ "Institute for Security Studies: Security Sector Reform in Sierra Leone," <https://issafrica.org>, May 2007, <https://issafrica.org/chapter-2-security-sector-reform-in-sierra-leone-osman-gbla>, (accessed May 1, 2019).

⁵⁴⁹ Ibid.

⁵⁵⁰ Peter Alexander Albrecht, "Transforming Internal Security in Sierra Leone: Sierra Leone Police And Broader Justice Sector Reform," *Danish Institute for International Studies* (2010): 11.

rights, preventing crime and addressing local needs.⁵⁵¹ The government and the security and justice sector had to have international recognition and state building initiatives had to be synonyms with peace building.⁵⁵² The SLP and by extension the justice sector and all aspects of SSR was chiefly funded by the UK, therefore the process was heavily influenced by UK policies.⁵⁵³ The intervention of Sierra Leone is considered to be a success due to the long term “buy-in”⁵⁵⁴ of UK institutions, which has been developing SSR for a decade.⁵⁵⁵ The UK, via its Department for International Development (DFID) advanced a security sector program for countries prone to volatility and violence, pioneering its program in Sierra Leone.⁵⁵⁶ The DFID worked in collaboration with the UN Development Programme (UNDP), the World Bank and the African Development Bank.⁵⁵⁷ Their objectives involve: strengthening capacities of institutions, decentralisation and devolution of power, safeguarding judicial institutions and safeguarding the rule of law.⁵⁵⁸ The SSR program has successfully secured public safety, however the economy is the largest threat to the nation, as the unemployed youth primarily made up the lumpen class. The economy needs resolve to prevent another wave of young rebels.⁵⁵⁹

The government of Sierra Leone, with key invested actors, embarked on an ambitious scheme in 2004, detailing institutional reform together with economic development. The objectives of the scheme focused on strengthening the economy and promoting growth while rebuilding the institutions of governance, emphasising decentralisation and the three pillars of effective democracy; accountability, transparency and inclusiveness of institutions.⁵⁶⁰ The aim of an

⁵⁵¹ “Institute for Security Studies: Security Sector Reform in Sierra Leone,” <https://issafrica.org>, May 2007, <https://issafrica.org/chapter-2-security-sector-reform-in-sierra-leone-osman-gbla>. (accessed May 1, 2019).

⁵⁵² Peter Alexander Albrecht, “Transforming Internal Security in Sierra Leone: Sierra Leone Police And Broader Justice Sector Reform,” 11.

⁵⁵³ Ibid.

⁵⁵⁴ Paul Jackson and Peter Alexander Albrecht, *Reconstructing Security after Conflict Security Sector Reform in Sierra Leone* (United Kingdom: Palgrave Macmillan UK, 2011) 171, 172.

⁵⁵⁵ Peter Alexander Albrecht, “Transforming Internal Security in Sierra Leone: Sierra Leone Police And Broader Justice Sector Reform,” 12.

⁵⁵⁶ “Institute for Security Studies: Security Sector Reform in Sierra Leone,” <https://issafrica.org>, May 2007, <https://issafrica.org/chapter-2-security-sector-reform-in-sierra-leone-osman-gbla>. (accessed May 1, 2019).

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹ Paul Jackson and Peter Alexander Albrecht, *Reconstructing Security after Conflict Security Sector Reform in Sierra Leone*, 96.

⁵⁶⁰ Sierra Leone - Institutional Reform and Capacity Building Project, <http://documents.worldbank.org>, April 14 2004, <http://documents.worldbank.org/curated/en/962241468759854264/pdf/283150SL.pdf> (accessed April 8, 2018).

inclusive and participatory government is comprised of a couple of main features, first, ensuring accountability focuses on delivering appropriate conduits to effectively channel government and donor resources aimed at the reconstruction of public infrastructure and the restoration of basic services. Second, allowing for public participation to enable citizens to engage with government, calling attention to incompetence and corruption. It also provides the opportunity to confront and mend long-standing social tension.⁵⁶¹

The main political reforms focused on the restoration of multiparty democracy and the reconstitution of local government following over 30 years of inactivity. The National Electoral Commission administered free and fair elections for parliament and presidency in 2007 and for the 19 Local Councils in 2004 and 2008. Implementing these reforms ensured the revival of competitive democracy at national-, district- and ward-level institutions. A noteworthy example of effective change was demonstrated by the peaceful relocation of power from the reigning SLPP regime to the opposition APC in 2007. A report by Freedom House, the NGO watchdog referred to the NEC (National Electoral Commission) stating that they, “functioned with remarkable independence and helped to ensure the success of the balloting, despite postponements and other difficulties.”⁵⁶²

A local government Act 2004 was enacted in February 2004. This legislation was ground-breaking concerning intergovernmental relations in Sierra Leone. It included a new assignment of functional duties, financial responsibilities and an accountability framework across numerous levels of government. It gave local councils independence and authority in financial and human resource management. In addition, it insisted on transparency and accountability in council operations.⁵⁶³ This Act was the first step to decentralising the government. Decentralisation empowers citizenry and provides avenues to assist in effectively administering communication between citizens and government. Regarding public goods, economically it is beneficial to decentralise service provision to local governments that are more informed about the local public.

⁵⁶¹ Casey, et al, “Healing the Wounds: Learning from Sierra Leone’s Post-War Institutional Reform,” 1.

⁵⁶² Ibid, 9.

⁵⁶³ Sierra Leone - Institutional Reform and Capacity Building Project, <http://documents.worldbank.org>, April 14 2004, <http://documents.worldbank.org/curated/en/962241468759854264/pdf/283150SL.pdf> (accessed April 8, 2018).

According to Casey “by reducing the (geographic and bureaucratic) distance between frontline service providers and managers, decentralization can further reduce cost of supervision and increase the speed and efficiency with which managers respond to needs on the ground.”⁵⁶⁴ These avenues of administration are particularly poignant considering the wreckage that is the communication and transportation networks which prevents central governments to confront rural challenges.⁵⁶⁵ Unfortunately, Sierra Leone’s population is largely illiterate and politically unaware and this could negatively affect the levels of competence of local government.⁵⁶⁶

According to the Local Government Act of 2004, the government of Sierra Leone began to slowly and steadily transfer responsibilities and tied grants for public services in health, agriculture, education and other sectors over to the Local Councils. Currently the implementation of decentralisation ranges considerably throughout sectors and currently the health sector is in the lead and education lagging far behind. In spite of its advancement, health “remains at best partial since the power to hire, fire and remunerate staff is retained by the central government.”⁵⁶⁷ The councils were allotted several million dollars of funds to assist in development projects within their districts under the Local Government Development Grants (LGDG) programme.

These institutional reforms were aided via bottom-up schemes implemented to strengthen institutions functioning at a community level. The community-driven development (CDD) is an example of an initiative that has aggressively been received by the public’s appeal. The World Bank has shouldered US\$50 billion in funds on CDD schemes throughout the developing world. The objective is to grant access to public goods in order to empower the poor, by focusing on public participation in and management over projects. Benefits of local participatory governance include, increased cost effectiveness in construction of infrastructure, a close alignment of rural needs and choice of project and the waning of authoritarian structures of control within the rural areas. Disadvantages include that participation requirements could contribute to regressive tax, hinder decision-making and the leaders introduced could not be local, rather literate elite that will not assist in transfer of power and exclude the previously disadvantaged.⁵⁶⁸

⁵⁶⁴ Casey, et al., “Healing the Wounds: Learning from Sierra Leone’s Post-War Institutional Reforms,” 9.

⁵⁶⁵ Ibid., 10.

⁵⁶⁶ “Sierra Leone - Adult (15+) literacy rate” <https://knoema.com>, 2018, <https://knoema.com/atlas/Sierra-Leone/topics/Education/Literacy/Adult-literacy-rate> (accessed April 8, 2018).

⁵⁶⁷ Casey, et al., “Healing the Wounds: Learning from Sierra Leone’s Post-War Institutional Reforms,” 10.

⁵⁶⁸ Ibid., 10.

Access to public services has improved from 2005 to 2007. There has been an increase of 5.5% in households reporting access to primary schools, to health clinics 4.4 %, to markets 13 % and to drinking water 12.4%.⁵⁶⁹ Currently the government of Sierra Leone continues to monitor progress and has implemented schemes to assist in facilitating access to public service like, in 2011 the government implemented the Public Service Pay Strategy.⁵⁷⁰ The outcome will benefit public servants and enhance the competitive public pay system.⁵⁷¹

The progress demonstrated by Sierra Leone’s institutional reform contradicts common perceptions of it being a failed state. Focusing specifically on collective action, the trauma of war does not hinder the commencement or results of local initiatives. Information is a key driver in successful results; therefore investing in media and education initiatives will prove beneficial. Regarding public goods and services, initialising decentralisation has resulted in steady and incremental progress. There is improvement in service delivery, citizen participation, greater access to electorate representatives and increased effective roles for district level managers.⁵⁷² However, in spite of the positive reports, there remain age-old problems of corruption, for example, during a recent presidential election between Julius Maada Bo and Samura Kamara and there have been allegations of election fraud.⁵⁷³

In spite of advancements the situation is still extremely dire. The 2014 outbreak of the Ebola virus is testament to this. There are only 200 doctors currently in a country of several million. Sierra Leone ranked 179 out of 182 on the Human Development Index in 2016 dropping three positions from 176 in 2014.⁵⁷⁴

4.8 Conclusion

⁵⁶⁹ Ibid., 12.

⁵⁷⁰ “Implementing Sierra Leone's Public Service Pay Strategy,” <http://thecommonwealth.org>, 2019, <http://thecommonwealth.org/project/implementing-sierra-leones-public-service-pay-strategy>, (accessed April 8, 2018).

⁵⁷¹ Ibid.

⁵⁷² Casey et al, “Healing the Wounds: Learning from Sierra Leone’s Post-War Institutional Reforms,” 17.

⁵⁷³ “Sierra Leone votes in run-off between Maada Bio and Kamara,” <http://www.bbc.com>, 31 March 2018, <http://www.bbc.com/news/world-africa-43595131>, (accessed April 1, 2018).

⁵⁷⁴ Ibid.

The civil war in Sierra Leone led to the establishment of a unique court whose mandate was to prosecute those who bore the greatest responsibility for atrocities committed. In the 10 years that the war raged the RUF attacked, raped, mutilated and ran a campaign of terror towards the civilian population. The SCSL then initiated the development of renewing legal concepts that included notions of child soldiers and gender-based crimes in the international criminal justice law. After the failure of pursuing amnesty in the hope of peace during the signing of the Lomé Accord the SCSL pursued indicting and prosecuting leaders of the RUF, AFRC and the CDF.

The LPA mandated the establishment of a truth and reconciliation court. The SLTRC represented the truth telling feature of transitional justice in Sierra Leone. It was modelled after the SATRC. The SLTRC was confronted with various challenges including: problems with political allegiances, donor fatigue, lack of transparency and impartiality issues. The challenges undermined the SLTRC proceedings with a UNDP report stating that the commissioners selected were unqualified and redundant and that the hiring process was politically motivated. The constant resurgence of violence further hindered the goals of the SLTRC, and contributed to a two-year suspension of funds from 2000. In spite of these challenges, the SLTRC advanced the prospect for the establishment of the SCSL.

The dynamic surrounding the SCSL and the SLTRC is about the role of justice in the proceedings of reconciliation and the friction between their mandates. The SCSL stressed that only the main perpetrators were going to be subject to prosecution and that the proceedings were going to enhance measures of accountability; however, many ex-combatants were then deterred from truth telling thereby thwarting the proceedings. Both the court and the SLTRC investigated patterns of violence the SLTRC focused on truth from testimonies.

SCSL was the criminal justice feature of transitional justice in Sierra Leone. Firstly, the LPA failed to secure peace with amnesty. Therefore the SCSL created punitive measures to prosecute those who bore the greatest responsibility. The government of Sierra Leone and the UN, via the UNSC Resolution 1315, established the SCSL. The court was regarded as a mixed court and referred to both Sierra Leone law and international law. The SCSL was considered a success in advancing international criminal law. It pioneered the legal precedent for international criminal tribunal. It was the first to recognise and prosecute the recruitment of child soldiers and specific gender-based crimes like forced marriages and sexual slavery.

When the court was established, arrest warrants for Charles Taylor and 12 other Sierra Leone leaders from three armed units: CDF, RUF and AFRC. In spite of controversy, Taylor was indicted, sentenced and is currently serving a 50-year sentence in the UK. Others have been tried and convicted however considering the extent of brutalisation on the citizens of Sierra Leone, the relatively small number of men punished means that the country has not necessarily received its due process.

There were numerous initiatives regarding reparations in Sierra Leone. These included the SLRP, the IOM, the NaCSA and the Year One Project. These initiatives need access to more resources to fully implement measures needed for the country to effectively transition. Key aspects are access to medical facilities and improved free education.

Institutional reform deals with transforming the civic facilities the structure a nation to an effective functioning democracy. The facilities include: judicial, military, public services like education and health. The SSR program through the DFID has successfully guaranteed public security however the economy has to improve to ensure violence doesn't resurface especially with the unemployed youth.

In spite of persistent issues with other aspects of institutional reform, like illiteracy and health issues (the Ebola virus), there have been advances. The decentralisation of government has made government compatible with improvement in service delivery, community-driven development and multiparty elections. The progress has been steady and incremental; however, resources need to be channelled more effectively in order to initiate change.

Five years after the civil war came to an end and two years following the release of the TRC's report, Sierra Leone is experiencing a tentative but steady peace. However, the infrastructure and administrative problems that hindered growth and development before 1991 persist. It is vital that the communities engage in post-conflict peace building. It was established that the TRC did not render peace or reconciliation in the country; however, it did "provide a platform for Sierra Leoneans to reflect collectively on the past and map out strategies for long-term peace building."⁵⁷⁵

⁵⁷⁵ Ekiyor, "Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective," 167.

CHAPTER FIVE: FINDINGS AND CONCLUSION

5.1 Introduction

The aim of this study was to explore the complexities of transitional justice through a concise comprehensive discussion detailing case studies from South Africa and Sierra Leone. The focus was on the four identified features of transitional justice, criminal justice, truth telling, reparations and institutional reform. Transitional justice was defined as the process whereby society is politically transformed via legal and semi-legal facilities in order to secure human rights, democracy and the rule of law. A prerequisite for a functioning society is the actualisation of justice. When democracies *in statu nascendi* are transitioning from oppressive rule and civil strife the features of transitional justice are applied to facilitate the necessary step forward to secure human rights and build sustainable economies. However, the structures of transition are not static; in fact, transitional justice is defined as both hybrid and fluid with the creation of space that is necessitated by laws that contribute to the on going evolution of international law.

5.2 Findings

This study's primary research question was: what were the challenges of the specific transitional justice mechanisms employed in South Africa and Sierra Leone's transitions from conflict to post-conflict societies? Sub-questions consisted of the following:

How were the four key features of transitional justice, namely; criminal prosecutions, truth telling, reparations and institutional reform implemented in South Africa?

How were the four key features of transitional justice, namely; criminal prosecutions truth telling, reparations and institutional reform implemented in Sierra Leone?

5.3 Chapter Breakdown

In Chapter One, the introduction, background, research problem and methodology were explained. This was followed by Chapter Two, where a general discussion of transitional justice (and its

complexities) and current developments was discussed, including references to international humanitarian law as well as the normative nature of human rights and its role in increasingly challenging the supremacy of the sovereign state. In Chapter Three, the first case study, South Africa, was analysed using the identified conceptual framework. In Chapter Four, the second case study, Sierra Leone, was analysed using the same framework. In the concluding chapter, a summary of key findings will be provided as well as suggestions for further research.

Criminal justice refers to legislative measures enacted to prosecute legally recognised crimes (against humanity) and regulate social behaviour. Its function is also to facilitate the prevention of crime, (that is, to deter individuals from criminal actions and break the cycle of habitual crime), secure individuals, as their rights are legally recognised and ensure that the necessity for reparations becomes a legal requirement for the governments to adhere to. Criminal justice is concomitant with the principle of rule of law. Ensuring rule of law is vital to the realisation of justice, as it commands that all members of a nation are answerable to the law. This specifically applies to government agents, security police and military personnel. The rule of law therefore needs to be enforced. Civil society, the media and international, multilateral organisations are found on the principle of rule of law and are therefore equipped to hold the government, police and military accountable. This is done through investigations and reports. However, it is often the case that in newly established democracies, transitioning from civil strife or oppressive rule there is an administrative structural vacuum. The consequence of this led to organised crime and social disorder, examples are cases in East Timor and Kosovo.

Another feature of criminal justice is the concept of amnesty. Amnesty is the practice of pardoning crimes to secure peace and in the case of South Africa to facilitate truth. It promotes restorative justice over that of retributive justice. It is argued that amnesty hinders justice as there are some wounds too deep to heal on the promise of peace alone. Frequently amnesty is regarded as a direct course to amnesia and oblivion. In the case of Sierra Leone, the 1999 Lomé Accord granted blanket amnesty to the RUF. As there were no consequences for the crimes committed hostilities quickly resumed indicating how amnesty can fail peace. South Africa asked offenders for full disclosure of their apartheid state-sanctioned crimes in return for full pardon. This was in keeping with the mandate of the TRC, which was to gain as full a picture of the apartheid years as possible. Restitution was encouraged with pardon, whereby offenders were granted the opportunity to assist

victims to lead a better life. The story of Brian Mitchell offers a successful example of sustained peace through restitution and amnesty.

Truth telling is the process of seeking, investigating and reporting events in order to facilitate justice and the rule of law. Truth telling assists the process of peace as the dignity of victims is regained through acknowledgement of wrongdoing. Truth telling encourages social healing and reconciliation, promotes justice, allows for the establishment of an official historic record, serves a public education function, aids institutional reform, helps promote democracy and pre-empts as well as deters future atrocities. Truth telling is essential in assisting the role of memory, which ultimately ensures an end to the cycle of violence and crime. The revelations gained from truth telling serve an educational purpose as it offers insights into behaviour, reveals consistent consequences of behaviour and illustrates patterns. This is important as when familiar warning signs appear, preventive measures can be taken to safeguard against history repeating itself.

There are four features to truth telling that help determine the reconciliation process. These are factual or forensic truth, personal or narrative truth, social truth and healing and restorative truth. Factual or forensic truth is an account that is supported with physical evidence. Personal or narrative truth is gathered through a collection of testimonies that assist in creating an accurate description of events. It is important to be aware of the subjective quality of personal truth and understand the value of unique perspectives when recreating events. Social truth is discrediting the myths that society, traditions and nationhood are based on. It is inquiring about the current nature of social ills by investigating the country's past. Healing and restorative truth replace the narrative of anger, violence and revenge with one that promotes forgiveness and hope for restoration. Healing truth is often spiritual in its approach that argues that when truth is found forgiveness can follow.

Reparations are an attempt to restore dignity and loss through financial and symbolic gestures both on an individual and collective level. These gestures include: economic compensation, mementos – (both public and symbolic), and strategies undertaken to improve the livelihood of victims and their families (housing schemes, proper infrastructure) – (such as giving scholarships and access to health services). Through these initiatives there aims to be a realisation of the recognition of human rights and with this an empowerment of the citizen. Reparations are an extension of the

transitional justice process that extends beyond the legislative discourse of crime-and-punishment or crime-and-pardon. It offers a chance in a new democracy for improved quality of life.

Unfortunately, reparations frequently fail to become a reality. It is often cited by government officials that there is an insufficient amount of resources to fully implement reparation schemes. In the case of South Africa, the government has procrastinated, citing inadequate legislation as the reason. The whole process of drafting the proper legislation has been declared privileged. Therefore, the South African public has not received what is legally recognised as theirs and remain in the dark about the legal procedures. In Sierra Leone reparations have been implemented; however, much still needs to be done. There are improvements in the health sectors but education and support for youth is lacking significantly.

Institutional reform rebuilds the country's civic, administrative and security sectors of government on the foundations of democracy, the rule of law and the social contract. It focuses on the judiciary, police and military, which were often the sectors where the previous regime abused their powers and used instruments of oppression against the public. Institutional reform includes: vetting or illustration of official positions belonging to the previous regime, structural reform, transforming legal framework, disarmament, demobilisation and reintegration and education.

In South Africa an example of institutional reform is in the chapter nine provisions of the nation's constitution. These provisions support the rule of law through the creation of commissions and officers with the role of promoting and securing human rights. These institutions are: the Public Protector, the SAHRC, the CRL Rights Commission, the CGE, the Auditor-General, the IEC, the Independent Authority to Regulate Broadcasting and ICASA. Another example of institutional reform is in the transformation of the South African police force to the SAPS. The emphasis on the policing sector is to protect and support the community whereas before it was on control and forceful monitoring. However, this is mainly on paper and not in practice as in the example of the Marikana killings.

In Sierra Leone institutional reform has been successfully implemented concerning decentralisation and improved communication networks between the capital and local communities. There are benefits to local participation in government, these are: increased cost effectiveness in construction of infrastructure, a close alignment of rural needs and choice of project and the waning of authoritarian structures of control within the rural areas. The

disadvantages include regressive tax measures, decision-making obstacles and leaders who might not be local could contradict the customs and confuse instead of assist the communications network, finally there might be a focus on empowering literate elite at the expense of the local rural inhabitants. Access to public services improved from 2005 to 2007. There was an increase of 5.5% of households reporting access to primary schools, to health clinics 4.4 %, to markets 13% and to drinking water 12.4%.

The focus of South Africa and Sierra Leone's transitions to peace, stability and democracy assisted in detailing the procedures of transitional justice. South Africa set up the SATRC with the mandate: to bear witness to, record, and in some cases grant amnesty to the perpetrators of crimes relating to human rights violations, as well as reparation and rehabilitation, and to gather information in order to construct a complete portrayal that characterised the actions of the apartheid years. The commission was divided into three sectors: the Human Rights Violation Committee, the Reparation and Rehabilitation Committee and the Amnesty Committee. The commission received international accreditation for its restorative structure and many other commissions have modelled themselves on South Africa, including Sierra Leone.

The SATRC took testimony from over 21 000 victims and witnesses of which about 2 000 testified publicly. There was a panel of 17 commissioners and Archbishop Desmond Tutu was the chairman. A seven-volume report was published. In October 1998 volumes 1-5 of the TRC report were published, subsequent to the Amnesty Committee finalising its work an additional two volumes were introduced into the report in March 2003. The Report has 4 500 pages.

In Sierra Leone the SCSL was established with the aim to prosecute those who bore the greatest responsibility. Nine men were found guilty and sentenced; one of these was Liberian President Charles Taylor who is currently serving a life sentence in the United Kingdom. The SLTRC succeeded in reaching most of the 149 chiefdoms, only nine were not reached. There were 7 706 testimonies gathered which was satisfactory as the sheer number of human rights violations was so large that collecting all testimonies from all surviving victims was not possible. The turnout at the hearings was moderate; however, a truthful account of the events of war could be accurately gathered.

Transitional justice with its four features is constantly evolving and accommodating new legislations to assist in the securing and promotion of human rights. The prospect of going to trial

serves as a deterrent to future rulers. South Africa and Sierra Leone have moved past a history of extreme oppression and brutality and look forward to a future governed by the rule of law and the hope that the implementation of the four features of transitional justice may lead to improved lives.

5.4 Challenges of Transitional Justice in South Africa and Sierra Leone

5.4.1 South Africa

Criminal justice in South Africa was enacted via the amnesty committee. A major challenge that prevented the prosecution of perpetrators was due to insufficient resources. An example is the trials of Eugene de Kock and Magnus Malan that cost the state over R14 million. There was also an absence of full-time investigators. The Amnesty Committee was also perceived as ineffectual due to the failed cases of Wouter Basson and Magnus Malan. It was then believed that prosecution was not a legitimate threat, this belief was held by the majority of members of the police force. These perceptions undermined the successes of the Amnesty Committee. Many South Africans feel that those who benefited from the legacy of apartheid were not properly held accountable.

The HRVC was responsible for the truth telling feature of transitional justice in South Africa. Challenges that face the HRVC included the use of labels like *victim* and the imposition of religious principles, like forgiveness, on the discourse of the proceedings. Some of those at the HRVC hearings who testified did not appreciate being branded a 'victim' and felt that their role was one of political activist or freedom fighter. Others believed that the extent of some of the crimes was unforgivable and that the proceedings did not create a way forward except with the imposition of forgiveness. Another hindrance to the success of the HRVC was the corroboration process. The IU focused mainly on gathering facts and not on the surrounding circumstances of events, thereby losing the necessary insights to assist the learning and prevention of social and habitual violence. Another issue of truth telling lay in the SATRC and the police sector. The majority of police did not apply for amnesty for fear of reprisal and public shame. The SATRC failed to adequately paint a realistic portrayal of the events during the apartheid years as only approximately 300 police gave their testimonies of an estimated 827 occurrences of HR violations.

The reparation process of SA is one of disappointment and disillusionment. Overall the money that was delineated to victims from the President's Fund has not reach the intended people. Of the R300 million that was set aside only R48.37 million has been paid out. In 2001 the government

stated that a further R500 million would go to victims. This amount is significantly diminished from the amount proposed by the Reparation and Rehabilitation Committee, which was R 2 864 400 000. The government has delayed giving the money and have claimed a lack of legislative capacity as of 2002. Currently the government has remained evasive, stating that the policy is still in deliberation and is part of a privileged process. The money has yet to be accounted for. The state cannot claim restitution if, financially, the citizens are still at a disadvantage.

Issues of institutional reform lie mainly with the police sector. One of the reformation processes was addressing the mind-set of the policing sector, from one of brutality to humanity. This was demonstrated by changing the name from the police force to the police service. Few instances of police brutality were investigated by the SATRC. Transforming the values of the police force was hindered by deep-set loyalties to the past regime and a lack of accountability. Another failure lay in the inability of the SATRC to comprehend the complex constitutional arrangements belonging to the local, provincial and national new police service and its constituent authorities. It could not make provisions that were implementable due to its lack of insight.

5.4.2 Sierra Leone

Regarding truth telling, the SLTRC faced challenges that included: poor reception, insufficient communication and not enough time to conduct the hearings. Added to these were issues of impartiality, transparency and political allegiances that thwarted the objectives of the truth commission. The secretariat was deemed by the UNDP as unqualified and redundant. There was also the divided nature of the social fabric that needed to be managed in order for the truth commissions to function. Donor fatigue suspended the proceedings for two years due too constant resurgence of violence. However, the reach and scope of the hearings was successful and a path to restoration was emerging.

Criminal justice of the SCSL was realised through Operation Justice. In spite of controversy the operation under David Crane successfully indicted Charles Taylor and 12 Leaders from the RUF, AFRC and CDF. The SCSL only tried and convicted an elite portion of the civil war's offenders and in relation to the extent of crimes perpetrated it cannot be concluded that criminal justice was realised.

The reparations programme to victims in Sierra Leone needs a more action-orientated approach. The victims need more free access to medical facilities, the children need free quality education and there is need for pension plans to be implemented for those who can no longer work. A problem is limited resources, and the channelling of resources to the necessary programs.

Institutional reform needs a significantly more stable economy in order to function and have its objectives realised. A challenge that could affect the efficiency of local governments is the high illiteracy rate and a dearth of relevant information to assist in political awareness. Information is a main avenue in garnering successful results in local initiatives; therefore, investing in media and education schemes will assist in realising the objectives that will reform local, provincial and national civic facilities that govern the country as citizen involvement will be emphasised as essential.

5.5 Recommendations for Further Study

The international community has scrutinized the SATRC and have deemed the commission a success. There have been many scholarly accounts and analysis on how truth commissions have changed the face of transitional justice. That is how the SATRC has influenced subsequent proceedings like the Guatemalan Commission for Historical Clarification, the East Timorese Commission for Reception, Truth and Reconciliation and the Sierra Leone Truth and Reconciliation Commission. Particularly unique and influential was the role of raising public awareness. The public participation and debate during the SATRC was one of the main successes of the commission, as it demonstrated the new regimes commitment to democratic principles founded on the will of the nation's citizens. This legitimised truth as a mechanism in transitional justice as full disclosure would enforce the role of memory in the peace building aspect of the new nation. Approximately 24 years on the country has experienced a truly remarkable transition in race relations as the scars of apartheid fade.

An important aspect of South Africa that needs further research is into the Chapter nine articles of the constitution. Although there are measures to ensure transparency, the constitution needs better accountability mechanisms that would deter corruption. How corruption manifests and leaders escape punitive measures needs research. Corruption is a highly relevant topic needing to be

investigated, as this is one feature of the current government that is hindering the country's progress. This can also be applied to why the reparations pay out has been delayed.

Further research is needed regarding the process of reparations. The role of the government has to be investigated and made public by reports from the media. This could further the effort of campaigns from support and human rights groups, whose role it is to assist victims of apartheid. Investigations about the 20-year delay in financial pay-outs, that were promised to the victims, needs to be undertaken. Again, accountability mechanisms need to be enforced to ensure that corruption at top government level can be addressed. The fact that a huge portion of the funds allocated towards reparations has yet to be distributed, warrants further investigation.

Sierra Leone has been analysed as one of the ground breaking truth and reconciliation commissions. It would be beneficial to the broadening field of transitional justice to analyse other courts that engaged with the UN and introduced new laws regarding crimes against humanity. For example the growing body of legislation against sexual violence has increasingly been developed and recognized as punishable crimes. Courts that could be compared to SCSL are the Extraordinary Chambers in the Courts of Cambodia (2006) and the Special Tribunal for Lebanon (2007). However, in spite of the success, Sierra Leone remains one of the world's poorest countries. Issues like inadequate public services that are responsible for the out break of Ebola and the significantly high illiteracy rates needs further research and investigation.

Decentralisation has been implemented and proven successful in channelling communication from central government to local communities. However the public needs to be more politically aware and the high illiteracy rate should be addressed to serve this. Varying initiatives on institutional reform that have been implemented and are receiving funding from donors like the UK needs in-depth evaluation to better assess why public service institutions are not functioning to standards of the Human Development Index.

The SSR section of institutional reform is a joint undertaking from the UK and Sierra Leone government via the DFID initiative. Violence has not resurfaced, and past rebels have been reintroduced into society, however the main hindrance of implementing successful SSR strategies lies with the country's weak economy. Lack of jobs, a failing education system and a disgruntled youth is what inspired the machinations of the war in 1991. Research into how to stabilise the

economy and provide jobs to every household will be beneficial to securing the future of Sierra Leone.

Unfortunately the scars that plague both countries are deep wounds that need constant attention, like upholding the rule of law, accountability, transparency and promoting individual's rights. This requires functioning systems of government aware of their responsibilities to uphold the principles of democracy. Currently the governments of both countries need to work harder to better achieve their commitment to their citizens, and focus on this as their primary role.

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