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Abbreviated Criminal Procedures for Core International Crimes

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E-Offprint:

Hanne Sophie Greve, “The Role of Abbreviated of Criminal Proceedings”, in Morten Bergsmo (ed.), *Abbreviated Criminal Procedures for Core International Crimes*, FICHL Publication Series No. 9, Torkel Opsahl Academic EPublisher, Brussels, 2017, 978-82-8348-104-4. First published on 29 April 2017.

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The Role of Abbreviated of Criminal Proceedings

Hanne Sophie Greve*

10.1. Introduction

Abbreviated criminal procedures represent a specific form of legal action. The purpose of this chapter is to examine whether there exist reasons for such action; that is, to see if there are considerations that call for or justify the usage of abbreviated criminal procedure. Are there one or more objective reasons that support this course of action regardless of whether it is realised? Reasons may be matters of fact or value, but values are always relevant. The objective is thus neither to examine *de lege lata* existing abbreviated criminal procedures – that is, positive law – nor to offer a *de lege ferenda* exploration aimed at developing a specific model of abbreviated criminal procedure for core international crimes or the ideal legislation in this respect. In this chapter there are only a few limited comments on abbreviated criminal procedures as such – primarily to highlight that abbreviated criminal procedures are not an anomaly in modern criminal justice systems, and that abbreviated criminal procedures may well be so provided for in the legislation as to meet with all the human rights requirements concerning a fair trial.

In this chapter the approach is more philosophical. Why should society have abbreviated criminal procedures for core international crimes? Or rather, what is the role – the purpose, reason, rationale, motivation – for abbreviated criminal procedures in cases concerning genocide, crimes

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against humanity and grave breaches of the 1949 Geneva Conventions? As will be explained, there are normative reasons – considerations having ethical force – that call for and justify that the commission of core international crimes should be followed by justice and criminal procedures. Facts – here the crimes – become obligating reasons in conjunction with these normative considerations; they give rise to an obligation to seek justice. Practical needs assign an important role to abbreviated criminal procedures in this context.

10.2. The Rule of Law

Whether it is agreed to measure length in metres or inches or anything else, or not to take advantage of any measurement, there exist dimensions in the physical world. Similarly, where there are human beings there is behaviour and there will be codes of conduct in existence – that is, *de facto* or *de jure* regulations of human behaviour. The main question in every society is who is entitled or allowed – sometimes by default – to decide and establish the codes of conduct, be these *de facto* or *de jure* laws.

10.2.1. A Primordial Stage of Everyone against Everyone

The initial human habitats are sometimes referred to as representing a natural stage of total calm, idyllic and peaceful, where all is well and plentiful and everyone acts towards everyone else in a spirit of loving kindness and where consensus rules supreme. Whether or not this was ever so is of limited significance, as conflicts of interests soon became one of the characteristics within any group of people living together not to speak of the relationship between different groups of people. For this reason it is quite common to speak of a primordial fight of everyone against everyone else.

Being vulnerable is a key element of the human condition. From total helplessness in infancy to the frail phase of old age, the human being is more or less in constant need of protection and support. Even the strongest and most capable of men – mentally and physically – at the zenith of their lives have no chance to protect their interests when outnumbered.

Human nature nevertheless is social. It is only in the interaction with fellow human beings that the individual can develop his or her full potential as a human being and become fully humane.

Another constituent of the human condition is the ability to reason – to learn, invent and create. Human beings soon realised that protection

and respect for the interests of others were useful and valuable, good for barter even. Living together in groups, human beings experienced that they could better provide for their needs – protection not in the least. To live and let live proved a more prosperous approach than to let everything be ultimately settled as a matter of physical strength – individual or in terms of numbers. Reciprocity opened up for development.

Ubi non est lex, ibi non est transgressio quoad mundum (where there is not law, there is not transgression, as far as this world is concerned). Every interest not respected had literally to be fought for, and defended by force. In order to terminate the primordial fight of everyone against everyone else, and transgressions to communities and societies, human beings entered initially *de facto* into some kind of social contracts. People joined together in communities structured internally by some guiding principles to avoid eternal fights among them, and to be better prepared to stand up against other groups.

10.2.2. The Rule of Law as Crucial to a Prosperous State

The rule of law is the largely formal or procedural properties of a well-organised legal system. These properties include in particular: 1) a prohibition of arbitrary power, meaning that no one – not even the lawgiver – is beyond or above the law; 2) laws that are general, prospective, clear and consistent and thus capable of guiding conduct; and 3) tribunals that are accessible and structured to hear and determine legal claims in a fair manner. The law is made by the state and the state by the law: *civitas fundaretur legibus*.¹ A well-ordered community is based on a legal system.

Following the Second World War, some basic principles were singled out as human rights – belonging to every human being in the very capacity of being human. Or, as ascertained in the Preamble to the Universal Declaration of Human Rights (‘UDHR’):

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings

¹ *Digesta Iustiniani liber primus*, 2.2.4., available as *The Digest of Justinian*, trans. by Charles Henry Monro, vol. 1, Cambridge University Press, Cambridge, 1904.

shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law[.]²

Democracy is central to the European understanding of both the rule of law and human rights. The three are not only intertwined, but in part also properties of one another. Understood in this context, it may be said that the rule of law is the rationale for building a community in contradistinction to a mere power base. Even the latter will sooner or later wither from within lest the people consider their interests to be provided for by the power structure.

The idea of every society being based on a kind of social contact may emerge as a theoretical construction, but can nevertheless help improve our understanding of communities – small and large. Social cohesion is a complex and multifaceted balance of give and take.

The Council of Europe has proposed defining the social cohesion of a modern society as follows:

Society's ability to secure the long-term well-being of all its members, including equitable access to available resources, respect for human dignity with due regard for diversity, personal and collective autonomy and responsible participation.³

The definition encompasses key aspects of a political strategy for a modern society to enable the strengthening of the bonds between individuals and between them and the community to which they belong. *Salus populi (est) suprema lex* (the welfare of the people is the supreme law). The pursuit of the rule of law is legitimate in every state; it needs no further legitimacy.

² United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, Preamble ('UDHR') (<http://www.legal-tools.org/doc/de5d83/>).

³ Council of Europe, *Concerted Development of Social Cohesion Indicators: Methodological Guide*, Council of Europe, Strasbourg, 2005, p. 23.

10.2.3. Arbitrariness versus Equity

A basic feature of the rule of law is that it replaces arbitrary power. No human being shall be beyond or above the law, not even the lawgiver. It provides room for flexibility if a ruler may himself give the laws and let it be at his behest whether the laws are to be followed or not, when and by whom. Laws in this latter context, however, are only one other means of arbitrary power – a sham that can never establish the rule of law. The way Adolf Hitler stood not only above and beyond the law in the Third Reich, but *de facto* also became the law, is but one extreme example.

It is thus no surprise that the revolutionary aspect of human rights is that they belong to *every member of the human family in the mere capacity of being human*. That groups of people had also recognised advanced rights for members of their own group was nothing new – that had been the situation for thousands of years. The United Nations understood the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the *sine qua non* of freedom, justice and peace in the world, as affirmed in the Preamble to the UDHR.

The recognition of the inherent dignity and of the equal and inalienable rights of every human being does not only imply that it is conceded that:

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]

All rights belong to everyone, and no one shall be subjected to out-lawed abuses – all in line with these basic principles:

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to

equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.⁴

Fairness – a core constituent of the rule of law – demands that equal situations are handled in an equal or similar manner regardless of the persons involved. The law is the main equaliser – no one shall be above or beyond the law, and everyone shall have equal standing in front of the law. Equity in contradistinction to arbitrariness was recognised in ancient times as a property of a well-organised legal system. Some of the old Roman law adages illustrate this:

- *Prima pars aequitatis aequalitas* (the first part of equity is equality);
- *ratio in jure aequitas integra* (reason in law is perfect equality);
- *leges suum ligent latorem* (laws should bind their own author); and
- *stare decisis et non quieta movere* (to adhere to precedents and not to leave established principles).

It must be appreciated that *talis non est eadem, nam nullum simile est idem* (such is not the same, for nothing similar is the same thing.) This, however, does not imply that it is impossible to have some agreed and more objective standards for identifying similarity and differences between cases – to avoid arbitrariness and discrimination.

10.2.4. The Rule of Law as an Effective Normative System

Laws are setting standards. Legal provisions thus are normative and intended to regularise the behaviour of people. Ideally, the law in itself suffices to have people behave according to its prescribed standards. When and where this is not the case, the power of the state can be utilised to right the wrongs and establish the rule – the supremacy – of law. Or, as expressed in the Roman law maxim *juris effectus in executione consistit* (the effect of law – or of a right – consists in the execution). Unless the state is willing and able to uphold the law there is no legal system that is really beneficial to the population.

This is of particular significance in the field of criminal law. It is best that the laws as such prevent crime. But every state in times of peace and stability will have to regularly administer criminal justice. Large

⁴ UDHR, see *supra* note 2.

numbers of crimes may be due to, but are not limited to, wars and armed conflicts, globalisation and mobility, and financial problems. In addition to chastening people to observe and honour their obligations not to commit crimes, the state itself has crucial obligations – obligations to react to crimes and positive obligations to prevent the most significant crimes that concern life and limb and personal integrity in particular. This is a situation in which *lex deficere non potest in justitia exhibenda* (the law cannot fail in dispensing justice). Article 8 of the UDHR states:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.⁵

For the state to have an effective criminal law system – normative as it regularises peoples’ behaviour – crimes as such are deterred, and when that is not achieved in individual cases the breaches of the criminal law must have consequences. Establishing guilt and responsibility is probably more important than punishing the perpetrators. The latter should, however, in any event be deprived of all unlawful gains and divested of any and all authority and power abused (having proved for the time being that they have not been qualified to handle the trusted authority), for example in the police or security apparatus or in offices of a political nature. It is for the state to balance rights and to somehow restore a broken balance.

In this context, it may prove useful to keep in mind that *omnis exceptio est ipsa quoque regula* (every exception is itself also a rule.) Moreover, even when a political situation in a country is not transitional, all criminal justice is in essence transitional, aimed at recreating a more or less workable moral universe.

10.3. Immediate Implications of Core International Crimes

In this chapter ‘core international crimes’ signify genocide, crimes against humanity and war crimes such as specified in international legal documents like Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court (‘ICC Statute’).⁶ Core international crimes are the most heinous of crimes – crimes that every state is required to punish and has a positive

⁵ UDHR, Article 8, see *supra* note 2.

⁶ Rome Statute of the International Criminal Court (‘ICC Statute’), Articles 6–8 (<http://www.legal-tools.org/doc/7b9af9/>).

obligation to protect its population against. Core international crimes are moreover crimes *erga omnes*, an affront against humankind as such that may be punished under any jurisdiction regardless of the identity of the perpetrators and the victims and of on what territory the crimes were committed. It follows from the description of the elements of these crimes that they, generally speaking, have much more destructive consequences both for the individual victims and for the collective or the state as such than other less serious crimes, due to their effects and the scale on which they have been committed.

10.3.1. Victimisation on an Individual Level

Core international crimes will more often than not affect the life and limb of the victims. People may, for example, have been killed, tortured and enslaved or any combination of all three of these absolute violations of human dignity. On an individual level this may not be entirely different from what happens in exceptionally gruesome criminal cases that do not as such amount to core international crimes.

Core international crimes do have an added dimension of scale, as they are part of an overall plan, widespread and systematic, or disproportionate and beyond military necessity. In consequence, the number of victims is likely to be high. As every human being has his or her own dignity and worth, and is unique so that no one can ever be replaced (not even cloned to be the same person – already time, place and circumstances will be different), the significance of large-scale crimes lies in the number of individual victims involved. That is, however, not the only distinction between ordinary crimes and core international crimes. One other dissimilarity is that numbers of victims affected by core international crimes are likely to be interrelated in a manner that, generally speaking, will victimise them in more than one respect directly or indirectly or both.

‘Ethnic cleansing’ may illustrate this. Ethnic cleansing may be organised so that the adult male population is separated from the women, children and elderly to be killed or physically and mentally broken; and the rest of the group is deported. Every woman is not only a victim of deportation with its ensuing deprivation, but she is likely furthermore to have lost more than one male family member – whether a father, husband, brother, brother-in-law or son. The sheer number of losses – more or less

matched by the losses of the other women in the victimised community – will make it far more difficult for her both as a direct and an indirect crime victim to deal with her sorrow and pain, than for a victim of but one serious crime. And her way back to a normal life will become much more thorny if at all accessible for her. Both the family network and the social fabric, that under regular circumstances are crucial for crime victims to stumble back to a normal life, are torn if they function at all. People in old age, children and male survivors face similar difficulties. This is exactly what the masterminds behind the ethnic cleansing intend.

In short, the victimisation on an individual level of core international crimes is likely to represent a complexity making restorative justice equally complicated, and more often than not unachievable.

10.3.2. Victimisation on a Collective or State Level

Core international crimes, being part of an overall plan, widespread and systematic, or disproportionate and beyond military necessity, do not only imply high numbers of individual victims. These crimes are characteristically committed in armed conflicts or other large-scale social upheavals in which commonly not just one core international crime is committed, but multiple such crimes.

In consequence, core international crimes are likely to considerably weaken the social fabric in the community at large if not also at the state level. This is, in particular, the situation when in addition to everything else the core international crimes committed have, in the first place, been aimed at victimising the leadership in the affected community – be it politicians, judges and law enforcement officers, teachers and community leaders of every kind. Even if not intended as genocide, it may have the same extreme consequences for the survival of an ethnic group as such.

In short, there is likely to be victimisation on a collective or state level of core international crimes. This is a kind of victimisation that may impair large parts of the state apparatus – its political, administrative and judicial structures and the state's income-generating ability. For this reason, in the aftermath of core international crimes, the state's ability to assist the individual victims of crimes in overcoming the consequences of these crimes may have been considerably weakened. Large-scale destruction of public and community property will increase these difficulties further.

10.3.3. A Shift of Balance in Favour of Perpetrators

Genocide and crimes against humanity – such as, but not limited to, ethnic cleansing – are intended to shift the social balance in favour of the perpetrators and their group(s) by them taking over the possessions and positions of the victims. That is, these crimes are aimed at creating a void in terms of people in which the culprits and their followers are prepared to more or less replace the victims' group. The *Boden* policy of the Third Reich when it attacked the Soviet Union in 1941 illustrates this. According to this “land only” policy, the Nazis wanted to conquer land only, and to annihilate or evict the people who lived in the area when it was captured. This was in contradistinction to the *Blut und Boden* policy in countries inhabited by so-called Aryan people such as Norway and the Netherlands, where the populations were allowed to remain in place as long as the Nazis thought they could subjugate them to the new Nazi order.

Furthermore, every serious crime affecting life or limb and personal integrity of another person will by necessity enfeeble the victim, and it thereby reduces that person's ability to protect self, kith and kind, possessions and other interests. The crime as such will have a disabling effect on a person's potential for defending his or her own interests. This problem is considerably augmented when more than one family member or member of a specific group is victimised. Any sizeable destruction of a person's property is also likely to have a debilitating effect on a person's possibilities to take care of his or her interests.

In sum, sometimes core international crimes deprive victims of their means in a manner that makes the same means available to the perpetrators for the latter to harvest the future advantage of these means. In other situations, the pre-crime equilibrium or relative strength characterising the relationship between the victims and the perpetrators are shifted simply by the victims being deprived of some of their relative strength regardless of this ‘strength’ not being made available to the perpetrators. As always, extensive knowledge of the weaknesses of others – which many perpetrators are likely to have after the commission of core international crimes – gives them some kind of an upper hand if the victims and perpetrators are to make up a future society with room for both of them. It is no surprise in this context that former members of security services become organised criminals in countries that have experienced profound changes.

On the other hand, the victims have a right to know the truth about the wounds inflicted on them and a right to know the identity of the perpetrators at the different levels. Lest this information is provided to the victims, the lack of information not only represents an added cruelty to the wounds inflicted by the crimes as such but the victims are also likely to be even more susceptible to future abuses as well.

The legacy of brutality that is likely to follow the commission of core international crimes will, moreover, frequently have a close to crippling effect on the sufferers. For example, the Khmer Rouge legacy long made it unnecessary for the group's former assassins to demonstrate any residual power to have things their way. When aborted, a reign of terror does not instantaneously lose its grip on victims. *Injuria propria non cadet beneficium facientis* (no benefit shall accrue to a person from his own wrongdoing). No one, that is, should be left to benefit from or take advantage from his or her own wrong – and in particular not of core international crimes. This basic principle cannot be effective least any shifted balance in favour of perpetrators is attended to and counteracted.

The no benefit prescription must pertain both to immediate benefits and to benefits in a longer perspective. In no event should crime be permitted to function as *de facto* steps in a career.

10.3.4. A Shattered Moral Universe

The word 'moral' has its roots in the Latin language, *mos, moris*, meaning custom or usage. When certain positive standards – value wise – are generally adopted in a community, these standards form the moral code of that society. Being incorporated into the state's criminal law provisions, commonly reinforces the basics from the moral code. *Thou shalt not kill*, and so forth.

In a rule of law situation the state is willing and able to enforce its laws which thus function as normative standards regulating the way the individuals on the state territory behave towards one another. If the laws of the land are not enforced, the regulative force of the legal provisions decreases. As the main provisions of criminal codes in well-functioning legal systems are in harmony with the community's basic understanding of what is right and good and what is wrong and sub-standard, crimes as such also have implications for the community's perception of values and morals. This is particularly so if the most serious of crimes do not have

consequences for the perpetrators – not to say if such crimes prove beneficial to the perpetrators even after the perpetrators' identities have become known to the state.

Core international crimes do somehow shatter the moral universe in a community. When the basic standards of what is right and what is wrong are ignored and broken, the very moral structure in society will be questioned. That is, standards not abided by give way to new standards, like water always finds its level. If a state is unwilling or unable to set the rules that are to govern the relationship between people living on its territory, the standards are set by those who impose their standards by the use of force, whether criminals from within the state or from outside. There is no inhabited territory without rules that the inhabitants or a majority of them will have to accept. The rule of the strongest is a negation of the rule of law, but it still implies regulations that the inhabitants will have to follow.

Thus the committing of core international crimes leaves behind a somehow shattered moral universe, and begs the question of who is entitled to set the standards and the rules according to which life in the affected community will go on also after these crimes have ceased. The rule of law, human rights and democracy all presuppose that it is the society as such that adopts and enacts the laws of the land. These laws will have to meet with the minimum requirements as provided for in human rights, and will have to promote some kind of a fair social balance as well.

Neither in the life of an individual nor in the life of a community is it possible just to draw a line and start afresh. Every moment and every event in history is an end, a beginning and a continuation.

If a state lets something as gruesome as core international crimes be bypassed in terms of criminal procedures, by regarding these crimes as belonging to an era that is over, can it then start with criminal procedures only in relation to far less significant *new* crimes and still be considered a non-arbitrary society – a society based on the rule of law? And what about a person serving a prison sentence for an ordinary crime for which he or she was convicted prior to the commission by others of core international crimes? Should that person be released before serving his or her sentence in order not to receive unequal treatment as compared to the treatment of the perpetrators of the core international crimes? Justice and fairness as significant concepts contributing to social order are easily undermined if a

community thinks that it can bypass an interregnum of a shattered moral universe by pretending that it never existed. This is even more so when there is also an ensuing shift of balance in favour of perpetrators.

Unumquodque dissolvitur eodem ligamine quo ligature (the same binding by which it is bound together dissolves everything): As much as a functioning state is based on a legal order, the lack of legal order makes a state disintegrate. Telling the truth and distinguishing right from wrong are significant to reconstructing the moral universe.

10.4. Options Following the Commission of Core International Crimes

For a start, as Aristotle said, “Not even God can undo what has been done”. Crimes committed are facts – they may be ignored, but cannot be deleted. Following the commission of core international crimes there is, ideally speaking, a need to rectify:

- the shift of balance in the pre-crime equilibrium or relative strength characterising the relationship between the victims and the perpetrators. This is so even if the balance can only be restored to a degree: 1) the dead cannot be summoned back to life; 2) more often than not, health cannot be fully restored; 3) financial deprivation may not be fully compensated for – the perpetrators and society may lack the necessary resources for that. In any event, such repair may take time and there may be at least a *de facto* need for a conviction prior to establishing a legal obligation to compensate. Furthermore, years lost in an individual’s life cannot be regained or caught up with;
- the tremendous harm caused to individuals and society at large; and
- the shattered moral universe.

Furthermore, the victims have a right to know the truth about the wounds inflicted on them – and thus a right to know the identity of the perpetrators at the different levels.

Particular challenges occur in respect of those perpetrators that remain within a society following armed conflicts between different groups within one state – fratricide – and in respect of perpetrators who as traitors collaborated with an invading or occupying alien power and took part in core international crimes committed by the aliens. Situations where alien perpetrators can be expelled after an armed conflict are in numerous

respects far easier to manage than when victims and perpetrators are compelled to continue to live side by side in the same state.

10.4.1. Impunity

With impunity the perpetrator is left at large without any punishment for the crimes that have been committed. Guilt is not properly established. The perpetrator may therefore shield him or herself behind such basic general provisions as found in the UDHR:

Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.⁷

Within the human rights regime, the lack of criminal justice may imply that people having committed the most heinous and serious crimes remain in positions of power. This is so also when they have enhanced their actual power base and potential for being able to abuse that base by financial gains and a reputation for brutality in combination with a special insight into the weaknesses of other people and society at large – all of which are acquired by the crimes. If this is allowed, serious crimes are not only not deterred but heinous crimes are *de facto* even encouraged, which is far worse.

Again, this is by no means new insight. The two following adages of Roman law illustrate this: *impunitas semper ad deteriora invitata* (impunity invites [an offender] to ever worse offences); and, *veniae facilitas incentivum est delinquendi* (the ease of winning pardon is an incentive to committing crime). When massive crimes go unpunished it is *de facto* the criminals who are permitted to keep the upper hand – that is, an oppressive upper hand. Neither a tyrannical regime (too much state power) nor

⁷ UDHR, Articles 11 and 12, see *supra* note 2.

criminals (too little state power) should ever be permitted to set the standards and the rules by which the state is governed.

It was in recognition of the strong need to liberate humankind of the scourge of impunity for core international crimes that first the United Nations *ad hoc* tribunals for the former Yugoslavia and Rwanda and later the ICC were established. However, the international tribunals cannot do all that is needed to remove the plague of impunity. International justice will only be available to some – ideally the principal instigators of core international crimes; the remaining perpetrators will have to be prosecuted within national criminal justice systems. Although it is unrealistic to prosecute every culprit, the point in case is that no major criminal should be able to evade justice. It is particularly difficult to accept impunity as there is no alternative to criminal justice within the context of the rule of law. Impunity is a negation of the rule of law.

Cui bono? The phrase is regularly used to imply that one or more persons guilty of committing a crime may be found among those who have something to gain from it. Here in the context of impunity the following question may be asked: Who will benefit from impunity? The answer in most cases is that impunity will be to the benefit of the perpetrators and to the disadvantage of the victims.

Furthermore, people engaged in organised crimes – and in particular transnational and international organised crimes – look for situations conducive to their destructive activities. Impunity for core international crimes establishes a thriving environment for organised crimes as the perpetrators possess insider knowledge that can be abused for their lucrative benefit. As if this were not enough in terms of potential damage attached to impunity as its shadow, impunity following the commission of core international crimes may endanger vital interests in a state already subjected to these crimes. Perpetrators benefiting from impunity have ‘dark secrets’ in their portfolio. They are already of ill repute and, as such, marginalised in their own way. The threshold for them trading in their insider knowledge of the state’s vulnerability may be quite low. Perpetrators with impunity may become ‘useful idiots’ who betray the interests of their fellow citizens to the benefit of outside powers. *Realpolitik* in international affairs – that is, arbitrariness ruling supreme – is not yet a phenomenon of the past.

With regard to persons serving prison terms for convictions predating the commission of core international crimes by others in the same

country, impunity for these later and most gruesome crimes is everything but equal treatment under the law.

10.4.2. Truth and Reconciliation

After core international crimes have been committed, there is no doubt a pressing need for the truth concerning these crimes to be established and recorded as accurately as possible. The right to know is part of the human rights of the individual victims. It is also basic for the proper development of a society that it has the fullest possible understanding of its own history and in particular the exact nature of the severe difficulties encountered in the past. The committing of core international crimes is part of the latter. There is, moreover, a strong need for society as such to reconcile itself with its past, meaning to be familiar with it, to acknowledge it and to move on into the future on this basis. Ideally, former perpetrators and victims of their crimes are also reconciled on a personal level. The latter, however, cannot be demanded by society or even expected of it. The relationship between perpetrator and direct and indirect victims of his or her crimes is far too complex for that. Many a time a victim has a basic right to be spared the open-ended experiment of just meeting the perpetrator once again.

Frequently, reconciliation is spoken of as a synonym for forgiveness. That is, reconciliation is but another demand on the victims. First, no one can forgive anyone anything done to others and not to oneself. Any surviving fellow human being cannot forgive a murderer for the crime committed against the dead person. The bereaved individual can at most forgive the murderer for the loss, pain and sorrow caused to that person. Second, reconciliation is not an alternative to justice, is not a managed process and it cannot be unconditional. Whether unconditional forgiveness has a religious role to play is an entirely different issue. Resentment of a crime and all its dire consequences is instrumental to the upkeep of what has been referred to already as the moral universe.

Some countries in South America, Africa and elsewhere have established truth and reconciliation commissions, with or without international involvement and support, in order to secure the need for the truth to be told and for reconciliation – the latter often used as a generalised and rather indeterminate concept. Most probably, each such commission has had some beneficial results.

It is appreciated that it may be easier to confess one's sins in full if no sanctions follow; and, conversely, the perpetrator is commended for having thereby contributed his or her part to reconciliation in its vague and wide sense. There is, on the other hand, reason to believe that the instigators of crimes and the people most responsible for crimes will demonstrate dexterous footwork in order to minimise their involvement and to try to the fullest extent to leave the main responsibility with the actual henchmen. If these efforts are successful, this action also represents injustice. It also distorts any understanding of what happened. In short, it is a means of having people accused of serious crimes speak, but no guarantee that they will speak the truth. As core international crimes represent acts that outrage the human conscience and violate the elementary dictates of humanity, it is still vital to an individual human being's understanding of self to recognise responsibility for such crimes. The perpetrators will face infamy in fact (*infamia facti* despite there being no *infamia juris*) the more crimes they take responsibility for. Some perpetrators may – as another extreme – want to take the opportunity to exaggerate their crimes to enhance their notoriety and reputation for extreme brutality in order to strengthen a continued quest for power.

More often than not, truth and reconciliation commissions have been established to replace criminal justice. Many a time such commissions have been explicitly prevented by their mandate from naming the individuals found to be responsible for the actual crimes. Perpetrators are protected from being embarrassed by their names being revealed – as they have not received due process of law with the privilege of being presumed innocent until guilt has been proved beyond any reasonable doubt. In other cases, the expression of guilt of a perpetrator has been exchanged for an amnesty, such as in South Africa. Whether the South African example – where the truth and reconciliation process has replaced criminal justice almost completely – is a success story can best be judged when one sees how that society evolves after the leading lights of the fight against apartheid are no longer around to ensure calm. Already, the resentment of the amnesty policy and the ensuing injustice run high among previous victims and their descendants, people who still, rightly or wrongly, consider themselves as victimised by the legacy of the apartheid policy.

In short, truth and reconciliation mechanisms as they are known thus far are more or less linked to impunity if they operate to replace criminal justice and not to complement it. On their own, truth and recon-

ciliation mechanisms fall short of securing the rule of law. It should be remembered that in Rwanda a truth and reconciliation commission delivered its report just before the genocide started in April 1994.

In Europe it may be argued that truth and reconciliation mechanisms that operate to the exclusion of criminal justice will be in violation of Article 6 of the European Convention on Human Rights ('ECHR') giving everyone the right to a fair trial:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.⁸

Almost any negative public sanction linked to a crime committed is considered a situation in which a person is having a criminal charge against him or her with the right to a fair trial and presumption of innocence until proved guilty according to law. Thus, the lack of criminal justice has implications far beyond impunity as such. Traditional means of conflict resolution and reconciliation are not common at the state level in Europe today, and, as with truth and reconciliation mechanisms, will not be able to substitute for criminal justice.

10.4.3. Compensation

In the European legal system, the law has traditionally penalised the conduct of the wrongdoer as well as ensured that the victim is adequately compensated. For example, the law has for at least the last two millennia entitled the victim of theft not only to recover stolen property or its equivalent but also to damages that represent a multiple of the victim's interests; this is in addition to the punishment of the culprit upon conviction.

As far as core international crimes are concerned, the harm inflicted on the victims directly and indirectly can never be fully compensated. Life, limb and physical and mental health can never be subjected to *restitutio in integrum*. The direct losses and other damages are furthermore likely to add up to such amounts of money that perpetrators individually or collectively will be unable to pay any considerable part of the compensation due from them. Even society at large may be unable to compensate the victims enough for them to meet their bare indispensable financial

⁸ Council of Europe, European Convention on Human Rights, Rome, 4 November 1950, as amended 1 June 2010, Article 6 (<http://www.legal-tools.org/doc/8267cb/>).

needs, not to speak of providing assistance to victims to deal with the traumas represented by the core international crimes. The damage and destruction done to society as such may effectively prevent the state from stepping in to replace the lack of compensation from the perpetrators. International aid may not be unconditional and there may be less visible strings attached as well. Not even international aid is likely to ensure full compensation for pecuniary losses alone.

But, and this is significant, compensation as such is not dependent on there being verdicts in criminal cases establishing guilt for individual crimes. For compensation *to be received* – that is, for individual victims to qualify for compensation – it will normally suffice that it can be established that the person has been victimised in the overall events. The degree of proof needed in this respect may not be more than the probability that the person was affected by any one specific instance – such as, but not limited to, a person considered to belong to a persecuted ethnic group being present when his or her village or town was ethnically cleansed. Having been detained in a specific Nazi concentration camp would, for example, qualify for compensation according to the German Law on the Creation of a Foundation “Remembrance, Responsibility and Future”.⁹

As the victims as a group are unlikely to receive proper and full compensation from the state and through international aid, it is in their interest – and it is their right as well – to be able to seek compensation from the perpetrators of the crime. This right may nonetheless prove more of a lofty ideal than a reality if there are no criminal proceedings against the alleged culprits. Starting civil proceedings for the victims to pursue their rights may be beyond their financial means. In any event, it will be overly costly and painful as compared to situations where the compensation claims can be linked to criminal justice cases in which the basic facts are established beyond doubt and to a degree that no perpetrator can thenceforth shield him or herself behind the right to be presumed innocent until proven guilty by a criminal court.

On its own compensation goes some way in assisting the victims in overcoming some of the effects of the core international crimes having befallen them. Bare compensation – as understood in Europe today – does

⁹ The Law on the Creation of a Foundation “Remembrance, Responsibility and Future”, 2 August 2000.

not ensure the rule of law and it does not give the victims their due in terms of basic human rights.

10.4.4. Full Criminal Procedures

In a modern European democracy with the rule of law and respect for human rights, the *one* general response to the commission of a more or less serious crime is criminal procedures. There is no reason – as opposed to practical resource considerations – why this should be different when the subject matter is core international crimes. A modern European state in fact has no other tool available than criminal procedures if it to obtain a number of core goals: 1) to prevent arbitrariness and re-establish the rule of law; 2) to do justice to the victims – individuals as well as collectivities and the society at large; 3) to even out imbalances caused by the crimes in favour of their perpetrators; and 4) to recreate the shattered moral universe. This does not exclude the possibility of the state establishing special compensation schemes and assistance programmes for victims, or that a conducive atmosphere for reconciliation is sought throughout.

Only through criminal procedures can the law be made to work for everyone. After many cataclysms – including recent ones – there have been total changes in the leadership of many new states. Time and again new leaders have previously been severely victimised. For this reason many have come across as extremely generous if they have pardoned everyone who in the past had committed crimes against them. More or less simultaneously, many of these new leaders have made it known that they would like their forgiveness to serve as an example for all or most other victims as well. It should be appreciated that it is a very far cry between a person showing benevolence when raised to a position of power after a debacle, and the situation of the ordinary citizen who may face a lifelong struggle in a state of deprivation and hardship due to the crimes visited upon him or her.

On the other side, members of the upper echelons of society are more likely than ordinary people to evade anything but proper criminal procedures. When more affluent perpetrators escape justice they may continue to harm not only their former victims but also their previous frontmen, their accomplices in the crimes.

Criminal justice is crucial in securing social cohesion and to prevent fragmentation and a lasting breakdown in social relations. It is no less important in transitional periods of recovery than under normal circumstances to follow basic guidelines found, for example, in the categorical imperatives formulated by Immanuel Kant:

Act only in accordance with that maxim through which you can at the same time will that it become a universal law (*Handle so, daß die Maxime deines Handelns jederzeit zugleich als Prinzip einer allgemeinen Gesetzgebung gelten könnte*).

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an end (*Handle so, daß die Menschheit, sowohl in deiner Person als in der Person eines jeden anderen jederzeit zugleich als Zweck, niemals bloß als Mittel brauchst*).¹⁰

The main challenges for a fair justice system remain perpetually the same: to seek a balance between the interests of the victims, the perpetrators and society at large. It is, however, a prerogative for the state to enact the codes of conduct in the society and never to leave this prerogative – not even *de facto* – to any unrepresentative group of citizens and in particular not to criminal groups.

The fundamental reason for every state-organised or international justice system is to break the vicious circles of revenge, and thus to preempt and prevent private ‘justice’. That is, it is not only the victims of the crimes who are protected by a public criminal justice system; it also clearly works to the advantage of perpetrators, in particular the less protected among them. Street or mob ‘justice’ is, generally speaking, overly harsh and arbitrary – it may not necessarily be concerned with finding the real perpetrators; a scapegoat may do.

Proper criminal procedures will, furthermore, stand in stark contrast to the negation of the rule of law in the time of the conflict when people who were considered political enemies were not provided with recourse to the protection of the law. After such calamities there is a need to demonstrate that conflicts can be settled properly within the law – as well as

¹⁰ Immanuel Kant, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concern*, trans. by James W. Ellington, 3rd ed., Hackett, Indianapolis, 1993, orig. publ. 1785, pp. 30, 36.

criminal cases. There must be a justice system where defendants are also handled with respect for their human dignity and offered the benefit of legal protection and proper procedures.

A state that has severe unresolved domestic problems almost always becomes a target of meddling, interference and exploitation by other states and outside forces – frequently the least benevolent and organised international criminal groups that are always in search of non-functioning or less well functioning states. Hard-core criminals are, unfortunately, on one level far more flexible than the different justice systems.

The fact that core international crimes will not be time barred also favours these crimes being dealt with within the criminal justice system as soon as possible. It is in the best interest of every state to be able to handle *all* criminal cases within its own criminal justice system. International justice is subsidiary. The rationale for the *ad hoc* tribunals for the former Yugoslavia and Rwanda was *never* that the competence and impartiality of their staff were preferable to local justice.

10.4.5. Abbreviated Criminal Procedures

There are many situations where there are too many criminal cases to bring them all to full trial due to a lack of adequate human or financial resources or both within the relevant criminal justice system. In particular, after armed conflicts or other major upheavals the regular courts may be unable – if the courts are utilising full criminal procedures – to deal with an extreme caseload. After major cataclysms there may be tens of thousands of criminal cases pending.

In civil law systems there is a duty to prosecute all cases that come to the attention of the prosecution. When there is information that gives reason to believe that a crime has been committed, a file has to be opened. The law provides for no discretion in this respect. Prosecution is mandatory. It is not possible for the prosecution to select for prosecution only the number of cases considered tenable under the circumstances.

It is highly unfortunate when many core international crime case files have already been opened within a criminal justice system that is unable to process the cases within a reasonable time. It is equally unfortunate when many core international crimes have been committed but hardly any case files opened. Backlogs of criminal cases – sometimes huge –

are not exclusively a phenomenon after significant debacles. Globalisation and large-scale trafficking in people are some other causes.

For a number of reasons abbreviated criminal procedures have come to represent a main criminal law agenda in most European countries today. There are many national legal systems that have different kinds of abbreviated criminal procedures in other areas than the one represented by core international crimes. Abbreviated criminal procedures are considered one legal tool among several within most European criminal justice systems today. The idea of utilising abbreviated criminal procedures for core international crimes is new. Despite the existence of a new overall concept, core international crimes are primarily compound, utterly complex and multifaceted serious crimes, although not exclusively that complex and serious. Full criminal procedures represent the main or regular norm. Also abbreviated criminal procedures are regular in the sense that they are not irregular.

Proper criminal procedures shall, in the words of the UDHR, secure the following:

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11(1)

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Article 11(2)

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the

one that was applicable at the time the penal offence was committed.¹¹

Minimum requirements to criminal procedures are, for example, that prosecutors and judges administer the cases, provisions guaranteeing *ne bis in idem*, and the right to appeal are added in Protocols to the ECHR. Beyond the basics there is nevertheless quite some leverage for states to organise their criminal systems according to their traditions and preferences. Most national criminal justice systems will have room for the possibility of elaborating and enacting abbreviated criminal procedures – entirely within the due process of law requirements – significantly more time- and cost-efficient than regular full criminal procedures.

Abbreviated criminal procedures must be so construed as to secure the interests of the victims. Detailed and reasoned judicial decisions that are needed for the society to obtain accurate historical records form no obstacle to the adoption of abbreviated criminal procedures. The utilisation of abbreviated criminal procedures does not impact on the prioritisation that will have to be made when huge numbers of cases are waiting to be processed. Prioritisation may be based on the seriousness of the crime or the violated interests, and on the degree of the perpetrators' guilt. On a different level, a criterion for priority can be that an alleged perpetrator already has a core international crime case file open when a new crime allegedly has been committed.

The use of abbreviated criminal procedures should reflect the different levels of gravity of the core international crimes. For example, property offences and minor unlawful detention prior to large-scale transfers of whole population groups are offences committed on an immense scale in many armed conflicts. These offences do not as such violate the interests of life or personal integrity and may thus suitably be addressed in abbreviated criminal procedures.

For the purpose of this discussion, it is presupposed that abbreviated criminal procedures are so construed as to meet fair trial standards. Abbreviated criminal procedures will furthermore have to comply with the principle of legality. It is also taken as given that the abbreviated criminal procedures are prescribed by law and made an integral part of the state's criminal justice system. The legality principle may not exclude some kinds of conditional discretion. Extrajudicial mechanisms are not

¹¹ UDHR, Articles 9–11, see *supra* note 2.

regarded as abbreviated criminal procedures. The many abbreviated criminal procedures in use in Europe presently *do in general meet* the due process requirement; they do not fall short of respecting human rights and the fair trial prerequisites. Abbreviated criminal procedures are intended, however, to provide the minimum needed and to represent accelerated procedures. Thereby the abbreviated criminal procedures are likely to significantly shorten the time and reduce the resources spent to process case files.

Abbreviated criminal procedures can thus have a very significant role to play by helping states to maintain the rule of law and protect fundamental human rights by also being able to prosecute large numbers of core international crimes within their national criminal justice system and with full respect for fair trial principles. The core of the matter is to simplify without compromising due process.

10.5. Concluding Remarks

There are, to summarise, normative reasons – considerations having ethical force – to support the implementation of justice and criminal procedures following the commission of core international crimes. Facts – here, the crimes – become obligating reasons in conjunction with these normative considerations. They give rise to an obligation for the state to seek justice. Abbreviated criminal procedures are *one* tool available in the aftermath of core international crimes for the state to meet its obligation to administer justice and uphold the rule of law. The best can be the enemy of the good. The interests at stake when criminal justice is foregone are highly significant and should never be left unattended to in search for ‘perfect’ criminal procedures. What matters is to concentrate on what is good. In the secular world only criminal justice can restore the rule of law fully.

There is a false perception that it is only by having a less than perfect criminal justice system that the state can make a serious mistake, and then only *vis-à-vis* the perpetrators. Not administering justice can be more harmful, primarily with regard to victims and the society at large but also in relation to perpetrators. In law, as in medicine, there ought to be a basic *primum non nocere* norm (first, do no harm) based on which societies constantly seek a fair balance between the interests of all those involved – on all sides – in criminal justice cases and without ever sacrificing the human rights of either side. As sang Vera Lynn back in 1942:

There's a land of begin again
On the other side of the hill
Where we learn to love and live again
When the world is quiet and still

That “land of begin again” is as far as can be seen one of rule of law, human rights and democracy.

FICHL Publication Series No. 9 (2017):

Abbreviated Criminal Procedures for Core International Crimes

Morten Bergsmo (editor)

This book is about jurisdictions that open more war crimes case files than they can process by trial. Such situations are characterised by a backlog of opened case files. The book discusses the legal policy question whether new forms of abbreviated criminal procedures should be created for such situations, to process high numbers of less serious core international crimes on the basis of criminal law and procedure. The volume is not about countries that have suffered many war crimes but without opening more case files than they can handle. Nor is it about the mapping of backlogs of cases, prioritisation of cases, non-criminal justice responses to core international crimes, or reducing the length of standard proceedings.

In his Chapter 1, the editor Morten Bergsmo suggests that, upon reflection, this would seem to be one of the main areas of international criminal procedure that remains under-researched. He argues that ideas should be found in national abbreviated criminal procedures, in particular in Italian law – as analysed in Chapter 3 by Kai Ambos and Alexander Heinze – rather than primarily in the limited transitional justice practice on the question. The book presupposes that abbreviated criminal procedures for core international crimes are in accordance with international human rights standards and consensual in nature.

The volume has further contributions by Jan Braathu, Meddžida Kreso, Milorad Novković, Mark Drumbli, Ilija Utmelidze, Gorana Žagovec Kustura, Maria Paula Saffon, Phil Clark, Gilbert Bitti, Marieke Wierda and Hanne Sophie Greve.

ISBNs: 978-82-93081-20-3 (print) and 978-82-8348-104-4 (e-book).

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