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## Restoring International Justice: Exposing the Limitations of Retributive Justice and Proposing a Restorative Dimension

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Restoring International Justice: Exposing the Limitations of Retributive Justice and Proposing a  
Restorative Dimension

by

Nazek Jawad

A dissertation submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy in Government  
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## **Abstract**

This dissertation exposes the limitation of international retributive justice in realizing interstate reconciliation and proposes including a restorative dimension into the existing international criminal justice system. I maintain that justice within the international criminal system is conceptualized purely on a punitive notion influenced by the liberal institutionalist understanding of the state and the international system. Hence, the current retributive structure does not engage rival stakeholders, who experience interstate wars, in the process of international justice, as it is centered on upholding international law and punishing states that violate the law. To this end, the current process is not equipped to restore interstate broken relations and falls short from resolving rival narratives, as it is not established to do so in the first place.

I utilize the English School and its conception of international society that understands states' interactions in a relational form, which allows for a restorative dimension of justice. I propose incorporating a process that is focused on restoring broken relations between rival stakeholders, which would eventually contribute to interstate relations restoration.

Understanding the state as a collection of individuals illustrates the need for discursive spaces for rival stakeholders to encounter, exchange their experiences, and address rival narratives. To this end, the process of international restorative justice would contribute to the maintenance of international order, as through discourse, it would provide the “human infrastructure” of a renewed international society that is bounded by shared norms.



This research proposes a more holistic approach to international criminal justice which includes both retributive and restorative measures. This would contribute to the maintenance of international order as two critical ends would be realized: the upholding of international law and the pursuit of interstate relations restoration.

## **Introduction**

This research advances a normative argument for the benefits of incorporating restorative justice elements into the existing international criminal justice system. The current system is mainly punitive as it is centered on upholding international law and punishing states that violate the law. I argue that restorative justice, which is focused on restoring broken relations, has been underutilized within the arena of international relations. If both retributive and restorative justice were to be included, this would result in a more holistic approach, and would contribute to the maintenance of international order. I also argue that if this were the case, two critical ends would be realized: the upholding of international law and the pursuit of interstate reconciliation, through the restoration of rival stakeholders' relations. (It should perhaps be mentioned here that in using the term 'stakeholders', throughout this research I refer to individuals who have been affected by conflict, whether part of government or civilian institutions.)

I first assess and critique the existing international criminal justice system that addresses violations committed during interstate wars. I provide a critique by discussing the theory of liberal institutionalism and its main assumptions with regard to anarchy, the state and international cooperation. I analyze how these ontological understandings have informed the prevailing punitive notion of international justice that is based on punishment. I maintain that the weakness of international retributive justice is that it fails to engage stakeholders in the process of justice, and also fails to provide the spaces needed to address rival narratives. On account of the absence of an active participatory role for individuals in the process of international justice,

stakeholders are incapable of internalizing the judgments produced by this process, and therefore the international norms the verdicts subscribe to fail to forge the social and political change needed in the aftermath of war. I also provide my prescription for the problem by utilizing the English School theory, and its concept of international society that understands states' interaction in a relational form, which facilitates a restorative notion of justice in the international criminal justice system. I assert a prescription for change based on incorporating restorative justice within the international criminal justice system. This would permit stakeholders to be participatory agents directly in the process of interstate relations restoration. I maintain that what is needed is a site for stakeholders to encounter each other, to exchange their experiences about what happened, and engage in an open and on-going dialogue to build new ways to move forward. Discursive spaces (please see pp. 15-17) allow for this to take place, and the theory of restorative justice provides the framework to conceptualize these spaces. I propose an international criminal justice that is both retributive and restorative by incorporating elements of what I call "international restorative justice," adopted from the discipline of criminology. Based on the theory of restorative justice, the strength of international restorative justice, as suggested in this research, is that it connects the process of international justice with regenerating international society guided by shared international norms, as it permits international justice to function at the level of the individual. Restoring broken relations, forging social change, and maintaining political order within the international society are mutually constituted goals of international restorative justice. It should be noted though I am not suggesting in this research that institutionalizing restorative justice within the international criminal justice is the cure-all solution that would resolve all the ills and damages produced by interstate wars. However, I am

arguing that it would provide a vital platform for stakeholders to address those ills, and more importantly, to map the path for interstate relation-restoration.

The discipline of international relations is replete with innovations borrowed from other fields, such as Kenneth Waltz's theory of structural realism (Waltz, 1979), which is based on the neoclassical economic theory of the firm, and Alexander Wendt's theory of constructivism in the field of international relations, based on the discipline of sociology (Wendt, 1999). I consider that the development of restorative justice theory is another notion that is able to provide insights in the field of international relations.

The research is mainly concerned with evaluating the underlying notion of justice relating to international criminal justice institutions that deals with interstate war crimes. Hence the research primarily focuses on the pursuit of justice within the International Criminal Court's ad hoc international criminal tribunals that deal with war crimes, genocide, crimes against humanity and crimes of aggression committed by states during interstate wars. However, ICC trials that deal with intrastate violations committed domestically within a state in the context of civil war or insurgency are not part of the remit of my dissertation, as I focus on interstate relations restoration. Crimes committed by terrorists, and militia and terrorist groups, are also beyond the scope of this research, as I focus exclusively on crimes committed by states in interstate wars.

I now address the problem discussed in this research, and show how my research is contributing to the body of literature that is reviewing the international criminal justice system by proposing a different perspective, which is a focus on stakeholders' relations restoration.

## Research Problem

The ICC was founded in 2002 in The Hague, The Netherlands, as a permanent international criminal court after the adoption of The Rome Statute of the International Criminal Court in 1998, an international treaty at the United Nations (UN). It was established with the responsibility for holding and trying individuals who are involved in four types of crime: genocide, crimes against humanity, crimes of aggression and accountable war crimes.

International criminal justice pursued by the ICC has been questioned within both academic and political arenas (Clarke, Knottnerus, and Volder, 2017). An inherent power structure, structural selectivity, neocolonialist critiques,<sup>1</sup> and the issue of victor's justice,<sup>2</sup> are just some of the objections raised against the current international criminal justice, since the Nuremberg trials of 1945–6 and the Tokyo War Crimes trials of 1946–8, up until the International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994. The ICTY has been widely critiqued as it prosecuted Serbs disproportionately,<sup>3</sup> while turning a blind eye to crimes and violations committed by the North Atlantic Treaty Organization (NATO) and the weapons and tactics they used during the Kosovo campaign in 1999 (Heinze, 2016: 159). The ICTR has also been critiqued for its failure to prosecute the Rwandan Patriotic Front (RPF) that had been accused of the massacre of civilians and militias amounting to 45,000 lives (Hauschildt, 2014: 1). In addition, objection within the political arena to the existing international criminal justice is evident in the plea of African states to withdraw from the Rome

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<sup>1</sup> See, for example, Paul D. Schmitt, "France, Africa, and the ICC: The Neocolonialist Critique and the Crisis of Institutional Legitimacy." (2016). In *Africa and the ICC: Perceptions of Justice* 127-51.

<sup>2</sup> See, for example, Richard H. Minear, *Victor's Justice: Tokyo War Crimes Trial*. (2015) and Danilo Zolo, *Victor's Justice from Nuremberg to Baghdad*. (2009).

<sup>3</sup> Almost two-thirds of those charged at the ICTY were Serbs, according to Owen Bowcott in "Yugoslavia Tribunal Closes, Leaving a Powerful Legacy of War Crimes Justice", *Guardian*. December 20, 2017. Available at: <https://www.theguardian.com/law/2017/dec/20/former-yugoslavia-war-crimes-tribunal-leaves-powerful-legacy-milosevic-karadzic-mladic>. [Accessed January 24, 2018.]

Statute on account of the court's bias against African states and its discriminatory target of African leaders.<sup>4</sup>

Recently, the international criminal justice system has been examined from a different perspective through employing a victim-centered approach (Findlay, Kuo and Wei 2013; Moffett 2014). In their book *International and Comparative Criminal Justice: A Critical Introduction* (2013), Mark Findlay, Louise Boon Kuo and Lim Si Wei outline challenges facing the work of international criminal justice, including politicization and selectivity that undermine the needs of the victims. The authors propose adopting a victim-centered approach that would privilege victims' interests, and eventually would advance the legitimacy of international criminal justice (Findlay, Kuo, and Wei, 2013). In the same line of thought, in his work *Justice for Victims before the International Criminal Court* (2014), Luke Moffett develops a theory of justice for victims within the ICC. He maintains that on account of the court's limited resources and due to its punitive orientation, the court fails to meet victims' needs. This is especially apparent in the court's inability to provide reparations to all victims and to prosecute all cases of violent crimes within the international system. Moffett suggests a complementary role of states that is oriented towards the victims, through providing reparations and domestic measures of accountability (Moffett, 2014).

This research contributes to the body of literature that examines the existing international criminal justice system and explores alternatives that would transform it. Unlike the previously reviewed works above which focus on victim-centered approaches, however, I instead focus on stakeholders' relations restoration in evaluating the international criminal justice system. I argue that the current paradigm is incomplete and lacks a restorative element that would complement

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<sup>4</sup> In October 2014, Ugandan President Yoweri Museveni called on the states of the African Union collectively to withdraw from the ICC, and in subsequent remarks described the ICC as "useless" (Conor, 2016).

its retributive component. Interstate wars produce rival narratives and uneven experiences between national communities of rival states. Once the wars are over, rival states produce their official, differing histories about what happened that validate their own national rhetoric. One state's act of aggression becomes another state's act of liberation. The atrocities and gross violations committed during interstate wars problematize the straightforward assumptions about crime and justice that currently shape the process of international justice. In addition, the magnitude of devastation caused by interstate wars means that large numbers of people in rival national communities experience many human rights violations, and also that large numbers of people have been responsible to a varying degree in creating such misery.

Therefore, the complex, multifaceted reality produced by interstate wars and the variations of contexts of international conflicts demand a multifaceted approach to international justice that is fitting for such variations. I draw on empirical cases in order to illustrate the benefits of incorporating a process of restorative justice that would provide a discursive space for stakeholders to address these rival narratives and pursue relations restoration. Stakeholders' encounter and discourse would introduce social and political change within the international society guided by international norms, and in this way, would contribute to the maintenance of international order. This would transform the existing international criminal justice into a more comprehensive system that is both retributive and restorative.

The following chapter examines the case of the ICTY to demonstrate the limitations of retributive justice. The ICTY was premised with the idea that reconciliation automatically follows retributive justice. Carla Del Ponte, the ICTY former prosecutor, maintained that retributive justice advances reconciliation in states that have experienced conflicts. She said, "Our primary objective is to bring justice, thereby contributing to the process of reconciliation

between peoples who have been torn apart by the wars of the nineties” (Del Ponte, 2005). I argue, however, that this is not the case and that stakeholders’ reconciliation requires a restorative dimension to international criminal justice. I show this through instances where the ICTY claimed achievement of reconciliation in the Balkan region remains highly contested. Military generals who were convicted by the tribunal as war criminals were regarded as national heroes in their countries, which is indicative of the contested perception of the achievement of justice by the national communities involved. Ratko Mladic, a former Bosnian Serb military general who was convicted by the ICTY in 2017, has been praised and referenced by the people in Belgrade as a national hero with posters of his image plastered on walls in public spaces after his conviction by the tribunal to a life sentence (Angelovski, 2017). In addition, thousands of people, along with two Croatian ministers, gathered in Zagreb in November 2017 to commemorate the Bosnian Croat general Slobodan Praljak, who killed himself at the tribunal after his conviction (Angelovski, 2017). Vladimir Lazarevic, a former Yugoslav army officer, was “appointed to teach cadres at the Serbian Military Academy” after he served his sentence for war crimes in Kosovo (Angelovski, 2017). These events collectively, along with others that are detailed in the following chapter, are indicative of the persistence of rival narratives about the Balkan wars that the tribunal has failed to reconcile or alter throughout its proceedings. Contrary to Del Ponte’s remarks, achieving justice did not yield to reconciliation as a consequence. Rather, the differing accounts of what happened during the Balkan wars have remained after twenty-four years of the deliberations of the tribunal. There is a clear discrepancy between the narrative displayed by the tribunal and the narratives promoted by rival stakeholders, which is partly due to the fact that the affected individuals did not engage in the process of justice.



In the third chapter I examine the discursive spaces that were present in the Truth and Reconciliation Commission (TRC) in South Africa. Stakeholders were involved in the process of justice through encounter and truth-telling. The TRC case illustrates the role of discursive spaces in addressing rival narratives produced by violent conflicts, and how this contributed to the process of reconciliation, as it provided an understanding of the underlying causes of violations committed during apartheid.

In the fourth chapter, I look at Franco–West German reconciliation during the years after World War II, and examine the role of discursive spaces created by societal initiatives. The chapter illustrates the restorative role of discursive spaces for stakeholders to encounter each other; address competing narratives around the conflict; make amends; and eventually contribute to interstate reconciliation. The chapter is also significant within the context of international politics as it highlights the critical role of stakeholders as direct participatory agents in the process of interstate reconciliation. Resorting to the English School and its understanding of states’ interactions in relational terms allows a restorative understanding of international justice within the international society. The chapter also illustrates how the creation of discursive spaces has contributed to the reintegration of the previously warring states within a renewed regional international society, all of which has contributed to the maintenance of international order.

Overall, in this research I advance a normative claim for incorporating restorative justice elements into the proceedings of international criminal justice that would provide a platform for stakeholders’ engagement in the process of international justice. I propose the creation of discursive spaces where rival narratives may be addressed by stakeholders, which would eventually contribute to interstate relations’ restoration.

## **Research Question, Hypothesis, and Concepts Utilized**

### *Research Question(s)*

My research addresses the following:

How is justice conceptualized within the international criminal justice system, and what are the implications of this conceptualization? What is to be done about it?

### *Hypothesis*

My hypothesis is that international justice is currently conceptualized in a purely punitive form within the existing international criminal justice system on account of the latter's liberal institutionalist orientation. I argue that international criminal justice is centered on upholding international law and international regulations, a byproduct of which is that it is based on punishing violating states. The punitive feature of international criminal justice, as manifested in the proceedings of the ICC and in the ad hoc international criminal tribunals, does not provide stakeholders that have experienced interstate wars with any method in which to take part in the process of justice. The current system lacks the discursive spaces for stakeholders to encounter the "other," or exchange their experiences about what happened, which are essential for resolving rival narratives produced by wars.

I utilize the English School as it provides the concept of international society that understands international politics through a relational perspective. Within this understanding the wellbeing of states' relations is central, as it is their interactions that regenerate international society and contribute to the maintenance of its order. The English School addresses an

interesting issue as it asks how a system of states can be transformed into an international society, and how the latter can slip back into a system of states. According to English School scholars the international society is vulnerable to quickly lapsing into a system of states with the outbreak of wars and interstate conflicts (Wight, 1979). Also, that the development of the international system into an international society is conditioned by the development of the social nature of the international system with the accumulation of mutually accepted rules and values. Hence, I argue that the pursuit of international restorative justice, which addresses lingering bitterness and divisiveness caused by interstate wars, is critical for the advancement of the international society. Here, the concept of international restorative justice is seen to be constructive for the stability and strength of the international society as it enhances the normative and moral standards of stakeholders through encounter and discourse. By engaging stakeholders in the process of interstate relations restoration, the process of international restorative justice provides the “human infrastructure” for a renewed international society that is bound by international norms. While power politics and resolving competing states’ interests through violence contribute to the fragility of international society, international restorative justice offers methods of partially resolving this fragility, as it may restore broken interstates’ relations and advance mutually accepted international norms and shared meanings of criminal acts, all of which are critical for the survival of the international society.

### *Concepts Utilized*

#### Retributive Justice and Restorative Justice

Retributive justice may be defined as a concept of justice centered on punishment on account of the underlying notion that justice takes place when offenders who commit crimes

“morally deserve to suffer a proportionate punishment.”<sup>5</sup> According to Declan Roche, the retributive justice approach is based on the work of Enlightenment philosophers Kant and Hegel, and the notion that punishment is the merited response to any criminal act (Mani, 2002: 33; Roche, 2011: 78). Here, the underlying rationale of retributive justice views the offender as one who “has taken an unfair advantage in committing a crime, which can only be corrected by the administering of a punishment” (Roche, 2011: 78). On the other hand, restorative justice, which gained increasing attention within the field of criminal justice in the 1990s, is focused on restoring broken relations between victim(s) and offender(s). Restorative justice programs in family law, teen courts, and juvenile justice have taken place in more than twenty-five countries, including New Zealand, Northern Ireland, Australia, Canada, Great Britain and the US (Roche, 2003: i; Roche 2011: 77). From the start, restorative justice has been defined in juxtaposition to retributive justice, as in the most prominent work of Howard Zehr, regarded as the “Godfather of restorative justice” (Johnstone and Van Ness, 2007: 21), when he proposed restorative justice as an alternative to retributive justice in his *Changing Lenses* (1990). He contrasts both approaches in terms of the following:<sup>6</sup>

Retributive Lens	Restorative Lens
Crime defined by violation of rules (i.e. broken rules).	Crime defined by harm to people and relationships (i.e. broken relationships).
Interpersonal, conflictual nature of crime	Crime recognized as interpersonal
Obscured, repressed: conflict seen as individual versus state.	Conflict: value of conflict recognized.

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<sup>5</sup> Walen, A. (2016). "Retributive Justice." In E. N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy*. Winter 2016 edn. Available at: <https://plato.stanford.edu/archives/win2016/entries/justice-retributive/>. [Accessed March 3, 2018.]

<sup>6</sup> Source: Zehr, *Changing Lenses* (1990): 184-5; Zehr, “Retributive Justice, Restorative Justice” (2003): 33-34.

State as victim.	People and relationships as victims.
State and offender seen as primary parties.	Victim and offender seen as primary parties.
Victim's needs and rights ignored.	Victim's needs and rights central.
Interpersonal dimension is irrelevant.	Interpersonal dimension is central.
Community on sideline, represented abstractly by the state.	Community as facilitator in restorative process.
Wounds of offender peripheral.	Wounds of offender important.
Offence defined in technical, legal terms, devoid of moral, social, economic, political dimensions.	Offence understood in whole context: moral, social, economic, political.
Focus on establishing blame, on guilt; on the past (did he/she do it?).	Focus on problem-solving, on liabilities and obligations, on the future (what should be done?).
Imposition of pain to punish and deter/prevent.	Restitution as a means of restoring both parties; reconciliation/restoration as goal.
Justice defined by intent and by process: right rules.	Justice defined as right relationships: judged by the outcomes.
One social injury replaced by another.	Focus on repair of social injury.
Action directed from state to offender: <ul style="list-style-type: none"> <li>• Victim ignored</li> <li>• Offender passive</li> </ul>	Victim's and offender's roles recognized in both problem and solution: <ul style="list-style-type: none"> <li>• Victim's rights/needs recognized</li> <li>• Offender encouraged to take responsibility</li> </ul>
Offender accountability defined as taking punishment.	Offender accountability defined as understanding impact of action and helping to decide how to make things right.
"Debt" owed to state and society in the abstract.	Debt/liability to victim recognized.

Response focused on offender's past behavior.	Response focused on harmful consequences of offender's behavior.
Stigma of crime unremovable.	Stigma of crime removable through restorative action.
No encouragement of repentance and forgiveness.	Possibilities for repentance and forgiveness.
Dependence upon proxy legal professionals.	Direct involvement by participants.

As illustrated in the table, Zehr has defined restorative justice based on the dichotomous retributive/restorative justice approach. His seminal work has shaped the narrative through which restorative justice is discussed by scholars, practitioners and advocates. According to retributive justice scholars, retributive justice suggests punishment as a just response to crime, since it imposes harm on the offenders to equal their criminal acts. To this end, offenders “should suffer their fair and determinate punishment proportionate to the seriousness of the crime” (Duff and Garland, 1994: 12). Therefore, by imposing punishment on the offender, justice may be realized. According to Howard Zehr, however, the concept of retributive justice is problematic because in a domestic context within criminal law the violation is considered to be against the state rather than the victim(s), and it is solely the state that has the authority to respond to the offense. The relationship between the victim(s) and offender(s) is therefore taken out of the picture as the state is the victim, and the relationship is between the offender(s) and the state. The process of retributive justice is thus not concerned with reconciliation between the offender(s) and victim(s), and restoring their relationship is not central within retributive justice's understanding of crime in the first instance (Zehr, 1990: 67-69). However, contrary to Zehr's dichotomous understanding of restorative justice, this research demonstrates that retributive and restorative approaches to justice are not mutually exclusive, but rather they complement each other. By

upholding the law and restoring broken relations, both approaches contribute to the rebirth of the broader community through the social change guided by shared norms.

### International Restorative Justice and Discursive Spaces

My research employs the concept of restorative justice first theorized in the literature of criminal justice to advance an argument for incorporating restorative justice within the international criminal justice system. I adopt the concept of restorative justice as defined by Jennifer Llewellyn and Daniel Philpott, who have defined it as a “relational theory of justice” (Llewellyn and Philpott, 2014: 17). This offers a different starting point from other concepts of justice as it is against an “individualist-based” understanding of justice because it “takes the fact of human connection – of human beings as relational – as its starting point for thinking about what justice means and what is required to do justice” (Llewellyn and Philpott, 2014: 18). In the same line of thought I maintain that the process of international restorative justice is focused on restoring international relations that have been shattered by the act of wars. Interstate wars severely damage the relation between involved rival states, and the damage spreads at both government and civilian units. However, the existing international criminal justice does not engage the affected national communities that have endured war and its aftermath, and who experience continuing bad relations with their counterparts, because they are not engaged in the proceedings of justice. The lasting rivalry between states is damaging to the well-being of the international society. Hence, the need for international restorative justice that is concerned with restoring broken international relations.

As the main strength of international restorative justice is its relational focus, this makes rival stakeholders’ participation in a process of interstate relations restoration central to the process of international restorative justice. To this end, the latter lends power to national

communities affected by wars, as well as those who have been ignored by the process of retributive justice, which has privileged the role of the state in executing justice. Hence, I argue that for the current structure of the international criminal justice system to be restorative, it should include public fora for various parties of the conflict to come together and discuss the aftermath of the conflict. I refer to these public fora as ‘discursive spaces’ which include individuals who belong to different parts of the state (non-governmental organizations (NGOS), intergovernmental organizations (IGOs), governments, intellectuals, educators, young people, religious institutions, etc.) These discursive spaces provide the platform for rival stakeholders to encounter and contribute to an ongoing public dialogue on the aftermath of war. It is to be hoped that these discursive spaces would provide the affected national communities with the opportunity to arrive at an agreed outlook on their shared history, address rival narratives about what happened, and decide on steps to be taken to restore broken relations. In doing so, discursive spaces allow a bottom-up approach, and recognizes the role of affected individuals in the process of interstate restoration. To this end, establishing discursive spaces is fundamental to the process of restorative justice, as discursive spaces provide the platform for stakeholders’ encounter and engagement in the process of interstate relation restoration.

In addition, this research demonstrates that international restorative justice is a context-dependent, dynamic process, as the process of interstate relations restoration is shaped by the stakeholders (which includes government personnel and civilians) rather than retribution applied according to law, which is determined solely by governments. It is stakeholders who shape the process of interstate relations restoration to accommodate their needs for moving forward, which may vary from case to case, and they are also able to adopt various means to provide discursive spaces to realize relations restoration.



In lending power to national communities, discursive spaces re-engineer the international criminal justice system which, to borrow John Agnew's term, has been locked in the state's 'territorial trap' (Agnew, 1994). According to Agnew, on the one hand, the state is conceptualized as a unitary actor within the international system, and to this end it has been reduced to an abstract, ahistorical and "unchanging spatial" entity (Agnew, 1994, 61). On the other hand, the state contains a collective of individuals, a national community, and to this end there is a historical and social context that informs the state's actions within the international society. Hence, addressing international restorative justice becomes challenging as the state comprises a point of contention on account of its national/international polarity. Establishing discursive spaces, however, addresses the national/international polarity of the state when addressing the issue of international restorative justice by engaging both entities of the state in the process: that is, both the government and civilians. To this end, stakeholders are engaged in the proceedings of justice through collective participation in restoring social relations. Hence the process of interstate restoration takes place at both national and international levels, which dissolves the rigid national/international polarity of the state.

I argue this would contribute to the maintenance of international order, as the discursive spaces would contribute to an ongoing international dialogue about international norms that govern warfare, and what binds us together as an international society. The existence of rival narratives produced by wars is detrimental to the formation of an international society and might eventually result in its decline. If they are not addressed and dealt with, the seeds of resentment and bitterness may lead to wars of aggression and very serious violations of the international society norms. I therefore advocate the importance of the concept of international restorative justice that is focused on restoring broken stakeholders' relations. Addressing competing

narratives and resolving them through discourse eventually generates a renewed international society, and preserves its order.

## **Research Design, Methodology, and Case Study Selection**

### *Research Design*

The research has been designed to first negate the argument that the retributive nature of the international criminal justice system on its own is capable of achieving interstate reconciliation between states that experience wars. Second, to consider restorative justice at the state level, identify its functioning discursive element, and then to draw on the restorative efficacy of this element at the level of the international system.

It should be noted that because I am addressing the issue of justice within the international system, and how it functions both between states and within a state, I am therefore including different levels of analysis; the international system, the state, and the individual. I include each of these levels in my analysis to draw connections between individuals and the process of justice that takes place within the international system. Individuals are important because justice can only be felt and internalized by people within the state, nevertheless the state remains an important actor, and because it asserts an unrivaled amount of power it must be held accountable.

In this research I am advancing an argument that promotes a participatory role of individuals in the process of international justice. To do so I first demonstrate the weaknesses of liberal institutionalism that emphasizes the role of the state regarding issues of international

justice. The major limitation of this theory is that it ignores how individuals are affected and the active role they can play in reconciliation. To this end, the process of justice that is taking place at the level of the international system is not contributing to interstate reconciliation. I also illustrate the benefits of the restorative process at the societal level, and identify its discursive element that is contributing to relations restoration between rival individuals. In addition, by resorting to the English School and its conception of international society, I demonstrate the benefits of this discursive element at the level of the international system. I show how discursive spaces contribute to relations restoration at the societal level between individuals from rival states. To map an argument that promotes engaging individuals in the process of international justice, I focus on how the process of international justice must go deeper than the state and include individuals within rival states to reconcile rival narratives between groups of people.

### *Methodology*

The method of inquiry employed in this research is qualitative case study analysis. It should be noted however, while this research draws on empirical cases to advance a normative theoretical claim for including restorative measures of international justice, this is in no way a positivist research. This research advances an argument for international restorative justice by undertaking the following:

a) I critique how international justice is conceptualized in a mere punitive form, based on the assumptions of liberal institutionalism. By focusing on the case of the International Criminal Tribunal of Yugoslavia (ICTY), I highlight the shortcomings of international retributive justice in addressing competing rival narratives about what happened during the Balkan Wars of the 1990s, and in realizing interstate reconciliation. This is the most recent ad hoc international

tribunal, and the only one which has addressed interstate violations and crimes that took place during a conventional war that has been concluded. I examine this case to investigate the retributive nature of the existing international criminal justice system, focusing on how the tribunal contributed to stakeholders' relations restoration. The case of the ICTY illustrates the limitations of the process of retributive justice in engaging the affected national communities in the process of justice. It fails to resolve rival narratives on account of the lack of discursive spaces where stakeholders from rival states might exchange their meanings about the shared violent conflict and move towards a shared outlook on their history.

b) I advance an argument for incorporating restorative justice tools within the international criminal justice system. I utilize the theoretical perspective of the English School and its understanding of the international society that understands states' interactions in relational form, which allows for a restorative conception of international justice. I maintain that international restorative justice would contribute to interstate reconciliation, as it provides discursive spaces for rival stakeholders to encounter each other and address their rival narratives about what happened. The process of interstate relations restoration would promote a renewed international society guided by international norms. Thus, I propose that regenerating international society and the maintenance of international order are mutually constitutive ends of the process of international restorative justice. Because of the absence of cases of interstate restorative justice within the international criminal justice system, this argument will be advanced in two stages:

1. I consider the role of restorative justice in contributing to the process of reconciliation in a domestic context by discussing the case of the Truth and Reconciliation

Commission (TRC) in South Africa. The case of the TRC is considered to be the leading case of reconciliation in a domestic context within the international system. This case helps to extrapolate the elements of restorative justice that function at the state level and I consider it at the level of the international system. The case of the TRC shows how discursive spaces that provided encounter and truth-telling between victims and perpetrators allow for an intersubjective understanding between them in the aftermath of a violent conflict. It shows that restorative justice contributes to reconciliation at the state level, because it engages individuals affected by the conflict in the process of justice. Significantly, this case illustrates the need for both retributive and restorative processes of justice in post-conflict societies. Considering the case of the TRC illustrates how restorative justice failed to reconcile stakeholders when retributive measures were undermined. This case therefore highlights how both retributive and restorative justice measures are required.

2. I consider the role of the discursive element of restorative justice at the level of the international system. I utilize the English School as it provides a different understanding of the state from that of the liberal institutionalist perspective that encompasses various societal and political factions. The case of Franco–West German reconciliation allows for examining the role of discursive spaces in addressing rival narratives, restoring broken relations, and eventually contributing to interstate reconciliation. It illustrates that providing discursive spaces between stakeholders contributes to interstates' relations restoration, and forges social change within the international society guided by international norms. The Franco–West German reconciliation after World War II is often attributed to the founding of

economic institutions such as the European Coal and Steel Community (1951) and the European Economic Community (1957), which promoted shared economic interests between European states, including France and Germany, who were considered to be “hereditary enemies,” with the notion that shared economic benefits would advance peace in Europe. In my research, however, I focus on the societal and political initiatives that took place after World War II, including the establishment of the Dokumente/Documents (1945), the meeting between Germany and France in Caux (1946), the founding of the Franco-German Institute (FGI) in Ludwigsburg (1948), and the founding of the first twin cities of Ludwigsburg and Montbeliard (1950). The Franco–West German reconciliation illustrates how stakeholders’ encounters contribute to interstate restoration when societal groups, as well as political leaders, pursue restorative initiatives.

### *Case Study Selection*

#### The International Criminal Tribunal of Yugoslavia (ICTY)

In my research I resort to secondary sources such as basic documents of the ICTY, including the statute of the tribunal, public perception polls conducted in stakeholder states to assess public perceptions of the tribunal, qualitative studies that investigated how victims perceived the proceedings of the tribunal, and statements made by political leaders on national days pertaining to events that took place during the Balkan Wars of the 1990s which were addressed by the ICTY. The aim is to evaluate how the process of justice provided by the tribunal has contributed to stakeholders’ relation restoration. I look at how the process of justice

is internalized by stakeholders to evaluate how the process of retributive justice contributes to eliminating the divide among rival states.

It should be made clear that the main cases that have been concluded by the ICC, which include the trial of Thomas Lubanga Dylio (2012), and the trial of Germain Katanga and Mathieu Ngudjolo Chui (2014) are not part of my brief. These cases are not considered in the research as the convicted are militia leaders that committed intrastate crimes in the Democratic Republic of Congo (DRC) within the domestic context of civil war during the Second Congo War (1998–2003). Another case concluded by the ICC is the trial of Ahmad al-Faqi al-Mahdi, a rebel who pleaded guilty to committing cultural war crimes, as he intentionally directed attacks against historical monuments in Timbuktu city in Mali (designated a World Heritage Site by UNESCO). This case is also not considered as it was an instance of intrastate violence committed by al-Mahdi who is a Malian militia rebel member of Ansar Dine (a Tuareg Islamist militia in North Africa) during the Mali Civil War, or what is known as the Northern Mali conflict (2012–2015). In addition, there has been a case of violent interstate conflict between Iraq and the UK that addresses alleged war crimes committed by the UK during the invasion of Iraq 2003–2008. However, this case is still under preliminary examination by the ICC, and therefore does not qualify to be addressed by this research.

Overall, these afore-mentioned concluded cases are not considered in this dissertation as they do not fit the focus of the research (investigating cases of international justice dealing with interstate violence committed during an interstate war). In addition, the International Criminal Tribunal of Rwanda (ICTR) is also not considered in this research for the same reasons listed above. The ICTR dealt with intrastate crimes that were committed during the Rwandan Civil War (1990–1994).

## The Truth and Reconciliation Committee (TRC) in South Africa

South Africa is often referred to as a country that transformed itself in a relatively nonviolent way after the fall of apartheid in 1994, on account of the significance of the role of the TRC as a “reference point” and a “field-changing moment” (VanAntwerpen, 2014: 82). The TRC is considered and discussed in this research as it is the first instance of relations restoration as a manifestation of justice (Llewellyn and Howse, 1999; Llewellyn and Philpott, 2014). The case of the TRC in South Africa is extremely significant for this research as it allowed rival stakeholders to take part in the process of justice, by providing discursive spaces where rival stakeholders were able to encounter each other and with each providing an account on what happened. It is critical for illustrating the role of discursive spaces in relations restoration and regenerating a renewed community guided by shared norms, and for considering the efficiency of restorative justice at the societal level.

I resort to secondary sources such as basic documents of the TRC, including the statute of the final report, to assess public perceptions on the tribunal, qualitative studies that investigated how victims and perpetrators experienced the process of restorative justice, and their take on the tools utilized (encounter, truth-telling, and reparation).

## The Franco–West German Reconciliation

The Franco–West German reconciliation is critical for this research as it is a distinctive case of interstate relations restoration within the arena of international politics, given the intense past rivalry between France and Germany. By considering this case I draw on the benefits of engaging individuals in the process of justice and providing discursive spaces between stakeholders that had previously experienced conventional war contributes to their respective interstate relations restoration.



I next critique the notion of justice the international criminal system is currently set to pursue, based on a punitive, ahistorical outlook on international politics.

### **International Criminal Justice: Healing the Symptoms but not the Disease**

Numerous current international institutions, including the UN and existing human rights regimes and international law, have been founded on an underlying liberal perspective of international relations, based on international cooperation and pursuing collective security by abiding by international law and international norms and regulations (Burchill, 2013). Within a liberal institutionalist perspective of international relations, states are understood to be rational, self-interested actors which join international institutions that are regulated by well-defined rules and norms, including a set of penalties for states that violate the regulations that have been enacted. Within this overarching outlook on international politics, the underlying notion is that international justice is achieved by punishing state actors that violate international law. Critiquing this perception of justice is at the heart of this research, which considers that pursuing international justice that is rooted solely in notions of retribution would lead to bitterness, as underlying rival narratives behind conflicts are in fact not resolved at all.

### *International Cooperation: Between Liberal Institutionalism and Neorealism*

Liberal institutionalism provides a pluralist account of international politics in which both sovereign states and non-state actors are important entities within the international system. Hence, international institutions, NGOs, multinational corporations (MNCs) and transnational groups, including human rights, environmental, and terrorist groups, are all important actors within the international system. This pluralist understanding of international politics has been

reflected in the work of Robert Keohane and Joseph Nye's *Power and Interdependence: World politics in Transition* (1977), which addressed the role of nongovernmental organizations and transnational organizations within the international system that function transnationally across state boundaries (Keohane and Nye, 1977). The centerpiece of Keohane and Nye's work is the concept of "complex interdependence" that analyses international politics, taking into account emerging developments in the international political economy and the rise of transnational issues (such as international trade, health, and environmental issues). The authors maintain that the pervasive interdependence within the international system between states and non-state actors alters the nature and effectiveness of state power. Interdependence presents a different framework from the realist system, which is based on the notion of "power politics," as it connects states through different channels (both state and non-state institutions) and around different transnational issues.

The realist response came from Kenneth Waltz in his book *Theory of International Politics* (1979), where he adopts a scientific approach to the study of international relations, which became known as neorealism (or structural realism).<sup>7</sup> He argues against the institutional liberalist advocacy of international cooperation, maintaining that the anarchic nature of the international system limits cooperation, owing to the fact that insecurity dominates states as they take part in the balance of power politics and are uncertain of the intentions of other states (Waltz, 1979: 105-11). According to the theory of neorealism, the international system is structured in a way that cooperation, if it takes place at all, is limited. Waltz maintains that in a world of balance of power politics the issue of "relative gains" would limit state cooperation, as

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<sup>7</sup> Korab-Karpowicz, W. J. (2017). "Political Realism in International Relations", in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy*. Summer 2017 edn. Available at: <https://plato.stanford.edu/archives/sum2017/entries/realism-intl-relations/>. [Accessed January 22, 2018.]

states are uncertain whether other states would gain more out of cooperation and shift the balance of power in their favor (Waltz, 1979: 105). For neorealists in a self-help system the structure dictates states' actions as considerations of security subordinate to economic gains for political survival (Waltz, 1979: 91). Neorealists consider that anarchy pressures towards both balancing powers and against cooperation as states operate to prevent others from gaining and advancing their capabilities, whereas for liberal institutionalists states operate to maximize their absolute gains. To summarize, with regard to international cooperation, neorealists and liberal institutionalists disagree, as neorealists maintain that international politics is a zero-sum game and that states will opt not to cooperate as they consider their rivals would gain more out of cooperation, whereas liberal institutionalists maintain that states engage in cooperation to maximize their absolute gains (Burchill, 2013: 66-67).

While neorealists maintain that international institutions are significant for international politics, on account of the dilemma of security, Keohane responds to this claim in his work *After Hegemony* (1984) where he develops a more comprehensive institutional approach (Powell, 1994: 326). The main question he poses is "Under what conditions can independent countries cooperate in the world political economy?" (Keohane, 1984: 9). He claims that international cooperation can be enhanced based on "complementary interests" among states, and that institutions are critical for advancing cooperation (Keohane, 1984: 9). Keohane addresses the neorealist claim that international institutions are only efficient with the existence of a hegemon that functions as a stabilizer within the international system, and that their efficiency declines with the absence of a hegemon and the existence of equally powerful states. He maintains that the existence of a hegemon as a means for balancing power among states becomes irrelevant with the existence of international institutions, as international regimes remain on account of

their significant role in facilitating negotiations and reducing transaction costs between states (Keohane, 1984: 107).

Furthermore, liberal institutionalism shares the same rationalist materialistic stand with neorealists. It acknowledges the basic assumptions of neorealism, which maintains the anarchic structure of the international system, together with the necessity for a centralized political authority to retain order among states. The critical difference here is that for liberal institutionalism power is exercised by a collection of states governed by international regimes. Liberal institutionalism sees the state as a rational, self-interested actor that makes decisions based on the calculations of costs and benefits, the ultimate goal of which is realizing its own survival.

According to liberal institutionalists, international regimes are significant as they reduce transaction costs and increase transparency, which are critical for state cooperation within the international system. Hence, within this liberal institutionalist understanding, administering a state's behavior becomes a technical issue based on a fixed set of procedures to be followed. International institutions do not oversee states' interactions based on a profound grasp of how those interactions are socially constructed and informed by a state's identity and history, as they are not founded to do so in the first place. There is therefore a lack of understanding of the social context of states' behaviors.

In his book *International Institutions and State Power* (1989), Robert Keohane accepts Waltz's assumption that states are rational, self-centered actors but counters his notion of the balance of power by employing game theory, which maintains that states can maximize their

self-interest through economic cooperation and participation in international institutions.<sup>8</sup> Within the neorealist tradition, anarchy defeats an actor's best intentions, illustrated by the prisoner's dilemma (whereby two completely rational actors might not cooperate, even though it would be in their best interest to do so), and with actors pushed by fear and uncertainty towards treating each other as enemies and choosing not to cooperate. Keohane challenges this notion by examining the conditions under which states cooperate, and the role of international institutions in facilitating cooperation (Keohane, 1989). He maintains that under certain conditions cooperation is actually possible between states: when cooperation is facilitated and monitored by international institutions, and when "actors adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination" (Keohane, 1984: 51). Keohane's work is of pivotal importance as it directed the divide between neorealism and liberal institutionalism to issues concerned with whether state behavior is conditioned by the anarchic nature of the international system or whether it is conducive to international cooperation with the existence of facilitating international institutions.

Liberal institutionalism accepts neorealist understanding of the state as an egoistic, self-interested and rational actor within the international system. However, unlike neorealism, the perspective stresses that states achieve their national interests through cooperation with the existence of international institutions that facilitate state collaboration. Moreover, liberal institutionalists, while they realize the limitations and challenges facing international cooperation among states, also assert that the likelihood of cooperation, even within an anarchic international system, is higher than neo-realists acknowledge, given the increasing reality of regional and

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<sup>8</sup> Korab-Karpowicz, W. J., "Political Realism in International Relations." In Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy*. Summer 2017 edn. Available at: <https://plato.stanford.edu/archives/sum2017/entries/realism-intl-relations/>. [Accessed 22 January 2018.]

global integration and interdependence. For liberal institutionalists, therefore, international politics is not a zero-sum game, and they claim the security dilemma might be mitigated through international cooperation, international law, and regimes and institutions.

International regimes are defined by Stephen Krasner as "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations" (Krasner, 1983: p. 1). Here it is important to note that regimes are different from institutions. International institutions are official, formal bodies created by states to organize and manage intergovernmental issues. International regimes help "institutionalize" international politics (Haggard and Simmons, 1987: 495-96). Liberal institutionalism highlights the crucial role of international institutions in reducing conflicts and taming the anarchic nature of the international system, as institutional international cooperation results in the greater prospect of regularity and predictability within international politics. Institutions are the vehicles of progress for liberal institutionalists as they maintain order and stability within the international system, and enhance trust among states. Therefore, within the liberal institutionalist understanding, international institutions are of vital importance as they organize state cooperation, determine rules of conduct, turn state interests and expectations into formalized agreements, and monitor states' compliance through adherence to international regimes, which are sets of principles, norms, and rules that condition state behavior. International institutions today govern a wide range of issues, including international trade, environmental matters, human rights and international justice (Burchill, 2013: 66-77).

To summarize, according to liberal institutionalism, international cooperation is in states' self-interest, as international institutions provide incentives to compliance by institutionalizing reciprocal cooperation through a clear set of rules. They provide information evenly among

states, reduce the cost of monitoring states' actions individually, and punish states that violate the rules. Rules and norms provided by international institutions minimize the cost of cooperation and maximize the cost of noncompliance. Furthermore, institutions enhance stability as they advance the ability of states to predict other states' actions.

### *Anarchy, the State, and International Criminal Justice*

According to liberal institutionalism, with the absence of any centralized authority that would compel states to comply with international law, anarchy is the underlying condition of the international system, contrary to the domestic politics of states, where the struggle for power is mitigated and channeled through the existence of hierarchal authority and the existence of legitimate institutions. Anarchy is a presupposed condition of the international system, and it is a presumed condition that exists even prior to state interactions and regardless of the course of the interactions. This underlying notion of anarchy determines how the state is perceived as a like-unit, an actor that seeks its own interests and survival. Each state is considered to be a static unit that performs the same functions as other states within an anarchic international system to secure its presumed same aim: survival. Within this ontology, attributes of the state, such as its political history, political ideology and economic and political system, are irrelevant since the quest for survival is the state's ultimate aim and the one that decides its actions, prior to entering the international arena and prior to interacting with other states. Subsequently, however, states are compelled to cooperate as they become involved with international institutions that provide a clear set of rules for compliance with the monitoring of their actions, and the imposition of penalties on states that violate international rules. Consequently, according to this narrative, international cooperation is only efficient and sustainable within the international system as long

as international rules and regulations are upheld by states. More importantly, it is mainly retribution that offers the deterrence required to prevent states from violating international rules. It is retribution that upholds the structure of international cooperation, based on penalizing states that violate international rules and regulations, which has ultimately informed the punitive nature of international criminal justice (Burchill, 2013).

I argue that the liberal institutionalist ontological understanding of anarchy, the state and international cooperation have informed the retributive notion of international justice, which is mainly concerned with punishing states that violate international law and international regulations. I maintain that restoring broken international relations between conflicting states are not considered within the current international institutions that handle criminal justice, because it is not why those institutions were founded in the first place.

I shall now lay out the theoretical ground for my prescription by resorting to the English School theory of international relations and its conception of international society, which allows for a relational understanding of international justice by incorporating the theory of restorative justice from the discipline of criminology.

### **International Restorative Justice: A Promising Approach**

The English School provides a conceptual eclecticism and a historical account of international relations, where power and morality, anarchy and hierarchy, together with structure and agency, are central concepts within its apparatus (Dunne, 2008: 268). On the one hand, the English School recognizes anarchy within the international system, but on the other hand it traces how normative constraints condition the interactions of states and the international order. Within the overarching narrative of the English School, mutual recognition of sovereignty and states'



membership of the international society are the initial social practices, which are the vital elements for the development of the international society. In addition, the existence of minimal common interests is critical for the advancement of the international society, such as trade, freedom of mobility and stability (Dunne, 2008: 272).

The English School's theory of international relations provides a social constructivist understanding of the state, which, I argue, consequently promotes a relational understanding of justice that is restorative. States' identities are not preconceived or eternal; rather, they are dynamic and in continuous flux as they are reinforced or contested in the process of states' interaction with each other. Utilizing the English School theory illustrates the significance of incorporating elements of restorative justice that engage with rival narratives produced by interstate wars. Resolving those narratives would contribute to international order as they are critical factors that influence states' interactions within the international society. I argue that the pursuit of justice without the alteration of these narratives has divisive effects that create an "us" versus "them" division, based on historical legacies of conflicts that remain unresolved through the processing of the ICC or ad hoc tribunals. I maintain that by employing the notion of how the state is conceptualized by the English School – as a social construct, a political association that binds a collective of individuals with a shared history – would provide an enhanced climate for states' interaction, granted the deeper engagement with each other's narratives. This would generate a renewed international society on account of the process of international restorative justice that provides a platform for an international conversation on international norms that bind the international society.

This research is not suggesting replacing the retributive element with a restorative element of justice, but rather is suggesting having both dimensions of justice in place. The

retributive element contributes to international order because of its merit in accentuating international law that regulates states' interactions. I argue in this research for a comprehensive understanding of international justice that is both retributive and restorative, as it is focused on both upholding international law and rebuilding broken relations.

The English School has made an important contribution to the study of international relations with the concept of the international society, advanced by the writings of Hedley Bull, Martin Wight, and Adam Watson. In his *The Anarchical Society: A Study of Order in World Politics* (1977) Hedley Bull maintains that intense interaction between both state and non-state actors is central for the founding of a system, where actions are calculated based on the conduct of all parties. Therefore, a system is merely the space where interaction takes place, without the existence of common rules and regulating institutions (Bull, 1977: 10). Bull claims the international society succeeds in developing under certain conditions. The existence of the international society is a subsequent development of the existence of the international system, with the founding of mutually accepted laws and institutions that guide and regulate interactions within the international arena. The international system might therefore develop into an international society, but it might also lapse back into an international system with the absence of shared, recognized laws, as is the case with the outbreak of wars (Bull, 1977).

Bull defined international society as:

A society of states (or international society) [that] exists when a group of states, conscious of certain common interests and certain common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another and share in the working of common institutions (Bull, 1977: 13).

A more precise definition of international society is found in Bull and Watson's edited volume *The Expansion of International Society* (1984), where they state:

We mean a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behavior of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements (Bull and Watson, 1984: 1).

This understanding of international relations and world politics primarily in social and relational terms is central for a restorative understanding of justice within the international system.

This research suggests that incorporating a process of international restorative justice would contribute to order within the international society, and, moreover, would be a constitutive element for its continuous existence. Bull questions how order occurs within an anarchical international society. He maintains a multifaceted perspective as he asserts that international order is influenced by power, mutually accepted laws and recognized common norms among state and non-state actors. Thus, state interactions are directed by state interests, conditioned by mutually accepted laws, regulated by institutions and led by commonly recognized norms and moral standards. According to Bull, "institutions" of the international society denote a "set of habits and practices shaped towards the realization of common goals" (Bull, 1977: 74), including the five institutions of the international society that he sets out: the balance of power, international law, limited war, the role of great powers, and diplomacy, all of which are critical for sustaining international order. It is this philosophical and intellectual diversity, based on the

work of Hobbes, Grotius, and Kant, that captures the multifaceted understanding of order within the anarchic international society, which constitutes the distinguishing ontological primacy of the English School. The latter, in contrast to liberal institutionalism, does not dismiss the normative element of international institutions. Liberal institutionalism, which is purely based on rationalist materialistic ontology, favors the critical role of international institutions as they facilitate international cooperation among egoistic states in pursuit of shared interests. Whereas according to the English School, within the anarchical international society, international order is maintained, as the behavior of states is restrained by both systematic and normative conditions. Hence the English School's notion of international society allows for a relational understanding of justice that is focused on restoring international relations broken by interstate wars. This would eventually contribute to maintaining order within the international society as it provides stakeholders with discursive spaces, where those affected may realize a mutual outlook on what happened, or make amends to help to rebuild trust with their former enemies and reintegrate them within a renewed international society.

Lastly, it should be mentioned; this research fits within the solidarist camp within the English School on account of its cosmopolitan approach that views individuals as active members of the international society. Solidarists, including Tim Dunne and Nick Wheeler, stress the collective responsibility of individuals as members of the international society in enforcing international rules and safeguarding human rights, which stands in opposition to the pluralist camp that emphasizes the normative value of state sovereignty (Dunne, 2008: 270). While the pluralist view maintains a "thin morality," in which states can agree to policies that emphasize mutual recognition of sovereignty, diplomacy, and non-intervention principles in terms of domestic affairs of states, the solidarist view is considered to be "thick morality," as it views the

world in cosmopolitan terms which highlight the tie that binds individuals to the greater society of human kind (Dunne, 2008: 272). The concept of international restorative justice that is proposed in this dissertation therefore corresponds to the solidarist understanding of the international society, as it views individuals as active actors participating in the process of international justice. To this end, the process of international restorative justice contributes to the regeneration of international society in its solidarist form, as it is individuals who are actively reinforcing international norms that were violated by the act of war through a process of relations restoration. However, while this research corresponds to the solidarist notions that underscore the role of individuals in international politics, I maintain my reservations against the solidarist doctrine of humanitarian intervention, as acting on that principle has produced more interstate dissent, which has weakened order within the international society. Therefore, this research carves its own territory within the solidarist camp, without confirming to the principle of humanitarian intervention. Instead, this research highlights a different venue for individuals to take part in international relations, through which rules and norms of human rights within the international society could be affirmed and maintained through non-violent means.

### **The Question of Measurement**

Evaluating the process of restorative justice is a challenging issue on account of its context-dependent quality. While the fluidity of the process is one of the main advantages of restorative justice – the fact that it is not a *one size fits all* – this benefit turns into a challenge when it comes to the question of measuring its success. This is mainly due to the fact that what it takes to restore stakeholders' broken relations varies from case to case, as each set of stakeholders' needs vary based on the political and social contexts of the conflict they experienced. The fluidity of

the process is based on the flexibility of the concept itself. This challenge is further asserted by Declan Roche as he asserts that restorative justice sometimes means “all things to all people” (Roche, 2001: 342). In addition, Garry Johnstone and Daniel Van Ness acknowledge that the concept has been contested, and that there is an absence of a single shared understanding of the notion. This is because it is an “open” idea that is still undergoing changes and development as it is experienced and applied differently in different political and social settings (Johnstone and Van Ness, 2007: 6-9). Nevertheless, these authors maintain that the fact that restorative justice is a contested concept is a testament to the richness of the idea, and its ability to be molded and utilized in different ways and situations.

In this research I employ three principles of evaluation that look at both the procedures involved and the outcomes of the process of restorative justice, in order to evaluate the extent of its restorative nature. I utilize the principles elaborated by Gordon Bazemore and Lori Elis, based on qualitative research conducted by Mara Schiff and Gordon Bazemore, of a national case study of restorative group conferencing in the US (Bazemore and Schiff, 2004). Bazemore and Elis provide the following three principles for evaluating restorative programs at the individual level: the principle of repair, the principle of stakeholders’ involvement, and the principle of transformation. However, in order to discuss the process of international restorative justice that involves rival states (both government and civilian entities) and the international society, I provide the following modifications:

- 1) The principle of repair maintains that justice is met when the damage caused to stakeholders is redressed.
- 2) The principle of stakeholders’ involvement maintains the restorative influence of the active participation in the process of justice by stakeholders.

3) The principle of transformation entails the transformation in stakeholders' relations, as well as in states' relations as the divide is on its way to be restored, together with the transformation of the international society on account of its involvement in the process of international restorative justice.

The following graph illustrates the three principles and their outcomes as listed by Bazemore and Elis (2007), with my modification to fit the context of restoring international relations.

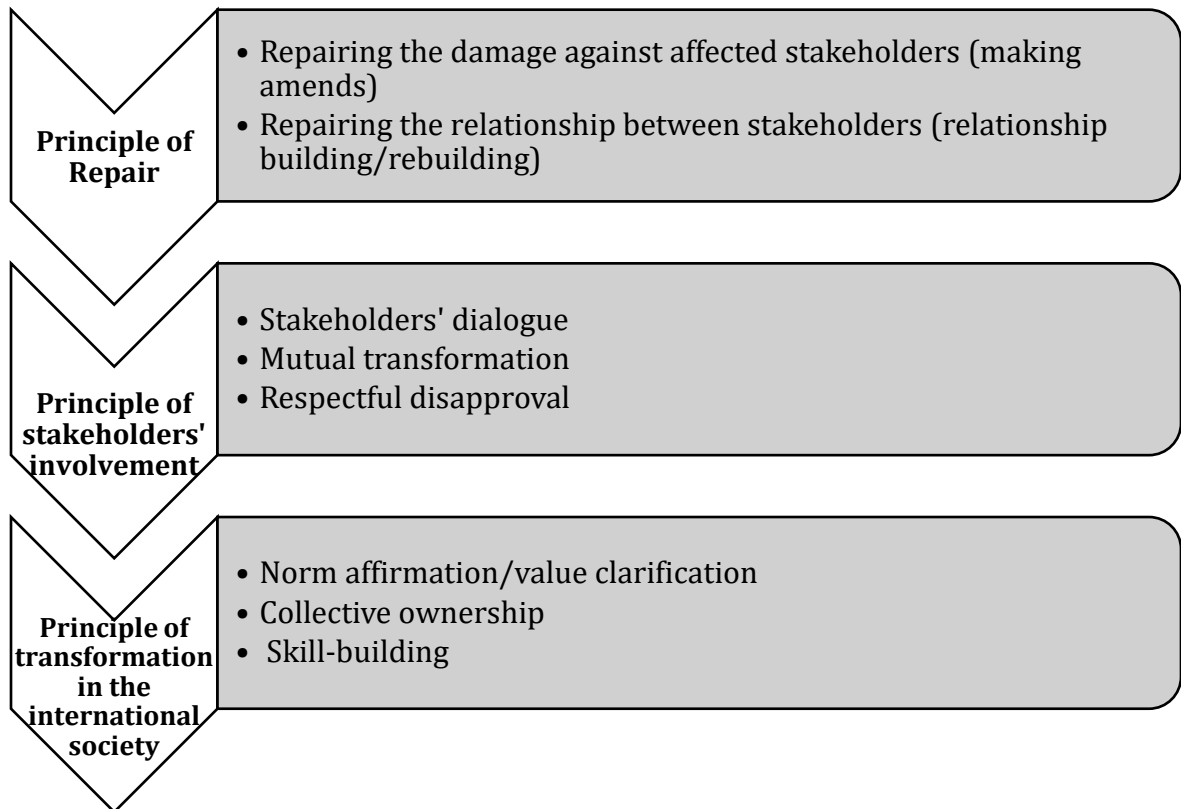


Figure 1 Evaluative principles of the restorative justice process based on the work of Bazemore and Elis's (2007)

The following figures illustrate the outcomes based on the dimensions of each principle which is evaluated, based on the work of Bazemore and Elis (2007), with my modifications in order to address restorative justice within the international society.

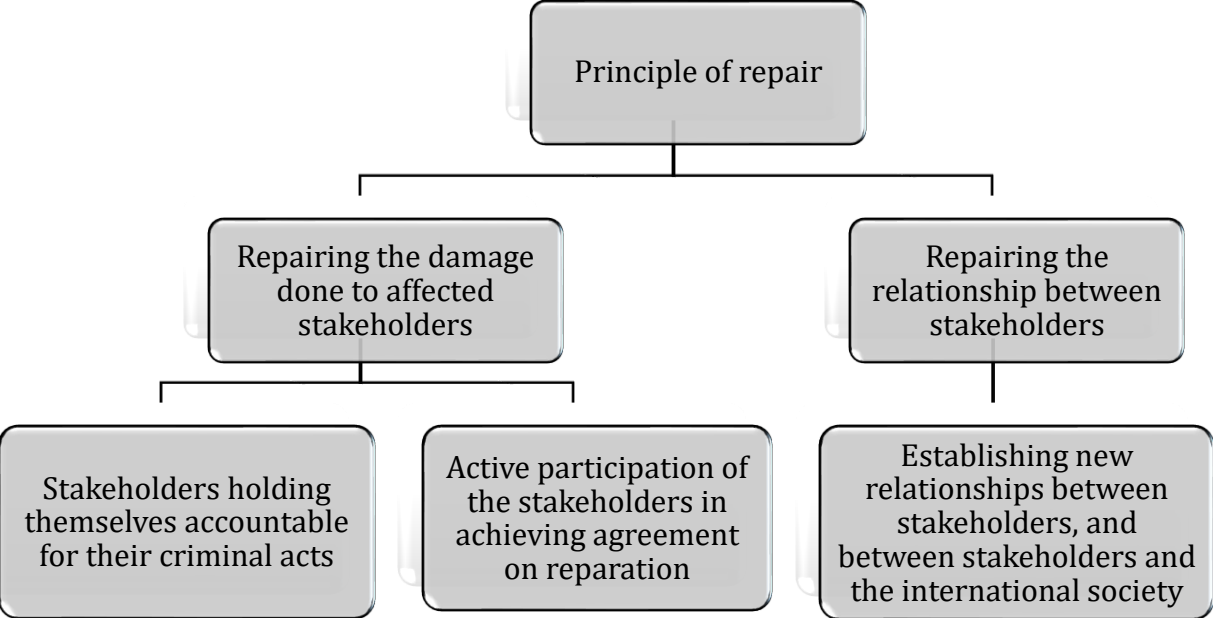


Figure 2 Evaluating the principle of repair

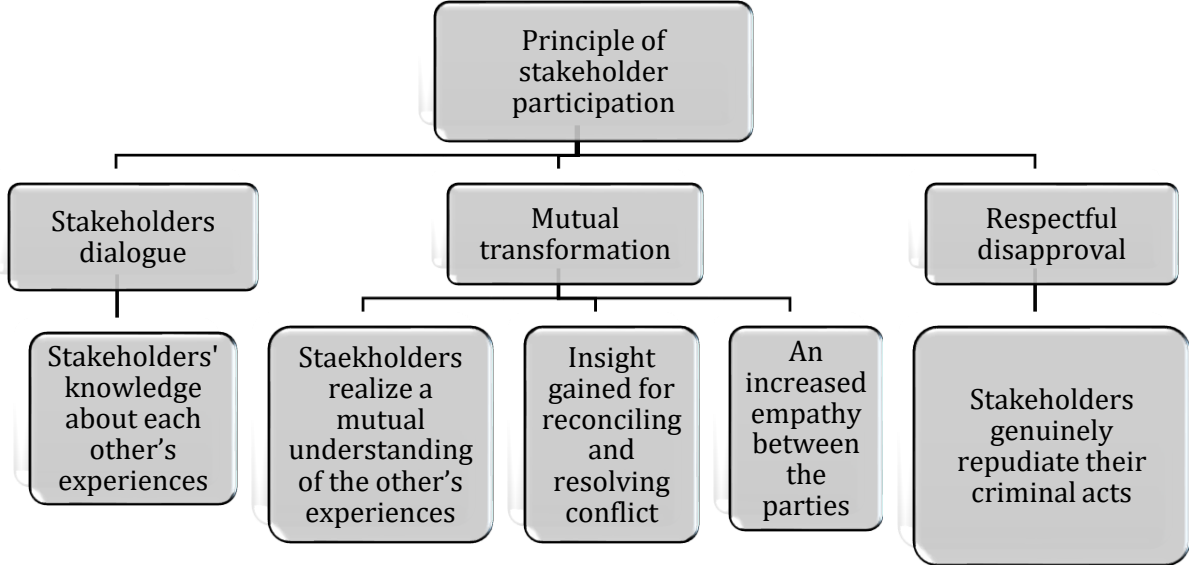


Figure 3 Evaluating the principle of stakeholder participation



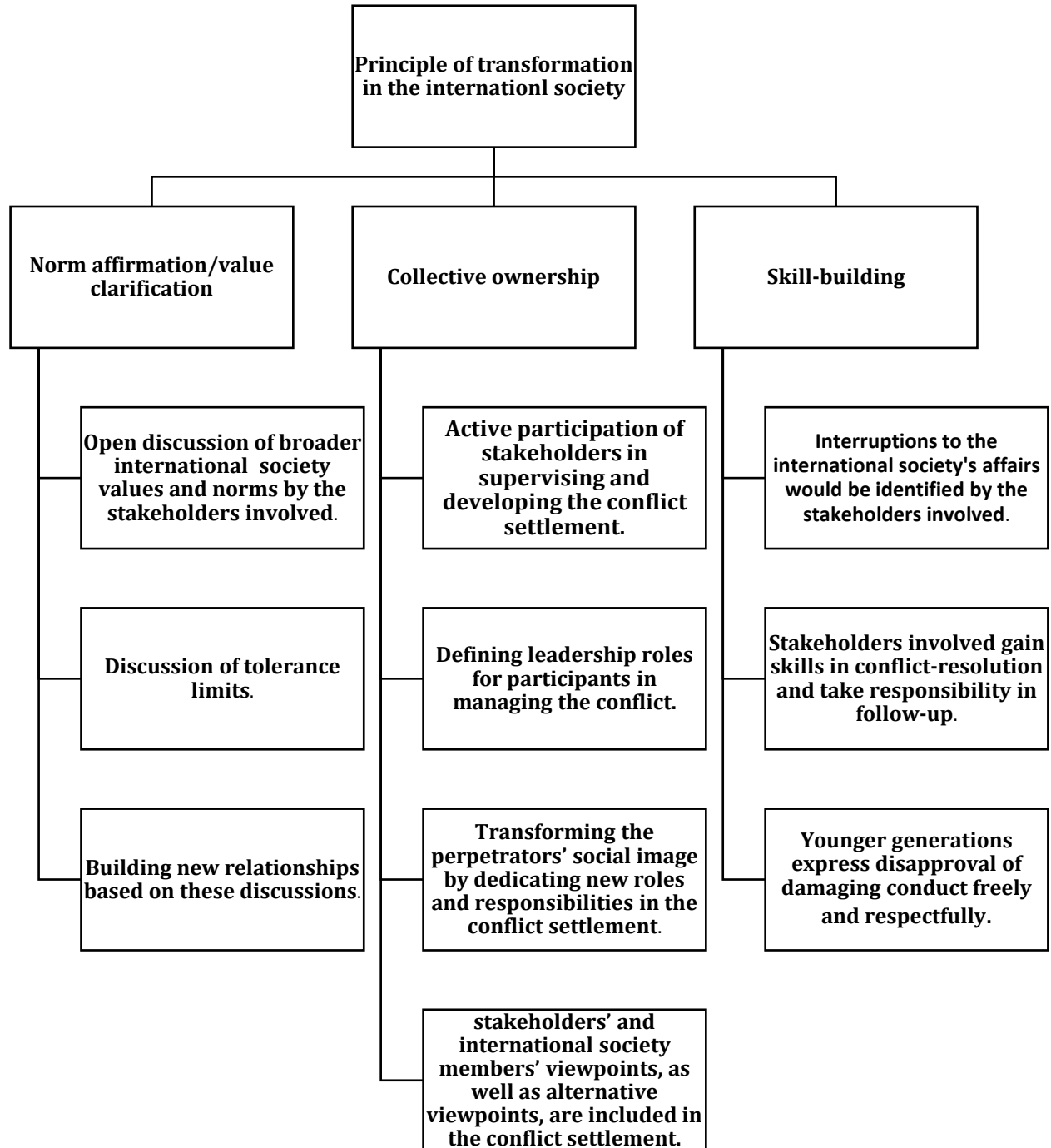


Figure 4 Evaluating the principle of transformation in the international society

Overall, the end goal of the process of international restorative justice is to reconcile and restore the broken relationship between rival states (both governments and national

communities), and to resolve rival narratives about what has happened. The end result should reflect the restoration of broken relations between previous rival states and the reintegration of both into a renewed international society, which requires active involvement of stakeholders in the process of justice.

### **Chapter review**

In the following chapter I discuss the shortcomings of retributive justice pursued within the international system. I address the case of the ICTY and show how retributive justice did not resolve the underlying conflict. By analyzing public perceptions polls and media coverage in both Croatia and Serbia, I highlight how even after the tribunal was closed, both states have been polarized around conflicting narratives with regard to their experiences of the Balkan Wars of the 1990s.

In the third chapter I discuss the experience of restorative justice in a domestic context, citing the example of the TRC in South Africa. Encounter and truth-telling were restorative tools utilized by the TRC to help affected individuals engage in the process of justice. The case of the TRC in South Africa demonstrates the critical role of discursive spaces in addressing rival narratives in a deeply divided society in the aftermath of mass atrocities. It demonstrates how relation restoration and forging social change on the broader community are mutually constituted ends of the process of restorative justice. In addition, the chapter addresses the limitation of restorative justice in resolving the innate tension between the two end goals aimed by the process of justice: accountability and reconciliation. Hence, this case illustrates the benefits of both retributive and restorative measures of justice in place in the aftermath of conflicts.

In the fourth chapter I discuss Franco–West Germany reconciliation during the years after World War II. This case emphasizes the importance of engaging national communities in the process of international justice, as justice is internalized by affected civilians when they become a driving force of the process. It further illustrates how the encounter of societal groups from rival states, including intellectuals, young people, and religious institutions collectively, has contributed to public discussions on international norms and values that govern states’ interaction. This, in turn, contributes to regenerating a renewed regional international society after international norms and values that have been violated are reaffirmed. Resorting to the English School helps to step away from the liberal institutionalist understanding of the state as a black box, and provides an eclectic understanding of the state that includes both governmental and non-governmental entities.

And lastly, in the fifth chapter I provide my conclusions, research implications, research limitations, and final remarks.

## **Conclusion**

Overall, this research highlights how the liberal institutionalist ontological understanding of the international system that provides primacy to international law has informed the retributive nature of the existing international criminal justice system. Hence, safeguarding international law has anchored the punitive nature of the international criminal justice. It has been claimed that realizing justice in its punitive form would eventually contribute to reconciliation. However, as I illustrate in the following chapter, this claim is highly contested. A different understanding of justice that is centered at stakeholders’ relations restoration is needed to restore broken

international relations. To this end, this research utilizes the lens of the English School on account of its conception of international society, which allows a relational understanding of states' interaction, and, in turn, a restorative understanding of justice. The English School considers the state to be a collective of governmental and non-governmental political associations, which allows accounting for how incorporating restorative justice within the existing international criminal justice system functions at the societal level, which would contribute to states' relations restoration within the international society. This is critical as international restorative justice is focused on restoring the divide and resolving rival narratives. In addition, it would contribute to maintaining order within the international society.

What the liberal institutionalism notion of the state is missing is that states comprise individuals and political associations. With the pursuit of international criminal justice in its current retributive format, together with the absence of restorative justice tools, there is no possibility of understanding how stakeholders account for the experience of the violent conflict, and how they internalize the process of international justice. The repercussions of pursuing international criminal justice solely in its punitive form in certain instances are catastrophic as this generates lasting hostility between states that is detrimental to their coexistence. Rival narratives that are dismissed by retributive justice do not go anywhere; they simply get brushed under the carpet. Restorative justice, however, provides the discursive space that offers the opportunity for encounter and discourse, as well as confronting contested meanings of shared experiences and shared history, which is lacking in retributive justice. Interstate conflicts encompass different narratives; each is constructed based on the historical, political and social contexts, and I argue that international retributive criminal justice if deployed on its own is damaging, and, as discussed in the next chapter, given that conflict operates only on the

dichotomy of “us or them,” it provides a power dynamic to this divide, validating one rhetoric over others.

## **Chapter 1**

### **Retribution without Restoration: The Case of the ICTY**

“[It] may well be a formula for eternal war when justice on one side of the mountains is injustice on the other”

(Johnstone, 2002: 96)

#### **Introduction**

In this chapter I critique the retributive conception of justice employed by the international criminal justice when it addresses violations committed by states that undergo conventional wars. I mainly critique the inherent punitive understanding, based on the assumptions of liberal institutionalism, which does not allow for the state to be seen as a political association of individuals. I highlight the international criminal justice’s shortcomings in engaging stakeholders in the process of justice, and in addressing their rival narratives, and to this end maintain that justice realized by the tribunal remains highly contentious.

The implications advanced in this chapter are the following. First, the critical need to incorporate restorative justice along with retributive justice within the international criminal justice system, and to provide an active participatory role of stakeholders in the process of justice and address their broken relations, which would contribute to interstate reconciliation.

Incorporating restorative justice into the ICC would advance interstate reconciliation as it would provide the discursive space for stakeholders to tackle the rival narratives of what happened. The

second implication asserts that the adoption of international restorative justice would contribute to the maintenance of order within the international society. The conception of restorative justice comprehends justice in relational terms (justice is realized when broken relations are restored), and the conception of the international society highlights the relational aspect of states' interactions. I therefore maintain that international restorative justice processes are constitutive of international order within the international society.

I look at the International Criminal Tribunal for the former Yugoslavia (ICTY) – a UN court of law addressing human right violations and war crimes that took place during the Balkan wars in the 1990s – as this was the first international criminal tribunal set up since the Nuremburg trials of 1945–6, before the establishment of the International Criminal Court (ICC) in 2002. By resorting to the case of the ICTY, I show that the pursuit of justice without engaging rival stakeholders in restorative processes remains partial. I problematize the notion advocated by proponents of international tribunals who maintain that international retributive justice is eventually able to realize interstate reconciliation by achieving the following three aims: upholding the rule of law, establishing the truth, and individualizing guilt (Del Ponte, 2005; Moghalu, 2004). While achieving those aims is critical for realizing reconciliation in post-war torn societies, through the case of the ICTY tribunal, I show how the relationship between justice and interstate reconciliation is not straightforward; rather, it is complex and intricate, and requires an active participatory role on the part of stakeholders who have experienced the war and are now experiencing its aftermath in a process of interstate relations restoration.

I utilize the solidarist view within the English School on account of its cosmopolitan understanding of international society, which recognizes the role of individuals within international politics. This is in contrast to the liberal institutionalist conception of the

international system, where the state is understood to be a black-box, a unitary actor, which takes no account of the political associations within the state, and, in turn, does not take account of the role of stakeholders in the process of international justice. Utilizing the lens of the English School allows for the examination of how the proceedings of the ICTY unfolded at the societal level within rival states. I highlight the shortcomings of the ICTY as I show how rival narratives remained unaltered, and the judgments of the tribunal remained contested by individuals in rival states, which undermine the legitimacy of international criminal justice.

I highlight the pitfalls of implementing retributive measures in the absence of restorative measures when attempting a resolution of interstate conflict. I do so by resorting to research studies and polls that were taken with regard to the countries involved: Serbia, Croatia, Bosnia, and Herzegovina.

In conventional wars the actions of states are internalized and understood by the respective national communities based on a shared political history, which is not considered within the ontology of retributive justice. The process of retributive justice is centered on legal procedures that are determined and ordered by the ICTY chamber, using formal rhetoric with legal terms. The role of stakeholders is limited to satisfy the requests of the chamber, whether for answering legal questions or for providing testimonies. Stakeholders are not engaged in the process of justice in a meaningful way with the aim of addressing their rival narratives, restoring broken relations, and directing the process of justice based on their needs. Rather it is the legal personnel who are the driving force of the process of justice, while stakeholders are deprived of their agency throughout the process.

Although it was maintained that the main aim of the ICTY was a neutral judicial function, it is impossible to ignore the political role of the ICTY, which produced an “official”



history of the Balkan wars that did not necessarily represent the narratives of the stakeholders involved as they did not take part in producing the formal narrative written by the ICTY. The ICTY became the main narrator and the dominant actor, socially constructing the narrative on display within the international society. This is further illustrated by the fact that Serbia was portrayed as the “villain” state by the ICTY, while neither Croatia nor NATO were portrayed in the same light despite their human rights violations. (The number of Serbians sentenced by the tribunal far exceeded the number of Croats: sixty-three Serbs vs. twenty-one Croats.)

Based on the case of the ICTY I set out the prospects of maintaining international order if the present international restorative justice were to be adopted. Based on the case of the ICTY and acknowledging that international law is currently mainly based on a retributive notion of justice, I focus on the merits of incorporating interstate restorative justice as it would contribute to the maintenance of order within the international society. International restorative justice would allow rival stakeholders to resolve contested meanings with regard to their violent conflicts. This is very important because only then would rival stakeholders be able to work towards arriving at a shared outlook on what happened. Subsequently they might be able to appreciate the legitimacy of international law executed by international tribunals and rules that regulate the aftermath of the conflict. Otherwise, the proceedings of the international tribunals and their legitimacy will remain contested in the best-case scenario and, in the worst case, negated domestically within the involved states.

I shall now discuss the main claim promoted by proponents of international retributive justice: that the process of retributive justice contributes to reconciliation by upholding the rule of law, achieving the truth, and establishing individual guilt. I also show how efforts to establish interstate reconciliation remain incomplete with the absence of interstate restorative justice.

## **The ICTY: Retributive Justice, Theory and Reality**

The ICTY was founded in 1993 by the United Nations Security Council (UNSC) before the Yugoslav wars ended in 1995, when the governments of Bosnia, Croatia and Yugoslavia (Serbia and Montenegro) signed the Dayton–Paris Agreement (DPA), which maintained these countries' commitment to the peaceful resolution of the Bosnian war and cooperation with the ICTY.

Located in the Netherlands at The Hague, hundreds of miles away from where the crimes and suffering took place, the ICTY was geographically and contextually distanced from the reality of the stakeholders.

The tribunal was founded with the aim of placing responsibility on those who violated international humanitarian law and the Geneva Conventions. Proponents of retributive justice maintain that international retributive justice, as manifested in international criminal trials, contributes to the process of reconciliation by realizing the following end goals: upholding the rule of law, establishing the truth, and individualizing guilt (Clark, 2008: 331; Moghalu, 2004). This is further illustrated by the ICTY's slogan: "No peace without justice" (Johnstone, 2002: 96), and in the ICTY's first president's remarks when Antonio Cassese maintained that the ICTY was set to achieve the following: individualize guilt, establish a reliable historical record about what happened, and facilitate reconciliation (Cassese, 1998: 6). In addition, Carla Del Ponte, a prosecutor at the ICTY, maintained that "well-administered justice does contribute even more than religion to long term peace of mind for the victims and their families, which is a necessary prerequisite for reconciliation" (Del Ponte, 2006, quoted in Clark, 2008: 31). In her statement Del Ponte claims that achieving justice in its retributive form is a prerequisite to reconciliation within war-torn societies. Although this claim, which has also been promoted by international lawyers, is valid, I nevertheless argue that efforts to realize reconciliation between the countries

involved in the conflict remain partial, unless stakeholders are involved in a restorative process of justice to complement retributive justice.

The reality of international politics and violent interstate conflicts, and the relationship between interstate reconciliation and justice, are much more complex than these theoretical statements quoted above claim to portray. Violent interstate conflicts involve thousands of alleged responsible individuals, including political leaders, military generals, soldiers and militias, and the actions of the ICTY illustrates how prosecuting every single individual involved is unattainable on account of the lack of resources that are necessary for collecting evidence for indictment and for criminal trials. Rather than pursuing a process of retributive justice that was fair to all the stakeholders involved, an incomplete process that criminalized some individuals while leaving others walking free occurred. This was seen to be very divisive, and the process of international criminal justice was perceived to be biased and political rather than neutral and judicial in seeking to implement international justice in equal manner to all parties (Clark, 2008). Also, the success of international tribunals is ultimately based on the cooperation of states, as demonstrated by Victor Peskin who, in an article entitled “Beyond Victor’s Justice?”, concludes with the remark that states’ cooperation is vital for the fair process of international criminal justice to take place (Peskin, 2005). With regard to the ICTY, states’ cooperation was realized by pressure from powerful international actors on the stakeholder states to cooperate (Peskin, 2005). The process of retributive justice as pursued in this particular international tribunal therefore translated as a political struggle.

The ICTY tribunal’s mandate maintains that the states of former Yugoslavia are legally obliged to cooperate with the tribunal. This is stated clearly in the ICTY Article 29 entitled “Cooperation and Judicial Assistance”:

1) States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2) States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: a) the identification and location of persons; b) the taking of testimony and the production of evidence; c) the service of documents; d) the arrest or detention of persons; e) the surrender or the transfer of the accused to the International Tribunal (UN, ICTY Updated Statute, 2009: 13).

Croatia and Serbia's cooperation with the ICTY at times was deemed to be questionable. Croatia was one of the first countries that asked for the establishment of an international criminal tribunal to investigate war crimes that took place in former Yugoslavia, but by the time the tribunal was established the country's commitment to the tribunal became conditional. Croatia agreed to cooperate with the tribunal only if it was recognized as a victim state, and refused to cooperate with the ICTY when the Croatian army's military operations "Storm" and "Flash" were investigated,<sup>9</sup> known in Croatia as the "Homeland War", or the "Croatian War of Independence" (Banjeglav, 2015: 83; Jovic, 2009; Peskin and Boduszynski, 2003). Initially the Croatian parliament passed a resolution maintaining that both operations fell under the jurisdiction of the Croatian judiciary and not the ICTY (Banjeglav, 2015: 84). This later changed when Croatia shifted its policy and improved its relations with the ICTY, as the EU preconditioned Croatia's candidacy to the European Union (EU) with full cooperation with the ICTY. Franjo Tudjman, the late first president of Croatia after its independence from Yugoslavia

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<sup>9</sup> Operations "Flash" and "Storm" (1995) are regarded by Croatians as key military victories that liberated Croatian territories which were held by the Serb forces of the self-declared Republic of Serbian Krajina (RSK) (Banjeglav, 2015: 83).

in 1991, promoted strong rhetoric that stood against compliance with the tribunal until his death in 1999. It wasn't until after his death when a new government came into power in 2000, led by Prime Minister Ivica Racan and his Social Democratic Party (SDP), that the Croatian government's stance towards the ICTY shifted, and showed serious commitment to cooperation as a way of repairing the country's war-torn economy and of being admitted to the EU. Tudjman's nationalist Croatian Democratic Union party (HDZ)'s loss of the elections highlighted the economic frustration felt by Croatia's citizens on account of corruption and absence of economic reforms (Peskin, 2008: 125). In 2000, the new Croatian government passed the Declaration of Cooperation with the ICTY, whereby the military operations "Flash" and "Storm" were under the jurisdiction of the ICTY, which was finally able to investigate war crimes that were committed by the Croatian Army forces during the Homeland War. Croatia applied for EU membership in 2003, and its candidacy was considered in 2004. The country became an EU member in 2013.

The pressure put on Serbia by the EU was fundamental for Serbian cooperation with the ICTY, and Del Ponte stressed that "90% of all indictees brought to justice [before the ICTY] are a direct result of conditionality applied by the EU" (Human Rights Watch, September 2007). This is illustrated when the Stabilization and Association Agreement (SAA) negotiations between Serbia and the EU were suspended in May 2006 as a result of Serbia's delay in handing over Ratko Mladic to the tribunal, who was indicted for genocide during the Srebrenica massacre in 1995 where more than 8,000 Bosnian Muslims were killed, and the siege of Sarajevo in which over 10,000 civilians were killed. This was emphasized in the EU Commissioner for Enlargement Olli Rehn's statement when he said that: "It is disappointing that Belgrade has been unable to locate, arrest and transfer Ratko Mladic to The Hague. The commission therefore has

to call off the negotiations on the Stabilization and Association Agreement” (*EUobserver*, 2006). In response, the Serbian Prime Minister at the time, Vojislav Kostunica, maintained that “It would be best for all if Ratko Mladic followed the example of other officers and went to The Hague. By hiding, he is causing great damage to our state and national interests” (*Guardian*, 2006). The negotiations didn’t resume until June 2007, after positive assessment of Serbian cooperation with the ICTY. Furthermore, it was Mladic’s arrest in 2011 that prompted Serbia’s EU candidacy membership status in 2012 (*New York Times*, 2011).

It may be argued that both Serbia and Croatia cooperated with the ICTY for a self-interested motive: to join the European Union, as membership of the EU for these countries was conditional on their cooperating with the ICTY. Engaging in the process of international retributive justice became an issue of national interest for countries that were involved in the Balkan wars who wished to realize political and economic gains.

I shall now evaluate the proceedings of the ICTY and highlight its shortcomings in advancing reconciliation based on its own aims.

## **Evaluation and Analysis**

I resort to the collection of empirical studies on Croatia<sup>10</sup> (Banjeglav, 2015), and Bosnia and Herzegovina<sup>11</sup> (Clark, 2009), that investigated the impact of the ICTY at the domestic level of

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<sup>10</sup> This is a case-study based on semi-structured interviews with twenty respondents from the town of Vukovar and the surrounding villages (Lovas, Negoslavac, and Stari Jankovci) in eastern Croatia (Banjeglav, 2015: 83). The study, conducted by Tamara Banjeglav, investigates the legacy of the ICTY in Croatia at a micro-level. The study mainly explores the public perceptions of the function of the ICTY and its success in realizing justice and establishing the truth, and ultimately how its performance has impacted on people’s lives.

<sup>11</sup> Interviews of sixty-five victims, “individuals who lost close members of their families, who spent part of the war in concentration camps, who were victims of landmine explosions, were raped, or who were internally displaced on the basis of their ethnic identity” (Clark, 2009: 3). Fifty-two were Bosniaks, eight were Bosnian Serbs, and five were

the respective countries. I will also utilize the data offered in two polls on the public perceptions of the role of the ICTY. The first poll was conducted by the Organization for Security and Co-operation in Europe (OSCE) “Attitudes towards war crimes issues, ICTY and the national judiciary” (2011).<sup>12</sup> The second poll was conducted by the United Nations Resident Coordinator’s Office in Bosnia and Herzegovina (UNRC) “Public Opinion Poll Results: Analytical Report” (2013). I show that the facts established by the ICTY did not alter stakeholders’ perceptions of what happened during the war, and will also show that there is a discrepancy between the truth established by the ICTY and what the stakeholders understood as the truth about what happened. In this respect the work of the ICTY did not engage with the perceptions of the people in the countries involved in the conflict and their experiences, and has not addressed the existing rival narratives, while the divide between “us” versus “them” has remained unaltered by the processes of the ICTY. In this regard, the claim that retributive justice advances reconciliation by establishing the truth is contested.

### *Principle of Repair*

With retributive justice, justice is met when the damage caused by the perpetrator state against the victim state is redressed. It is evident, however, that the process of justice as carried out by the ICTY did not involve restorative elements. There were no procedures adopted to repair the damage or make amends as the ICTY was not authorized to “award reparations to victims of war crimes, crimes against humanity, and genocide” (War Crimes Research Office, 2010: 13). In addition, the ICTY failed to initiate a process of repairing the relationship between Serbia,

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Bosnian Croats. Snowball sampling, purposive sampling and opportunistic sampling were used. The interviews were conducted between May 11 2008 and August 29 2008.

<sup>12</sup> The poll was conducted using the face-to-face data collection method. The Serbian target population was aged sixteen and over. It was a three-phase, stratified, random representative sample. The size of the sample was 1,047 respondents. The survey was conducted between September 27 and October 18, 2011.

Croatia, and Bosnia and Herzegovina as the procedures not only lacked restorative elements but were also entirely judicial and legal in nature. Encounters between rival stakeholders, active participation of these stakeholders in realizing agreements on reparation, rival stakeholders holding themselves accountable for their criminal acts, and active relationship restoration and building between conflicting stakeholders, which are critical dimensions in evaluating the principle of repair, were completely absent from the procedures of the ICTY as the tribunal procedures and outlook on justice were entirely retributive.

### *The Principle of Stakeholders' Involvement*

#### Rival Stakeholders' Dialogue

There was an absence of a restoration process in the procedures of the ICTY where rival stakeholders dialogue was initiated. It is not possible to evaluate the dialogue owing to the absence of open rival stakeholders' exchange, which might have realized their knowledge about each other's experiences.

#### Mutual Transformation and Respectful Disapproval

The research shows that the ICTY lacked a transformative effect on rival stakeholders' perceptions about the war, and indicates that Croatian, Serbian, and Bosniak victims, or victims' families, maintained that justice was not achieved. Late and long trials, lenient and unfair sentences, and selective crimes that were prosecuted by the ICTY while there was a lack of focus on other crimes, are among the frustrations expressed by the afore-mentioned victims (Banjeglav, 2015; Clark, 2009). The public perceptions of justice conducted by the ICTY judgments and stances on perpetrators of war crimes remained unaltered. Serbian, Croatian and



Bosniak respondents maintained a selective approach to the ICTY judgments. They only accepted facts that corresponded to their narrative of victimhood and rejected facts that challenged or falsified this narrative (Banjeglav, 2015; Clark, 2009). For example, the majority of Serbian respondents in Serbia in comparison to the rest of the responses who responded to a questionnaire (49 percent of the sample) thought that Ratko Mladić was not responsible for the crimes he was tried for before the ICTY, and most Serbians in comparison to the rest of the responses (41 percent of the sample) who responded to the questionnaire think Mladić should have not been “apprehended or extradited to the ICTY” (OSCE, 2011: 35-36). In addition, the majority (69 percent) maintained that the Serbs were the ones who suffered most during the Balkan War, and also the majority in comparison to the rest of the responses (40 percent) blamed Croats for war crimes (OSCE, 2011: 79). Moreover, in the case of Bosnia and Herzegovina (BiH), which is a very diverse country in terms of its ethnic, national, religious, and cultural affiliations, Bosniaks, Bosnian Croats and Bosnian Serbs each maintain conflicting understandings of the war. Bosniaks consider the war in BiH was a war of aggression, while Bosnian Croats consider it a war of liberation, and Bosnian Serbs see it as a civil war (UNRC, 2013:19). Furthermore, the polls indicate that Bosniaks, Bosnian Croats, and Bosnian Serbian communities within Bosnia and Herzegovina are still divided on placing responsibility for the war. While the majority of Bosniaks and Croats hold Serbians responsible, the majority of Serbs blame the international community (UNRC, 2013: 20). The same divide is apparent in how these communities perceive their own suffering during the war. While Serbs maintain that everyone suffered equally, Bosnian Croats maintain that everyone suffered, but not equally, and Bosniaks stress that their community suffered the most (UNRC, 2013: 22). Furthermore, the persistence of

ethnic tension is apparent as the majority of respondents prefer to reside in areas where their community is the majority, rather than in ethnically mixed areas (UNRC, 2013: 23).

This analysis maintains the absence of mutual transformation as the communities involved, Serbs, Croats and BiHs, are still divided about what happened with the existence of three different histories, and with the absence of mutual understanding of other stakeholders' experiences. The role of the ICTY has been ineffective in relation to transformation and restoration. In addition, respectful disapproval cannot be evaluated with the absence of procedures that involve dialogue and exchange between rival stakeholders. The tribunal did not provide opportunities for rival stakeholders to renounce their criminal violations of human rights.

#### *The Principle of Transformation in the International Society*

The proceedings of the tribunal did not involve an open discussion by the rival stakeholders about the broader international society's values and norms; a discussion of tolerance limits; or building new relationships based on these discussions. Hence it is not feasible to evaluate normative affirmation or value clarification as the procedures of the ICTY did not engage with dialogue with regard to the role of the international society in maintaining a just peace.

Moreover, collective ownership of the conflict was not realized as one of the achievements of the ICTY; rather, Serbia was portrayed as the main "villain" of the war. An active participation of rival stakeholders in supervising and developing the conflict settlement, and in transforming the social image of the rival states by dedicating new roles and responsibilities in the conflict settlement, was not deemed to be part of the functions of the ICTY. In addition, the functions of the ICTY did not include active participation of rival stakeholders in advancing conflict resolution skill-building.

## *Analysis*

It is not surprising that the ICTY, while claiming to contribute to interstate reconciliation, had no restorative effects as it was inherently structured to function and deliver only retributive justice. However, the pursuit of retributive justice with the absence of elements of restorative justice risks the lack of internalizing justice by stakeholders. While the ICTY pursued justice solely in its legal, retributive procedural form, it did not incorporate the stakeholders' perceptions, and the ICTY failed to alter its own narrative about what happened.

Proponents of the ICTY maintain that realizing justice was one of the main accomplishments of the tribunal. However, this research suggests that “justice is not seen to be made” according to stakeholders, as the verdicts were not internalized within the states by the people; hence the process of justice remained incomplete. Justice remained an abstraction that failed to alter the domestic narrative. Consequently, the claim that reconciliation is realized by establishing the truth does not hold true, as in this instance the “truth” produced was produced from legal judicial processes that did not involve the perceptions of stakeholders and did not address competing rival narratives. Within the context of conventional wars, I argue that the process by which stakeholders arrive at the truth is key. It was only if the rival stakeholders in the ICTY processes had been included that the truth produced would have impacted on the perceptions of the people, because it would have been a mutually constructed contextual truth based on encounter and discourse. The process of realizing the truth should include all perspectives, address different narratives and experiences, and acknowledge the suffering of all parties.

I shall now discuss two events in the Serbian–Croatian conflict during the Yugoslavia wars: The Homeland War and Srebrenica. By discussing how the ICTY dealt with these events, I

shall illustrate the ICTY's inability to resolve the issue of who was on trial to eliminate the divide in the rival narratives about what happened. I will start by highlighting the connection between international restorative justice and international order, and I will follow with a discussion on the Homeland War and Srebrenica in order to further illustrate this connection.

### **International Restorative Justice and International Order**

In his *The Anarchical Society: A Study of Order in World Politics* (1977), Hedley Bull tackles the fundamental issue of order within the international society and how international order is maintained. He addresses the significance of the value of order in international politics and claims that order in social life preconditions the realization of other aspired goals. He maintains that order does not merely attest to the existence of “pattern or regularity,” but rather to “a pattern that leads to a particular result, an arrangement of social life such that it promotes certain goals or values” (Bull, 1977: 4). Building on this understanding of order in social life, Bull defines international order as a “pattern or disposition of international activity that sustains the elementary or primary goals of the society of states, or international society” (Bull, 1977: 8). Those elementary or primary goals include: “the preservation of the system and society of states itself, maintaining the independence or external sovereignty of individual states, the maintenance of peace in the sense of the absence of war among member states of international society as the normal condition of their relationship, the limitation of violence, the keeping of promises, and the stabilization of possessions by rules of property” (Bull, 1977: 16-19).

Bull maintains that contrary to the predominant assumption that international relations is in a constant state of disorder, and that international order has been perceived as a mere aspiration that states seek to realize; international order is in fact “part of the historical record of

international relations present throughout the history of international relations” (Bull, 1977: 24). Consequently, building on the starting-point of this proposition, Bull’s main concern is how international order is maintained. He asserts that as states interact within the international society in their efforts to realize their primary goals, international order is maintained by the following three elements: “a sense of common interests in those elementary or primary goals; by rules which prescribe the pattern of behavior that sustains them; and by institutions which make these rules effective” (Bull, 1977: 53). Significantly, Bull maintains that for rules to be “socially effective” they must be “obeyed to some degree”, and that it is the responsibility of the members of international society to carry out functions that contribute to the efficacy of those rules (Bull, 1977: 56). He addresses two main functions that are important for the argument that is addressed here:

(iv) The rules must be *interpreted* – questions arising about the meaning of rules, the relationship between rules in case of conflict, and the existence or non-existence of breaches of rules, have to be settled if rules are to provide guidance for actual behavior.

(vi) The rules need to be *legitimized* in the eyes of the persons or groups to which they apply. Rules are legitimized to the extent that members of society accept them as valid, or embrace the values implied or presupposed by the rules. To the extent that the rules are legitimized does not depend for their effectiveness on sanctions or enforcement (Bull, 1977: 56-57).

The English School stresses the importance of turning to history within the context of international politics, asserted in the work of English School scholars, including Barry Buzan and Richard Little, who highlight the critical need for including as many historical accounts as possible for the purpose of understanding the affairs of international politics:

IR [International relations] scholars already know how to tell Hobbesian, Kantian and Grotian stories but as things stand they prefer to tell them in opposition to each other. IR thinking needs to shift in order to recognize these stories not as alternative, mutually exclusive, interpretations, but as an interlinked set of perspectives, each illuminating a different facet of reality. The interesting question is not which of these stories is right, but what kind of configuration the combination of them all produces (Buzan and Little, 2001: 38).

Based on the arguments advanced by Bull and other members of the English School regarding the importance of historical accounts, I suggest that the role of international restorative justice in maintaining order within the international society is vital. The issue I take with the existing proceedings of the ICTY is that its judgments and their interpretation remain contested by national communities within rival states, which in turn make their legitimacy questionable, since the orders are not internalized by the individuals of rival states as legitimate. International restorative justice, as proposed in this research, provides the discursive spaces for rival stakeholders to encounter and resolve the contested historical meanings underlying their shared interstate conflict. This would allow the retributive rules of international law to be interpreted and legitimized by stakeholders in the involved states. Hence, the proceedings of international restorative justice are innately constitutive of international order. This is in contrast to the liberal institutionalist understanding of international justice and states' interactions within the international system, where states are either punished/rewarded based on their behavior that violates/upholds international laws and regulations. Such an understanding obscures the relational aspect of states' interaction within the international society of which individuals play a

critical role in shaping and maintaining, which in turn undermines the international order that is maintained by interstate relation restoration.

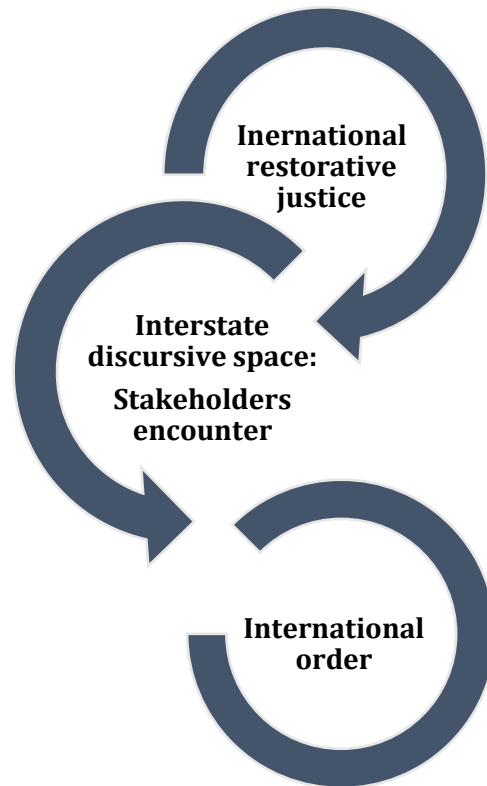


Figure 5 The dynamics of international restorative justice and international order

The following discussion will further illustrate this argument, based on the events of The Homeland War and Srebrenica.

*The Homeland War: A National Struggle for Independence or an Act of Aggression?*

“Operation Storm” was a large Croatian military campaign against the Serbs in which Croatian forces killed 150 Serbs and removed between 150,000 and 200,000 Serb civilians out of Croatia, which at the time was the largest refugee crisis of the Balkan Wars (Peskin, 2005: 216). The

Homeland War is considered by Croats to be a War of Independence. The ICTY investigations into war crimes that were committed during “Operation Storm” were perceived by Croats to be both an attack on the Croatian War of Independence, and an attack on the sovereign state of Croatia.

A number of Croatian Army generals were indicted by the ICTY, including Mirko Norac in early 2001, Ante Gotovina and Rahmi Ademi in mid-2001, and Janko Bobetko in late 2002. However, the Croatian government did not hand over these generals immediately on account of public dissatisfaction as they were considered to be national heroes. Public resistance against the ICTY was on the rise in Croatia, and massive public demonstrations and road blockades took place for days in 2001 in the capital Zagreb and in Split, with 150,000 protestors in Split in February 11 2001 calling for the government to resign. The ICTY was deemed to have failed in defending the dignity of the Homeland War once the Croatian court had issued the first war crimes indictment against Mirko Norac,<sup>13</sup> who was celebrated by the Croats as a national hero who fought for the independence of Croatia (*Washington Post*, 2001). “We are all Mirko Norac,” “Hands off our Holy War,” and “Amnesty for all Defenders,” are some of the slogans that were chanted in the Split demonstration (CNN, March 5, 2001). Another protest rally took place in the eastern town of Osijek, with over 5,000 protestors, many holding portraits of Croatia’s World War II leader Ante Pavelic, founder of the fascist *Ustasha* (insurrection) movement in 1926. While playing the national anthem, many protestors gave the Nazi salute (*Washington Post*, 2001).

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<sup>13</sup> Norac was an army general who led the defense of the town of Gospic in the Serbian Karjina region in 1991. Later he was the key strategist in “Operation Storm” when dozens of civilian Serbs were killed. He was jailed for fifteen years and released in 2011 after having served more than two-thirds of his sentence (Balkan Transitional Justice, November 25, 2011).



Another large demonstration took place in Split against the government's cooperation with the ICTY when Ante Gotovina, the retired military general who commanded "Operation Storm" and ethnic cleansing, and who forced almost 200,000 Serbian civilians out of Croatia, was arrested and handed over to the ICTY in 2005. Forty thousand protestors demonstrated in Split against his arrest, as he was celebrated among Croats as a hero of Croatia's liberation and independence and is accredited nationally for recapturing the Serb-held Krajina area of Croatia (*New York Times*, 2005). In 2011 Gotovina was sentenced to twenty-four years in prison as he was found guilty of participating in a criminal enterprise with the aim of permanent removal of Serbians from the Krajina region. However, he was acquitted of war crimes in 2012 after an appeal at a United Nations tribunal (BBC News, 2012). Thousands of Croats watched the proceedings live in Zagreb's main square and celebrated his acquittal, and later Gotovina was received in Croatia with red carpet treatment as a national hero and welcomed by Zoran Milanovic, the Prime Minister at that time, together with thousands of cheering crowds waving the national flag. Some of the celebrating Croats asserted "Our generals are heroes because they risked their lives to save our country and liberate the people" (BBC News, 2012); "Finally, we can say to our children that we are not war criminals. We fought for justice and our fight was righteous and just" (*The Australian*, 2012). The Croatian president, Ivo Josipovic, maintained that, "The verdict confirms everything that we believe in Croatia: that generals Gotovina and Markac are innocent" (BBC News, 2012), while the Serbian president Tomislav Nikolic maintained that the verdict was "scandalous" and further asserted, "It is now quite clear the tribunal has made a political decision and not a legal ruling. Today's ruling will not contribute to the stabilization of the situation in the region and will open old wounds" (BBC News, 2012). The incumbent Serbian Deputy Prime Minister, Rasim Ljajic, said that the Hague tribunal had "lost

all its credibility and the appeal decision was a proof of selective justice which is worse than any injustice. It is a move backwards and the public opinion of the tribunal [in Serbia] will be worse than it already is” (BBC News, 2012).

These major protests against the ICTY indictments and judgments are significant for the argument advanced in this research for two main reasons. First, they illustrate how the proceedings of the ICTY failed to take rival stakeholders narratives into account, which meant that the contested narratives of victimhood and aggression between the Croats and the Serbs remained unresolved. Second, the protests negate the theoretical argument advanced by proponents of retributive justice that international tribunals individualize guilt. Croats considered that taking Croat military generals who were involved in the Homeland War to trial equated to placing Croatia on trial. By issuing indictments against Croatian generals involved in the Croatian War of Independence (the Homeland War – *domovinski rat*), the ICTY was perceived domestically in Croatia to be attacking the sovereignty and national independence of the country. The Homeland War is thought by Croats to be a national struggle for independence that symbolizes the dignity and sovereignty of Croatia. Also, within the national rhetoric Croatia was perceived to be the victim in its war with Serbia, and Operation Storm a victory of a defiant nation. For Serbs, however, the same battle was perceived to be an act of aggression.

The narrative promoted by the Croats is a narrative of victimhood and self-defense. The ICTY indictments were translated domestically as an “attack on the nation” as the attack on the Homeland War was perceived to be an attack on the act of independence of Croatia. The ICTY indictments were viewed by the Croats as efforts to criminalize the Homeland War, and ultimately to criminalize Croatia as a nation, casting collective guilt on the country by indicting Croatian military generals who were involved in the war of independence. By the same token,

the ICTY acquittal of both Gotovina and Markac validated the Croats' perceived notion of victimhood of their country, and also validated Croatia's innocence, while at the same time it dismissed Serbia's perceived notion of human right violations committed against the Serbs. The Homeland War – which is referred to by the Serbs simply as “The War in Krajina” (*Rat u Krajini*) – is regarded by the Serbs as the greatest act of ethnic cleansing since World War II, while for the Croats it is celebrated as “Victor Day.” Both states are divided with regard to this historical event, and this is further evident in the way in which both states remembered the day in 2015 (the year marking the twentieth anniversary of “Operation Storm” in 1995). Croatia celebrated the event with a military parade in Zagreb, while Serbia mourned the bitter memory of the Serb victims who were forced out of the Krajina region with a predominant atmosphere of sadness (BBC News, 2015). It should also be noted that in 2018 during the Serbian Remembrance Day of the twenty-third anniversary of “Operation Storm”, the Serbian president Aleksander Vučić maintained that “Hitler wanted a world free of Jews and Croatia wanted a country free of Serbs” (Balkan Transitional Justice, 2018).

The lasting Serbian and Croatian contested meanings of “Operation Storm” are evidence of the shortcomings of the ICTY in addressing these rival narratives, and I have illustrated how the interpretation and legitimacy of the verdicts and indictment of the tribunal were challenged by the rival stakeholders. The protests are indicative of the contested interpretation of the judgments issued by the ICTY, and the contested legitimacy of those rules according to stakeholders in rival states. Incorporating interstate restorative justice would have provided discursive space for rival stakeholders to encounter and arrive at a shared outlook that is representative of how both stakeholders experienced the event. This in turn would have contributed to the maintenance of the international order as it would have provided an

opportunity for stakeholders to have internalized the indictments and verdicts of the tribunal as they would have been actively involved in the process of justice. As it is, those rival narratives may inflame future interstate interaction and risk disturbing the international order.

### *The Contested History of Srebrenica: Genocide or Massacre?*

Srebrenica is a town in Bosnia and Herzegovina, and during the Bosnian War (1992–1995) it was a town that UN peacekeeping troops in 1993 announced as a “safe area,” promising Bosnian Muslims they would be protected. However, in July 1995 UN troops failed to protect Bosnian Muslims, and more than 8,000 Bosnian Muslim men and boys were taken away, tortured, murdered, and buried in mass graves within Srebrenica, while the army of Republika Srpska (Bosnian Serb army) instigated an ethnic cleansing of another 25,000 to 30,000 Muslims (ICTY, 2015). The massacre was later recognized in 2001 by the ICTY as genocide in the ICTY’s appeal judgment with regard to the Bosnian Serb General Radislav Krstić, who was the first person to be convicted of genocide at the ICTY and sentenced to forty-six years imprisonment (ICTY, 2001). The massacre was considered by the European Parliament to be the largest mass murder that had taken place in Europe since World War II. The Resolution on Srebrenica, adopted by the European Parliament in 2009, called on EU member states and West Balkan countries to mark July 11 as a Day of Remembrance of the Srebrenica Genocide (European Parliament, 2009). Although Serbia adopted a declaration in 2010 condemning massacres that had taken place in Srebrenica, nevertheless to this day the country denies that what happened in Srebrenica was genocide.

The contested history is not limited to how the day is remembered in Bosnia and Serbia; an inflammatory atmosphere exists within Bosnia and Herzegovina where there are two main

political entities: the Republika Srpska, with a Serb majority, and the Federation of Bosnia and Herzegovina with a majority of Bosnian Muslims (known as Bosniaks). The contested history is present in Bosnia and Herzegovina, where schools are segregated along ethnic lines and students are introduced to different, mutually exclusive, narratives of what happened in Srebrenica. For example, in Bosnia and Herzegovina where Srebrenica is located and where there is a Serbian majority who support the Republika Srpska, genocide is still denied by President Milorad Dodik (Al Jazeera, 2014). International recognition of the genocide remains irrelevant as the Remembrance Day is still contested after twenty years and is remembered with bitterness. For instance in Bratunac, a village near Srebrenica, an Orthodox ceremony is held on July 12, the day after the Remembrance Day, to honor the 3,200 Serbs who were killed there during the war. It is a ceremony that is attended by the president of Republika Srpska.

In 2015 in Sarajevo, an attempt was made by Bosnian Muslim lawmakers to draft a resolution to call the Srebrenica massacre a genocide, but this was blocked by Bosnian Serb MPs who maintained that the proposed resolution was an attack against the Serbs and would eventually undermine stability in the country (Reuters, June 10, 2015). The incumbent Bosnian Serb President Milorad Dodik commented on the draft resolution, asserting that “It does not mark a step towards ethnic reconciliation but may rather further destabilize relations in the country” (Reuters, June 10, 2015). He also stressed that: “I will keep saying that genocide was not committed there. It was a grave atrocity” (Reuters, June 10, 2015). The divide around the recognition of Srebrenica as a genocide took place within the international system and was most apparent in July 2015 when the UK drafted a UN Security Council resolution marking the twentieth anniversary of the Srebrenica genocide. The draft, which was eventually vetoed by Russia, further exposed the existing divide. Serbia protested against the draft as “anti-Serb,”

while Bosnian Serbs view the draft as deepening ethnic divisions in Bosnia (Reuters, July 8, 2015). For the Serbs, the Russian veto has prevented “smearing the entire Serbian nation as genocidal” (Reuters, July 8, 2015) as the Serbian president at the time, Tomislav Nikolic, maintained, while Bosniaks were furious about the Russian veto, maintaining that it was supportive of a criminal act. A statement by the late Russian UN ambassador, Vitaly Churkin, maintained that the draft resolution was “not constructive” and “confrontational,” and at the same time that this did not deny “the suffering of the victims of Srebrenica” (Reuters, July 8, 2015). All this highlights the pitfalls of the proceedings of international retributive justice without engaging stakeholders in the process of international justice. The international recognition of Srebrenica as a genocide remains ineffectual as domestically this label is not perceived to be correct or internalized; rather, it remains contested and disputed. It is worth mentioning that after the death of Churkin in February 2017, the Bosnian Serb Eastern Alternative Association installed a monument to him in Eastern Sarajevo in Republika Srpska in November 2017 in an effort to honor him (Balkan Insight, 2018). In addition, the Serbian cultural association, Srpski Krivak, announced it was paying tribute to Churkin by installing a statue of him (characteristically raising his right hand vetoing the UN draft resolution), in Russia opposite his house in his hometown of Marinkino. People from Serbia and Republika Srpska in Bosnia have donated contributions to honor the Russian diplomat that vetoed the UN draft resolution (Balkan Insight, 2018). This indicates the lack of connection between the Serbian narrative and the narrative produced by the ICTY, and the latter’s inability to alter how history is understood within national narratives.

Although the ICTY in 2007 ruled that Serbia was not directly responsible for the Srebrenica genocide, but nevertheless was responsible for failing to prevent it, the perceptions of

what occurred in Bosnia have been different. On July 11, 2015, during the twentieth anniversary commemoration of the genocide, the Serbian Prime Minister at the time, Aleksandar Vučić, who was representing Serbia at the commemoration in a gesture of reconciliation, was attacked by an angry crowd of Bosnian Muslims who tossed rocks and bottles at him chanting “Kill, Kill” (*Chicago Tribunal*, 2015). In Bosnia, Srebrenica is remembered as genocide by the Bosniaks, but Bosnian Serbs dispute this while Serbs deny this, and the process of retributive justice with the absence of an active participatory role of stakeholders has failed to resolve these competing narratives about what happened.

Furthermore, the contentious repercussions on domestic politics of adopting retributive measures without the pursuit of restorative justice is highlighted in the way the ICTY’s indictments and judgments have been perceived locally. The sixty-nine-year-old Bosnian Serb general Ratko Mladić, who was indicted by the ICTY for the Srebrenica massacre and also accused of besieging the Bosnian city of Sarajevo, was arrested after sixteen years of hiding in May 2011. In Belgrade, thousands of Serbians gathered in protest against the arrest, chanting nationalist slogans and holding banners honoring Mladić as a national hero: “We are here to show these traitors how real Serbs will defend a Serbian Hero,” one of the protestors said in the Serbian capital (Reuters, May 29, 2011). Among the protestors were those who called for the resignation of the Serbian President Boris Tadić at the time, holding banners that said “Tadić is not Serbia;” “Hypocrites and traitors arrested our hero;” “Mladić the ultimate Serb;” and “Srebrenica is a NATO hoax” (Reuters, May 29, 2011). In Kalinovik, an eastern town in Bosnia where Mladić grew up, a banner in the main street said, “Welcome to Mladicevo” (Mladić’s town), and a protest of one thousand people took place in support of Mladić, with protestors holding Serbian flags and Mladić posters. “He was and has remained a hero for us, the defender

of the Serb people, our commander-in-chief who defended us” (Reuters, May 29, 2011) said one protestor. Another woman protested against the Serbian President Boris Tadić, saying that, “He should be ashamed. He is a traitor” (Reuters, May 29, 2011).

The indictment and arrest of Mladić reinforced the Serbian sense of victimhood, as ethnic Serbs viewed the atrocities that were committed by Mladić in light of what was done to Serbs by the fascist Croatian government during World War II in the Jasenovac Concentration Camp (France 24, May 30, 2011).<sup>14</sup> According to the Serbian national narrative, what happened during the Balkan Wars of 1991–1995 cannot be understood apart from what happened in Jasenovac, as with the rise of nationalism in Croatia the way the Serbs acted in the 1990s was based on the fear of another Jasenovac and fear of Croats committing another genocide against Serbians. In their “Jasenovac – A Past that Does not Pass,” Stipe Odak and Andriana Benčić state that:

Although historically distanced by seventy years, the events surrounding [Jasenovac] are still constantly recurring in both political and private, official and unofficial, spheres of life, functioning as a specific symbol around which narratives of ethnic, national, and religious understanding as well as inter-group conflicts are thought and constructed (Odak and Benčić, 2016: 805).

The ICTY proceedings therefore remain unfinished to the Serbs as they have failed to engage with, or even address, their experiences, let alone tried to understand what happened. Addressing Srebrenica without taking Jasenovac<sup>15</sup> into account further heightened the Serbian

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<sup>14</sup> “The Jasenovac Concentration Camp was the largest complex of extermination, concentration, and labor camps in the Nazi-allied Independent State of Croatia (NDH) during WW II, where around 50,000 Serbians were killed between the period of August 1941 to April 1945” (Odak and Benčić, 2016: 807-08).

<sup>15</sup> In November 1998, during a basketball game between Red Star from Belgrade and Cibona Zagreb, Croatian fans held a banner with the slogan “Serbs to Jasenovac” with an Ustaša “U”. Available at:



sense of being victimized by the West. Furthermore, in January 28, 2014, during the trial of Radovan Karadzic (former president of Srpska 1992–1996, who was convicted by the tribunal for Srebrenica genocide in 2016),<sup>16</sup> Mladic during his testimony requested the judge to allow him the time to read his seven pages statement:

As for this Hague tribunal, I cannot stand it. I cannot recognize it. And I cannot testify before it. I cannot take an oath, because this is pressure against me as a person, and against my people. I kindly request that you give me the following possibility-with all due respect to president Radovan Karadzic and the effort he has made for the salvation of our people, and [to which] I contributed doing some good – to hear me out. I wrote seven pages last night, if you don't mind I would like to read them out, and after that I can take an oath.<sup>17</sup>

However, his request was denied without providing an explanation by the judge.

For the Serbs, the process of international retributive justice as carried out in the proceedings of the ICTY remains partial, and moreover was considered to be a highly suspicious political endeavor as the proceedings were understood to be hostile to their state. The entire nation of Serbia was perceived to be under attack. This further refutes the claim that the ICTY helped to individualize guilt, as the face of Mladić became the face of Serbia and handing him over to the ICTY was identified domestically as handing over the national dignity of the country. Furthermore, the indictments and the ICTY proceedings pertaining to Srebrenica illustrate the discrepancy between the judgments of the ICTY and the individuals' understandings of what happened. Once again, the interpretations of the orders were contested by individuals in

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<http://www.balkaninsight.com/en/article/no-remorse-a-croatian-wwii-camp-commander-on-trial-06-14-2018>. [Accessed May, 20, 2018.].

<sup>16</sup> Available at: <https://www.hrw.org/news/2016/03/24/icty/bosnia-karadzic-convicted-srebrenica-genocide>. [Accessed May 8, 2019.]

<sup>17</sup> “Karadzic-Testimony of Ratko Mladic (Part ½) – 28 January 2014.” Available at: <https://www.youtube.com/watch?v=OqXZQOacfA>. [Accessed May 8, 2019.]

stakeholder states and the legitimacy of the ICTY orders was once again questioned. All of this is indicative of how international restorative justice would complement international retributive justice, by providing the discursive space through which rival narratives could be addressed and rules could be interpreted and legitimized in the eyes of stakeholders in rival states.

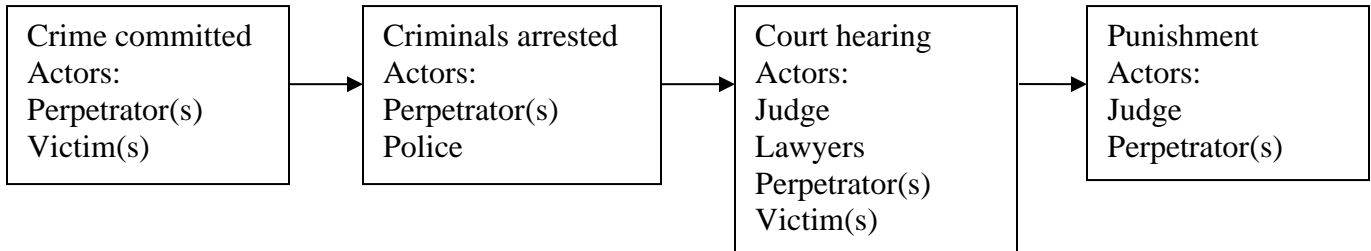
Overall, the top-down approach of international retributive justice as manifested in the proceedings of the ICTY fell short of realizing interstate reconciliation; moreover, it inflamed domestic politics in post-conflict fractured societies, and this now places a risk to the international order which is vulnerable to the outbreak of another conventional war based on unresolved rival narratives. With the absence of encounter and dialogue, the proceedings of international retributive justice further politicized the interstate conflict for twenty years after the war ended. International justice was neither internalized nor perceived to be active locally, and unresolved narratives of what happened continue to haunt the reality of the involved countries.

### *Who is on Trial?*

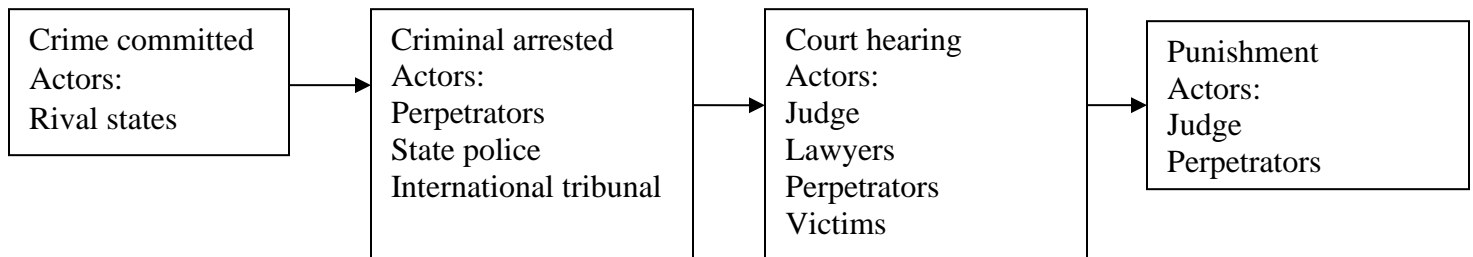
Unlike the proceedings of criminal justice within the state, where the individual who committed a crime based on personal motives is prosecuted; within the international system the process of justice is not that straightforward. Crimes committed during interstate conventional wars are committed in the name of the state based on political motives, while perpetrators prosecuted in international tribunals are individuals. This issue may be further illustrated with the following

diagrams contrasting the process of retributive justice at the state level and the international system level, and the actors involved at every step in this process:

1-The process of retributive justice at the state level:



2-The process of retributive justice at the international system level:



As illustrated in the diagram, retributive justice at the level of the state is a straightforward, consistent process, as the individual perpetrator(s) who committed the crime, based on personal motives, is/are prosecuted. However, at the level of the international system, I argue, there is confusion with regard to both state responsibility and individual responsibility in relation to violations that take place during interstate conventional wars. It is individuals who are prosecuted for crimes committed by the state during interstate conventional wars. Retributive justice, as manifested in the proceedings of the ICC, individualizes guilt and prosecutes individuals with the intention of not casting guilt on states, based on the assumption that holding a few individuals accountable advances “group reconciliation,” whereas, casting responsibility on an entire group might result in counter effects , such as inciting enmity between rival groups

(de Hoon, 2017: 604). From the perspective of the ICC, and how its proceedings are carried out, individuals that are on trial, whether politicians or military generals, are not considered to be representatives of the state; rather they represent only themselves. This understanding, however, that the ICC holds does not necessarily correspond to the understanding of the citizens of the state, who might view the individuals on trial as representing their state rather than the individuals themselves. The proceedings of the tribunal highlight the implications of employing the same process of retributive justice within the domestic context as at the level of the international system, and the implications of reducing crimes committed in the name of the state as individual crimes. As the cases of the Homeland War and Srebrenica have illustrated, the claim that international retributive justice manifested in international tribunals individualizes guilt has here been shown to be contested as each ethnic group or nation in question has considered that collective guilt was cast on its entire community when the military generals of their ethnic group or nation were put on trial. To this day there is a strong belief among Serbs that the main aim of setting up the ICTY was to establish “Serbs’ collective guilt” (Clark, 2008: 337). In addition, it is clear that with regard to the Homeland War and Srebrenica, military generals were considered to be representative of the entire community, and that taking them to trial meant the state rather than the individual concerned was on trial. This is evident with regard to how the military generals were celebrated and perceived as national heroes and the issue of whether it was the state that was on trial or individual perpetrators remains blurred.

The aim here is to recognize the tension between the criminal act and locating the guilt within the proceeding of international retributive justice. Therefore, the association between realizing justice and individualizing guilt is heavily contentious within the context of international politics. The process of international retributive criminal justice obscures the lines

between state responsibility and individual responsibility, as individuals are held accountable for crimes committed based on political motives on behalf of the state, the main actor in interstate conventional war. This indicates a missing process in place that would provide the discursive space for stakeholders to discuss who is, and who is not, on trial. Restorative justice would provide a discursive dimension for stakeholders actively to address who or what is on trial, and allows people to have a stake in whether or not their state is on trial.

### **Between the Politics of Denial and Establishing the Truth**

As shown in the cases discussed, the ICTY established retributive measures without active restorative involvement of the rival stakeholder states. In doing so it produced its own version of history that was displayed as the legitimate abstract account of past events, but which had no meaningful impact on the rhetoric promoted by the involved states as they did not take part in producing it. The history maintained the divide between “us” and “them.” Moreover, the proceedings of the ICTY did not take into account the dimension of how history is interpreted within the hegemonic narrative of the involved states. Hegemonic state’s narratives matter for international politics because “they often contain a clear designation of responsibility for past historical events that are perceived to be unjust as well as proposals for how this injustice can be rectified in the future” (Subotic, 2013: 308), and this is where the functions of restorative justice might complement the functions of retributive justice.

When addressing the claim that criminal trials help to establish a historical record about what happened, it is important to emphasize that unless the facts of the matter are internalized by the stakeholders and impact on their perceptions, they will remain irrelevant to the stakeholders without any substantial impact. When addressing the “truth” established by the ICTY,

fundamental questions may be asked: *Whose* truth is established? According to Jürgen Habermas, establishing the truth is “a collective enterprise, in which we learn from each other” (Jenkins, 2002: 251). Truth is plural and can only be constructed with active participation on the part of all stakeholders. As shown earlier, the “truth” about what happened in the Homeland War or Srebrenica varies according to whether one is speaking to a Serb, a Croat or a Bosnian Muslim. Each side is prone to see itself as the principal victim of war crimes, without acknowledging the crimes committed by its own community. The lack of acknowledgement criminalizes the state within the international system, as legal procedures are front and center, but with stakeholders sat behind in the passenger seats.

The alleged achievement of justice that was celebrated after the closing of the working of the tribunal in 2017 is here disputed, and I have shown that the divide about what happened remain unaltered.

## **Conclusion**

*“History is not the past.  
It is the present.  
We carry our history with us.  
We are our history.”  
(James Baldwin)*

The ICTY has been critiqued relating to many issues, including selectivity and victors’ justice. This chapter has focused on showing how the pursuit of retributive justice falls short of transforming stakeholders as it does not engage with their narratives, and therefore the justice that is achieved and celebrated remains ineffectual. The ICTY became a narrator of the conflict and produced a formal history on display, over which stakeholders remain divided.

In discussing the Homeland War and Srebrenica, I have shown that interstate conventional wars are conflicts around meanings of victimhood, acts of aggression, and national struggles of self-defense and survival. The process of international retributive justice as carried out by the ICTY does not involve an active participation of stakeholders, and therefore it remains contested by them as it fails to address the rival narratives about what happened. More than twenty years after the Balkan Wars and a year after the ICTY closed in December 2017 the divide still exists because the verdicts and judgments of the ICTY have not been internalized domestically by the stakeholders. At the same time the national rhetoric of the involved states has remained unaltered. The persistence of the divide risks altering the international order as the underlying contested meanings of the conflict remain unresolved with the danger of inflaming future conflicts. Thus, I claim that interstate restorative justice is a critical element that has to be included within the international criminal justice system for the maintenance of the order of the international society.

The liberal institutionalist account of the state has shaped the international criminal justice system in a way that deals with states as enclosed unitary actors. As illustrated in the proceedings of the ICTY, international retributive justice is centered on upholding international law and punishing states that violate it, with total disregard for the rival narratives maintained by stakeholders. Evaluating the ICTY through the solidarist English School lens, and its understanding of the state as comprising political associations of individuals and their role in international politics, allows looking at how stakeholders have internalized the proceedings of the ICTY, and highlights the persistence of rival narratives. This case indicates the need for engaging stakeholders in the process of international justice by creating discursive spaces where they might encounter their rival counterpart, and address their competing narratives about what

happened. The absence of institutionalized interstate discursive spaces within the process of international criminal justice undercuts the legitimacy of the existing international criminal justice system, as the judgments of the ICC and the ad hoc tribunals remain contested by stakeholders in rival states.

This is not to suggest that restorative justice should replace retributive justice, but rather to highlight the necessity of incorporating both approaches to justice within the international criminal justice system, as the proceedings of each complement the functions of the other. While restorative justice is tailored to restore broken relations and provide mutual understanding with regard to shared past experiences, retributive justice is focused on safeguarding international law by providing punishment.



## Chapter 2

### Justice through Truth-Telling and Encounter: The Case of South Africa

*“We have to open the wounds and cleanse them, so that they don’t fest. We have dealt with our past, as effectively as we could. We have not denied it. We have looked the beast in the eye. If you don’t look the beast in the eye, that beast is not going to lie down quietly, it is going to come back and haunt you.”*

*Desmond Tutu (2007a)*

#### Introduction

As shown in the previous chapter, the process of international retributive justice fails to resolve rival narratives about previous conflicts, because it lacks an active participatory role for rival stakeholders seeking justice. I maintain that exchange between such stakeholders can resolve these issues, which necessitates the need for discursive spaces. The aim of this chapter is to illustrate the benefits of discursive spaces that were present in the Truth and Reconciliation Commission (TRC) in South Africa, and how effective those spaces were in addressing rival narratives in a deeply divided society. In addition, this case highlights the tension between two end goals aimed by the process of justice: accountability and reconciliation. The TRC exposes the limitation of restorative justice in resolving this tension single-handedly, and illustrates the need for both retributive and restorative processes of justice to be in place in post-conflict societies.

I conclude this chapter with the following implications. First, the case of the TRC highlights the critical role of discursive spaces in the aftermath of mass atrocities, as they provide the space for rival stakeholders to take part in the process of justice, to encounter and exchange, which are key for relations restoration. Secondly, this case highlights the need for incorporating both restorative and retributive measures of justice in the aftermath of violent conflicts. Restorative justice and retributive justice are not mutually exclusive as suggested by Zehr; rather, they complement each other as they deliver different functions. Retributive justice holds perpetrators who do not participate in the process of reconciliation accountable for their human rights violations, while restorative justice helps both victims and perpetrators deal with their mutual animosity and come to terms with their past. Both approaches to justice contribute to a broader process of reconciliation at the societal level. In addition, The TRC highlights the vital role of political and religious leadership in directing a process of restorative justice. Furthermore, it draws special attention to the importance of the public nature of the reconciliation process, as individuals who were engaged in the process of justice took part in nationwide nominations of the commissioners, and engaged with the process of truth-telling through national broadcasts of public testimonies.

The TRC is considered in this research as it stands out as being the most prominent experience of truth-telling commissions that was committed to restorative justice principles (Leebaw, 2001; Llewellyn and Howse, 1999; Llewellyn and Philpott, 2014; Tutu, 1999: 52). It is the first instance of relational restoration as a manifestation of justice, rather than criminal retributive justice that employ punitive measures (Llewellyn and Howse, 1999; Llewellyn and Philpott, 2014). Moreover, this case is extremely significant for this research as stakeholders were able to engage in the process of justice through encounter and truth-telling. Therefore, this

case is critical for considering the role of discursive spaces in relation restoration and regenerating a renewed community guided by shared norms. Furthermore, this case is critical as it provides insights on the strengths and limitations of restorative justice in contributing to the process of reconciliation.

This chapter will first provide a brief historical review of the founding of the TRC as an institutional body that sought social reconciliation as its ultimate goal. I will then discuss one of the unique features of the TRC that is critical to consider for this research, which is the central role of *ubuntu* (humaneness; an inclusive concept that values the humanity of everyone within a given community) that shaped the role and functions of the TRC. In this chapter, I focus mainly on two studies that were conducted by the Center for the Study of Violence and Reconciliation (CSV) that investigated the operations of the amnesty hearings and the Human Rights Violations (HRV) hearings, and analyze the data these two studies provided based on the perspective of restorative justice.

## **Historical Review**

South Africa is often referred to as a country that transformed itself in a relatively nonviolent way after the fall of apartheid in 1994, on account of the significant role of the TRC as a “reference point” and a “field-changing moment” (VanAntwerpen, 2014: 82). The TRC was established in South Africa out of a political compromise between the de Klerk government and the South Africa’s liberation movements, including the ANC, during a negotiation period of 1990–1993. The negotiations took place on account of rising domestic and international pressures to end apartheid, and against the backdrop of political violence. The first democratic election held in 1994 marked what is often referred to as South Africa’s “miracle”: the relatively

peaceful transition from apartheid to democracy, contrary to the scenario of bloodshed that was anticipated at the end of the minority white rule in the country (Waldmeir, 1997). The African National Congress (ANC) won the majority of votes and formed the Government of National Unity (which included the National Party), under the leadership of Nelson Mandela, the first democratically elected black president of South Africa (Kaufman, 2012: 4). The young democratic South Africa has yet to deal with many issues inherited from apartheid, including racialized governance institutions, structural economic injustices, and a deeply divided society based on racial lines. When addressing the question of how to deal with the past, the interim constitution maintained the following guiding principles: “[T]here is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not victimization.” (Constitution of the Republic of South Africa Act no 200, 1993). This indicates the conscious choice that was made at the time in advancing restorative, rather than punitive, measures. This choice was made clearer with the founding of the TRC based on the Promotion of National Unity and Reconciliation Act No. 34 that was passed by the South African parliament in 1995. The scope of the TRC was to investigate the crimes committed in the period between 1960 and 1994, and its mandate was to document the horrors of apartheid. Reconciliation is explicitly stated as the TRC’s ultimate goal, its slogan being “Truth: the road to reconciliation.” This is further expressed in the TRC’s mandate to “promote unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past” (TRC Act: s. 3(1)). To realize the full disclosure of truth by all parties, the TRC was set to grant amnesty to offenders in return for truth (PNUR, 1995: 4).

The TRC was adopted in South Africa as a “third way” (Tutu, 1999: 30), a middle-way ground between the two dominant options of retributive justice or blanket amnesty; between

criminal tribunals such as the Nuremberg trials at one end of the spectrum, and national amnesia at the other. The first volume of the “Truth and Reconciliation Commission of South Africa Report” (1999), clearly addresses the retributive/restorative choices that were available to post-apartheid South Africa, and illustrates why the choice for restorative justice was the best fit for what had occurred in the country. This included the circumstances facing post-Apartheid South Africa, with the existence of a military stalemate, as neither the state nor the liberation movement had a decisive victory over the other (TRC Report, vol.1, 4). With a deeply divided society based on racial lines, it was considered that retributive measures would further deepen the divide (TRC Report, vol.1, 4-5). This detail is significant as it demonstrates the muddled reality caused by violent conflict, of which punitive measures lack the tools to alter. With the existence of military stalemate in post-conflict societies, rival narratives continue, and, as this chapter illustrates, truth-telling and encounter are helpful tools to address the underpinning causes of the divide. The report further states that if there were to be solely retributive measures:

There is no incentive for perpetrators to tell the truth and often the court must decide between the words of one victim against the evidence of many perpetrators. Such legal proceedings are also harrowing experiences for victims, who are invariably put through extensive cross-examination (p. 6).

According to the TRC report, realizing the truth was also one of the significant reasons why restorative justice was a better option for post-apartheid South Africa. The ultimate end result that the Commission aspired to was forging social change, which could not be realized unless it was founded on truth. Collective amnesia was never an option for post-apartheid Africa for two main reasons:

- (a) it was necessary to restore the dignity and identity of the victims, by acknowledging their suffering and affirming their experiences as real;
- (b) it was necessary to learn the truth about what happened and why it happened, to both avoid repeating the past and also to have a new fresh start that upheld human rights; “It is only by accounting for the past that we can become accountable for the future” (p. 6).

The TRC’s commitment to confront the past and restore broken relations to aim for national healing reflects its restorative approach to justice. However, as shown by Bronwyn Leebaw, its restorative feature is paradoxical as it aimed to “*restore* something that never was, a South African political community with shared values and goals” (Leebaw, 2003: 26).

It should be mentioned that the public nature of the TRC distinguishes it from previous truth-telling commissions, including those in Uruguay (1985); Zimbabwe (1985); Chile (1990–1991); and Chad (1991–1992) (Avruch and Vejarano, 2001: 1). This is illustrated in the national and international broadcasting of the cathartic hearings and public testimonies, which engaged the public in the work of the Commission and in the process of truth-telling. The first public hearing was held in April 1996, which allowed access to the public, regardless of their location because it was broadcast live on television, of the experience of healing and restoration. Public testimonies are considered to be an institutional innovation of the South African TRC, as this was the first time a national commission made an impact that was not limited locally or regionally but was also international (VanAntwerpen, 2014: 90). It has been argued that this feature allowed an opportunity to “apply what may be therapeutically effective at the interpersonal level to the collective level” (Avruch and Vejarano, 2001: 41), and allowed healing to shift from an individual level to a national level (Tutu 1999; Wilson 2000). In addition, its public character is manifested in the nationwide public nominations of the seventeen

commissioners, who were interviewed publicly by an independent selection panel that included different sections of the society, including political parties, civil society, and religious institutions, which eventually resulted in a diverse commission (Llewellyn and Howse, 1999: 375; Tutu, 2017). The public character of the TRC is significant as it provided stakeholders with an active participatory role in the process of justice.

Before providing my analysis and evaluation of the TRC, I shall first discuss the concept of *ubuntu* on which the TRC was founded, and which fundamentally influenced the orientation of the TRC as an institution that was geared towards the realization of national reconciliation.

### **Restorative Justice and the Afro-Communitarian Concept of *Ubuntu***

Desmond Tutu, the Archbishop and chairperson of the TRC, had an influential role that shaped and influenced the TRC in realizing justice in its restorative form. Tutu's distinctive account of reconciliation is rooted in the Afro-communitarian concept of *ubuntu*. His understanding heavily influenced the orientation of the Commission and its role as a vehicle towards reconciliation (Oelofsen, 2016: 3). In Tutu's words, *ubuntu* has the following meaning: "I am human because I belong" (Tutu, 1999: 31), and "We need other human beings in order to be human. I am because other people are" (Tutu 2007b: 3). Tutu elaborates on his account of restorative justice based on the communal African understating of *ubuntu*, as he says that for restorative justice to take place there needs to be "the healing of breaches, the redressing of imbalances, the restoration of broken relationships" (Tutu, 1999: 51).

The concept of *ubuntu* provides a specific understanding of the self that is inseparable from others and cannot be fully realized without the existence of relations with others. The self is only realized and understood in connection with the broader community. In this way, *ubuntu*

recognizes the communal nature of human beings. This specific understanding of the individual as part of a larger community has informed the restorative nature of justice pursued by the TRC. Justice is achieved when the restoration of relations in the divided post-apartheid community is realized. Tutu further illustrates how *ubuntu* informs the understanding of restorative justice as follows:

[...] there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution and punishment but the restoration of broken relationships [...] restorative justice is being served when efforts are being made to work for healing, for forgiveness and for reconciliation (Tutu, 1999: 51-2).

Tutu elaborates on the difference between Western and African understandings of justice. He claims that the former is individualistically based, considers criminal acts as violations of the freedom of the individual, and maintains that balancing the damaged social equilibrium takes place by alienating offenders rather than seeking reconciliation. He further elaborates when he says: “Retributive justice is largely Western. The African understanding is by far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew” (Tutu, 1996).

In sum, the case of the TRC in South Africa is critical for this research as it is founded on a very strong belief in the value of restoring broken interpersonal relations within fragmented communities. The underlying notions on which the TRC is established are that being human is essentially relational, and that justice is achieved by restoring broken relations, which is central for balancing the curtailed social equilibrium caused by criminal acts. These notions overlap with



the overall argument this research is advancing, which is the need for incorporating restorative measures within the international criminal justice system.

### **The Tension between Accountability and Restoration**

*“There is something therapeutic about telling your story. You are being acknowledged. You are not a cipher. You are someone.”*

*Desmond Tutu<sup>18</sup>*

The experience of the TRC in South Africa highlights the tension between accountability and restoring broken relations when addressing gross human rights violations in divided societies. This tension is reflected in the political compromise that provided amnesty to apartheid leaders in exchange for democratic transition. The complexity of the post-conflict reality is captured in Dullah Omar’s comments (the minister of justice at the time) when he introduced the TRC legislation to parliament in May, 1995. In his address to parliament he assuaged the ANC by denouncing apartheid as a crime against humanity, but at the same time assuaged those who were affiliated to apartheid, by stressing the constitutional principles that the TRC would follow that called for "understanding, but not for vengeance" (Hansards, parliamentary debates, 1995: 1342). His effort to address both competing political concerns reflects the inherent tension between accountability and relations restoration that leads to political compromises. Furthermore, the intensity of the political compromises was heightened during the parliamentary debates in 1995, when ANC leaders opposed the term “Human right violations,” outlined in the parliamentary act on which the TRC was founded. According to ANC leaders, the term criminalized violations that

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<sup>18</sup> In a BBC documentary, “Truth and Reconciliation Commission: The Difficulty of Forgiveness” (2009). [Online.] Available at: <https://www.youtube.com/watch?v=9k4deBth2K8>. [Accessed March 27, 2018.]

took place during apartheid, rather than “criminalizing the apartheid system in its entirety” (Leebaw, 2003: 44). On the other hand, the National Party representative opposed the commission as they feared it would “produce a revisionist official history, based on *moral relativism* that justifies atrocities committed by the ANC” (Leebaw, 2003: 42). The complexities presented in the aftermath of this violent conflict were therefore seen to be legion, and the delicate balance required to cater for both accountability and reconciliation demonstrate the need for a hybrid approach to justice that include both retributive and restorative measures.

The TRC was faced with various criticisms, such as those raised by Mahmood Mamdani. He maintained that the TRC’s focus on the perpetrators of human rights violations took away from the focus on beneficiaries of apartheid, including the business community, who, although they were not involved in violence, were nonetheless equally liable as they gained privileges from apartheid, and their complicit role contributed to its continuation (Mamdani, 2001: 58-61). He also critiqued the very political compromise made by the commission, describing it as a moral compromise, and maintaining that the historical record provided by the TRC was a very narrow one that did not take into account the vast majority of victims of structural injustices that were innate to the very fabric of apartheid, including segregation and land dispossession (Mamdani, 2001: 58-61).

On the other hand, one of the strengths of the TRC that is significant for this research was its commitment to restorative justice principles through fostering discourse between rival stakeholders and providing discursive spaces that were inclusive to different perspectives (Leebaw, 2001; Tutu, 1999; Sachs, 1998). This is further highlighted in Cynthia Ngewu's testimony, whose son was murdered by the security police, as she maintained "We do not want to return evil by another evil. We simply want to ensure that the perpetrators are returned to

humanity” (TRC Report, vol. 5, 366). Another man whose brother was killed by the Local Defense Force maintained in his testimony that he had to let go of his hatred towards all whites as it would "negate everything that my brother stood for” (TRC Report, vol. 5, 375). In addition, in his testimony on the “Bisho massacre”<sup>19</sup> in the presence of families that lost members, Colonel Schobesberger of the Local Defense Force asked the families for their forgiveness:

I say we are sorry. I say the burden of the Bisho massacre will be on our shoulders for the rest of our lives. We cannot wish it away. It happened. But please, I ask specifically the victims not to forget, I cannot ask this, but to forgive us, to get the soldiers back into the community, to accept them fully, to try to understand also the pressure they were under then. This is all I can do. I ‘m sorry, this I can say, I’m sorry (TRC report, vol. 5: 382).

These testimonies demonstrate the critical role of discursive spaces, where the narratives of both apartheid and anti-apartheid movements become part of the same history. Ending apartheid was not only about ending political structural injustices; it was also about the liberation of the victims’ and offenders’ minds and souls from the fabrications, perceptions, and a value system on which apartheid was maintained. Reconciliation is a process that involves releasing both victims and offenders from their rival narratives and forging the birth of a new narrative through discourse between all parties. By dealing with the violations through punitive measures without addressing the underpinning narratives that justified those violations would have meant the symptoms might have been cured but not the disease.

## **Evaluation and Analysis**

The TRC was founded to fulfill the following tasks: hear the victims and offenders, recommend

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<sup>19</sup> A massacre took place in September 1992. When members of the ANC marched in the streets of Bisho, the Local Defense Force soldiers fired on the demonstrators and killed twenty-eight of them (Pope, 2012: 91).

reparations, and grant amnesties, with the aim of realizing national reconciliation. To fulfill these tasks the TRC comprised a Committee on Human Rights Violations, a Committee on Amnesty, and a Committee on Reparation and Rehabilitation (PNUR, 1995). I shall now discuss the work of the before mentioned committees and provide my analysis o by utilizing the data provided by two research studies conducted by the Centre for the Study of Violence and Reconciliation (CSVR). I look at the restorative role of discursive spaces provided for rival stakeholders and also look at restorative tools, in particular truth-telling, encounter, and reparation, and evaluate their contribution to relations restoration between stakeholders, and the overall reconciliation of the community.

## **Conclusion**

*“His death becomes a scar, no longer a wound.”*

More than twenty years have passed since the TRC was set up in South Africa. The Commission has been applauded as it enabled the country to transition from apartheid to democracy with very little cost and saved it from the predicted bloodshed. The TRC has contributed to reconciliation through creating the discursive spaces needed for truth-telling, encounter, and exchange of shared experiences between stakeholders about what happened. The case of the TRC in South Africa illustrates how relation restoration and forging social change on the broader community are mutually constituted ends of the process of restorative justice.

One of the main insights provided by the TRC is the tension between accountability and reconciliation that was reflected in the political compromise that led the transition to democracy. This signifies of the complementary roles of both retributive and restorative measures of justice and their importance in the process of reconciliation in a divided society. This is evident with the

sense of bitterness and injustice felt by victims on account of the fact that perpetrators who failed to be granted amnesty were not subjected to retributive measures or taken to criminal trials.

Stakeholders encounter would provide a moment for the nation to understand what had happened, and prosecutions would establish a new nation with a committed respect for human rights and democratic norms. I counter the argument that presents restorative justice and retributive justice as mutually exclusive, and instead support the argument that they actually work hand-in hand, and should both be in place in post-conflict societies dealing with violent pasts.

In addition, this case highlights the significant role of political and religious leadership heading the process of restoration at the societal level. While the role of religious leaders might vary in its efficacy from case to case, based on the cultural context of the country, in the case of South Africa the religious leadership of Desmond Tutu heading the process of restoration has proved to have healing effects on rival stakeholders. In addition, this case illustrated the critical role of the political leadership of F. W. De Klerk, South Africa's president (1989-1994), who led the National Party and the government in speedy reform to end apartheid, release political prisoners-including Nelson Mandela, and initiate negotiations about the transition from apartheid to democracy and post-apartheid constitution, with representatives of South Africa's racial groups. The presence of political leaders, including Mandela and De Klerk, who were committed to coexistence, contributed to the process of reconciliation at the societal level. It should be noted that De Klerk testified before the TRC and apologized on behalf of the National Party for the harms that were caused by apartheid.<sup>26</sup>

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<sup>26</sup> <https://www.britannica.com/biography/F-W-de-Klerk>. [Accessed May 12, 2019]

Moreover, the case also underscores the role of the public feature of the TRC as the hearings were broadcasted nationally, which allowed affected citizens to witness the experiences of rival stakeholders, which in this instance was transformative. Through public testimonies, restorative justice became a “public” process to be experienced collectively, as the suffering, guilt, pain, and trauma were publicly shared and processed. Public hearings became equally therapeutic for the victims, offenders, and the nation. This has not only contributed to the consciousness of South Africans of the harms committed by the apartheid regime, but also to everyone who followed the public testimonies internationally.

Furthermore, this case provides insights about the critical role of reparation in the process of relations restoration. The government’s delay in providing reparation to the victims created a sense of frustration that the victims held against the TRC. In addition, victims’ suffering was caused by structural economic inequalities, and the absence of remedies to eliminate these inequalities delayed the process of reconciliation at the societal level. The issue of reparation should not have been handled separately from the broader issue of dealing with the root cause of apartheid that provided economic benefits based on racial lines. Transformation of the national community required greater efforts that were beyond the capacity of the TRC, which involved undoing the long-term economic deprivation of the majority of the population of South Africa. The TRC was critical in helping victims, perpetrators, and the nation as a whole to come to terms with the past; however, it lacked the capacity to take the necessary actions for an enhanced future.

South Africa today is far from being the “rainbow nation” that Mandela aspired for, partly due to lasting economic structural injustices since apartheid. I would nevertheless argue that the TRC stands as a powerful model in demonstrating the importance of restorative justice,

as it shows the healing power of creating discursive spaces between rival stakeholders, which allows them to understand the others' experiences. It is this understanding that is the stepping stone for relation restoration, which is not provided through retributive measures. This is particularly important for the sake of the argument advanced in this research, which is to focus on the importance of incorporating international restorative justice as it transforms relations between stakeholders that undergo violent conflict.

## **Chapter 3**

### **The Role of Discursive Spaces in Interstate Relations Restoration: Franco-West**

#### **German Reconciliation**

##### **Introduction**

In the previous chapter, I illustrated the restorative role of the discursive spaces provided by the TRC between rival stakeholders in addressing rival narratives in South Africa. In this chapter I show how providing discursive spaces contributes to interstate reconciliation between states that undergo conventional wars as they provide the necessary venue for rival stakeholders to address rival narratives and engage in the process of relations restoration. I show the benefits of providing a participatory role for stakeholders in the process of interstate relations restoration. I look through the lens of the English School as it provides a different understanding of the state from that of the liberal institutionalist perspective that encompasses various societal and political factions. This chapter demonstrates the effective role of discursive spaces created by early societal and political initiatives after World War II, in addressing rival narratives between stakeholders, and how they contributed to the restoration of Franco–West German relations. This chapter shows that the role of discursive spaces is innate to the process of international restorative justice. I highlight the restorative role of both governmental and non-governmental initiatives, led by stakeholders (including political leaders and various factions of civil society, in both France and West Germany.) In addition, this case illustrates that interstate relations



restoration, the regeneration of regional international society guided by international norms, and the maintenance of order within the international society, are all mutually constitutive ends of the process of international restorative justice.

The Franco–German reconciliation after World War II is often considered in conjunction with the creation of the European Coal and Steel Community (ECSC) (1951) and the founding of the European Economic Community (EEC) (1957). A firm basis for economic interdependence between previous adversaries was definitely established, which eventually contributed to interstate reconciliation and to overall European stability. The Franco–German rapprochement is often attributed to various factors, including the international politics of the time with the rise of the Cold War and the increased Allied interest in West Germany’s recovery and rearmament to face the Soviet threat. This chapter, however, is focused on the restorative role of societal and political initiatives which preceded those economic developments, and which were led by various societal factions that provided stakeholders from both countries with the opportunity to encounter each other, amend their relationship, and address competing narratives with regard to their shared history. This in turn contributed to the process of interstate reconciliation. I argue that creating relational restorative spaces between France and Germany, countries that were previously perceived to be hereditary enemies, contributed to realizing interstate restorative justice at the level of the international system, as this helped with the restoration of broken interstate relations between states that had experienced war.

### **The Franco-West German relations restoration**

The rule of the French military government in Germany from 1945 to 1949 is often portrayed as paradoxically pursuing conflicting policies: demilitarization and rapprochement (Willis, 1962).

The Allies were in agreement in pursuing a policy of disarmament, demilitarization, and de-Nazification, which served the French key goal with regards to Germany: security for France. However, one of the important aspects of the policy pursued in the French zone, which did not take place in either the American or the British zones, was the focus on the role of education of the German youth and cultural exchange between the French and Germans, to the extent that it has been claimed that in the French zone, the “Germans were stuffed with culture rather than food” (Willis, 1962: 179). It has been argued that ironically it was the years of the French occupation that provided a closer understanding between the French and the Germans, which later manifested at the political level in the 1950s (Willis, 1962: 20). Reconstructing the educational system in the French zone introduced German youth to French culture, and, to a lesser extent, to diverse cultures of European countries, which, in the long run, helped to shape young people in Germany away from a totalitarian mindset, with an open outlook on Europe. In addition, the French policy of de-Nazification differed from those pursued in the American and British zones, as the French dealt with each case based on an individual setting rather than employing a strict blanket classification based on questionnaires. The way in which the French dealt with de-Nazification was based on the French “sense of individuality” which is rooted in the French consciousness of the “individuality of all men” (Willis, 1962: 150).

The immediate post-war years of the late 1940s, 1950s and early 1960s in West Germany have been characterized as “the years of forgetting” (Schroeder, 2013; Taylor, 2011), mainly on account of the fact that the German political leadership at the time, represented by Konrad Adenauer, opted to adopt foreign policy with European countries with the attitude of beginning anew and forgetting the past, a policy that Frederick Taylor calls “the sleep cure” (Taylor, 2011). However, this understanding obscures individual initiatives that sought reconciliation between

the Germans and the French, which took place at grassroots level. These efforts collectively complemented governmental efforts for reconciliation between France and Germany which took place in the 1950s.

The Franco–German rapprochement shows how stakeholders’ encounter is the starting point for interstate relations restoration. A significant feature of these societal efforts is that they are neither entirely non-governmental nor entirely governmental efforts, but rather a mixture of both. They are “parapublic,” as described by Ulrich Krotz (2002). The initiatives were founded by both civil society and governmental personnel, and later were institutionalized and funded by both governments. In addition, the significance of the role of stakeholders in interstate restoration, at both societal and political levels, is illustrated here. For example, at the political level, General Pierre Koenig, the head of the French military administration, maintained that rapprochement was one of the goals to be achieved in post-Nazi Germany, when he laid out the aims of the French administration in Germany:

To free the German population, and above all its young people, from its illusions; to give to a Germany plunged into chaos a suitable organization for this order-loving country; to be inspired in setting up this organization by the principles of the democratic countries in the West and America; to attempt to orient toward our ideas the teeming youth which tomorrow will take charge of the revival of this country; to lay down with an indestructible firmness the bases of a Franco–German rapprochement, which is indispensable for the reconstruction of Europe – these were the main aims of the heads of the French military government (Willis, 1962: 78).

This reflects the political will to deal with the underpinning causes of interstate conflict, and the central role of individuals in interstate relations restoration. Similarly, Raymond Schmittlein, a Germanist professor and the head of the Directorate of Public Education in the French zone of occupation, was a believer in the idea that true de-Nazification of the German

mindset could only take place through restructuring the education system in a more democratic and universalistic fashion.

### **Franco-German discursive restorative spaces founded by individual initiatives**

I now discuss the following events: the founding of the *International de Liaison et de Documentation* (BILD)/*Gesellschaft für ubernationale Zusammenarbeit* (GUZ) (1945), the Re-Armament (MRA) meeting in Caux (1946), the founding of the Franco–German Institute in Ludwigsburg (*Deutsch-Französisches Institut* (DFI) (1948)/*Bureau de Paris* (opened in 2004), the French Protestant Church’s participation in Synod, in Speyer in Germany (1950), the Franco–German Historians’ Agreement (1951), twinning towns, and de-Nazification and re-education policies pursued by the French in Germany. I illustrate how these events collectively provided the discursive spaces through which stakeholders from both France and Germany were able to encounter and address rival narratives, complemented by a political will and leadership towards reconciliation that eventually contributed to interstate reconciliation and paved the way for economic interdependence.

Subsequently I provide a discussion based on the aforementioned initiatives, and afterwards provide my analysis of the restorative role of those initiatives based on a restorative justice perspective.

#### *The International Bureau of Liaison and Documentation (BILD)*

The *International de Liaison et de Documentation* (BILD) was founded by the French priest Jean du Rivau in August 1945. It was focused on students and young people who comprised its main

members and was rooted in the Catholic notion of moral responsibility to realize reconciliation. (The German sister organization was known as *Gesellschaft für ubernationale Zusammenarbeit* – GUZ) (Passman, 2008: 343). Jean du Rivau believed that both German and French communities were desperately in need of spiritual restoration, and that a peaceful Europe was solely to be found with the rebirth of a new moral community. He believed this could be done only through promoting dialogue and building bridges between both French and German communities (Passman, 2008: 343). His initiative is significant as it took place quite some time before any government effort was undertaken for interstate reconciliation. Underpinned by theological and moral notions, BILD was established right after the war during very charged times, when a part of West Germany was still under French occupation, when security was still a first priority for the French authorities, and when French and German interaction was clouded with difficult issues such as the questions of the Saarland, the Ruhr, and the issue of de-Nazification, (Passman, 2008: 343-44). In 1945 the French took control of the Saarland and the Ruhr, exercising economic control over German coal and steel reserves. The French aimed both to disempower Germany economically in an effort to prevent any future threat of a rising German power, and at reparation for rebuilding the French economy (Libera, 2008: 137-38). In addition, the process of de-Nazification took place as the French banned Nazi ideology and National Socialist notions in the part of West Germany occupied by the French. However, punishing the Nazis was a very problematic issue at this time as in 1945 there were eight million Nazi party members, comprising more than 10 percent of the German population; many were teachers and civil servants (Sebestyen, 2011.)

BILD's activities included organizing lectures, conferences, scholarships and internships that created contact between different sections of both German and French communities,

including students, clerics, workers, artists and journalists (Passman, 2008: 349). In 1951 du Rivau initiated the first exchange of children between the two countries, and 450 German children went to France to spend a month with French families to learn about French people. The exchange program expanded, as in 1952 900 German children spent two months in France, a figure that increased in 1953 to 1,400 children (Krotz, 2002: 10). Moreover, by 1964 “BILD had arranged more than 10,000 family exchanges, 170 meetings among youth groups, 59 among political and union organizations, and many others” (Krotz, 2002: 11). In addition, BILD operated a Franco–German bookstore, a liaison office that managed Franco–German encounters, and a study bureau operated by graduate students who conducted research on important issues of the time, including unemployment, refugees, and the Ruhr statutes (Passman, 2008: 349). For instance, in 1953 research was conducted at the study bureau by three French graduate students, two from Germany, one from Belgium and one from the Netherlands (Passman, 2008: 349).

In addition, du Rivau founded BILD’s twin journals *Dokumente* and *Documents* that were first published in August 1945 in an effort to bridge the gap between two hostile communities through dialogue. The twin journals started to provide information for both German and French communities about their counterpart community. Hence *Dokumente* published translated articles in German, which had originally appeared in the French press, for the German public, while *Documents* published a French translation of articles that had first appeared in the German press for the French public. This was a sincere effort to learn about the “Other” through the “Other’s” own authentic perspective. It was through *Documents* that French communities learnt about issues concerning the German public through German voices, and vice versa. The first issues of the twin journals maintained a modest aim for both journals, merely to provide a window for both communities to “peek on the other side of the wall” (Passman, 2008: 349). The

back cover of each issue set out what the documents aimed to serve: “On the day after the conflict that opposed the peoples [of the world], we feel the need to resume cultural exchanges that were for too long interrupted” (Passman, 2008: 340). Although the first issues of the twin journals provided only translated articles, subsequently they included original articles on contemporary issues concerning the counterpart community (Passman, 2008: 349).

It is argued that maintaining the “international” feature in the twin documents’ title and avoiding any political association contributed positively to the publications, and both helped to avoid stirring the Franco–German divide further between the war-torn communities. In addition, maintaining the publications’ independence from the French authorities in the early years (primarily attributed to the machinations of the French occupation authorities) allowed space for independent initiatives and helped to build trust in efforts initiated by BILD as they were not seen, or stigmatized, by the Germans as an extension of the occupation authorities (Passman, 2008: 349).

Overall, through its activities and the founding of the twin journals, BILD was able to create the discursive space needed for Franco–German encounter, where many myths, prejudices, and fears that had been promoted by Nazi propaganda were faced head on. Collectively, BILD and the twin journals were able to contribute to interstate reconciliation by addressing the divide between the two rival communities. Mutual understanding through informing each other of their experiences, and building generational connections through young people and family exchanges, helped to diminish negative perceptions about the Other. It is worth mentioning that du Rivau conducted the memorial mass at Notre Dame in 1967 for Konrad Adenauer, the first chancellor of West Germany, in a gesture that highlights how far the previous rivalries between these two states had changed in their efforts to restore the divide.

During the memorial du Rivau maintained that it was Adenauer's role in the Franco–German reconciliation process that was “his crowning achievement as a chancellor” (Passman, 2008: 395).

*The Moral Re-Armament Meetings in Caux (1946, 1947 and 1948)*

The Moral Re-Armament movement (MRA) was initially launched by Frank Buchman in London in 1938 (although located in the US), at a time when states were re-arming on the brink of war, in pursuit of a “moral and spiritual re-armament” across the world. The MRA, known as Initiatives of Change since 2001, was founded on the notion that social transformation begins with personal moral and spiritual transformation (Initiatives of Change, 2018). While the MRA was originally based on theological and Christian-based notions, as Buchman viewed political life as inseparable from religious issues, over time, the religious nature of the movement faded, and it turned into a secular organization focused on peace-building around the world. Its goal was now aimed at bringing post-war enemies belonging to different religions and political orientations together to resolve their differences and restore divisions through dialogue. The Allied powers encouraged Germans to travel and granted them travel permits to attend and participate in MRA meetings, and in 1946 sixteen Germans attended the MRA Caux conference. In 1947, the number had increased to 150, while in 1948, 414 Germans attended the conference (Schroeder, 2013: 114). The MRA meetings at Caux were of social and political significance for both the Germans and the French who attended the meetings, given that they were volatile times charged with fear and resentment very soon after World War II (Schroeder, 2013: 114). The meetings provided an opportunity for the Germans and French to discuss their differences, rebuild trust, and spread the MRA message of change and reconciliation back in their own



countries (Schroeder, 2013: 114-16). The Germans who were at the Caux conferences were able to meet French participants, who were mainly relatives of people whom the Germans had slaughtered when they had invaded and occupied France, while the French were able to face their fears and bitterness and become agents to spread the message of forgiveness and rapprochement (Schroeder, 2013: 114-16). The MRA meetings were attended by high-ranking political figures from Europe, and, most importantly, were attended by Konrad Adenauer in 1948 (later Chancellor of the Federal Republic of Germany) and by Robert Schuman, the French Foreign Minister, in 1953. The MRA's message of seeking reconciliation through encounter and dialogue, and the need for change and transformation based on restoring broken relations, helped foster both Adenauer and Schuman's outlook on the Franco-German reconciliation (Buchman, 1961). Its political influence is further illustrated in the collective statement by eight German ministers who attended the MRA conference in 1948 who maintained that:

Germany is ready for your message [...] the spirit of genuine unselfish love of one's fellowman is what is needed to bring Germany through her present distress and lead her to a better future. Moreover, the ideology of MRA is an indispensable foundation for the reconstruction and peace of Europe and the world (Buchman, 1961: 322-3).

In addition, Schuman addressed Buchman in 1948, saying, "I salute in moral rearmament one of the animating forces at work for inspired democracy which must re-establish the supremacy of all the spiritual values at the heart of our tormented humanity" (Buchman, 1961: 321).

The meetings at Caux highlight the role of rival stakeholders in war in the process of reconciliation, and in driving that process. It also underscores the restorative outcomes of encounter and dialogue.

*The Franco–German Institute in Ludwigsburg (Deutsch-Französisches Institut (DFI) (1948)/Bureau de Paris (2004))*

The Franco–German Institute (DFI) in Ludwigsburg was founded in 1948 by a group of intellectuals and public figures. These included Theodor Heuss (who later became the first president of the Federal Republic of Germany), Carlo Schmid, Fritz Schenk, and, on the French side, Joseph Rovin and Alfred Grosser. It was based on their deep-seated belief in the need for a renewed intellectual platform on which interstate dialogue and political cooperation could be based. The institute is regarded as one of the most long-lasting social initiatives focused on restoring Franco–German relations during the last seventy years (Feldman, 2012: 96). It was set up to include various areas of intellectual and public life in both France and Germany, and to foster exchange programs for university students, and professionals who might serve in public offices. At its core, the DFI valued the role of individuals in interstate reconciliation as it aspired to “build human infrastructure for Franco–German affairs” (Kiersch, 1993: 321). Although in its early days the DFI started as an elitist enterprise on account of the lack of funding, thus making it unable to be reached by the middle classes, the services it contributed to both German and French young people, ranging from language classes to informal exchanges, provided the framework for the Elysée Treaty (1963) that addressed young people and education (Feldman, 2012: 96). The role of the DFI is significant for Franco–German reconciliation as it facilitated the birth of a new political community that advocated Franco–German relations by educating new generations on the importance of building bridges between past rivals, which later became the foundation for the Franco–German Interaction in Public Affairs (Feldman, 2012: 96). Its partner in Paris is the Centre d’Information et de Recherche sur l’Allemagne Contemporaine

(CIRAC) (The Center for Information and Research on Contemporary Germany) (Feldman, 2012: 96).

Founded only three years after the end of World War II, through exchange of information and experiences, the DFI was able to provide a platform for dialogue between the two countries that had previously been at war with one another. Today, the institution continues to serve as an intellectual enterprise in providing academic exchange programs and is an archival and documentation center for researchers (DFI, 2018).

*The French Protestant Church Participation in Synod in Speyer (1950)*

In March 1950, an encounter between fifty Protestants from both Germany and France was planned by their respective churches to discuss the prospects of the Franco–German reconciliation and the role of the Church in Speyer, Germany (Schrober, 2012: 156). Participants were mainly connected to the church at various levels, including theologians and workers. At the conference, delicate issues were discussed, including the division of Germany, the question of the Saar, and the reconstruction of Europe. The Church took on the role of mediator and helped to dissipate tension with regard to difficult issues that were discussed freely within the Church’s remit of spirituality. It was noted that disagreement took place more within the respective delegations rather than between the two groups of people (Schrober, 2012: 157). For two days participants were able to encounter, and exchange perspectives with each other and learn about each other’s experiences. At the conclusion of the congress both churches agreed to collaborate towards a Franco–German reconciliation (Schrober, 2012: 158). For participants their common faith (as they were all Protestants) was a cross-border, unifying common denominator that superseded national disputes and was the starting point for Franco–German reconciliation. The

meeting at Speyer laid the ground for an exchange of pastors in 1950 and a number of “reciprocal invitations to synods and church conferences, to enthronements, and church dedications” (Schrober, 2012: 160).

### *The Franco–German Historians’ Agreement (1951)*

The Franco–German Historians’ Agreement founded in 1951 is the product of earlier, longstanding efforts between French and German history teachers and academic historians during the interwar period, known as the Deutsch–Französische Vereinbarung über Strittige Fragen Europäischer Geschichte (the Franco–German Agreement on Contentious Issues in European History). Triggered by the idealist political climate after World War I, French and German history teachers met for the first time in 1935 to discuss different ways of teaching the shared history of the two states outside the nationalistic narratives that had previously inflamed World War I. These efforts, however, were disrupted by the rise of Nazi ideology, the Third Reich, and the outbreak of World War II. It was only in the late 1940s when French and German teachers’ unions called for the renewal of previous efforts to engage with bilateral history textbook reform that the idea was mooted to aim for an agreement on contentious issues. In 1951 a meeting took place between French and German academic historians and history teachers, which resulted in the Franco–German Historians’ Agreement. Their efforts were directed at outlining how the shared past of wars had been fed and triggered by nationalistic rhetoric and charged with myths and hatred to be taught to future generations in both states. Prior to World War I and during the interwar period, history textbooks in both Germany and France comprised lessons about national heroes and “epic stories highlighting the nation’s triumphs over past enemies” authored to deliver a “patriotic function” (Siegel & Harjes, 2012: 373). The 1951

Historians' Agreement stemmed from the belief in the role of history in shaping social memory, and the role of history textbooks as agents of reconciliation rather than as generational carriers of toxic myths and divisive nationalistic narratives.

Realizing this mutual agreement on history textbook reform was not an easy task for either team of historians, as it involved an academic and diplomatic process of cultural negotiation to construct a shared historical narrative about the shared past. The reformed history textbooks had to strike a balance between the pursuit of objective historical inquiry, and, at the same time, to “reaffirm each nation’s distinct identity” (Siegel & Harjes, 2012: 374). In addition, reformed history textbooks aspired to “promote empathy with former enemies and point to a future of collaboration rather than conflict” (Siegel & Harjes, 2012: 374). The textbook reformers therefore decided that the reformed history textbooks would be centered on the social history of Europe and a common, unifying European culture (Siegel & Harjes, 2012: 390). The recommendations stressed the vital need to examine critically both states’ nationalistic myths and adverse criticism that was propagated against the Other (Seungryeol, 2009: 81).

While it is very difficult to assess the specific impact of the agreement on history teaching in France and Germany, it is nevertheless worth mentioning that history textbooks published in Germany and France after 1951 did take into consideration historical interpretations recommended in the bilateral agreement (Siegel & Harjes, 2012: 399). French and German history teachers continued to meet after 1951 both annually and biennially as they were inspired to:

imagine new, broader European history narratives that might supplant older national ones. [Textbook reformers] were important cultural agents who helped make a new, European identity imaginable. Collectively, textbook reformers helped give birth to a

new cultural environment of Franco–German cooperation and European unity whose full spirit can perhaps only be truly appreciated nearly half a century later (Siegel & Harjes, 2012: 401).

In the early 1980s, the 1951 agreement recommendations were included in the working methods of the Georg Eckert Institute for International Textbook Research in Braunschweig (Feldman, 2012: 84). In addition, the 1951 recommendations informed the 1988 agreement of Germany and France's *Deutschland und Frankreich, Raum und Zeitgeschichte* (Germany and France's Space and Contemporary History) which was focused on teaching students in both countries the history of the other country, and using methods devised to create a mutual understanding of the other nation based on a knowledge of its history (Seungryeol, 2009: 81).

In 2006 *Historie/Geschichte* was published, which was the first bi-national secondary school history textbook in the world, jointly produced by France and Germany and published in two languages, and covers contemporary history since 1945 (Siegel & Harjes 2012: 371–72). The second volume of the book, published in 2008, covers the period 1815–1945 from the perspective of “collective grief” which focused on the shared suffering of both populations in both countries, rather than on national prejudices and vengeance directed against each country's inhabitants on account of the atrocities committed in the past two world wars. In addition, it is worth mentioning that the initial idea of publishing a bi-national history book was not proposed by politicians, but rather was suggested by 550 high school students who participated in a Franco–German Youth Congress in 2003 on the fortieth anniversary of the signing of the Elysée Treaty in Paris, a treaty of friendship between France and West Germany signed by President de Gaulle and Chancellor Adenauer on 22 January 1963.

The Franco–German Historians’ Agreement is significant as it illustrates the critical role of history as a cultural agent, and the restorative role that mutually constructed historical narratives play in interstate reconciliation. How historical narratives with regard to interstate wars are taught is critical for shaping future generations’ social memories and ideas about, and actions towards, the “Other.” History is not just related to the past, about what happened; it also provides perspectives for the future, and shapes the identities of the young people of a nation, determining their beliefs and attitudes that they hold about other people in other nations. With regard to the Franco–German Historians’ Agreement, history to some extent became the bridge from an atrocious past to a unifying future as it provided the discursive space through which national myths and prejudices were examined (Siegel & Harjes, 2012).

#### *Jumelage/Städtepartnerschaft (Twining Towns)*

Twining towns is a phenomenon that took place in Europe after World War II between European towns in Germany, France, and the UK. At its core, the idea of twining towns is to restore the broken relations between countries and to repair the damage caused by war. By pairing towns together it was hoped the curiosity of the inhabitants of these places would be sufficient to encourage them to visit their twin and encounter and mix with its inhabitants (Self-Pierson, 2012). On the welcome sign of each town one can see the name of the town they are paired with. “Twinship” between French and German towns is usually based on various points of reference. For example, both towns are usually roughly the same size with a relatively comparable socio-economic background, and, most importantly, with a shared historical connection, or at least historical parallels (Krotz, 2002: 8). Similar economic aspects might also serve as a point of reference for pairing towns, such as those that were paired between the German Ruhr and Saar

areas and French Lorraine, based on challenges caused by declining industries. The partnership includes various activities such as “high school students exchange, joint sports activities, concerts, and other cultural exchanges” (Krotz, 2002: 9). In addition, activities tailored towards war veterans and former war prisoners have increasingly taken place since the 1960s, under the slogans “prisoners into guests” and “from enemies to friends” (Krotz, 2002: 9).

The first “twinship” between French and German towns took place in September 1950, between Montbéliard and Ludwigsburg. By January 1963, when the Elysée Treaty was signed, “there were around 120 twinships between French and German towns and cities, and the number of new town partnerships rose to between thirty and eighty new connections per year. By the Treaty’s tenth anniversary there were already six hundred” (Krotz, 2002: 8).

The experience of twinning towns has helped to create encounters not only between individuals who belong to past rival countries, but also between individuals and the rival spaces which encouraged the wars that divided Europe. It was thought that by visiting their twin town, individuals would get to experience its space, and eventually come to understand and respectfully acknowledge its history.

It is worth mentioning that the very first “twinship”, which occurred during World War II, took place between Coventry in the UK and Stalingrad in Russia (known as Volgograd since 1961) in 1944. This was the result of a grassroots effort dating back to 1942, when a left-wing group of women urged the then mayor of Coventry, Emily Smith, to ask the British authorities to provide help to the Soviet Union as Stalingrad was facing annihilation (Baker, 2016). The urge to help pushed the residents of Coventry to organize efforts and send aid to the residents of Stalingrad. At one event “830 people paid six pence each to sign a tablecloth which was sent to the city with the message: ‘little help is better than big sympathy’” (Baker, 2016). In return,



“36,000 women in Stalingrad signed an album that was sent to Coventry” (Baker, 2016).

Significantly, the “twinship” survived the Cold War, and continues as the Coventry–Volgograd “twinship”, thus surviving the Western opposition to Putin. This is indicative of the lasting effects of restorative initiatives that are founded and nurtured at grassroots level by ordinary people (in this instance by women), and that are able to transcend interstate political divides and endure recurring turbulent political climates between states. Here again, interstate reconciliation has been taking place between stakeholders, through initiatives created by societal factions. Building bridges between rival towns, in essence between stakeholders, has contributed to the restoration and continuity of relations between states. Town twining is an act of interstate restoration that functions at the societal level which is based on knowing and understanding the “Other”. It is to be hoped that it will eventually turn enmity into amity that surpasses ideological differences and political divides. It is a “relationship-builder” (Self-Pierson, 2012) between towns that already have so much in common: a shared history and shared experiences.

### *De-Nazification and Re-Education*

According to the Postdam agreement (1945), the de-Nazification pursued by the Allies included abolishing the National Socialist Party and all organizations associated with it, repealing all National Socialist laws, punishing war criminals, and removing members of the Nazi party from all important official public and private posts. While the French agreed to the first three terms, their ideas regarding the fourth provision were different to those of the British and Americans (Willis, 1962: 152-53). The de-Nazification process in the French zone was deemed to be acceptable by both the occupiers and the occupied, which was not the case in either the US or British zones. The process of de-Nazification in the French zone allowed Germans to take

procedures into their own hands, based on the notion that those living in Germany during the war who were against the Nazis and who suffered from the Nazis and the Third Reich were to be involved in the process (Willis, 1962: 155-56). In addition, evaluating each case based on its individual merits, rather than simply allowing Nazi party membership as binding evidence of an individual's guilt, was unique to the French zone. This is further illustrated in the Ordinance for Political Cleansing passed in the French occupied zone in Germany on May 28, 1946, as it maintains in its first clause: "Political cleansing demands energetic action against National socialism and militarism, but at the same time, thorough and just consideration of every individual case. It must secure the well-being of the whole people" (Willis, 1962: 157). Moreover, the second clause further elaborates on the individuality of each case as it maintains that "membership in the Nazi party or its subsidiaries would not be *prima facie* evidence of guilt, but non-membership would not be taken as proof of innocence" (Willis, 1962: 157). The accused were given fair hearings as they were held in their own locality, and their cases were examined individually by an examination committee whose members were of the same profession (for example, doctors would try doctors), as this would provide the local knowledge required to make a judgment on the responsibility of the accused (Willis, 1962: 158). The French deviation with regard to the official de-Nazification policy was tailored to recognize the distinction between *Will* and *Mass*-Nazis, between those who joined the Nazi party out of conviction, and those who were forced to join it, including lawyers and academics. In addition, it was taken into account that for many of those who wished to withdraw from membership of the Nazi Party, to do so during the war was not an option (Willis, 1962: 160). It is also important to mention that it is because of this policy that although many Germans were refused employment in the American

and British zones, there were nevertheless many more Germans who were able to make a living in the French zone, including Konrad Adenauer and Carlo Schmid.

Although the French policy of de-Nazification maintained that each case required an individual judgment, and involved Germans in the process, there was no judgment of the morality of what had happened. In this respect, the process of de-Nazification fell short of undoing the harm that the Nazi political ideology caused to the minds of the German people. This issue was addressed by the French professor Edmond Vermeil, who, when speaking in Germany in 1946, maintained that “‘denazification’ is a fallacious term. One does not throw off Nazism, like a garment that has gone out of style” (Willis, 1962: 163). He claimed that to undo the effects of the Nazi political ideology would need a restructuring of the education system, as spreading French ideals and its vocation of universalism was the best remedy for the damage caused by extreme German nationalism (Willis, 1962: 163).

What is unique about the French re-education policy is the attention given to the role of the young in the future of Germany, and Europe in general. German youth posed a serious challenge for many reasons, including the generational rift between the young and older generations led by mistrust caused by Nazism. Many young German people were still under the influence of Nazism, and many were alienated from politics altogether as they were disoriented and confused (Willis, 1962: 166). While Nazi ideology had been rooted in the minds of young people through education, it was through re-education that the French aimed to undo the effects of Nazism. Here again the role of the individual in interstate restoration is highlighted by the aforementioned Raymond Schmittlein. Schmittlein maintained that his policy of re-education was aimed at “break[ing] the chains of the German youth” (quoted in Willis, 1962: 167). He asserted that individuals are the product of the climate within which they are nurtured, and that

the key for liberating the German youth was to mold them within an educational environment that instilled democratic values. Schmittlein maintained that the re-education structure would enforce individual liberty: “the effective liberty of choosing one’s own opinion, and of expressing it, which has as a corollary respect of the opinion of others” (quoted in Willis, 1962: 175).

Among the many changes that were introduced by the French was the following: the French language became a compulsory foreign language for Germans in high school, in an effort to build a closer understanding between France and Germany. Even if the implicit motives of the French were different than the ones stated officially; such as, for example, spreading French culture rather than reconciliation with Germany, nonetheless, the effects of this policy did contribute to the restoration of interstate relations. There was also the rewriting of history textbooks, with a focus on European ties between German cities and European countries, and the re-founding of the University of Mainz, which had previously existed between 1477 and 1817. By 1947 the French had published 6,300,000 textbooks for 9,000,000 children, which is a staggering number compared to the number published in the American zone where only 3,000,000 textbooks were published for 3,000,000 children, and the British zone where 2,500,000 textbooks were published for 3,500,000 children (Willis, 1962: 169). Overall, it was through restructuring the education system in the French zone that the German youth were re-educated out of the totalitarian mindset by the instillation of democratic ideals that valued individualism and individual choices through both the content and the structure of the education system.

In addition to the education programs, French military officers started cultural programs by organizing contacts between French and German artists, intellectuals, and students. In 1946

the military government organized summer courses at the universities of Freiburg and Tübingen, which included 620 French, German and other foreign students (Willis, 1962: 177). These cultural exchange programs provided the opportunity for the citizens of both France and West Germany to encounter and examine the extreme Nazi rhetoric with which the German people had been indoctrinated.

## **Evaluation and Analysis**

### *The Principle of Repair*

The enterprises set out above illustrate the restorative role of both political and societal initiatives with regard to the Franco–German reconciliation. They have collectively created a discursive space between different stakeholders, including students, academics, journalists, clerics, teachers, intellectuals and ordinary citizens, through, for example, town twinning, youth exchange programs, and history textbook reforms. These eclectic societal and political efforts have collectively succeeded in initiating a process of repairing the relationship between Germany and France on account of the restorative elements that created discursive spaces through which encounter and exchange of knowledge and experience about each other’s history, attitudes, beliefs and values took place. Restorative justice took place at the individual, micro level, in restoring divides and addressing rival narratives, and eventually this contributed to interstate reconciliation at the level of the international society. This is illustrated by the fact that in August 1945 a poll showed that 78 percent of the French favored the break-up of Germany, while 71 percent wanted it to become an agrarian nation, indicating a deep-seated resentment against the Germans (Passman, 2008: 353). However, in 1954, another poll showed that 54 percent of the

French public prioritized reconciliation with Germany, while only 23 percent opposed it (Passman, 2008: 394). According to Passman, this illustrates the significant role of grassroots initiatives and how they complement the role of governments in contributing to interstate reconciliation (Passman, 2008: 394). The principle of repair, including encounter between stakeholders and their active participation in a process of restoring broken relations between stakeholders from states that were previously in conflict, was met in the societal and political efforts between France and West Germany following World War II. In addition, reparation was obtained by the French by dismantling German industrial equipment in addition to the utilization of the zone's resources and industrial production of coal and steel for the benefit of France (Willis, 1962: 43).

### *The Principle of Stakeholders' Involvement*

The case of France and Germany's reconciliation illustrates the restorative outcomes of active participation by stakeholders towards reconciliation with previously rival states.

### Rival States' Dialogue

The immediate years after the end of World War II are known as the years of suppressing the Nazi past in West Germany at the political level, on account of a realpolitik choice made by Adenauer, who opted for "securing institutional and popular foundation for democracy" (Olick, 2007:142). However, I argue that rival states' dialogue between Germany and France was initiated collectively at the societal level, where stakeholders met and mixed with their counterparts, through church congresses, teachers' unions, cultural societies, and through an abundance of civil society initiatives that collectively provided the realization of knowledge

about the experiences of the “Other.” The significance of these societal efforts is evident, as despite the political choice of silencing the past, later generations in Germany in the 1960s (mainly student movements) nevertheless did address the Nazi past and issues of German historical responsibility (Olick, 2007: 145).

### Mutual Transformation and Respectful Disapproval

The Franco–West German reconciliation initiatives illustrate the transformative effect of creating discursive spaces between stakeholders of rival countries. This is further illustrated by a poll that took place in 1965, with a French audience answering the question, “What is your opinion in regard to West Germany?” [The] French audience responded with ‘good opinion,’ 52 percent; ‘neither good nor bad,’ 29 percent; ‘bad opinion,’ 9 percent; ‘no response,’ 9 percent” (Grosser, 1965: 26). In his piece “France and Germany: Divergent Outlooks” that appeared in 1965, Alfred Grosser, a political scientist whose work was focused on the Franco-German reconciliation, attributes those results to the individual efforts that took place right after the war. He says:

Let us note simply that the amelioration began in 1945. At the end of the war, there were some Frenchmen who believed that the future could not be built on aversion and fear. [...] It was the organizers and the participants of the Franco-German meetings of the years 1945–1950 who constituted what might be called the human infrastructure of the present political leadership.” (Grosser, 1965: 26).

Hence, Germany and France have begun the process of addressing their rival narratives about their shared history during two world wars, and efforts are being made to realize a mutually constructed narrative about this history, rather than two different, completely separate, histories. They are also engaging with a mutual understanding of each state’s experiences. The role of the societal groups within the states has proved to be very effective, as collectively their

efforts have contributed to the transformation and restoration of interstate relations between the two countries. In addition, respectful disapproval has taken place through dialogue and exchange between stakeholders from former rival states. The eclectic discursive spaces collectively have provided an opportunity for the restoration of broken relations.

### *The Principle of Transformation in the International Society*

The proceedings of the various initiatives involved open discussions by stakeholders from the two former rival states about building new relationships based on tolerance and understanding, and forging a social change that supplanted chauvinistic national notions. Normative affirmation took place as the proceedings of these initiatives engaged with dialogue with regard to the role of the respective states in forging a new, unified Western European peaceful political climate, based on mutual understanding and economic interdependence. Moreover, the proceedings of these political and social efforts entailed an active participation of stakeholders in developing and realizing different forms of interstate relations restoration, and in transforming the social image of Germany from its previous aggressive dictatorship to its present liberal democracy by dedicating new roles and responsibilities within the new intergovernmental bodies. These restorative efforts collectively laid a solid ground for forging the future regional international society of the European Union (EU). This is not to give an underserved credit to these initiatives, or to overshadow the fundamental role of the ECSC and EEC in interstate relation-restoration between France and Germany through economic interdependence. Rather the aim here is to underscore the critical and complementary role of these initiatives to the work of these organizations. These initiatives were already working at the grassroots level when these regional organizations were created. To this end, these initiatives provided the “human infrastructure”



which helped to produce European economic integration and a stable Europe. Both efforts were complementary and mutually constitutive to each other's work, and together provided top-down and bottom-up approaches to interstate relations-restoration.

## **Conclusion**

Interstate conventional wars are fueled with national myths and distorted notions about the "Other." While it might be argued that national identity in its essence is constructed in juxtaposition to the "Other," and is inherently "Othering", the acts of war radicalize those identities further, as political and military leaders capitalize on the differences between "us" and "them" to mobilize the masses. It is these radicalized notions of the self and the other that need to be addressed after interstate wars are over, and there is an absence of institutionalized discursive spaces within the international system to do so. States that undergo conventional wars cannot change their history. However, they can change their outlook on their shared history. Discursive spaces allow for such transformative and restorative processes to take place. They permit stakeholders from rival states to encounter and confront national prejudices about each other and make the necessary amends to repair their relationship and restore the divide.

The main insight that Franco–German reconciliation provides pertaining to restorative justice is the benefit of engaging stakeholders in the process of interstate relations restoration, as stakeholders' encounter and exchange information and experiences, which contribute to interstate relations-restoration. States comprise stakeholders who consist of collections of governmental personnel, civil society, political leaders, academics, and young people, through which interstate restorative justice functions. Hence, I suggest there is a critical need to

incorporate restorative justice into the international criminal justice system, to complement retributive justice, help address rival issues, and provide the discursive space necessary for interstate dialogue.

The liberal institutionalist perspective considers the state as an abstract, as an enclosed entity. The problem with this notion is that it does not take into account the individuals that make up the state, who comprise the state's governmental and non-governmental bodies, and who create the notions of enmity and amity. Utilizing the English School helps us understand how interstate restorative justice functions between states, as it understands states' interactions within the international society in relational terms, and shows that restorative justice may function between stakeholders of previously rival states. In the process of Franco–West German reconciliation it is clear that it was through the collection of eclectic discursive spaces that were created by both societal and political efforts that interstate restorative justice was achieved. Those discursive spaces allowed France and Germany to address the divide and their broken relations through encounter and dialogue to transform their relationship, deal with rival narratives, and mutually construct an agreed outlook on their shared history, which eventually transformed their relationship.

In addition, the case of Franco–German reconciliation highlights the significance of the role of the political leadership, which provided the political climate needed for these individual initiatives to prosper. For example, Robert Schuman the French foreign minister (1948–1952), one of the driving forces of reconciliation, advanced rapprochement between France and Germany at governmental levels, based on a novel foreign policy with regard to equal rights and duties that reintegrated Germany back within the European community (Fasanaro, 2008: 92). His efforts manifested with the founding of the Schuman Plan (1950), which gave precedence to

European economic integration and provided France and Germany with equal rights and restrictions over the Coal and Steel Community under the common High Authority (Fasanaro, 2008: 93). Another milestone was the signing of the Elysée Treaty (1963) by the French President Charles De Gaulle and the German Chancellor Konrad Adenauer, who were also among the driving forces of the Franco–German reconciliation. The treaty was considered to be a treaty of friendship that institutionalized bilateral talks for policies pertaining to foreign affairs, education, youth, and defense. It was recently renewed by the current (2019) French President Emmanuel Macron and the German Chancellor Angela Merkel on January 21 2019, underlining the bilateral cooperation pertaining to defense, twinning towns, language teaching, and cultural exchanges. It is important, therefore, to highlight the critical role of individuals in influential political leadership posts that spreads a climate conducive to healing and restoration. The existence of such political will further empowers societal efforts in working towards interstate restoration.

Another significant insight provided by the Franco–German reconciliation is the restorative outcome of the focus on young people and the attention given to the role of history in constructing future generations’ identity. Instilling norms of understanding the “Other” in future generations, and teaching history that is anchored in a critical look at each state’s own history, young people become the makers and carriers of the restoration of relations between their own and other states. The French occupation zone in Germany (1946–1949) also highlights the political function of education in creating a “human infrastructure” for rapprochement by pulling the German mindset out of isolation, which is the root of extreme nationalism, into the mainstream of European culture in general and French culture in particular. Schools and universities were first opened in the French zone. Through education and cultural exchange, the

French transformed their previous enemy into a partner in a “common cultural inheritance” (Willis, 1962: 249). This is further stressed by Roy Willis as he maintained in his book the *French in Germany 1945-1949*:

An observer traveling through the zone today is struck by the lack of bitterness toward France felt by the older people and the friendliness shown by the younger generation. Such attitudes are the best testimony to the success of France’s policy in its zone of occupation in Germany (1962: 249).

While the EU is currently undergoing serious threats to its future, with the rise of populism in Poland and Hungary and a nationalist government in Italy, together with the UK leaving the EU, nevertheless Germany and France, previously rival states, thus far remain the driving force of the project. Although this might be attributed to various elements, including the politics of the Cold War, economic integration, and political leadership, the discursive spaces founded by grassroots initiatives that allowed the French and Germans to encounter each other and become reconciled definitely contributed to the restoration of interstate relations. These efforts also founded a strong platform on which political efforts aimed at resolving the divide have prospered.

## **Conclusion**

### **Summary**

In this research I have shown how the liberal institutionalist understanding of the state has influenced the current retributive structure of international criminal justice. I have utilized the English School, and its conception of international society that understands states' interactions in a relational form, which allows for a more comprehensive notion of justice that is both retributive and restorative. Understanding the state as a collection of individuals illustrates the need for a discursive space for stakeholders from rival states that experience interstate wars to encounter and exchange their experiences. To this end, I have provided a normative claim for including important element that is missing from the current international criminal justice system, which is a restorative process that would complement the existing retributive element.

The absence of discursive spaces means there is a lack of knowledge about the experience of the "other," mainly due to the fact that the discourse involved in criminal trials is a formal, legal discourse concerned with legal procedures, and does not allow for interpersonal encounter and discourse between rival stakeholders. This has been illustrated in the case of the ICTY, as the "objective" truth produced by the ICTY in the aftermath of the Balkan Wars had contested impact on the perceptions of the people who experienced these wars, as they were not engaged in the process of justice. The existing rival narratives produced by the conflict remain unresolved, thus underpinning the post-conflict reality of tension and discord experienced with

the states involved. This case illustrates how atrocities committed during interstate wars problematize the assumptions about crime and justice that shape the process of international justice, and highlight the need for engaging stakeholders in the process of international justice. There is a need to provide discursive spaces for rival stakeholders to encounter and interact with each other. I have shown how the present international criminal justice system is incapable of substantially addressing the underlying ramifications of interstate atrocities, mainly because it is not tailored towards achieving this end. It deals with the symptoms, but not the disease. I have suggested that there is a critical need to incorporate elements of restorative justice within the international criminal justice system, which would provide the discursive space necessary for stakeholders in rival states to address differing narratives about what occurred.

The case of the TRC illustrates the benefits of an active participatory role for rival stakeholders seeking justice, and the benefits of incorporating discursive spaces in the process of justice, as they provide the venue through which stakeholders are able to encounter and address rival narratives about what happened. This case shows it is through encounter that stakeholders arrived at a shared outlook about what happened, which, in turn, contributed to a social change within the broader community guided with shared norms and values. It also shows that restorative justice and retributive justice are not mutually exclusive; rather, it demonstrates that they complement each other as they deliver different functions, and that they both eventually contribute to a broader process of reconciliation at the societal level. The Franco-West German reconciliation case highlights the critical role of discursive spaces in the process of international restorative justice, and illustrates the benefits of engaging individuals in the process of interstate relations restoration. This is further highlighted as stakeholders from rival states that had experienced conflict with each other were able to address rival narratives about what happened

and construct a mutual outlook on their shared history that acknowledged both experiences. This has contributed to discussion at the international level on international norms affirmation, which in turn, has contributed to the generation of a renewed regional international society. This case also demonstrates how the process of international restorative justice is connected to the reconstruction of a renewed regional international society as stakeholders' encounter and discourse introduced social and political changes within the renewed regional international society, guided by international norms, and in this way contributed to the maintenance of international order.

Furthermore, focusing on the cases of the TRC in South African and the Franco-West German reconciliation illustrates the flexible nature of the process of restorative justice as it is a context-dependent process with stakeholders' participation at its center. Stakeholders' engagement is central to the process of restorative justice as it is through their participation that the process to accommodate their needs is shaped for moving forward. This is further illustrated as the process of restorative justice in the case of the TRC was centered on coming to terms with the past through realizing the truth about what happened. In the case of the Franco-West German reconciliation the process was more focused on the future through reconciling differences and arriving at a shared outlook about what happened in order to move forward and save future generations from reproducing the same discrepancies that caused the conflict. Stakeholders in each case adopted different means of providing discursive spaces between stakeholders to realize relations restoration. In the case of the TRC, discursive spaces were created through establishing truth-telling commissions, whereas in the case of Franco-West German reconciliation discursive spaces were established through, for example, youth exchange programs, moral re-armament meetings, and twining towns. Both cases draw insights on the dynamic nature of the process of

restorative justice as in both cases stakeholders created different discursive spaces and molded the process of relation restoration in a way that fitted their needs for reconciliation. To this end, the process of international restorative justice is a dynamic one as it is able to accommodate the varying contexts of interstate conflicts, and is shaped by stakeholders through their participation in order to accommodate their varying needs to realize relations restoration.

Overall, this research therefore advances a normative claim that proposes incorporating a process of restorative justice within the international criminal justice system. Retributive justice is a rule-based process of justice that places punishing states that violate international law at the center of that process, while restorative justice is a relation-based process that places the need to restore broken interstate relations at the center. Incorporating both approaches of international justice would transform the existing international criminal justice system into a more comprehensive entity that is both retributive and restorative. It should be mentioned here, however, that this research is not proposing that restorative justice would produce lasting harmony within the international society. Rather, it maintains that there are nuances of perceptions and meanings produced by interstate wars that are significant in international relations as they inform states' interactions. However, there is an absence of institutionalized venues within the international arena to address them, and this research proposes international restorative justice as a possible venue to do so.

## **Implications**

I think one of the main contributions this research provides is proposing a restorative role of discursive spaces and institutionalizing restorative justice as part of a comprehensive criminal



justice process that deals with interstate wars would eventually contribute to the maintenance of the international order. Discursive spaces are needed to address rival narratives and contribute to interstate relations-restoration within the international society as they allow stakeholders, in this context meaning national communities, of rival states to engage in public discussions in the aftermath of war and to discover ways of restoring the divide, which might eventually contribute to interstate restoration of relations.

Interstate wars are often based on underlying radicalized degrading and desensitizing notions and accusations. These might well lead to personal, or collective, revenge taking place, which makes the line separating victims and offenders in rival states fuzzy and unclear. With interstate wars it is often not feasible to hold all perpetrators involved accountable, since it is impossible to know exactly who has done what or to investigate all of the very many random crimes that have taken place. Interstate wars are destructive as the damage spreads to many levels and in many directions, leading to political and social cleavages between rival stakeholders. Such wars are based on dehumanizing the enemy, and, as this research has illustrated, pursuing retributive justice without resorting to restorative justice methods, fails to resolve the underlying rival reductionist narratives about the “Other.” This failure is because the civilians who experience the war, and who internalize the narratives produced, are not engaged in the process of justice that deals with the aftermath of the war they have endured. Consequently, as the ICTY case illustrates, and as I have shown in Chapter 2, the realization that justice that was assumed to be achieved has not been internalized by stakeholders and the differing accounts about what happened remain after the process of justice has finished. This is not to suggest a process of restorative justice that would allow military generals and political

leaders to walk freely without measures of accountability, but rather this research is proposing a restorative international justice that would provide context for retributive measures.

The suggested international restorative justice is relational and would provide the necessary discursive spaces for the stakeholders to deal with the narratives produced by the violent conflict and make amends. This would contribute to the restoration of relations, since it is the individual rival stakeholders who would comprise the driving force of the process of restorative justice. This would allow a role for civil society and non-state actors, such as members of NGOs and intellectuals, in the process of justice. As illustrated in the case of Franco–West German reconciliation in Chapter 4, there is the potential for a vital role for affected civilians to play in resolving interstate divide and realizing interstate reconciliation. The key here, which has been advanced in this research, is that those societal and individual efforts are not to be considered as separate from the process of international justice, and not to be left to the discretion of the involved states. Rather, such efforts should be institutionalized, because they would be central to a comprehensive process of international criminal justice as they would help to internalize the verdicts of retributive justice at the societal level. Restorative justice would become a fundamental cornerstone of international criminal justice, as it would allow the process of retributive justice that takes place at the level of the international system to be managed at the societal level, between, and within rival states. To this end, I claim that both retributive and restorative justice are indispensable for achieving reconciliation within the international society, as each is tailored to deliver particular functions that complement the other. The former upholds international law and the latter restores the divide within the international society.

In addition, the suggested international restorative justice process would contribute to a transformed international society, as the process would allow addressing and reaffirming

international norms violated by interstate wars through the existence of discursive spaces. I suggest that this process would eventually advance peaceful coexistence as it would help stakeholders to realize a shared narrative about bitter experiences created by interstate conflicts, and eventually enhance trust between former rivals.

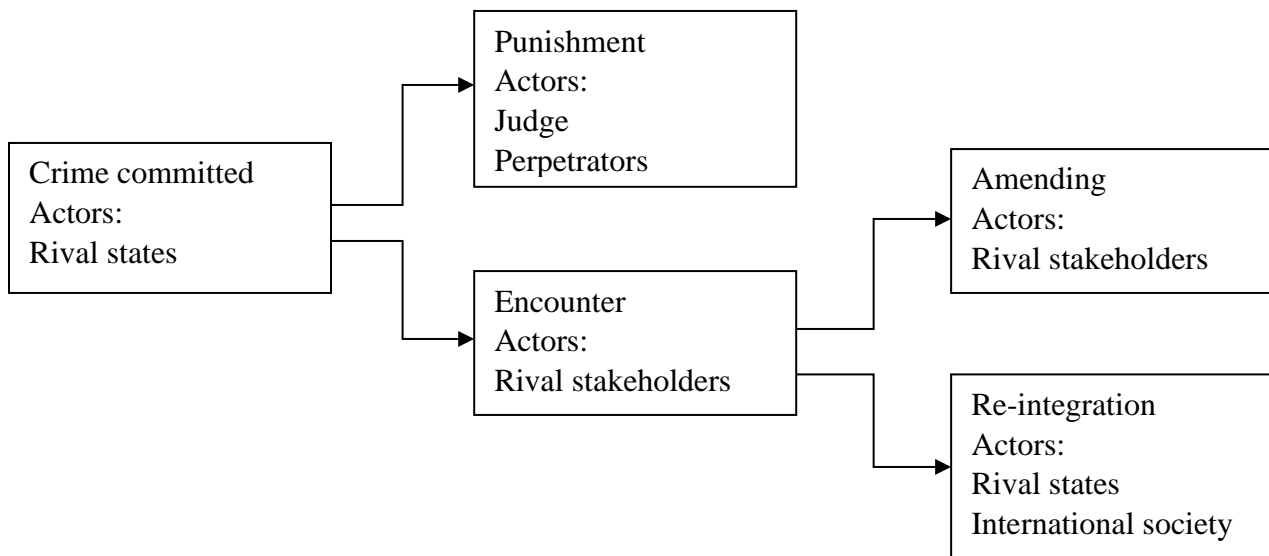


Figure 6 The proposed comprehensive International Criminal Justice System

### Limitations of the Research

There are several challenges I have faced while conducting this research that I classify under methodological and political challenges.

### *Methodological Challenge*

The major methodological challenge I faced in this research was the absence of an international restorative justice system in place that I could evaluate and analyze. To overcome this challenge, I have had to rely on three different cases to show how an international restorative justice might contribute to interstate reconciliation, and what the main factor would be that would complement the retributive system currently in place. The ICTY case illustrated the shortcomings of the existing retributive criminal justice structure in restoring the divide. The TRC case demonstrated the restorative function of the victim–offender encounter. It clarified the significance of the discursive space that allowed the relation restoration process to be effective for individuals involved in the conflict, as well as for communities and the country of South Africa as a whole. While the TRC was located within a domestic context, with the Franco–West German case I was able to illustrate the restorative role of discursive spaces within the context of international politics and how they contribute to interstate reconciliation between rival states that experience horrendous wars as they function at the societal level. The analyses provided in both cases, although addressed at different levels, draw the connection between the individuals and the process of justice that takes place within the state, as well as, between states within the international system. Both cases illustrate how discursive spaces contribute to relations restoration between individuals within the same state, and between individuals from rival states. I show the role of engaging individuals in the process of international justice to reconcile rival narratives between groups of people in rival states.

### *Political Challenge*

The existing retributive structure of international criminal justice is subject to power politics within the international system, which has been critiqued in the victor's justice literature, and power politics would also be one of the major challenges that would face the pursuit of international restorative justice. While it has been shown that states have resisted handing over their leaders and military generals to ad hoc tribunals, as illustrated in the ICTY case with both Serbia and Croatia, there is also a strong possibility that stakeholders might also be resistant to encounter and engage in a restorative process. I therefore recognize that the structure of the international system might pose equal limitations on both retributive and restorative processes of international criminal justice. The existence of a political will on the part of the stakeholders, together with the political climate within the international system that would permit the pursuit of international criminal justice, are both critical factors that condition the possibility and the realization of both international retributive and restorative justice. However, it should be mentioned that in the three cases examined in my dissertation, international political pressure has been a factor that influenced the process of justice. For example, there was the pressure put by the EU on both Serbia and Croatia to cooperate with the ICTY tribunal, and international pressure put on the apartheid government to engage with negotiations with the ANC, as well as the efforts of the Allies to transform the role of Germany in Europe with the rise of the Cold War. Therefore, international political pressure has a potential in implementing both retributive and restorative measures of international justice. In addition, drawing on the case of the TRC, providing incentives, such as granting amnesty in exchange for truth, could encourage states to engage in a restorative process of international justice.

In addition, this research has illustrated the value of employing democratic methods in the pursuit of restorative justice in both the TRC and Franco–West German reconciliation cases. In the case of the TRC, the committee was democratically elected by the people, and in the Franco–West German reconciliation case, although the occupied French zone was not governed democratically, liberal values were nevertheless maintained which allowed both individual and societal initiatives to take place. Initiatives that are driven by stakeholders are central to the proposed process of international restorative justice, and a positive political culture within involved states is a significant factor for determining that those efforts come to fruition. It is suggested that it would be much more challenging for stakeholders to organize and initiate a discourse with their counterparts from a ‘rival’ state within an authoritarian political system or a dictatorship. On the other hand, democratic governments could pose an equal obstacle towards restorative efforts by capitalizing on rival narratives for domestic political wins. Therefore, and drawing on the case of Franco-West German reconciliation, this research suggests a significant role of civil society in the process of interstate relation restoration that would undercut obstacles posed by domestic politics of authoritarian or democratic political systems.

Another challenge to the institutionalization of discursive spaces may be posed by geography. In the case of Franco-West German reconciliation, for instance, close geographical proximity between France and the occupied French zone was helpful for stakeholders to encounter and engage in their various initiatives (youth exchange programs, twining cities, etc.) The absence of geographical proximity might pose a financial challenge for rival stakeholders at a distance from each other.

## **Future Research**

It is hoped that this research will act as a stepping stone for further research as it opens the door for many possible roles for institutionalized interstate restorative justice within the international system. Future research might address the aforementioned political challenges that would face a restorative process of justice within international criminal justice. Exploring venues for, or state compliance and international cooperation pertaining to, international restorative justice might further complement the work advanced in this research. In addition, future research could look into how a process of international restorative justice is able to further unpack the relation between international society and world society. Furthermore, as this research has looked only at the role of international restorative justice in dealing with the aftermath of wars that took place between states, future research might investigate the potential for this role in dealing with the aftermath of violent conflicts between state and non-state actors.

In addition, future research might examine how the pursuit of restorative justice within the international system might allow addressing past interstate injustices that still shape interstate relations today. The current punitive structure of the international criminal justice lacks the tools to address past interstate injustices that took place before 2002. History lingers in the present, however, and I think it is vital that a framework of international restorative justice should be set up as soon as possible to deal with past injustices that have been glossed over, the repercussions of which are still lingering today. Post-colonial states have been preoccupied with the history of political injustice, and have been significantly scarred; subsequently they have deteriorated under this injustice. Colonialism, imperialism, invasions, wars of aggression, and other forms of past political injustices have not only affected those who have endured this humanitarian tragedy but also subsequent generations, and, perhaps most importantly, the relationship between rival

stakeholders. For instance, there have been recent instances when the Kenyan Truth, Justice and Reconciliation commission demanded an apology from Britain for past-colonial injustices in 2013, which led to the British government's apology that was given in same year; Algerian demands for a French apology for torture and very many human rights violations during the French colonial rule in Algeria from the early nineteenth century to 1962 in 2016; and Indian demands for an apology from Britain for the massacre of Amritsar on April 13 1919 in 2013. These occurrences attest partially to the need for a process of international restorative justice within the international society to address these and many other histories of past injustices that took place under colonial rule. The recollection of history should be the product of many voices, based on a discourse of inclusion rather than domination. Retributive justice is not equipped with the tools needed to deal with past injustices. On the other hand, public apology and forgiveness are some of the tools of restorative justice that might be utilized to deal with past political interstate injustices. Establishing discursive spaces is critical for addressing past human rights violations that still cloud interstate relations, and it is an area that future research might explore.

## **Conclusion**

This research aims to institutionalize restorative justice within the international system, which would provide the structure through which rival stakeholders might find fertile ground to encounter, and which in turn would contribute to interstate reconciliation. The research stresses the importance of international restorative justice and, as such, also promotes the importance of the role of the individual and discourse in the process of international criminal justice.

The research stems from the belief in the capacity of interpersonal connection between stakeholders to contribute to the resolution of interstate divide. The impact of encounter and



discourse in leading the way to the restoration of relations and to overcome a political divide has been reflected in various instances. For example, there was the West–East Divan workshop founded in Weimar in Germany by Edward Said and Daniel Barenboim in 1999, which took place over a span of several weeks. The workshop included Israeli, Palestinian and other Arab musicians, and was a manifestation of both Said and Barenboim’s efforts to find alternative ways to address the Arab–Israeli conflict. The musicians from the conflicting sides would practice together under the leadership of the maestro Barenboim, and also engage in discussions that were led by Said on the Arab–Israeli conflict and the question of identity. The influence of encounter provided by that discursive space was shown as musicians from the conflicting parties (Israelis and Arabs) would refuse to talk to each other at the start of the workshop, but, by the time it had ended, they had developed a reflective understanding about the “Other.” This is not to argue that such an effort is capable of resolving the Arab–Israeli conflict, but simply to say that resolving the conflict without creating discursive spaces is unattainable as the divide at the societal level will always be maintained between the affected communities. What the workshop did was to “humanize” the enemy, and provide the space for a difficult, but very much needed, discourse about the conflict. The workshop later created the West–East Divan Orchestra, which eventually led to the founding of the Barenboim–Said Academy in Berlin in 2016. On its website, the logo of the orchestra says “Equal in Music” in three languages: English, Hebrew, and Arabic. In its mission statement it maintains that the orchestra has “materialized a hope to replace ignorance with education, knowledge and understanding; to humanize the other; to imagine a better future.” The mission statement further maintains that:

During the workshop individuals who had only interacted with each other through the prism of war found themselves living and working together as equals. As they

listened to each other during rehearsals and discussions, they traversed deep political and ideological divides.<sup>27</sup>

This statement reflects the essence of this research: the aspiration for enemies that have experienced brutal conflict meeting each other to attain understanding and respect for the other. Restorative discursive spaces might liberate rival stakeholders from rival accounts that are holding them back from making peace with each other, and help them to establish a shared outlook on their history. There are dialogues that need to be undertaken within the international society in order to realize interstate reconciliation. This would set rival stakeholders on the path of healing from past harms, and also save future generations from reproducing the same rivalries. Institutionalizing the process of international restorative justice is the path to be pursued to uproot the divide within the international society and plant the seeds of understanding and trust.

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<sup>27</sup> <https://www.west-eastern-divan.org/>. [Accessed May 6, 2019.]

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