universität wien

Diplomarbeit

Titel der Diplomarbeit:

"International Criminal Courts and Tribunals in the Concept of Transitional Justice and their Impact on Post-Conflict Societies"

Verfasser

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Zur Erlangung des akademischen Grades

Magister der Philosophie (Mag. phil.)

Betreuer: Ao. Univ. Prof. Dr. Otmar Höll

Wien, im März 2009

Studienkennzahl lt. Studienblatt:	A-300
Studienrichtung lt. Studienblatt:	Politikwissenschaften
Matrikelnummer:	0348732

International Criminal Courts and Tribunals in the Concept of Transitional Justice and their Impact on Post-Conflict Societies

- a comparative study

International Criminal Courts and Tribunals in the Concept of Transitional Justice and their Impact on Post-Conflict Societies

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1. The Concept on Transitional Justice in Post-Conflict Societies

1.1 General Remarks

Generally speaking, the concept of transitional justice refers to methods and practices states or the international community may apply in the aftermath of humanitarian atrocities or conflicts in order to re-establish a legal and social framework. Methods in this regard include both judicial and non-judicial approaches. Transitional justice seeks to re-establish peace and stability in war-torn societies by establishing possibilities for justice, reconciliation and democracy.

This concept of the '*New Law*'[1] was established in the late 1980's and early 1990's, mainly due to political changes in Latin America and Eastern Europe.[2] The progressive rise of the international community's awareness of the protection of human rights during this period can be held as an aggravating factor for the ascension of transitional justice as a 'remedy' for post-conflict societies.

Nevertheless, one can argue, that the concept of transitional justice was first established in the early years after WWII, when high-ranking Nazi leaders were for the first time in history held accountable for atrocities committed during the darkest years of Europe's contemporary history. [3]

Teitel therefore reckons that Transitional Justice was already established after WWII[4]. He furthermore argues in his article, to split the development of transitional justice into three crucial phases: The first phase, as stated above, in his view kicked off after WWII. The period lasted until the end of the Cold

[1] Bell, Christine: *The 'New Law' of Transitional Justice* in *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development, The Nuremberg Declaration on Peace and Justice* by K Ambos (ed.); Berlin, 2007; p.1

[2] International Center for Transitional Justice; "*What is transitional Justice*"; http://www.ictj.org/en/tj/ 30.10.2008; especially the trials of members of the Argentinean junta and in Greece are mend here!

[3] However, why this statement could also be denied by a couple of others will be addressed in the following chapters.

[4] Teitel, Ruti: *Transitional Justice Genealogy* in Harvard Human Rights Journal; Vol. 16; 2005; p.1

War. The post-Cold War phase, he reckons, is deeply related with the wave of democratic transitions and modernizations that began in 1989 due to major geo-political changes, especially in Eastern Europe. The third phase, or steady-state phases, as he calls it, is associated with contemporary conditions of persistent conflicts and is still prevailing until today.

But what is Transitional Justice mend to achieve and how? By far, the main aim was and still is establishing a new regime of stability in often fragile and crumbly societies. By doing so one focus has be put on strengthening the civil society, re-establishing the *Rule of Law* and state institutions, judicial administrative and others. Studies by scholars on the transition from autocratic regimes to democratic ones, including those by Samuel Huntington, O'Donnell and Schimiter, have all integrated the transitional justice framework into an examination of the political processes inherent to democratic change.[5] Methods and instruments used in this regards vary a lot and depend as well on the specific situation and circumstances as on the funding and support provided.

Governments and the international community adopted many of what became the basic approaches concerning transitional justice. They include the following main initiatives[6]:

- *Criminal Prosecution:* Judicial investigations of those responsible for gross human right violations. Usually carried out against the 'Big Fish'.
- *Truth Commissions:* Usually focus more on the victim's perspective of a conflict. Have no judicial power and work on the basis of recommendations.
- *Reparation Programs:* State-sponsored programs to help balancing the damages caused during the conflict.
- *Security System Reforms:* Seek to transform the military, police, judiciary and related state institutions from instruments of repression and corruption into instruments of public service and integrity.
- *Memorialization Efforts*

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[5] Huntington, Samuel P.: *The Third Wave: Democratization in the Late Twentieth Century*; Washington; 1991;

[6] supra note [2]

In the following I will focus on the judicial approaches in the concept of transitional justice and will just refer to the other approaches where needed to complement the overall picture. It is quite obvious, however, that periods of transitions require more then just one method to overcome the past turmoil. Judicial remedies and effective governmental institutions may be the most obvious indicators to outline and evaluate a functioning state, but a broad variety of measures has to be introduced in order to ensure long-term amelioration. Post-Conflict societies are often earmarked by a deep miss-trust regarding state institutions and governmental institutions. In order to overcome this deep disruption affecting all layers of a state, trust and confidence has to be re-built. Critics might claim that international institutions are not *per se* suitable for doing so, but, as I will proof in the following, they provide for a sound basis and framework to encompass the situation of a power vacuum.

2. Criminal law as contribution towards peace

As discussed above, several measures have been implemented to re-build conflict-torn societies. One of the most controversial issues on these regards was the discussion, whether or not justice implies peace, or if these two paradigms contradict each other. In the following, I will examine this question and how effectively justice and truth, if brought to light after the fog of a conflict has lifted, leads to a stabile and reconciled society. In the chapters to come I will focus on this question in more detail, focusing on certain conflicts and compare their impacts on the society in question.
Several attempts have been made, to set-up guidelines, how transitional justice has to be executed, to ensure that sustainable developments evolve.

According to Christine Bell, transitional justice has to ensure that,[7]

[7] supra note [1]; p.3

- Blanket amnesties that cover serious international crimes are not permitted;
- Some amnesties, however, are required as conflict-related prisoners and detainees must be released, demilitarised, demobilised, and enabled to re-integrate[8];
- Criminal proceedings for the most serious offenders, coupled with creatively designed local mechanisms aimed at a range of goals such as accountability and reconciliation, for those further down the chain of command and a general amnesty at the lowest level.

In a U.N Report issued in 2005 by Diane Orentlicher on behalf of Secretary General Kofi Annan regarding the updated set of principles to counter impunity, Ms. Orentlicher held in Art.19 that,
'*States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.*'[9]

These prohibitions on blanket amnesties for the most serious violations of human rights (torture, genocide, inhuman treatment and willful killing) are also written down in a number of 'hard law' treaties, such as the 1948 Genocide Convention[10], the Convention against Torture[11] (UNCAT), the Geneva Conventions of 1948 including the Additional Protocols, the International Covenant on Civil and Political Rights (ICCPR) and others.
Some crimes, however, are furthermore defined in the statutes establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY), the

[8] cf. Add. Protocol II Geneva Conventions 1948; Art.5(6)
[9] UN COMMISSION ON HUMAN RIGHTS E/CN.4/2005/102/Add.1; 8 February 2005. See in particular Principle 19; The principles define serious crimes under international law as follows: Grave breaches of the 1949 Geneva Conventions and the 1977 Additional protocol I thereto and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity and other violations of internationally protected human rights that are crimes under international law and/or which international law requires states to penalise, such as torture, enforced disappearance, extrajudicial execution and slavery.
[10] *Convention on the Prevention and Punishment of the Crime of Genocide*; Dec. 9th 1948;
[11] *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; June 26th 1987;

Special Court for Sierra Leone (SCSL), the International Criminal Tribunal for Rwanda (ICTR) and in the Rome Statute, establishing the International Criminal Court. Especially the ICTY statute provides for new definitions of some criminal conducts, such as rape, and was the first international legal institution, which accepted that rape might be used as a method of genocide.

2.1 The Rule of Law

The Rule of Law, as means bringing back judicial and legal standards to societies, is normally understood as to be an ideal that provides both justice and order as well as individual freedoms and social stability.[12]
The Rule of Law dictates that all people in one society obey to the constitutional procedures and solve conflicts in accordance with the law. The lack of an effective judicial systems and the missing of a constitutional framework, which is often predominant in post-conflict societies, usually provides for no effective remedies for criminal conducts and therefore cannot provide a secure social environment for an evolving society. However, international intervention in the form of transitional justice can provide guiding principles in this regard. The establishments of the ICTY and ICTR in 1994 were both mend to provide a link between a conflict resolution and the Rule of Law. Furthermore aimed the Security Council (SC) with the establishment of the two sister-tribunals, acting under Chapter VII of the UN Charter, to contribute peace and reconciliation in the regions concerned. They were expected to contribute to making, keeping or building peace in law-broken societies by implementing legal standards.[13] Both tribunals, seen as historic experiments, derived from the belief that international justice leads to international peace. Alongside the same argumentation the ICC followed the to tribunals in 2001 as a permanent player in this respect.

It is mainly accepted, that psychologically, justice is necessary to heal traumas and old wounds, which is needed to reach reconciliation and

[12] Shinoda, Hideaki: *Peace-building by the Rule of Law*: An examination of intervention in the form of international tribunals; 2001; p.2; accessible under http://www.theglobalsite.co.uk (March 2008)
[13] ibid.

peace.[14]Politically, a failure to carry out justice may undermine the legitimacy and credibility of the post-conflict government and encourage future failings.[15] Despite, however, strong arguments in favor for post-conflict justice (PCJ), some might argue, that the threat of an international trial is highly unlikely to deter perpetrators in ongoing conflicts.

But in what sense are they said to contribute to peace? Are they necessary and useful instruments to maintain peace and is it always the case that pursuing justice solidifies peace?[16]

As some authors argue, it would be from greater importance to grand wide-raging amnesties and exiles during ongoing conflicts, which make perpetrators immune to post-conflict prosecution. By doing so, the government would create a stimulus for rebels, to lay down their weapons and stop future atrocities.[17]

However, as many scholars argue, PCJ manifested in legal and political justice will contribute to sustainable peace, but there are many problems associated with carrying out justice in post-conflict societies.[18]

2.2 Definitions

But before we even speak about peace and justice as a possible result of transitional justice approaches, we should define the terms in this context. According to Johan Galtung, peace simply is the absence of organized violence. This minimalist approach, however, is different to a structural and cultural peace, which lays the foundation for reconciliation amongst former disputed people. In this context, peace should be defined as structural, cultural and political peace in the absence of injustice or repression.

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[14] Gates, Scott: *Post-Conflict Justice and Sustainable Peace*; Paper presented at the annual meeting of the American Political Science Association 2007; p.1

[15] ibid.

[16] It should be held that the rule of law in the context of international criminal tribunals does not mean (re-)establishing a domestic legal order, but principally describing a method to prosecute and punish war crimes under international law and to end a 'culture of impunity'.

[17] Gates, Scott et al.: *Post-Conflict Societies and Sustainable Peace*; World Bank Policy Research Working Paper 4191; 2007; p.1;

[18] supra note [11]; p.2

Justice on the other hand is more difficult to define. Several attempts have been made to clarify the term in this context; some of those should be discussed:

One of the main critique points regarding the Nuremberg trials was that the justice implied by the Allied powers was simply victor's justice, since the court was established solely by the allied powers and was not backed by a vast majority amongst German people.[19]

Political justice, as Elster describes it, is justice against the conflicts loosing party.[20] This is not distributive justice, however, which entails addressing the underlying cause of conflict e.g. social, political or cultural injustice.[21] Retributive Justice, as a concept embedded in the area between victim, perpetrator and society, seeks to reconcile amongst those parties, to both prevent future violence and sentence the wrongdoing. In my further explanations, I would like to use this definition of justice, as it seems to be the only definition providing the fundamental elements for sustainable peace and reconciliation.

2.3 Retributive Justice

Retributive Justice has received the most attention in post-conflict societies. It claims to punish perpetrators and to hold them accountable for their misbehavior and wrongdoings. By carrying out such prosecutions national and international courts appear to be the appropriate instrument. The most important thing concerning the judicial justice process is, however, that the trials do not become a show trial, meaning that judicial mechanisms are misused as political orchestrations. Furthermore it is necessary, in the case of PCJ, to lock perpetrators out of public service jobs to publicly show that wrongdoings are not being ignored or accepted.

[19] I will discuss the other criticism regarding the trial in the following chapters in far more detail.
[20] Elster, Jon: *Closing the Books*: Transitional Justice in Historical Perspective; Cambridge; 2004; p.135
[21] supra note [11]; p.2

The psychological impact of justice on peace and reconciliation is nevertheless disputed. Some argue, that criminal trials open old wounds instead of supporting the process of healing, forming greater resentments among former participants in civil conflicts[22], while others suggests that trials lead to the individualization of guilt, what reduces the collective incentive for forgiveness.[23] More importantly, however is the argument, that victims, who lost their faith in the judicial system of a state, regain confidence and trust from the break with the past and by seeing those tried most responsible for injustice. Failing to deal with past atrocities may also reduce the government's liability and legitimacy and prevent further stabilization. If victims of war or former dictatorships gain the impressions that wrongdoings were not sufficiently prosecuted, they might be tempted to use private justice as an instrument for personal compensation.

2.4 Theoretical Perspectives

Especially since the Second World War many attempts have been made to put international criminal tribunals into a common political theory. The main theoretical approaches concerned Realism, Constructivism and Neo-liberal Institutionalism. But rather then applying these approaches as fully constructed theories or antagonistic concepts, I want to point out their different approaches very briefly and use them in a complementary way for my work.

2.4.1 Realist Theory

In realist theories, states are seen as the main actors on an international level. Furthermore it is assumed that individuals and states alike are rationalist, self-seeking beings. Realists take the view that no global government exists and

[22] Long William & Peter Brecke: *War and Reconciliation*: Reason and Emotions in Conflict Resolution; Cambridge; 2003; p.68
[23] Fletcher Laurel & Harvey Weinstein: *Violence and Social Repair*: Rethinking the Contribution of Justice to Reconciliation in Human Rights Quarterly; p.573-639; Vol.24; 2002; p. 575

that the world of international politics is therefore characterized as a constant, anarchic struggle amongst states. The only possibility to deal with this 'lawlessness' on a global scale is to create a balance of power that emergence from the confrontation of states. States affect each other by using, or threatening to use, coercive power defined in material (military and economic) terms.[24]

For a realist approach, international organizations stand as a proxy for national states in their competition with each other, but they are not instruments to create a global order or regime.[25] It would make little sense for states to sacrifice sovereignty to enforce international laws against genocide, crimes against humanity, and war crimes, unless to do so would confer some relative advantage or to oppose it would entail some relative costs.[26] Therefore it is likely to understand, why realists would seek to limit the powers of an international criminal court in order to retain their own freedoms. This view might explain the ongoing opposition of some of the major countries towards the ICC.

2.4.2 Neo-Liberal Institutionalist Theories

Institutionalist theories overlap with the assumptions of realist theories in many ways, though they differ in many crucial points. Classical liberals believed in the idea of progress, human goodwill, and the (rational) perfectibility of mankind through collective institutions, in order to escape the state of anarchy. Neo-liberal institutionalists combine this liberalism with realist approaches. They still share the realist assumption that states are the predominant international actors but argue that states can develop incentives to co-operate for improvements in their own interests. Through the implementation of such co-operations and organisations, a certain level of regulated international behaviour can be reached.[27] Such a regime could create areas of international interaction, regulated by laws, which would

[24] Schiff, Benjamin: *Building the International Criminal Court*; Cambridge; 2008; p.179;
[25] Bloxham, Donald: *Beyond 'Realism' and Legalism*: A Historical Perspective on the Limits of International Humanitarian Law in European Review; p.457-470; Vol.14; 2006; p.462;
[26] supra note [20]; p.180;
[27] ibid. p.41;

impose certain legally binding obligations amongst states. Liberal institutionalists furthermore acknowledge that other actors than states, such as international organizations, NGO's and civil societies, can affect states. Thus, states' objectives are defined, at least partially, by internal political forces such as interest groups and political parties, and not just imposed by realist assumptions arising from a structurally determined national interest.[28] Neo-liberal institutionalists argue that states will support co-operation with international organisations, if it produces absolute or relative advantages. If they see co-operations damaging their interests, they will oppose, constrain, or defect from them. Thus, if the ICC assists in implementing states' normative objective of countering impunity, it should receive continued or increasing support.[29] For institutionalists the assumption prevails that the more the ICC can serve states' interests, the more support it will acquire in terms of credibility, legitimacy and state support.

2.4.3 Social Constructivism

Contrary to realist and institutionalist approaches, social constructivism builds up on the assumption that states behavior can flow from a variety of motives, including both material (power, money) interests, and normative commitments.[30] To explain the process leading to the establishment of the ICC, constructivists would argue that developments in areas such as human rights law have emerged since WWII and consequently led the approach to put an end on impunity. Furthermore, the continued increase of coverage of human rights laws, led to a change of states identities. Social constructivism seeks to explain geo-political developments in a socio-historic context. Therefore, not anarchy driven assumptions but more rational approaches enhance political changes. Constructivists argue that international institutions embody normative commitments that denote personal, national, and global

[28] Schiff, Benjamin: *The U.S. will learn to love the International Criminal Court*; (unpublished) 2007; p.9
[29] Schiff, Benjamin: *Building the International Criminal Court*; Cambridge; 2008; p.181;
[30] supra note [24]; p.10;

identities.[31] For constructivists the creation of the ICC could highlight a significant change of the historical system in a way that collectively, without obvious gains and for apparently non-material reasons, states committed themselves to co-operate with an international organization, which serves the purpose to prosecute collectively deemed acts whose prosecution had previously been considered, if at all, on an *ad hoc* basis. For states, such as the United States, who still strongly oppose the ICC, pressure from human rights activists could lead to an adoption of the court's jurisdiction.

3. Assumptions

In my thesis I would like to focus on special questions regarding the field of transitional justice. Before applying those assumptions on selected courts/tribunals and conflicts, I would like to form a theoretical framework and set up certain standards to verify the actual impact that PCJ had on the society in question.

Main assumptions:

- Post-conflict trials, through creating a historic record, will lead to a stable and more durable peace in a democratic post-conflict society;
- Granting blank amnesties lead to the reduction of the post-conflict peace period by establishing a regime of collective innocence;
- Criminal proceedings help to expose violent regimes for what they are and help to stigmatize and diminish them;
- The removal of key political figures from power supports the emergence of more moderate political influences;
- Providing effective remedies for victims, helps to end cycles of revenge and ultimately leads towards reconciliation;
- By individualizing guilt, a regime of collective guilt is prevented and social healing can occur on the mid- and long-term;

[31] supra note [20]; p.192;

- Criminal prosecutions cut a clear break between past and present political regimes and help to legitimacy a new democratic government and supports the re-establishment of the Rule of Law

Those assumptions build up the general framework I would like to focus on during my research. Even though, I will not be able to either verify or falsify each single one regarding every tribunal, I will try to create a sufficient and clear overall picture.

4. Genealogy of Transitional Justice - a very brief history

4.1 The Nuremberg Legacy

The aftermath of the atrocities committed during WWII gave way to the first approaches regarding transitional and international criminal justice. By establishing *the International Military Tribunals in Nuremberg* (and Tokyo), the victory powers, for the first time in history, held senior officials accountable for crimes committed during times of war. However, this was not the idea intended by the victory powers from the beginning.

Stalin, for example, when asked, how to deal with Germany and the Nazi-leaders, answered, that in his view, it would be fair to pick 100.000 random German soldiers and execute them, U.S President Franklin D. Roosevelt joked that 49.000 would do as well. Churchill's response towards that proposal was rather skeptic. In his view, as he already declared in the *Moscow Declaration* of 1943, the only possible way to deal with those responsible, was putting them on trial.[1]

After this issue being clarified, the victory powers unanimously held, that putting the former German leaders on trial would be the best way with regards to de-Nazification, nation building and reconciliation amongst Europeans and Germans alike. However, many discussions arose, which would be the best forum to try those people. First of all the question was, whether to establish an international or national tribunal. After the lessons learned in the aftermath of WWI, when German courts established to try selected war criminals turned out to be a farce, the international community decided to create an international tribunal.[2]

So it became clear fairly quickly, that an international criminal tribunal was the only adequate way to deal with the accused.

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[1] *'Das erste Weltgericht'* in Die Zeit; 48/2001; accessible under http://www.zeit.de/2001/48/Das_erste_Weltgericht.htm

[2] The so called 'Leipziger-Trials' were initially established under pressure from England, France and the U.S. in Germany to deal with the most serious crimes committed during WWI. The trials were held in Leipzig at the German Supreme Court ('Reichsgericht'). However, the trials turned out to be a farce. The most high-ranking officers in the German army, responsible for a number of war crimes, were either acquitted or sentenced to lower-level terms of imprisonment.

This approach marks the incorporation of transitional justice and international criminal justice alike. I will discuss the Nuremburg trials, its establishment, rules of procedure and influence on post-Nazi Germany in far more detail in the following sections.

4.2 The Cold-War Dilemma

After the time of euphoria about finally establishing a working regime dealing with war criminals amongst the international community, the situation changed rapidly for the worse in the years to come. In the shadow of the Cold War and its mutual blockings on an international level between the U.S and the Soviet Union, further attempts to create a working global regime of transitional justice and to draft a U.N document marking the basis of any further trials, were stopped. However, the impact on the trials was still capable during the negotiations leading to the signature of the 1944 Geneva Conventions.[3]

4.3 The Establishment of the ad hoc Tribunals

After the end of the Cold War and in the face of the crimes committed in the Balkans during the war in the 1990's, the international community realized, that it was time to act again. By establishing the sister-tribunals for the former Yugoslavia and Rwanda, situated in The Hague and Arusha, the discussion of international criminal justice and transitional justice came back into the public focus.

Furthermore, other attempts such as the peace and reconciliation commissions in the Republic of South Africa, established after the Apartheid-era, and elsewhere supported the idea of transitional justice as a means of sustainable peace building in post-conflict societies. I will continue on this issue as well in the upcoming chapters in more detail.

[3] Teitel, Ruti: *Transitional Justice Genealogy*; Harvard Human Rights Journal Vol.16. 2003; p.74;

5. Typology of International Criminal Tribunals

5.1 The Past, Present and Future

In order to identify the impact of criminal tribunals on post-conflict societies, it is important to look at their past, present and future.

From its very beginning international criminal tribunals were affiliated with international conflicts. The emerging concept of transitional justice, however, put them in correlation with peace building, which was rather new.[4]

The Nuremberg and Tokyo trials are often referred to as predecessors of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the newly established International Criminal Court.

The two ad hoc tribunals established a framework of international criminal responsibility based on the so-called *'Nuremberg Principles'*. However, despite all its similarities between the ICTY/ICTR and the Nuremberg Trials, there are many significant differences. First, the Nuremberg tribunal can clearly be stated as semi-international, despite the fact, that its establishment was not backed by the international community as a whole, just by the victory powers, whereby the ad hoc tribunals established in 1994 can truly be seen as internationally, due to their form of creation under Chapter VII of the UN Charta.

One point often raised in this regards was that the Nuremberg trials did not create a regime of international or global justice, but victors' justice (I will come back on that point at a later point in more detail). In contrast, the ICTR and ICTY are often referred to as dispensing 'Victim's Justice'.[5]

Another point worth focusing on is the fact that for the first time in history a true international prosecutor is bringing claims against the defendants at The

[4] Shinoda, Hideaki: *Peace-building by the rule of law: An examination of intervention in the form of international tribunals*; Free Press; 2001;p.3

[5] Watson, Geoffrey: *The Humanitarian Law of the Yugoslavia War Crimes Tribunal* in Virginia Journal for International Law; Vol.36; p.687-719; 1996; p.719

Hague and Arusha, while at the military tribunals in Nuremberg and Tokyo each participating state had its own national prosecution services.

Furthermore, focusing on the scope of the present tribunals in comparison with their ancestors, it can be stated that their jurisdiction is less narrow and limited regarding its application. The past tribunals were limited not only because the victors alone controlled the tribunals, but also because the tribunals had no formal authority beyond war participants. The parties to the tribunals were also parties to the war.[6]

The differences, however, between the ad hoc tribunals and the International Criminal Court (ICC) are far more obvious. First of all, and in my view most importantly, stands the fact that the ICC was established as a permanent court. Secondly, the ICC was created through a multilateral treaty and does not have overriding powers over states jurisdiction on the first hand, even though the court has jurisdiction over a person, if the national state of the accused or the state, where the crimes occurred is party to the Rome Statute.[7] On the other hand the ICC will have no binding jurisdiction over states not party to the statute.[8]

The scope of the ICTY and ICTR is, generally speaking, more limited then the one of the ICC. The ICC has no territorial or temporal delimitation as the ad hoc tribunals do.[9] However, the ad hoc tribunals being established by a SC resolution[10] under Chapter VII UN Charta have far-reaching powers in regards of e.g. non-compliance of a state. The enforcement powers of the SC always reside behind their activities. The ad hoc tribunals are concerned with specific criminal conducts, but exercise almost universal powers. The power, however, is not perfectly universal, since some states are not recognized as members of the UN yet. Still cooperation is obligatory for most states in the world.[11]

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[6] Shinoda calls this fact '*ad hoc compulsory unilateralism'*

[7] The Rome Statute is the founding document of the ICC. It was adopted at a multinational diplomatic conference in Rome in 1998. More then 100 states are party to the statute yet.

[8] Shinoda calls this *'permanent voluntary multilateralism'*

[9] Temporarily the ICC is limited to crimes committed after the statute has entered into force (Art.11 ICCSt.)

[10] UN SC Res. 827 dated 25.05.1993; UN SC Res. 955 dated 08.11.1994;

[11] supra note [4]; p.3; Shinoda calls this '*ad hoc compulsory multilateralism'*

The reason why the ICTY and ICTR have so far reaching powers and almost universal compulsory jurisdiction is due the fact, that the SC in its resolution considered the situation in the Balkans and in Rwanda as a 'threat to international peace and security'. The SC held that '*the prosecution of persons responsible for serious violations of international humanitarian law` would 'contribute to the restoration and maintenance of peace'* in the former Yugoslavia *and 'to the process of national reconciliation and to the restoration and maintenance of peace'* in Rwanda.[12] This specific link between peace and justice in times of military intervention was missing at the Nuremberg trials, as well as in the Rome Statute.
The ICC furthermore seems to be more inclined to be a genuinely judicial organ in comparison to its ad hoc predecessors since there is no genuine link to 'peace' in its statute.[13]

In Art.13 and 16 of the Rome Statute the SC nevertheless has the possibility to use the ICC as a tool comparable with the ICTY or ICTR. In Art.13 and 16 of the Statute legal mechanisms are provided to use the ICC in operations directly linked to peace in conflict-ridden areas as a tool for Chapter VII resolution enforcements.

5.2 Three Philosophical Perceptions of Tribunals

The achievements of the two ad hoc tribunals can truly be considered as significant in the area of international criminal law and transitional justice.[14] However, the *raison d`etre* of the two ad hoc tribunals is their contribution and maintenance towards peace, which is inherent to their served purpose. The main aim of the two tribunals must be first and foremost to contribute justice in the first instance. This might collide with its contribution towards peace and

[12] supra note [10];
[13] supra note [4]; p.4
[14] e.g. applying common Art.3 of the Geneva Conventions of 1949 to internal warfare, recognizing rape as a crime of genocide etc.

reconciliation.[15] The ambitious nature of the ad hoc tribunals concerning the nexus between justice and peace raises philosophical issues:

- *Does justice consequently contribute towards peace?*
- *Is it true that the idea of natural harmony of peace and justice is a groundless and even dangerous assumption in international relations*?[16]

Hideaki Shinoda proposes three different approaches in this regard concerning the relationship between peace and justice in international criminal tribunals, past and future: 'harmonious', 'adversarial' and 'conditional' position.[17]

5.2.1 Harmonious Position

For this conceptual framework Shinoda argues that justice should not be understood as opposing peace. He strongly emphasizes the interrelationship between both. Richard Goldstone, the ICTY's first prosecutor held, that `*we have had illustrated the political approach which subscribes to the view that peace is more important and should be achieved if necessary at the cost of justice, and, on the other hand we have the approach from the view of the victim. In my opinion, it is the victim who is too often and too frequently left out the equation and left out of account*'.[18]

Shinoda furthermore emphasises the genuine link between peace and justice.[19]According to him endurable peace is highly connected to justice and its contribution in war-torn societies. He points out that the aim of justice should include the exposure of truth by avoiding the establishment of collective guilt, public and official acknowledgments towards victims, accurate

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[15] supra not [4]; p.5
[16] Carr, E.H.: *The Twenty Years Crisis 1919-1939*: An Introduction to the Study of International Relations; London; 1981;
[17] supra note 4; p.5f
[18] Goldstone, Richard: *Justice as a Tool for Peace-making*; Truth Commissions and International Criminal Courts in New York University Journal of International Law and Politics; Vol.28; p.485-503; 1996; p.7-8
[19] Goldstone, Richard: *Assessing the Work of United Nations War Crimes Tribunals* in Stanford Journal of International Law; Vol.33; p.1-8; 1997; p.501

and faithful recording of history, curbing criminal conduct by implementing efficient criminal justice, and revealing a systematic pattern of gross human rights violations.[20]

5.2.2 Adversarial Position

The adversarial position does not build up on such a positive link between peace and justice. Far from that, this position claims that an excessive pursuit of justice undermines the basis of sustainable peace. The priority of politics over law is crucial in this context. Stephen Krasner, a prominent political scientist in this regards, in an article in the *International Herald Tribune* held that, after the Clinton administration signed the Rome Statute, the ICC is *'the wrong instrument for dealing with large-scale war, devastation, destruction and crimes against humanity'* and emphasized that *'developing stable democratic societies and limiting the loss of human life require[s] prudent political calculations, not judicial findings. Judgements about individual guilt can point in one direction, and judgements about political order and promotion of peace and democracy can point in another'*.
Krasner, however, acknowledges the positive effect of the judicial process *'if they are conducted through national, not international, tribunals, and if they are designed to elicit the truth, as South Africa's was*'. He furthermore points out that *'criminal prosecution is pressed without consideration of political realities, the search of justice could hinder democratic rebuilding in war torn nations*'.[21]

5.2.3 The Conditional Position

This position reflects a mediational attempt between the two antagonistic positions. It still favours the establishment of international criminal tribunals but warns against its inappropriate use e.g. when legal implementation ignores the political considerations and vice versa. One representative of this

[20] ibid.
[21] Krasner, Stephan: *After Wartime Atrocities, Politics Can Do More Than the Courts* in International Herald Tribunal; 16.January 2001;

approach is the former US ambassador-at-large for war crimes David Scheffer. He was highly supporting the establishment of the two ad hoc tribunals and about the establishment of a permanent international criminal court, but opposed the Rome Statute. In an article published in 1996 he advocated strongly for the erection of such a court of permanent nature. He held that '*the ad hoc war crimes tribunals and the proposal for a permanent international court are significant steps toward creating the capacity for international judicial intervention*'.[22] However, the question remains, why someone who is obviously in strong favour of creating an international criminal system voted against the adoption of the Rome Statute in 1998.[23]

5.3 Idealistic v. Realistic Approaches

These referred three different approaches reflect the contradiction between law-orientated or politics-orientated or idealistic and realistic views. Furthermore they reflect the way peace and justice are understood in international politics.

The realistic or Hobbesian concept of international relations sees international relations as an arena for constant struggles among states. Contrary to that, the idealistic Kantian concept builds up on a unified world of universal human rights. For the Hobbesian approach, justice and order is the first value to be achieved. The Kantian approach, however, claims that justice subsequently leads to peace, because an unjust world order would consequently remain unstable. The Kantian thesis that perpetual peace is well secured among democracies is strongly denied by Hobbesians.[24]

A third view in this concept is Bull's middle ground position, following a rationalist or Grotian concept. He acknowledges the necessity of power

[22] Scheffer, David: *International Judicial Intervention* in Foreign Policy; Vol.102; p.35-51; 1996; p.51
[23] I will focus on the rejections of the US administration in 1998 and on the current issues between the ICC and the US in a later chapter.
[24] supra note [4]; p.7

politics among states, but claims a certain regime of rules and norms covering that area and binding states and other actors. The Grotian view does neither overemphasize the necessity of power struggles among actors, nor does it claim for a universal jurisdiction. This position stresses to evaluate fundamental principles and values of an international society and use them as a fundamental pillar in an international society. The mutual existence of justice and peace and not to jeopardize the political system is the main aim of the rationalistic concept.[25]

It can be noted that the majority in the international politics community more or less favours the Grotian approach. It favours the establishment of international criminal tribunals by maintaining the existing international political structure. However, as the idealistic approach does, it acknowledges the direct link between peace and justice. Overall it can be held, that the Grotian system seeks to establish fundamental common rules and norms by simultaneously keeping the international order stable.[26]

5.4 The Concept of Judicial Intervention

Since its introduction into international politics, international criminal tribunals were highly criticised as too time and money consuming and as not contributing to peace in their area of operation. However, in the following section I will try to point out mechanisms applied by the tribunals to fulfil their aim of contributing justice and peace in war-torn societies.

First of all, one might raise the question, why we need international criminal tribunals overruling the national judicial system? The answer to this question is multilayered.
First, international criminal tribunals might introduce international legitimacy and indictments, which often lacks in national trials. Secondly, as already

[25] Bull, Hedley; *The Anarchical Society*: A Study of Order in World Politics; Oxford; 2002;
[26] supra note [4]; p.7

stated above, do conflict-ridden societies often lack of a judicial system suitable for dealing with crimes committed during the times of the conflict in question. Thirdly, international judicial systems may prevent the appearance of partisanship or the lack equidistance of national courts in inter-state conflicts.

5.4.1 International Criminal Tribunals v. Truth and Reconciliation Commissions

Before pointing out the advantages, necessity and impacts of international criminal tribunals on post-conflict societies, we have to clearly distinguish them from truth and reconciliation commissions.

Truth and reconciliation commissions as set up in South Africa, Argentina, Chile, Haiti, are by any means no judicial instruments in the concept of transitional justice. Their main purpose is to uncover the truth in order to achieve reconciliation and not to punish those responsible for the crimes committed.

Significantly, all countries in Latin America, which established such commissions, were catholic-dominated countries. It is naturally assumed that such commissions take shape in accordance with catholic values such as confessions and forgiveness.[27]

The commission established in the RSA seemed to follow the same pattern, since it aimed at disclosing atrocities during the apartheid regime, but it never called for punishment or compensation.

Their principle aim is national reconciliation and therefore to make hidden crimes public. The idealistic approach that truth consequently leads to reconciliation and therefore to peace behind this concept is inadmissible. The element of forgiveness between the victim and the perpetrator (such as in retributive justice systems) is the fundament to build up anew a divided society.

[27] ibid.

In contrast, the ICTY and the ICTR are a form of judicial intervention of the international community into a domestic system. Even though the intervention by the tribunals is certainly not militarily, it still has dictatorial aspects. Furthermore, the intervention is not of a 'humanitarian nature', but it clearly has strong connections with humanitarian law.[28]
The overall purpose of the tribunals coincides with other forms of humanitarian interventions with respect to humanitarian concern for victims in conflict-ridden areas.[29]

5.5 General Advantages and Disadvantages of International Criminal Tribunals

With great success comes great criticism! But what are the great achievements of international criminal tribunals and where lay their weaknesses.

5.5.1 Ad hoc Tribunals

As we already noted, the ad hoc tribunals are limited in both time and place of their jurisdictional application. However, that enables them to focus on the special needs required in its field of work. The UN, by setting up international tribunals can shape the jurisdiction and structure as it chooses.[30]
Furthermore the UN can equip the tribunals with the powers necessary to deal with the atrocities it is dealing with and to handle these cases effectively. All UN members, if the tribunal is established under Chapter VII of the UN Charta, are required to work in accordance with the court. Moreover, because the tribunals are created under Chapter VII, states' obligations to cooperate

[28] All criminal tribunals refer in their statute to the Geneva Conventions of 1949 and its Additional Protocols of 1977;
[29] supra note [4]; p.9
[30] Swaak-Goldman, Olivia: *Recent Developments in International Criminal Law*: trying to stay afloat between Scylla and Charybdis in International and Comparative Law Quarterly; Vol.54; p.691-703; 2005; p.1;

with the tribunals prevail over other international obligations.[31] The staff of such tribunals is furthermore said to be much more skilled in dealing with such situations then in comparison to national judges and prosecutors.[32] Furthermore, international criminal trials draw more public attention then national trials do, which sends a positive signal to the victims in the region.
Another positive aspect of these tribunals is the fact that one is assured that international standards are met concerning e.g. the rights of the accused, procedural standards and the length of a trial.

Disadvantages on the other hand include the enormous expense attached to such tribunal. Both tribunals in Arusha and The Hague are considered to consume about 10 per cent of the UN's total budget per year.[33] Additionally, the tribunals act dispatched from the region concerned, which both leads to more expenses and secondly hinders the work of the tribunal being easily monitored by the people concerned.

One of the main achievements and advantages of international tribunals, however, is the creation of a complete conflict record. Collected in hundreds of hearing sessions in front of the court as well as in investigations by the court in the field, they provide a complete illustration of the conflict and anticipate the denial for certain happenings.
If the ICC can create this record of situations concerned is still uncertain. A point speaking against the ICC on this regards is the fact that the ICC is intentionally created to deal with the 'big fish' of a conflict and will therefore not crate a record from the bottom up, such as the ad hoc tribunals did by investigating first cases against minor offenders and then, when dealing with the offenders at the top of the command chain having already created a record of evidences against them.

[31] ibid.
[32] Zolo, Danilo: *Peace through criminal law?* in Journal of International Criminal Justice; Vol.2; p.727-734; 2004; p.2
[33] Mose, Erik: *Main Achievements of the ICTR* in Journal of International Criminal Justice; Vol.3; p.920-943; 2005; p.11 furthermore http://www.un.org/icty/glance-e/index.htm

6. The Nuremberg Trials

"In untroubled times, progress toward an effective rule of law in the international community is slow indeed ... Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behaviour during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power."

- American Chief Prosecutor Robert Jackson in June 1945

6.1 General Introduction and Remarks

The Nuremberg trials were held from 1945 to 1949 in the Palace of Justice in Nuremberg. They dealt with the political, ideological and economic leadership of the Nazi regime. The best known of these trials was the Trial of the Major War Criminals before the International Military Tribunal (IMT), consisting of representatives of the victory powers, which tried 22 of the most important captured Nazi-leaders. The trials lasted from the 14th Nov. 1945 till 1st of October 1946.

The second trials of lesser importance against war criminals were held at the same location. They dealt with minor offenders. Best known in this regards is the '*Doctor's Trial*' [1], against the leading medical staff of the regime, who faced charges of crimes against humanity and war crimes.

The trials brought up the most serious offences to a broader public through the medium of newsreel footage. Remarkably at that time, however, the response of the Allied for the horrors committed was not brute revenge, but a fair and public trial. Indeed, the scale of the atrocities, the desire to find a way to prevent such carnage in the future and the spirit of international cooperation that followed the Allied victory led to an approach of post-war

[1] United States of America v. Karl Brandt, et al. (Case No.1)

justice based, at least in theory, on the rule of law rather then the rule of strength.[2] The new concept introduced by the IMT is truly remarkable in the history of International Criminal Law. The Tribunal, made up of representatives from each of the four allied powers, introduced a new concept of individual criminal accountability for crimes committed in wartimes before an international body. Not the German nation as a whole, as happened in the treaty of Versailles after WWI, but individuals were found guilty for committing war crimes.[3]

Nineteen of them were convicted of war crimes, crimes against humanity, or crimes against peace. Twelve were sentenced to death.[4]

As Geoffrey Robertson states, the Nuremberg Charta, trial and judgment, were attributable to a curious mixture of American idealism and Stalinist opportunism, overcoming British insistence on summery executions for Nazi leaders.[5]

6.2 The Establishment of the Tribunal

As early as 1941, Winston Churchill declared the punishment of war crimes as a main principle for the time after the war and in 1943. When the victory of the Allied powers just became a matter of time, the set up of a commission to gather evidence was agreed. However, the idea to actually try those responsible for war crimes was still in far reach. At the end of the war in Europe, Churchill warned, '*all sorts of complications ensue as soon as you admit a fair trial*'. Eden, his foreign secretary, observed that '*the guilt of such individuals as Himmler is so black, that they fall outside and go beyond the scope of any judicial process'*.[6]

Lord Chancellor Simon even decided that one should revive the medieval concept of outlawry for German officials, a status which is imposed by a grand

[2] Cooper, Belinda: *War Crimes*- The Legacy of Nuremberg; New York; 1999; p.11
[3] Braithwaite, John: *Restorative Justice*: Assessing Optimistic and Pessimistic Accounts in Crime and Justice; Vol.25; p.1-127; 1999; p. 7
[4] cf. Appendix
[5] Robertson, Geoffrey: *Crimes Against Humanity* – The Struggle for Global Justice; London; 2006; p.244
[6] British Foreign Office Paper (18 July1942)

jury on suspects held guilty for committing serious crimes who did not show up for trial: They could be killed by everyone, who captured them.[7]

The British already knew about the problems that would occur in front of a bar. The absence of any precedent trial and the lack of a solid legal basis would put the trial in jeopardy of breaching the *nulla poena sine lege* principle on retroactivity. In particular this point was later raised by many critics of the trial.

The US Secretary of State, Cordell Hull, declared, '*if I had my way I would take Hitler and Mussolini and Tojo and their accomplices and bring them before a drumhead court martial, and at sunrise the following morning there would occur an historic incident'*.[8]

That Hull did not have his way was mainly due to the Secretary of War, Henry Stimson. In a letter to President Roosevelt, he held that '*the very punishment of these men in a dignified manner consistent with the advance of civilization will have greater effect on posterity…I am disposed to believe that, at least to the chief Nazi officials, we should participate in an international tribunal constituted to try them'*. The main reason behind this proposal was that '*a condemnation after such a proceeding will meet the judgment of history so that Germans will not be able to claim, as they have been claiming with regard to the Versailles Treaty, that admission of war guilt was exacted under duress*'.

Roosevelt initially wavered this proposal, but his successor Harry S. Truman picked up on it and appointed Supreme Court Justice Robert Jackson as his special envoy for this issue.

Jackson held in one of his first reports sent to President Truman: *'To free them without a trial would mock the dead and make cynics of the living....but undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not sit easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the*

[7] supra note [5];
[8] ibid.

accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.[9]

Furthermore he held that '*the groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world. We must not forget that when the Nazi plans were boldly proclaimed they were so extravagant that the world refused to take them seriously. Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence'.*[10]

Jackson saw himself confronted with the unique possibility of establishing a war crimes tribunal, to hold those responsible for war crimes, who had so often been hiding behind the paradigm of state sovereignty and state immunity.

As a lawyer, Jackson understood the problems he was facing from its very beginning. He knew about the importance of collecting evidence to build up his accusations as Chief-Prosecutor. 'What evidence? ` one might ask. '*In a city where, only twenty years before, the law itself, namely the Nuremberg Decrees, had forced Jews into ghettos, placed them into forced labour, expelled them from their profession expropriated their property, and forbidden them all cultural life, press, theatre and schools. Just open your eyes and look around you*!' could be the obvious response.[11]

Jackson, however, was determined to compile a record, which would not leave the slightest doubt about what has happened for any future generation. He was convinced, that '*we must establish incredible events by incredible evidence*'.

The Torah itself tells us: There Grew up a generation that knew not Joseph! [12]

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[9] Taylor, Telford: *The Nuremberg Trials* in Columbia Law Review; Vol.55; p.488-529; 1955; p.497
[10] ibid.
[11] Breyer, Stepen: *A Call for Reasoned Justice in War Crimes* – The Legacy of Nuremberg; 1999; New York; p.40
[12] Exodus/ 2.Mose; 8;

The four prosecutors, during the subsequent months, brought up 100,000 captured German documents, examined hundreds of films and took over 25,000 pictures of what they found in Europe after the liberation, to proof, beyond reasonable doubt, the atrocities committed under the Nazi regime.
Jackson, after carrying out the investigations for almost a year held, '*with such authenticity and in such a detail that there can be no responsible denial of these crimes in future and no tradition of martyrdom of the Nazi leaders can arise among informed people*'.[13]
Furthermore, Jackson was well aware of the regime change Nuremberg would imply in the field of international criminal justice. He was convinced that the court would serve as a predecessor for any future courts and tribunals, following its tradition. 'The power of the beaten path', as Benjamin Cordoza calls it, was a paradigm Jackson was well aware of.

Justice Jackson hoped to create a precedent that, he said, would be 'explicit and unambiguous' what previously had been 'implicit' in the law, that '*to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds…is an international crime…for the commission [of which]…individuals are responsible' and can be sentenced*.[14]

In his opening speech before the court, Jackson held: '*The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.*'[15]
This statement Jackson gave at the very first court session represents, in my view, his believe in a human aspiration to do justice. When he was later asked

[13] *Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals* in American Journal of International Law; 1945; Vol.39; p.178
[14] ibid p.41
[15] Justice Robert Jackson; Nov.21, 1945; downloaded at http://www.roberthjackson.org/Man/theman2-7-8-1/ on 21.November 2008

about his work at Nuremberg, Jackson, having been a member of the Supreme Court in the United States besides other remarkable positions he held during his standing long career as both academic and judge, always answered that this work was his greatest achievement.

6.3 The Trial

Considering the bleak alternative for the actual trial – summery executions of Nazi officials – that would have left their crimes committed being revealed by posthumous propaganda rather than in an open forum, provided a rather grim perspective. Even though some scholars argue that Nuremberg in fact was a show trial, still it served a minimum level of fairness.[16]

The odds, as Robertson states, were: All prosecutors and judges were nationals of the Allied powers, whereby all defendants and, more regrettably, their attorneys were Germans.[17]

The German defence lawyers quickly found themselves confronted with an alien Anglo-American legal regime, which they were not trained for. They were initially given limited access to recourses and facilities to prepare their cases adequately. Prosecution evidence was held back before the actual trial began. Those and more circumstances raised high criticism of legal scholars, such as Hans Kelsen, after the trials had ended. The fundamental concept of legality and equality of weapons were indeed infringed, but given the short period of time to prepare for the trials, the level of fairness is truly remarkable, at least in my view, but I will come back on those issues in a later point.

6.3.1 Tu quoque

The relevance of the *tu quoque* principle ('I did it, but you did it too', or 'You did it first') was plainly dismissed in the trials. The criticism raised by the accused was that war crimes committed by the Allied during the war were not

[16] supra note [5]; p. 246

[17] The British Bar Association even refused to allow an English barrister to defend the Krupp family, while several German lawyers were later accused of defending the Nazis too vigorously.

at stake during the trials. The judges dismissed all those claims rapidly and predetermined so that it was obvious that the judges were bent on silencing any allegations about Allied war crimes.[18]

Geoffrey Robertson states that the *tu quoque* evidence is highly relevant to any assessment of whether a particular mode of warfare is justified by military necessity, or if sufficiently beyond the common pale to count as war crime. So far as the counts alleging the conspiracy to wage aggressive war and the commission of crimes against peace were concerned, the *tu quoque* argument was most obvious: the Germans were charged *inter alia* with violating the rearmament provisions of the Versailles Treaty which the French had ignored and the British had joined the Germans in circumventing.[19]

Jackson was well aware of this problem. He confessed in a letter sent to his president that in his opinion, the Allied had done the same things the Germans were accused of. Indeed, the French were violating the Geneva Convention in their treatment of their prisoners of war, so did the Russians. Furthermore, he stated '*we are prosecuting the Germans for plunder and our allies are practising it…we say aggressive war is a crime and one of our allies asserts sovereignty over the Baltic States based on no title except conquest*.[20]

The only time, the *tu quoque* argument was not dismissed by the court was during the Dönitz case. He held that while having been admiral of the German naval fleet, he used the same practice in the submarine war as did his counterpart on the Allied site, Admiral Nimitz, who was not subject to any trial, as well. Dönitz was therefore acquitted of this charge.[21]

6.4 Nuremberg as a Milestone

Despite all those failings, Nuremberg can be seen as a milestone in the development of International Criminal Law. Its charter for the first time in

[18] supra note [5]; p.247
[19] ibid.
[20] Conot, Robert: *Justice at Nuremberg*; 1983; New York; p.68
[21] Wechsler, Herbert: *The Issues of the Nuremberg Trial* in Political Science Quarterly; Vol.62; p.11-26; 1947; p.26

history defined crimes against humanity and subsequently led to the establishment of the 1949 Geneva Conventions and other legal instruments. Its rules of procedure and evidence built a legal framework all Allied powers could agree on.

The emotional highlight of the trials, the afternoon when the accused were confronted with their wrongdoings by showing them the horrors of Auschwitz and Bergen-Belsen on a screen, can be held as a turning point during the proceedings. Some of them sweated, some sobbed or put their heads in their hands. Their initial defence strategy failed at that point. Even to them their guilt was being presented beyond reasonable doubt. Above all that, the accused were at this point flattered by the fairness of the trial and rose to the bait of making their excuses to posterity. Justice was seen to be fulfilled: the accused were accorded the right to defence counsel, to a trial translated into their own language[22], to a detailed indictment and a record and copies of all documents related on by the prosecution.

6.5 The Judgment

In many ways the international criminal order has never been the same after Nuremberg. The charter itself, signed on August 8, 1945 in London, covered for the first time history a definition of crimes against humanity.[23] The articles covered atrocities committed in wartime between states as well as within a state. Art.7 and expressively waivers the immunity of heads of state, which was on its own a breakthrough at this time and should not have been repeated until 1998, when the former President of Chile Augusto Pinochet was arrested in London for indictments issued by a brave Spanish judge.

Jackson blew away the shield of state sovereignty, which helped individual leaders to escape responsibility by arguing that they were merely agents of an immune state:

'*These defendants were men of a station and rank, which does not soil its*

[22] For the first time in history the instrument of simultaneous interpretation was applied at the Nuremberg trials.

[23] *Charter of the International Military Tribunal* of August 8, 1945; Art.6(c)

own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders…. The idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes are always committed only by persons…. [i]t is quite intolerable to let such a legalism become the basis of personal immunity…. Modern civilisation puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.[24]

The tribunal rejected the argument that international law is only subject to sovereign states and can therefore not deal with individuals or, on the other hand, carry out punishments against individuals obtaining orders from a sovereign state. Art.8 of the Charter provides: The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.

The proceedings ended after 216 days of actual trial on October 1, 1946. Twelve of the defendants were sentenced to death and seven to imprisonment for terms from ten years to life sentence. Three of the accused were acquitted.
The Nazi leaders tried at Nuremberg were not minor soldiers further down in the command chain. Furthermore they were the very ones ordering and planning the murder of thousands of humans under the lead of a wrong believe.

6.6 Criticism about the Nuremberg Trial

"*It would become clear in the century-run what its meaning would be*"
Justice Robert Jackson

Shortly after the trials at Nuremberg were concluded, critics raised concerning

[24] Opening speech of the Chief Prosecutors 1946; dowload: http://www.geoffreyrobertson.com/milosevichhussein.htm on 21.11.2008

several issues about the trial and its procedure. Most notably in this regards is Hans Kelsen's Article '*Will the Judgment in the Nuremberg Trial constitute a Precedent in International Law?*'.

The German reaction towards Nuremberg was rather ambivalent or even negative, as described by several authors. First and foremost, it was held that the trials were simply imposed against Germany by the Allied Powers. The fact alone of justice being dispensed by judges and prosecutors only from these four countries that occupied German soil was widely seen as a '*dictate*'.[25]

Especially emphasised in this regards was the lack of impartiality of the judges on the bench. No impartial country was asked to send a judge to Nuremberg, nor were German judges. Therefore it was not surprising that the Nuremberg trials were often referred to as imposing 'Victors' Justice'.

A short time after Nuremberg, in the Tokyo Trials, the victory powers refrained from repeating some of those mistakes done by calling for international judges on the bench. However, those judges called on duty all originated from countries that had suffered from Japanese military activity.[26]

The legal basis for the judgments at Nuremberg was also subject to an intense judicial discussion. Art.6 of the IMT provides the basis for crimes against peace, subsequently used by the court to subsume the German genocide committed, and the crime of war of aggression. The defence at Nuremberg argued that the legal basis for such *corpus delicti* was simply missing, since no statesman has ever before been convinced of having launched a war. So the only way to establish such a norm was through custom. The usual requirements to establish a customary rule in public international law, namely state practice and *opinio iuris*, were missing. Those two requirements were both stated in the statute of the Permanent Court of International Justice (PCIJ) and the in the latter statute of the International

[25] Tomuschat, Christian: *The Legacy of Nuremberg* in Journal of International Criminal Justice; p.830-844; Vol.4; 2006; p.3

[26] Minear, R.H.: *Victors' Justice* – The Tokyo War Crimes Trial; 1971; Princeton; p.75

Court of Justice.[27]

The Austrian scholar Hans Kelsen especially emphasized this point. Kelsen raised the question, whether Nuremberg would establish a precedent in international law. He argued that '*a precedent is a judicial decision of similar cases. In order to be a precedent, the decision of a tribunal must conform with certain formal and material conditions which the judgment of Nuremberg do not fulfil'*.[28]

In his view, the judicial decision must establish a new rule of law. Furthermore, this rule of law must be created by the judicial decision, not by the act of legislative organ, or by custom, or by an international treaty.[29]

The IMT, especially the US Chief Prosecutor Justice Jackson, were well aware of this problem. It was held that the Briand-Kellogg Pact of 1928, which counted Germany as on of the parties to the treaty, constitutes the legal basis for the tribunal's jurisdiction. According to the pact, wars are conducted not only by states as abstract entities, but human beings; this also had to entail consequences for individuals responsible for preparing war and making the relevant decisions for carrying it out.[30]

This, however, was far from being convincing. To declare an inter-state war as being unlawful is one thing, but shifting the responsibility to an individual criminal level is another. However, the prevailing dualist approach in public international law was watered down by this argument. The dualist approach acknowledges two separate entities in law, domestic and international law. Both, the subjects and application of those two entities are divided from one another. Public international law was seen to be the law between sovereign states, whereby domestic law was seen to be the legislative regime within one state. There was no interference. A monist approach, on the other hand, acknowledges that the legal system of every State forms part of a single system of international law and state's own laws, with international law automatically incorporated into the state's internal legal system and taking

[27] Art.38 Statute of the ICJ
[28] Kelsen, Hans: *Will the Judgment in the Nuremberg Trial constitute a Precedent* in International Law in International Law Quarterly; p.153-171; Vol.1; 1971; p.1
[29] ibid.
[30] supra note [23]; p.4

precedence over purely internal laws.[31] Today, scholars agree, that the monist approach appears to be the more convincing concept to deal with international legal issues.

But the criticism did not stop there. It was often argued by the defense at Nuremberg that alleged crimes by the Allied powers during the war, fell not under the jurisdiction of the court. In fact, the court has been established solely for the trial and punishment of the major war criminals of the European Axis countries. Allegation against the Allied powers for air attacks against the civilian population in Dresden or Hamburg during their campaign could therefore not be raised.

Another point raised was the inconsistency of the Allied powers in dealing with the German population after the war. Deportation was recognized as both a war crime and a crime against humanity under the IMT statute. However, the deportations of German civilians from territories in the Czech Republic, Poland or Hungary were never claimed as falling under these provisions. [32] Although it was emphasised that '*any transfers take place should be effected in an orderly and humane manner*', it was clear from its very beginning that wild persecutions would follow and that this was clearly a case of ethnic cleansing.[33]

6.6.1 The case of *ex post facto* legislation

One of the main legal points held against the legitimacy of the IMT was the case of *ex post facto* jurisdiction. The alleged retrospective application of rules, on which the prosecution is based, has been discussed within scholars for a long period of time in national and international forums.
The categories of crimes, namely crimes against peace, crimes against humanity and war crimes, did, furthermore, not constitute a homogenous block. Some were held to be directly linked to the Briand-Kellogg pact, some

[31] One of the leading scholars arguing for a Monist approach in Public International Law at this time was Hans Kelsen!
[32] supra note [23]; p.5;
[33] cf. Gutachten v. Felix Ermacora; 1991

were not. It was therefore often referred to them as establishing an *ex post facto* regime, by retrospectively applying criminal law. However, in my opinion, this argument does not prevail. The 1928 Briand-Kellogg Pact can clearly be held as a predecessor of the IMT-statute in some regards. The principles established in this pact clearly break the ground for the requirements of the PCIJ in order to establish a rule of customary international law.

The violation of the proposition of *nullum crimen sine lege* can be denounced in this manner as well. The criticism of crimes against humanity followed the same pattern. As Tomuschat argues, the core values of the various national legal regimes of 'all civilized nations', galvanize in the core values of crimes against humanity and war crimes and can therefore establish a rule of custom as well, since both, the *opinio iuris* and state practice, were given.[34]

6.6.2 *Nullum crimen sine lege*

Historically the *nullum crimen sine lege* principle arose during the liberal movement in Europe. In its core function, it was supposed to protect the civilian population from random dispossession by the ruler by insisting on the necessity of parliamentary approval. After the Napoleonic wars this provision was extended to liberty rights as well.

The main aim of the *nullum crimen* principle is to establish a system of legal confidence and predictability. Nobody should be prosecuted on account of a conduct, a punishable character of which he was not aware of and could not be expected to have been aware of, when he practised that conduct. For that reason, especially in criminal law, a retrospective application of a certain conduct was permitted.[35]

In the case of crimes against humanity, as it was argued by the defence bar, the *nullum crimen* principle did not apply. As held by some scholars, there cannot be the slightest doubt that all the offences subsumed under crimes against humanity are not only objectionable from a moral perspective but clearly deserve to be punished and must be punished for the maintenance of

[34] supra note [23];. p.6
[35] cf. Anselm Feuerbach, Franz von Liszt and "the Martens Clause".

the peaceful coexistence of mankind as a whole.[36]

The scope *ratione materiae* of the *nullum crimen* principle must therefore be reduced accordingly to conducts the international community unanimously condemns.

Furthermore supporting this argument is the fact that in 1935 the Nazis themselves removed the *nullum crimen* principle from the German Criminal Code. Consequently it was argued by Justice Jackson, and more recently by Professor Cherif Bassiouni that the Nazi leadership forfeited their right to rely on this principle of law as a defence[37].

6.7 The Impact on Germany

As stated above, the reaction of the German population towards the trials was predominantly negative. Most of the Germans got informed about the trials by wallpapers or the like, but were well aware of their happening. The actual information provided to the population about the proceedings and findings of the trial on the other hand was rather bad. No detailed information has been forwarded. So the Germans were confronted with the facts and outcomes of the proceedings, at a very late stage. At this point, there was no sign of remorse within the German population as such. The argument that British leaders should be held accountable as well for their bombing campaigns over Hamburg or other German cities was still strong and prevailing within the civil society.[38] Whatever crimes the victors had committed were simply justified, rationalized or conveniently deemed irrelevant to the present case just for the mere fact that they were the victors. It was clear from the very beginning – losers could be punished, winners cannot.

However, this negative attitude changed throughout history. In the re-united Germany, the reaction towards the tribunals was relatively positive, due to several factors I will refer later on.

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[36] Ibid.

[37] Bassiouni, Cherif: *The Nuremberg Legacy* – Historical Assessment Fifty Years Later in War Crimes – The Legacy of Nuremberg (Ed. Cooper, B.) 1999; New York; p. 298

[38] Friedrich, Jörg: *Nuremberg and the Germans in War Crimes* – The Legacy of Nuremberg (Ed. Cooper, B.); 1999; New York;

When describing Germany's public opinion towards anything during 1945 and the 1990's, one has to bear in mind, that due to the separation of the country in the years to come after 1945, developments in eastern and western Germany contradicted each other in many ways.
Critique raised by West Germany was merely focusing on legal issues (especially following the legal critic of Hans Kelsen and his emerging concept of Positivism), leaving political issues almost entirely aside, even though the motivation behind this critique was often politics. [39] On the other hand, East Germanys affirmation with the trials did not reveal their true intend either.

For this reason I intend to split my analyses on the impact of the trial towards society in two parts – East and West German findings. Furthermore I want to take other transitional justice measures implied into consideration, as set out in the previous chapters.

Generally speaking, until 1951, the legal justice measures imposed against alleged perpetrators in the post-war period were predominantly carried out by the allied powers. The national judicial system was incapable of dealing with such issues at this early stage after the war. This applied to East and West Germany alike. However, since all of the four victory powers had jurisdiction over persons in their occupied zone, the methods applied varied. Each of the powers exercised their legal power in pursuing different aims. Nevertheless, some efforts regarding the implementation of transitional justice methods were even made in accordance.

Three of those measures shall be mentioned here:

- *The Military Tribunals at Nuremberg*;
- *National War Crimes Tribunals under Control Council Law No.10;*[40]
- *Trials carried out through a variety of domestic courts, initially operating under allied supervision, later independently;*

[39] Burchard, Christoph: *The Nuremberg Trial and its Impact on Germany* in Journal of International Criminal Justice; p.800-829; Vol.4; 2006; p.2
[40] I will refer to this measure in a later chapter in more detail

Apart from holding perpetrators accountable, the occupying powers also sought to purge Germany of its Nazi leaders and its legacy. Cornerstone of this initiative of de-Nazification was to prepare the ground for a new government, through a variety of measures, both judicial and non-judicial. Crucial in this context was the policy to not just penalize individuals for their crimes committed, but also to denounce certain organisations, such as the SS, SA, GESTAPO and the Nazi party as a whole, as being criminal. Those organisations, convicted by the Nuremberg Tribunals as being criminal, had former members amounting to several millions. Their members could be held accountable without any further indictments, but just for their membership in the particular organisation. Convicted members were subjects to a variety of punishments, ranging from terms of imprisonment, confiscation of property, dismissal from public service, loss of businesses or fines. The allied powers aimed to 'educate' the German people as to the crimes that had been committed in their name, through institutions in which many of them had participated.[41]

It was indeed highly questionable, if those measures imposed had any solid legal basis.[42] The Hague Rules of Land Warfare of 1907 do not provide any legal basis for such measures to undertake. The allied powers, being well aware of this issue, circumvented this problem by simply declaring themselves as the new German government, since the predecessing government had been overthrown, hanged or sentenced to long terms imprisonment.

Apart, however, from the international trials at Nuremberg, each victory power held separate trials either under Council Control Law No.10 or under their own national jurisdiction.[43]

Art. III of the Control Council Law No. 10 held in paragraph 1:

Each occupying authority, within its Zone of Occupation,

(a) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the

[41] Cohan, David: *Transitional Justice in Divided Germany after 1945 in Retribution and Repatriation in the Transition to Democracy* (Ed. Elster, Jon); Cambridge; 2006; p.2

[42] supra note [35]; p.90

[43] downloaded at http://avalon.law.yale.edu/imt/imt10.asp on 25.11.2008

property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.

Furthermore, paragraph 2 of the same Art. provided:

(a) The tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the Jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

Beyond Nuremberg, the American authorities began in 1945 to prepare trials against about 2.200 alleged German perpetrators. Of those1814 were convicted, 450 received death sentences. British tribunals sentenced 1085 persons (240 death sentences) and the French tried 2107 persons (104 death sentences). The number of people tried in Soviet courtrooms was, however, even higher. About 45.000 persons were held accountable for committing crimes as defined in the statute of the IMT.[44]

6.7.1 Transitional Justice Approaches in Western Germany

As already described, a wide variety of measures to deal with post-war Germany were lined out by the victory powers in the years even before 1945. They covered actions such as summery executions[45] or the reduction of the German state into a rudimentary agricultural state[46], which would have imposed collective punishment and guild to the German people. However, a trial, combined with other measures, which would today be subsumed under the regime of transitional justice, was established.

As a consequence following the first trials at Nuremberg against the major war criminals, other trials took place to deal with other offenders who were either not at the top-end of the military command chain or who's support for the

[44] supra note [38]; p.3; numbers regarding the Soviet trials are subject to great doubt! No official record exists.

[45] one of Churchill's favourite ideas

[46] see Morgehthau Plan of the US administration

regime derived from a different source. As representatives for the German industry, for example, the cases against the leading group of German industrials, such as Krupp, Flick et.al, was brought before the court in 1946 on initiative of the American administration. Below this very high level of judicial effort, the U.S conducted 489 trials against lower level officials in subsequent cases. Most of the American-lead cases were held in Dachau.[47]

A major part of American judicial resource was dedicated to hunt down and prosecute those, who committed crimes against American nationals during the war. This was similar in all national judicial approaches of the four allied powers. Furthermore, the Americans conducted several major trials against a large group of defendants, who were involved in running the concentration camps in Dachau, Buchenwald and Mauthausen. These cases followed the concept of collective responsibility for participation in a system of organized criminality to connect every member of the camp from the lowliest guard and functionary to the camp commander to all of the crimes committed in the camps.[48] By doing so, the Americans hoped to erase any doubt in the minds of ordinary Germans about the criminal and destructive element in Hitler's regime. The same pattern was applied by the British administration as well. The public interest in all those cases soon got lost. What followed accordingly was a significant cut in budget for those trials.
The French and Soviet approach, however, was somehow different. Their approach on post-war trials was somehow determined by the mere fact of occupation of their soil by German troops. The humiliating defeat and the terror of the German occupation encouraged their governments to put more emphasise on prosecuting those responsible.

6.7.2 Legal Critique in West Germany

In the years following 1998, most German commentators refused from accepting the principles established at Nuremberg. The point of 'Victor's

[47] The broad variety of judicial trials, carried out by different institutions (civil and military) often lead to misunderstandings in those regards.
[48] supra note [38]; p.4

Justice' was highlighted as well as the previously discussed problem of *nullum crimen.*

Few of the West German scholars accepted the IMT as being international. As Hans-Heinrich Jeschek put it, the tribunal was not more then an inter-allied court or even an occupational court.[49]

At a conference of West German international law professors it was held: '*The general principles of belligerent occupation, as they are enshrined in [t]he Hague Convention on the Laws and Customs of War on Land, apply to…Germany and cannot be derogated from the distinct legal will of individual states*'[50]. The IMT's jurisdiction over crimes against humanity and aggression was therefore held to be contrary to The Hague Conventions and hence being contrary to international law as such.'

Some commentators furthermore criticized the court for not providing for the necessity of equality of arms between the prosecution service and the defence. They argued that access to crucial documents were not handed over to the defence and could not be contested before the case was actually presented to the court.

Two leading defence counsels, however, concluded independently years after the actual trials that '*the proceedings, the treatment of the defendants and the right granted to the defence were very fair and it would be untrue to state that the defence was restricted*'.[51]

More seriously was the critique that the IMT did not consider the crimes committed by the Nazi regime against the German people. It was held that the jurisdiction focused exclusively of crimes committed against foreigners. Indeed, the interpretation of crimes against humanity by the court was rather narrow: A crime against humanity would only be punishable under the jurisdiction of the court if it constituted either a war crime, or if it was committed in accordance with the crime of aggression.[52]

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[49] supra note [37]; p.803;
[50] ibid.
[51] Kaufmann, K: *The Nuremberg Trial in Retrospect* in Whittier Law Review; p.537-552; 1988; p.549; Kaufmann was the leading defence counsel for Ernst Kaltenbrunner, who was sentenced to death by hanging from the IMT
[52] supra note [37]; p.805

The crimes committed against German dissidents and the euthanasia of mentally and physically ill people was barely mentioned in the judgments. Crimes against the Jewish population were only considered as they were linked to war crimes and only in the years after 1939.

6.7.3 *auctoritas non veritas facit legem*

One of the strongest opponents, as already noted, was the Austrian scholar Hans Kelsen. Kelsen, being himself a victim of the Nazi regime, strongly argued against the Hobbesian approach of unilateral implementation of law. '*What really impairs the authority of the judgement is that the principle of individual criminal responsibility for the violation of rules of international law prohibiting war has not been established as a general principle of law, but as a rule applicable only to vanquished states by the victors'*.[53]

Other West German scholars were far more pejorative. Georg Dahm, Professor of Law in West Germany called the laws applied at the IMT '*special law for the vanquished*'.[54]

Walter Schätzel, Professor for International Law in Bonn, held that '*defendants will be called war criminals, without this connoting a moral allegation. Everybody knows that acts of utmost patriotism and dedication may be considered war crimes from the other side'*.[55]

6.7.4 Nuremberg as a Political Question

During the period of actual trials held at Nuremberg, there was rather small or even no German critique. Critical commands were only published in the years to come. At the beginning of the 1950's, as the de-Nazification process put a firm grip on Germany, the Nuremberg principles were increasingly rejected.

The first phase of critique, as noted above, was predominantly theoretical in its nature. Scholars such as Kelsen or Dahm challenged the legality of the

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[53] supra note [26]; p.171;

[54] Dahm, Georg; *Völkerrecht;* Vol.3; Stuttgart; 1961; p.292; Dahm, however, was himself being associated with the Nazi regime. He was prohibited to lecture in post-war Germany and therefore went to Pakistan in 1951.

[55] supra note [37]; p.806

tribunal. The first critical attempts, however, were not addressed in an open forum, but more in informal arenas. Reasons for this hesitation may have been:

First, question with regards to the legality of the IMT were predominantly of a theoretical nature. Secondly, the more urgent issue among German scholars was to clarify the legal status of Germany as such, since there has never been a formal surrender of the German 'Wehrmacht'. Thirdly, in the early years after the war, it was considered as being simply not appropriate to criticise the Allied trials.[56]

The period following the 1950 saw a steady increase of critique. Again, three explanations can be given for this:

Firstly, Control Council Law No. 10, which gave way to the subsequent cases following the IMT by criminalizing the same offences as the IMT statute did, was becoming of more importance. Control Council Law No.10 did not include a right to appeal (neither did the IMT statute!). The problem of the implementation of this law was that the very same issues, namely *nullum crimen* and retrospectivity that were held against the legality of the IMT were brought up against the trials under Control Council Law No.10.

Secondly, the political climate in Germany changed rapidly. The German people assumed themselves as ready to draw a line under history and to start anew. However, the still ongoing process of de-Nazification was seen as an artificial barrier against this.

In 1965, a German criminal lawyer held:

'For years, most German citizens made all possible efforts to forget what happened in twelve ill-fated years. They made their gaps in memory systematic, and developed the handling of these generous gaps to perfection. That foreign countries neither could nor would forget as easily had to be taken note of from time to time, yet did little to disturb the inner-German silence. Already the term reconciliation with the past was becoming frowned on. Of collective responsibility, a responsibility of the German people (not collective guilt), nobody wanted to know'.[57]

Thirdly, the change in international political climate demanded a re-

[56] supra note [37]; p.811;

[57] Baumann, J.: *Der Aufstand des schlechten Gewissens*; Tübingen; 1965; p.127

emergence of a strong West Germany. With the beginning of the Cold War, a strong democratic state was needed against the emergence of communism in east and south-central Europe. In the years following 1951, a new course in U.S politics towards West Germany was introduced. A large number of amnesties were granted or sentences were reduced in order to ensure that West Germany would stand strong as an Ally against communism. [58] As Friedrich held: '*The defence of freedom no longer required Germany's legal consciousness and moral remorse, but its old vigour, fighting experience, innovative science, artful weapons design and dynamic industry*'.[59]

6.7.5 Shaping Public Opinion

Empirical evidence regarding the Nuremberg Trials was and still is rare and hard to find. However, some public polls, carried out by the American forces, were published in the years following the trials.

During the trials, some 87% of the Germans knew that the trials were taking place; 80% of them considered the trials as being fair and a majority even assumed the defendants guilty. Additionally, 70% of the population thought that there were still other Germans at large, which should be held accountable as well. Only 6% expressed their negative attitude towards the trials after the final judgement and just 9% deemed the verdicts as too harsh. However, those polls changed rapidly in the years to come.

In the 1950's already 30% of the German population held the trials as having been unfair and 40% deemed the verdicts as too harsh. 59% of the population disapproved, how the Allied dealt with the defendants and 10% said that they approve the trials.[60]

Reports on post-war Germany enhance the view that the German population never appreciated the work of the IMT and its subsequent trials. Large scales of the Western German Public were, however, never disaffected by the trials either. In Wuppertal, for example, schoolgirls dressed in black on the morning

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[58] supra note [37]; p.812
[59] supra note [36]; p.97
[60] Wilke, J. et el.: *Holocaust und NS-Prozesse*; Köln; 1995; p.127ff.

of the execution of those sentenced to death by the IMT.[61]
In the legislative time following the Nuremberg trials the German government passed the German *Grundgesetz* in 1949, which expressively in Art.103 (2) prohibits the application of ex post facto legislation. This strong positivist approach can clearly be tracked down to the developments following the IMT judgments.

6.7.6 De-Nazification

Simultaneously to the ongoing trials in Nuremberg and elsewhere in Germany, a second measure was persecuted by the Allied powers to re-establish Germany after the Nazi Regime. De-Nazification, in general, aimed at purging Germany of Nazism and to rid the society, culture, press, economy, industry and politics of all remaining Nazi officials to ensure the extinction of any national-socialist ideological restraints. Surly, those approaches even included punitive aims, though only as one element in a complex set of policies and practices.
The de-Nazification process, as the judicial persecution, was operated in different ways in all of the four occupied zones. Furthermore, during the initial four years after the war, policies by all Allied powers were re-shaped and adapted.
Among the occupational powers, there was little unanimity apart from the mere fact that governmental and party leaders of the former regime should be removed and rendered harmless.
The initial phase of the de-Nazification policy was intimately linked to security policy aspects. The establishment of full Allied control was crucial in the years following 1945.[62] The focus clearly was on the disarmament of underground resistance to the Allied. For this reason, a couple of legislative measures were introduced by the Allied to deal with these issues. On the American side, for example, a military handbook was prepared, which encompassed the automatic arrest of individuals, who were presumed to be of a certain security risk. Mandatory initial arrest also applied to all former members of the

[61] supra note [36]; p.87
[62] supra note [39]; p.6

GESTAPO, SS, SD and SA. All in all, some 250.000 individuals fell under this regime. Automatic arrest warrants without a trial were applied by all occupational powers alike. By January 1947 some 240.000 Germans were either still in Allied detention or had already been released. [63]

By the end of 1948, however, only a couple of hundreds still remained interned in the American zone. The same applied to the British and French zones. All Western powers were very keen on quickly emptying their camps from German prisoners. In the Soviet occupational zone, however, the situation remained different. A large number of those interned remained in custody or were send to the Soviet Union for slave labour. Also interestingly, compared to less then 1% of the detained persons, who died in western custody, about one third of prisoners in Soviet detention facilities died either in detention or during their slave work under Soviet supervision. For the Soviet Union internment and retribution seemed to have gone hand in hand, not so in the West.

In the Western zones, new policies occurred in the years following 1947. The large number of detainees subverted the economic plan of the occupational powers to rebuild a German society. The workforce needed to fulfil this plan simply clashed with the initial aim to prosecute and punish a large number of German citizens. Secondly, it became clear that the persons in charge for the crimes committed, the ‘big fish’, were not caught by this measure.

Another measure introduced in 1946, apart from automatic arrest warrants to neutralise the former regime, was to declare the membership in former organizations, such as the SS and SA, as illegal *per se*. Six of the main former Nazi organisations had been declared illegal before the IMT, three of those were convinced being criminal. The initial aim behind this policy was beyond being symbolic. Especially the American forces saw themselves confronted with a vast number of members of organizations, such as the GESTAPO or SS, which were responsible for a wide range of the atrocities committed during and before the war. To tackle this issue and to amplify the ‘symbolic justice’ of the IMT, the American forces planed to hold mass trials

[63] ibid.

for those having been members of these organizations. The above-discussed Control Council Law No.10 established the basis for such trials. It provided that '*membership in categories of a criminal group or organization declared criminal by the IMT'* was a crime punishable with sentences ranging from death to fines. The IMT, however, rejected this plan, by holding 'that criminal guilt is personal and that mass punishments should be avoided'. The IMT thereby refused to apply a policy of collective guilt.

The American officials were not particular happy with this position. They decided to somehow circumnavigate this opinion of the IMT by establishing national courts (Spruchgerichte) to deal with those persons. By October 1949 these courts had tried some 25.000 members of these organizations. Almost 16.000 were convicted and about 5.000 were sentences to terms of imprisonment, the rest was fined.

In an official American report in 1952 on de-Nazification three major points had been lined out. Firstly, powers should be transferred to non-Nazi officials to enable a democratic, stable and peaceful Germany to emerge. Secondly, it was claimed to prosecute those responsible in such a way that the German public could recognize that 'they had violated basic standards of a just society'. And thirdly, the report held that de-Nazification had to be accomplished in such a way that it did not produce instability.[64]

The accomplishment of these goals was not particularly easy. To complete the process of de-Nazifiacation the American authorities even sent out questionnaires to evaluate the participation in criminal organizations and alike. Those huge efforts from the Americans to identify all persons, who were related to Nazi crimes summed up in an enormous amount of documents and papers. To evaluate the guilt of each of those suspects, who were held to be accountable on the first sight and to distinguish between the 'real' Nazis and minor offenders, a vast number of 545 national tribunals were set up. These tribunals were supposed to classify the accused into five separate categories: Major offenders, offenders, minor offenders, followers and non-offenders. About 190.000 persons were brought before those tribunals. At the end of the trials, 339 persons had been classified as major offenders, 3600 as offenders

[64] supra note [39]; p.9;

and about 14.000 as minor offenders. The vast number of persons was declared as being a follower.[65] This so-called 'Persilschein' enabled persons to be relieved of the Nazi stigma and to re-integrate socially and economically into the German society.[66]

6.8 Developments in East Germany after 1945

When looking on the developments in Eastern Germany after 1945, one has to bear in mind that political diversity and the freedom of speech was not granted in a way as it applied to its Western neighbour. Society was merely controlled by a small elite and political discourse had to be in alignment with the ruling party.

The Soviet authorities transferred the responsibility to deal with the trials of minor offenders earlier to the national East German judiciary system as it happened in West Germany. The courts in East Germany based their jurisdiction as well on the above-discussed Control Council Law No.10. This regime, however, was implied in 1961 into national criminal law and could therefore be applied by any national court or tribunal in East Germany. The principles of Nuremberg where therefore used on a domestic level as well. The recognition of the jurisdiction of the IMT as having established general principles of international law, which subsequently found application in national law, can be held as a significant different to the West German approach.[67]

A different approach is also evident in East Germanys reaction towards the *nullum crimen* issue: Under Article 153(3) of the 1949 Constitution of the GDR, retroactivity of criminal proceedings was explicitly granted for cases '*to overcome Nazism, fascism and militarism or that were necessary to prosecute crimes against humanity'*.

The Nuremberg trials, nevertheless, were often used in the GDR as a political

[65] The small number of persons convicted gave those tribunals the byname 'Mitläuferfabrik'.
[66] ibid.; p.11
[67] supra note [37]; p.816

instrument as well.[68] Nuremberg was a 'revolution from above' and was intended to promote the anti-Nazi ideology and therefore to legitimise the communist rule.

6.8.1 The Waldheim Trials

The Easter German attitude towards the prosecution of former Nazi officials can best be exemplified in the proceedings against approximately 3.400 defendants at the so called Waldheim trials, which took place in1950 in the city of Waldheim, Saxony. A huge number of former inmates of Soviet internment camps were brought before special trial chambers. The trials rarely lasted longer than 20 to 30 minutes. All the members of the judgment board were hand-picked loyal judges and party officials. Of those accused 32 were sentenced to death, more than 140 were sentenced to terms of life imprisonment. The rest received sentences from up to 25 years of detention. Fewer than ten were formally acquitted. In West Germany the trials were viewed as follows:

'*The number of flagrant violations of due process, which make a mockery of any kind of regular administration of justice, leave no possibility of upholding the legal effects of these judgments. They are ipso iure and irremediably null and void*.'[69]

The intention behind those trials was not to bring perpetrators to justice, but to display the GDR's anti-Nazi attitude.

6.8.2 Developments during the initial phase of the Cold War

During the period following the mass trials on both German soils, East and West, other issues emerged replacing the focus to punish the war criminals.

The Cold war spreading its cast all over Europe and the rest of the world rapidly promoted other issues on the forefront of policies in America and the Soviet Union. Both countries quickly noticed that a strong Germany, equal West or East, was crucial to widen their influence and strength in Europe.

[68] ibid.; p.817
[69] ibid.; p.819

Politicians, especially in West Germany, noticed that this shift in policy put them in an advantage situation. They knew about their key benefits and well knew how to use them.

The Adenauer administration was increasingly successful in making the release of German detainees a key issue for their co-operation with the West. The plan was to rebuild Germanys political strength as being key players in Europe by simultaneously overcoming their own dark legacy, for which those still imprisoned were a constant reminder.[70]

However, a lot of politicians, especially in the U.S, had a rather critical attitude towards that approach. It was argued that a permission of mass releases and amnesties would jeopardize the efforts carried out during the last years.

A change in German legislation in 1953 gave way to the return of some 53.000 Germans to return into public service, after having been forcefully removed in the years before. The denunciation of declaring most of the persecuted persons as followers during the mass trials in the years between 1946 and 1951 can be held as a supporting factor for this.

The policy of Adenauer was clear. He wanted all German prisoners, which were still held in Allied custody, being handed over to the German authorities. Churchill agreed, but not without trying to make a bargain. Though it appeared clear that there was no alternative to handing over the remaining detainees to the German authorities. It would have made German sovereignty a mockery, if judicial power over their own citizens would not be granted.[71]

For Churchill it was, however, clear that under no circumstances, the judgments of Nuremberg ought to be declared void. If convicted war crimes were declared void, these acts had not been crimes and had therefore never happened. For the Allied it was clear that the legality of their invasion stood or fell with the legality of the Nuremberg judgments. At this time, even though having been a divided country at that time, the Germans were unanimous on one position: Under no circumstances would the judgments of Nuremberg be recognised as being valid and legal acts.

Under Art.11 of the peace treaty with Japan, signed in September 1951, the Japanese government had agreed to recognise the validity and legality of the

[70] supra note [39]; p.18

[71] supra note [36]; p.99

Tokyo War Crimes tribunal judgments and to enforce the sentences handed out to the perpetrators. Germany, however, was in a completely different situation for the above-mentioned reasons and an agreement like this was out on sight.

On December 4th, 1951 Churchill agreed to hand over all detainees remaining in British custody to German authorities. Furthermore it was assured that Germany, unlike Japan, had not to recognise the validity of their sentences.

In 1952, an annex to the Paris peace treaty was proposed. These articles contained three main provisions[72]:

First, a mixed board would be established to review further sentences handed out by German courts against alleged war criminals, but with no legal authority to question their validity. Secondly, a provision was included, which empowered Germany to take custody over war criminals. The third provision under section 11 of Art.6, however, declared that Art.7, which dealt with the validity of the Nuremberg judgments, was not applicable. By doing so, a legal provision to acknowledge the validity a legality of Nuremberg was circumvented. Nuremberg was surrendered and justice was sacrificed for peace and stability!

6.9 Concluding Remarks

Does this all mean that the transitional justice approaches failed in Germany? The answer to this is not simple. I would say – It depends!

From its very beginning Allied attempts to restore justice and peace in post-war Germany were characterised by a strong tension between legal justice and political goals, between political and judicial solutions. Clear is that one of the main goals of the Allied powers was to eliminate the Nazism legacy in Germany and to create a new and sustainable political order. Trials and punishments were just one aspect of that framework. In my opinion, the decision to release a vast number of perpetrators early from their terms of imprisonment or even without being sentenced does not mean that the trials have failed. As David Cohen noticed:

[72] official document '*Convention on the Settlement of Matters Arising Out of the War and the Occupation*' in The American Journal of International Law, p.69-120; Vol. 49; 1955;

'*They did, from stigmatization of the NS regime and its highest servants, education of the German public as to what had been done in their name, criminal condemnation of thousands of perpetrators, and removal and neutralization of a large group of individuals during a critical period, to serving the discovery of historical truth and providing rehabilitative, integrative, and unifying mechanisms by which Germans could come to terms (however imperfectly and in whatever different ways) with their past and get on with the work of reconstruction. The irony of the failure of de-Nazification and of the 're-Nazification' of the early 1950's was that they seem to have served the creation, for the first time in German history, of a stable democratic Rechtstaat built, above all, upon Germany's successful re-emergence as a major world economic power. From this standpoint the Allied program for Germany was an undoubted success*.'[73]

Therefore the Nuremberg trials and its subsequent judicial approaches marked a significant change in German history and draw a clear cut between the years of 1933-1945 and the contemporary German political developments. Furthermore, the historic record created by the courts and tribunals serves until today as a sound basis for scholars and politicians to prevent any mal- or wrong- interpretation of this part of European history.

[73] supra note [39]; p.19

7. Reconciliation on the Balkans and the International Criminal Tribunal for the Former Yugoslavia

7.1 The Establishment of the Tribunal

After the Nuremberg Trials established following the Second World War, dealing with mass atrocities committed by Nazi Germans against millions of people all over Europe, the concept of transitional justice and criminal responsibility for crimes committed in times of war fell into oblivion. It took another fifty years to re-invent a criminal court to deal with conducts, such as genocide and war crimes.

The crimes committed in the Balkans during the 1990's, however, forced the International Community to act in order to bring alleged war criminals to justice. *The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1992* (ICTY) was established by Security Council (SC) Resolutions 808[1] and 827[2] in 1993. The SC, by doing so, acted under Chapter VII of the UN Charta. Due to this procedure, the tribunal was equipped with far reaching powers, especially regarding state co-operation. The establishment of an ad-hoc tribunal gained inexorable momentum. Louis Arbour, who served as the Chief Prosecutor of the Tribunal from 1996 to 1999 held, that the court was born '*out of the utter despair of the international community as to how to manage these unmanageable conflicts in the Balkans*'.[3]

Subsequently, little after a year later, after the world community witnessed the genocide committed on the Tutsi minority by the Hutu majority in Rwanda in 1994, the *International Criminal Tribunal for Rwanda* (ICTR), was established. The ICTR was created as a 'sister' tribunal of the ICTY, sharing both the Office of the Prosecutor (OTP) and the Appeals Chamber.

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[1] UN SC. Res. 808; 22. Feb. 1993;
[2] UN SC. Res. 827; 25. May 1993;
[3] Arbour, Louis: *Crimes against Woman under International Law* in Berkeley Journal of International Law; 2003; Vol. 21; p. 196;

Rwanda, however, having by chance been an elected SC member at that point, voted against the resolution[4] establishing the ICTR. By doing so, the Rwandan government wanted to express its discontent with certain provisions within the resolution.[5]
Following the establishment of the ICTY and ICTR, many calls for the creation of additional tribunals, dealing with cases in Cambodia, Sierra Leone, Burundi and East Timor, came up.[6] However, these calls were subsequently ignored, but came back on the agenda in the following years.

The creation of the two courts marks a fundamental shift in international law and policy. For the first time since Nuremberg, heads of state and others stood trial before a truly international court. As Richard Goldstone, the first prosecutor of the ICTY held before the Court: '*A plea of head of state immunity will not constitute a defence, nor will it mitigate punishment'.*[7] Geoffrey Robertson QC, a well known advocate for human rights and international criminal liability, even calls the establishment of the courts a *'deeply symbolic, if not Grotian, moment: the first sign of a seismic shift, from diplomacy to legality, in the conduct of world affairs*[8].
The conclusion Robertson gives is perfectly right. Even if the Nuremberg and Tokyo trials can be considered as groundbreaking for the ICTY/ICTR, their objectives and scopes were significantly different. The power of the *'beaten path*' was yet to come.

At the time of Nuremberg, Germany already lay in ruins. The aim of the following trials was to promote retributive justice, rather then to promote peace and end an ongoing conflict, as it appeared in the Balkans.[9] The word reconciliation, which is utterly fashionable amongst scholars these days, was not being used at Nuremberg. The UN, by establishing the ICTY during an

[4] UN SC. Res. 955; 8. Nov. 1994;
[5] The dissent of the Rwandan government concerning the resolution, was predominately caused by the prohibition of capital punishment for the ICTR regarding their future judgments. UN Doc. S/PV.3453;
[6] Schabas, William: *The UN International Criminal Tribunals* – The former Yugoslavia, Rwanda and Sierra Leone; Cambrigde; 2006; p.4
[7] Robertson, Geoffrey: *Crimes Against Humanity* – The Struggle for Global Justice; London; 2006; p.373;
[8] ibid.
[9] supra note [6]; p.8;

ongoing conflict, emphasised the genuine link between justice and peace and concluded that the work of the tribunal '*would contribute to the restoration and maintenance of peace'*.[10] For the ICTR, the UN SC held in the preamble of the resolution establishing the court in Arusha that its work would '*contribute to national reconciliation*'[11].

The given link between justice, peace and national reconciliation justified the engagement of the institutions and of the SC itself, and invalidated the concerns regarding the withdrawal of state sovereignty.[12]Furthermore, criticism arose amongst scholars that Chapter VII does not provide for a tribunal to be established. It was held that the list of remedies provided in Art. 41 and 42 is exhaustive and does not provide the legal basis for such tribunals.

7.2 Establishing the Court

As the creation of an international criminal tribunal gained momentum after decades of atrophy, the conflict in the former Yugoslavia erupted, when states started to furthermore disintegrate. The concept of creating such a tribunal during an ongoing conflict was truly remarkable.

But the establishment of the ICTY was not concluded by simply passing the required SC Resolution in 1993. Gabrielle Kirk-McDonald, the courts first president and former US Supreme Court Judge held: '*When I compare my experience at the International Criminal Tribunal for the Former Yugoslavia (ICTY) with my service as a federal judge in the United States, where I had the benefit of an established infrastructure and staff, with rules of procedure and evidence and clear precedent to look to, the progress of the Tribunal is absolutely amazing. When we 11 original Judges met in The Hague in November of 1993, we had none of that. We had no premises, no permanent staff and, critically, we had no legal framework to guide the work of the*

[10] supra note [2]; preamble;
[11] supra note [4]; preamble.
[12] supra note [6]; p.8

prosecution staff and the Judges.'[13]

This example serves as a good explanation for the state of the court during its initial stage. Even though endowed with the powers arising out of Chapter VII of the UN Charta, the path to establish a fully operational court required more than just the will to pursue justice on an international scale. Given the work of its predecessors at Nuremberg and Tokyo, one might conclude that the ICTY could build up on its jurisdiction. However, the comparison between the Nuremberg proceedings and the ICTY's soon pales. The defendants at Nuremberg were arrested soon after the allied powers invaded Germany and most of them were convicted under an enormous amount of documentary evidence collected. The tribunal in The Hague, however, did not have these amenities. Far away from the conflicts in question and from a continuing and ferocious war, with no ground force at hands, the ICTY struggled to establish itself as a credible judicial body. The first defendant at The Hague, Dusko Tadic[14], did not testify before April 1995 and a judgment was not delivered before May 1996. In comparison, all major trials at Nuremberg had been concluded within 12 months time.[15]

Meanwhile, in 1994 the ICTY was unable to prevent the killing of up to 8.000 Bosnian man and children and furthermore failed to deter the atrocities committed in the Kosovo in the subsequent years. The problem in this respect was that states obligations to co-operate with the ICTY, which were enshrined in the Dayton Peace Accords and within the SC Resolutions, failed to take grip and the legal instruments at hands did not hamper the states for not complying. Furthermore, the Court faced severe difficulties in finding support within the international ground force in order to arrest the key players at stake. As a NATO Spokesman quoted in 1996, '*Arresting Karadzic is not worth the blood of one NATO soldier'*.[16]
The mandate given to the 60.000 soldiers strong I-FOR force was to support

[13] Kirk-McDonald, Gabrielle: *Problems, Obstacles and Achievements of the ICTY* in Journal of International Criminal Justice; Vol.2; p.558-571; 2004; p.1
[14] Tadic, Dusko IT-94-1;
[15] supra note [7]; p.374;
[16] ibid.

the ICTY fully and to hand over alleged perpetrators to The Hague.[17] However, NATO officials would not be too keen on hunting down the alleged defendants. This marks another main distinctive point between the Nuremberg trials and the ICTY. The Allied powers, by having occupied the territory of Nazi-Germany did not face any severe problems in arresting some of the main perpetrators. Contrarily, the ICTY did.

The Hague tribunal strongly depends on national and international co-operation, in both military and monetary means. The issue of state support and co-operation became one of the most discussed issues, when speaking about the work of the ICTY. To tackle the ongoing problem of non-compliance with the court, a reporting system was introduced, which allowed the president of the court to report directly to the SC, in case of non-co-operation of a state with the tribunal. This, however, proved to be ineffective and toothless. Most of the states concerned in these proceedings were at that point themselves involved in military operations and were therefore unwilling to co-operate with the tribunal. Frankly speaking, justice was put in second place.[18]
But it was not merely the lack of support from states towards the ICTY. Furthermore, the SC failed to provide an efficient and ambitious response to these claims. In its fourth annual report to the General Assembly and the SC, the President of the Court held: '*The tribunal remains a partial failure – through no fault of its own – because the vast majority of indictees continue to remain free, seemingly enjoying absolute immunity*'[19]. Co-operations of states and the international community remained a crucial element for the court to succeed. In an open letter to the president of the SC, the former President of the ICTY, Gabrielle Kirk-McDonald emphasised with a sense of despair:
'*On the verge of the twenty-first century, it is simply unacceptable that territories have become safe-havens for individuals indicted for the most serious offences against humanity. It must be made absolutely clear to such States that this behaviour is legally—as well as morally—wrong. The Security Council has the authority and wherewithal to rectify this situation. For the*

[17] http://www.nato.int/docu/pr/1998/p98-008e.htm download: 03.Feb. 2009;
[18] supra note [13]; p.2
[19] Fourth Annual Report of the ICTY; 1997; p.42; accessible under http://www.icty.org/tabs/14/1

benefit of all the peoples of the former Yugoslavia, I urge you to act'.[20] However, the international community widely ignored those claims, and once again, witnessed horrible atrocities being committed on the very soil the tribunal was initially intended to promote peace and stability.

7.2.1 Justice in Times of War

Again the question was raised, whether or not international criminal tribunals could contribute towards peace, even in times of an ongoing conflict. An answer to this question cannot be given without observing the different arguments. From the court's perspective it was argued, that the crimes following the establishment of the tribunal could be prevented, if the states concerned would have complied fully with the court and if the key indictees would have been extradited.[21] In contrast, the state parties accused the president and the prosecutor of the ICTY for undermining the ongoing negotiations of the Dayton Peace Accords in 1994 and 1995. Even further they blamed the human rights lobby for opposing the Vance-Owen plan, and being therefore responsible for the death of thousands of civilians.[22]Whether those accusations were true and justified can be doubted. It, however, seems clear beyond reasonable doubt, that the ICTY could not exercise its full powers during its initial phase and was therefore unable to prevent erupting hostilities by judicial means. It is furthermore questionable, if, by any means, alleged perpetrators should be invited to participate in peace negotiations. Manfred Nowak, in an interview given to the author, held that alleged perpetrators should not be given seat on such round tables, even though their political influence remains strong.[23]

[20] Letter from President McDonald to the President of the SC Concerning Outstanding Issues of State Non-Compliance; Nov. 1999; JL/P.I.S./444-E; accessible under http://www.icty.org/sid/7726
[21] supra note [13], p.3;
[22] supra note [7]; p.376;
[23] Interview of January 12th 2009

7.2.2 The Legal Basis of the Court

In 1993, when the SC already had imposed economic sanctions on Serbia, the atrocities committed had soon reached a level of severeness Europe had not experienced since the end of the Second World War. The SC, at the same time, began setting up a commission of experts, led by Professor Cherif Bassiouni, to investigate human rights violations on an international scale. At first hands, these efforts faced serious obstructions, in particular imposed by French and British diplomats. The opponents to this body held that justice considerations would interfere with their peace-building efforts and would therefore impose more harm then good[24]. However, the expert body managed to acquire the funding required to proceed in its investigations from private donors.[25] Bassioumi acted with significant rapidity and issued an interim report only a few months after he commenced his investigations. In his report dated January 26th 1993, he concluded that cases of ethnic cleansing, mass murder, rape, pillage and destruction of cultural heritage had occurred. He furthermore urged in his report for the establishment of an international criminal tribunal to deal with those issues and that the situation at stake constitutes a threat to international peace and security in the region.[26]His report consequently led to the adoption of SC Res. 808, providing that the situation in the former Yugoslavia created a situation of threat towards international peace and security. Furthermore, in the same resolution, the SC called for the establishment of an international criminal tribunal to carry out further investigations and promote peace and security in the region.

However, from the very beginning, it was rather unclear, how the tribunal should be established from a legal perspective. The lessons learned from Nuremberg and Tokyo proved that it was of great importance for the acceptance and credibility of the tribunal to provide for a sound legal

[24] Similar explanations were given for the critique concerning the ICC's arrest warrant against Sudan's Omar al-Bashir in 2008;
[25] Most of the funding was provided privately by the McArthur Foundation and by the Soros Foundation;
[26] Report accessible under www.unhchr.ch/Huridocda/Huridoca.nsf/0/42bd1bd544910ae3802568a20060e21f/%24FILE/G0010236.doc

framework, which would not let any legal criticism arise. In the end it was decided that the tribunal would derive its legitimacy from the fact that it was intended to be a measure restoring or maintaining international peace and security in the region.[27]The tribunal would be a subsidiary organ to the SC, but, however, would be independent in its judicial capacity from any political considerations. This decision did not go without any criticism.

7.2.3 Criticism

Shortly after Resolutions 808 and 827 were adopted, criticism amongst scholars arose, whether or not the SC had the legal powers establish such a tribunal. The answer to this question lies within the scope of Art. 39 and 41 UN Charta. However, in the time of the Charta being drafted, it is hard to guess, whether it was intended to include the possibility to establish a criminal tribunal under these provisions. But the powers enshrined in Art. 41 and 42 are wide ones and do not exclude the imposition of criminal responsibility on persons who's actions demand punishment.[28]In Art.2(7) of the Charta, however, it is stated that the UN should not intervene in '*matters which are essentially within the jurisdiction of any state*' but, it further provides, '*this principle shall not prejudice the application of enforcement measures under Chapter VII*'. The SC agreed on this view and this sound and solid legal foundation was intended to prevent any accusations the Allied powers faced regarding 'Victor's Justice' after WWII.

The only alternative at hands would have been to build up the tribunal on a multinational treaty. This approach, however, includes two significant disadvantages: First, treaty negotiations are a lengthy process and to become legally binding, the treaty has to be signed and ratified. Secondly, by definition, only state-parties to the treaty would be bound by its jurisdiction. Nobody at this point was able to predict such a co-operation from the states in

[27] supra note [7]; p.378
[28] supra note [7]; p.379

the region involved.[29]In contrast, a tribunal established under Chapter VII would bind all states and it would clearly meet the criterion of expeditiousness.

Another issue to be clarified before the creation of the tribunal was its implied scope and jurisdiction. According to SC Resolution 808 para.1 the tribunal '*shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991*'.[30] This determination leaves a wide discretion for future adoptions. However, the official name of the ICTY reflects this initial proposal. An even further problem was the subject-matter jurisdiction of the tribunal. Bassioumi and others were well aware of the criticism raised by scholars, most notably Hans Kelsen, concerning the jurisdiction of the Nuremberg trials. The *nullum crimen* accusations should not have been repeated. For this reason, it became clear that the only possible remedy to prevent these allegations was to build up the legal basis of jurisdiction of the tribunal on customary international law, irrespective of whether or not it was codified and whether a state had adhered to such codified legal instruments.[31]A wide range of jurisdiction was already at hands at this point and did not leave any solid ground for criticism in this respect. Furthermore the accusations of retrospective punishment would not occur. Another major difference to its predecessor at Nuremberg was the application of jurisdiction not only in an international armed conflict. Major Nazi-officials could not have been legally punished for crimes committed against their own fellow-citizens. This does not apply to the ICTY since the application of international humanitarian law was not in question for this situation.

7.2.4 Legal Basis of Jurisdiction

The main articles in the statute of the court, concerning its legal scope were set out as follows:

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[29] Zacklin, Ralph: *Some Major Problems in the Drafting of the ICTY Statute* in Journal of International Criminal Justice; p.361-367; Vol.2; 2004; p.1;
[30] supra note [1]; para.1;
[31] supra note [27]; p.3;

Art.2 of the Statute empowers the court to punish 'Grave Breaches' of the Geneva Convention of 1949 (i.e. wilful killings, torture, ill-treatment of prisoners etc.). Art.3 sets forth the powers to punish violations of the 1907 The Hague Conventions regarding the laws and customs of war. Art. 4 breaks ground for the punishment of genocide, i.e. attempts to destroy a group on national or ethnic or religious grounds. Art.5 gives jurisdiction to punish crimes against humanity. [32]

In the Tadic-case, arguing that the Art.3 purely applies to international armed conflicts, an attempt to challenge the jurisdiction of the court was made. The definitional approach of the court, however, of what an international armed conflict is, was significantly broader in this respect. They found Art.3 being applicable in case of two confronting parties, as long as they are 'armed' and 'organized'.

The Appeals Chamber held:

'...an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.'[33]

The Appeals Chamber by setting aside the legal limitations of the 1949 Geneva Conventions created a new regime for criminal liability in the case of war crimes. The ICTR in Arusha, facing the very same legal obstacles, followed suit in the Kanyabashi[34] case.

[32] Statute accessible under http://www.icty.org/sections/LegalLibrary/StatuteoftheTribunal
[33] supra note [14]; Appeals Chamber Judgment of Oct. 2 1995; para.70;
[34] Prosecutor v. Joseph Kanyabashi (ICTR-96-15)

7.2.5 How the ICTY operates

As discussed above, Art. 2-5 give jurisdiction to the court over crimes, which were in 1992 assumed being customary international law. So no defendant could argue that he faced charges, which did not exist at the time he was alleged to have committed them. A significant difference between the jurisdiction of the ICTY and the Nuremberg trials in this respect is, however, that the jurisdiction is solely limited to natural persons. Art.6 of the Statute provides no jurisdiction over organizations or associations. In contrast, as seen in the previous chapter, the IMT at Nuremberg declared organizations such as the GESTAPO or the SS illegal per se. Therefore, any membership or affiliation towards one of these organisations was declared unlawful and punishable. The ICTY refused from doing do.

During the initial phase of the ICTY, when the conflict was still immanent and ongoing in the Balkans, the Office of the Prosecutor (OTP) was hampered by a lack of access to documents, evidences crime scenes, intelligence information and supportive governments. Most of the evidence collected at that time came from persons, who emigrated from the region.[35] As a result, the OTP collected a significant amount of evidence about mid- and lower-level officials. Many of the initial cases at The Hague were carried out against such defendants.[36] Those cases consumed a huge amount of resources, by means of time and monetary spending. The ICTY in this respect had to take a lot of critique for not co-ordinating its investigations in a more housewifely manner.[37]

The ICTY, especially Claude Jorda, President of the Tribunal from 1999 to 2003, justified these allegations by holding that more emphasis had to be put on the role of the victims. Victims should find an open stage at The Hague where, for the first time in history, their story would be heard. This approach led to the establishment of the term *`Victim's Justice'*, in contrast to Victor's Justice, when speaking about the work of the ICTY.

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[35] Schrag, Minna: *Lessons Learned from the ICTY Experience* in Journal of International Criminal Justice; p.427-434; Vol. 2; 2004; p.4

[36] see especially Prosecutor v. Nikolic and Prosecutor v. Tadic

[37] Raab, Dominik: *Evaluating the ICTY and its Completion Strategy* in Journal of International Criminal Justice; p.82-102; Vol. 3; 2005; p.3;

The Court itself has primacy powers over national jurisdiction, which is a rather different approach compared with the principle of complementarity within the legal framework of the ICC. Those primacy powers enable the court to wrest jurisdiction from national courts. However, the principle of *ne bis in idem* remains valid.

7.2.6 Structure or the Court

The structural organisation of the court is rather simple. However, compared to its predecessors at Nuremberg and Tokyo, the ICTY introduced some additional features in order to fulfil all requirements of a fair and due trial. All the judges serving at The Hague serve in their own capacity. A broad variety of representation from different legal systems is guaranteed. To date, 16 permanent judges and 12 *ad litem* judges are engaged at the three Trial Chambers and the Appeals Chamber. The Appeals Chamber was initially shared with the Arusha Court, but due to the Completion Strategy of the ICTY, introduced in 2003 by the SC, the ICTY received its own Appeals Chamber to match the provisions of the SC. The other two organisational bodies of the ICTY are the Office of the Prosecutor (OTP) and the Registry. Compared to the trials at Nuremberg, where there has been no instance for appeal and no common prosecution service, the ICTY structure appears to be clearer, but still more expensive and time consuming. Still critics claim that the principle of equality of arms is not sufficiently provided in the proceedings.[38]Critics demand the creation of a principle defender, of the same status as the prosecutor, in order to provide for a fair trial. The argument for such an institution is due to the often overstrained and less-educated defence attorneys during the initial stage of the tribunal. This situation has changed significantly in recent history. Defendants are nowadays represented by the most honourable attorneys from all over the world and the situation hence has changed and nowadays looks rather grim for the OTP, which is highly understaffed and lacks funding to carry out investigations in an adequate manner.

[38] supra note [7]; p.388;

7.3 The ICTY and Balkan Reconciliation

To date the tribunal has concluded proceedings against 116 alleged perpetrators. 45 proceedings are still ongoing and two of the key figures, Ratko Mladic and Goran Hadzic, remain at large. The overall costs since 1993 has amounted USD 1.585.490.022 ,- .[39]The average cost for one single trial stands at USD 10 – 15 Mio..[40] Those immense costs have often been of particular interest for critics of the tribunal. Still, is there a price for justice?

War crimes trials are expensive, indeed. Hundreds of people are engaged in their proceedings. Evidence has to be collected, witnesses have to testify, data has to be evaluated and after all, the court in its own capacity sits outside the region in question. But did the work concluded lead to reconciliation?
The establishment of the tribunal represents the attempt to apply human rights law in a situation where states have failed to protect their citizens from atrocities and where successor regimes had failed to investigate and prosecute gross human rights abuses.[41] The ICTY has sought to carry out, what national courts could not and provided for the institutional groundwork for the re-establishment of the Rule of Law in the region. Furthermore it challenged legal impunity through the prosecution of those most responsible, restored the authority of law and promoted reconciliation amongst divided ethnic groups.
The prosecution of the key figures of the Balkan wars led to the individualisation of guilt and helped to put the political and organisational character of the crimes committed into context. [42]The establishment of the tribunal, however, is just one part of a strategy to promote peace in the long

[39] all data taken from www.icty.org/sid/325; visited 05.02.2009
[40] Skilbeck, Rupert: *Funding Justice* – The Price of War Crimes Trials in Human Rights Brief; Vol.15; 2008; p.1;
[41] Humphrey, Michel: *International Intervention, Justice and National Reconciliation*: The Role of the ICTY and ICTR in Bosnia and Rwanda in Journal of Human Rights; p.495-505; Vol.2; 2003; p.1
[42] ibid. p.2;

term. Additionally, the establishment of truth and reconciliation commissions, democratic elections and peace negotiations were installed to accelerate and complete the process.

The importance of the legal bodies in the concept of Transitional Justice is their institutionalized status; the work accomplished by a structure of laws cannot be accomplished by a structure of sentiments.[43]Politically, it is the task of the state to recover the status of a victim. International law, in this respect, provides this recovery for a victim against a state. Usually, state violence does not violate the rights of a single person more then compared to a normal criminal offence, but as representatives of a particular social or ethnic group, state crimes do stigmatize the whole ethnic or religious entity. By identifying those offences, international law helps to identify and remedy those stigmas.[44]

But in a conflict as complex as the one in the Balkans, it is often unclear to determine distinctly, who the key perpetrators were. Figures show, that more then 15.000 individuals committed crimes directly related to the conflict. Given this sheer amount of persons, the question arises, how an international court can cope with this workload. International criminal prosecution therefore must not claim to deal with every single case, but to break ground for subsequent cases to be dealt with either through national judicial systems or non-judicial mechanisms. Without penalizing gross human rights violations reconciliation may be doomed to failure.[45]The assumption that justice was directly linked to long-lasting peace, was crucial for the creation of the ICTY and influenced from the experience of the Nuremberg legacy, which helped to turn post-Nazi Germany into a sustainable democracy.

Even though reconciliation was not expressively mentioned in the mandate given to the ICTY, the court itself emphasised its role in this regards.

In the Erdemovic[46] case, the court held:

'The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues

[43] Scarry, E: *The Difficulty of Imagining other Persons*; New York; 1999; p.302;
[44] supra note [38]; p.2;
[45]Mulaj, Klejda: *Impact on Criminal Justice on Reconciliation*: The Case of the Former Yugoslavia; 2007; p.6
[46] Prosecutor v. Drazen Erdemovic; Case No. IT-96-22

of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.'[47]

But still there is shared consensus that if the tribunal is to fulfil its mandate and to promote peace and reconciliation in the region, an effort must be made to improve the understanding of the work of the court in the former Yugoslavia. In order to lay the ground for promoting the work of the ICTY, it is from utter importance to create a system, through which people in the region can inform themselves about the work of the court. For this reason in 1999, Gabrielle Kirk-McDonald established the ICTY Outreach Program. This program enables the local population to learn more about the work of the tribunal. The program was designed to *'provide a comprehensive proactive information campaign stressing the Tribunal's impartiality and independence, as well as countering the endemic misconceptions that had prompted widespread disillusionment with the Tribunal in the former Yugoslavia'*.[48]
The four regional offices set up in Prishtina, Belgrade, Sarajevo and Zagreb engage with local communities, non-governmental organisations, the media and educational institutions. The program further includes websites and the translation of important legal documents. The key role of the campaign is to disseminate trial proceedings as wide as possible and to refute wrong information.

7.3.1 Evaluating Reconciliation

But how can the impact of the ICTY on reconciliation be evaluated? Conclusive data and evaluating surveys are rare in this respect.
Most notably for the local population was indeed the removal of some key political figures from their position, since those persons were responsible for

[47] ibid. Sentencing Judgment of 5th March, 1998; para.21;
[48] supra note [42]; p.14;

policies such as ethnic cleansing. As Payman Akhavan states: *'…the removal of leaders with criminal dispositions and a vested interest in conflict makes a positive contribution to post-conflict peace building. In concert with other policy measures, resort to international criminal tribunals can play a significant role in discrediting and containing destabilizing political forces. Stigmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence. Even if wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power.*'[49]

The constant negative reaction of Serb leaders to the arrests of the ICTY reflects the impact on the post-conflict society. The ICTY's indictments have furthermore contributed positively to the emergence of a number of moderate political leaders in the region, which now endorse confronting the past and call for a return of the refugees.[50] However, still today in Croatia and Serbia extremist leaders refrain from co-operating with the tribunal and deny their role in history. Tragic peak of this development was the assassination of the former Serbian Prime Minister Zoran Djindjic in March 2003 for his co-operation with the ICTY. The circumstances were never restored fully. In this respect, it must be borne in mind, that the ICTY proceedings and findings undermine the political forces aligned with ethnic chauvinism. Therefore, political opposition towards the tribunal should not come as a surprise.[51] As Akhavan observes, co-operation with the ICTY had become '*a factor in the power struggle between nationalist forces and democratic elements committed to democratic reform*' and multi-ethic reconciliation. Even further, the opposition towards the Hague tribunal obscures an intrinsic link between '*supposedly patriotic concerns about war heroes and the self-preservation of political forces that exploited the conflict for their own ends'*.[52]
Particular in Serbia, the political attitude towards the tribunal becomes a

[49] Akhavan, Payman: *Beyond Impunity*: Can International Criminal Justice Prevent Future Atrocities? In The American Journal of International Law; p.7-31; Vol.95; 2001; p.1;
[50] More than a million of victims had returned to their home by to date. For more information access http://www.unhcr.ba/return
[51] supra note [42]; p.16;
[52] supra note [46]; p.21;

question of sheer vote calculation. None of the major parties is keen on getting an un-patriotic image by affiliating with the tribunal. Most of the politicians therefore walk a thin line between co-operating with the court (and the European Union) and gaining voters confidence in being patriotic. The strong rhetoric of the Milosevic era opposing the ICTY still remains vivid the in the heads of a large number of voters, even though the access to information and the media coverage has significantly changed since that time. Milosevic accused the tribunal's concept of justice as being sheer injustice towards the Serbs. As a Serbian Scholar put it: '*They are killing Serbs in The Hague!*'[53]
Even whilst in the docks, Milosevic used the tribunal as a stage to promote his views and gained a lot of attention in Serbia and all over the region and undermined the courts credibility and integrity. Even his death in March 2006 and whether it occurred under natural circumstances, was questioned by the local Serb population and senior politicians.
Surveys amongst the population in various different countries of the region come to rather different conclusions, regarding the perception of the courts work.
While in Kosovo people conclude that the work of the ICTY has been fair and just, the figures in Serbia and the Republica Srbska look rather grim.[54]
More recent surveys support this result. Serbia thereby evinced the least trust in the work of the ICTY – only 8% trusted in the work of the Court. On the flipside, trust in the Kosovo was still very high, standing at 83%, whilst the level of trust in Bosnia stood at 51%.[55] These figures give a good impression on the overall impression on the perception of the courts work in the region and why the Outreach Program has to be furthermore enhanced.

7.3.2 Did the court fail to prevent future atrocities?

This question was raised openly when speaking about the early years of the

[53] Rangelov, Iavor: *International Law and Local Ideology in Serbia* in Peace Review; Vol.16; 2004; p.13;
[54] Meernik, James: *Justice and Peace?* How the International Criminal Tribunal affects Societal Peace in Bosnia in Journal of Peace Research; p.271-289; Vol.42; 2005; p.274;
[55] Information taken from: http://www.idea.int/press/pr20020404.htm visited: 06.11.2008;

tribunal. The ICTY, established in 1993, was unable to prevent the massacre in Srebrenica and the erupting violence in Kosovo in 1999. Yet, it is unrealistic to assume that the tribunal could have immediately after its creation deterred crimes in the midst of an ongoing nationalist-led conflict. But the impact of the ICTY on the political sphere cannot be assessed on a short-term scale. Far more important is the ICTY's impact on long-term developments in the region.[56] Public vindication of human rights and the marginalization of criminal leaders may contribute to prevent future atrocities through the power of moral example to transfer behaviour.[57] Additionally, holding perpetrators accountable can mark a significant shift in policy and can break with the past and it provides for punishment of the persons politically responsible for the atrocities and can, in this respect, individualize guilt, contrary to blaming a society as a whole.

This is vital since the rejection of a notion of collective guilt can lead to a clear interpretation of the facts and figures of and conflict and can provide to enhance dialogue and co-operations between former antagonistic communities.

7.3.3 Complementary Approaches

Despite its overall success, the proceedings of the ICTY have been very complex in nature. Trials are costly, slow, time consuming and procedurally complicated. It has been estimated that about 15.000 persons were responsible for war crimes committed in the region of the former Yugoslavia during the 1990's. This colossal number, beyond any doubt, exceeds the capacity of any tribunal. Hence, different approaches have to provide for an alternative to deal with these open cases. One alternative is to try perpetrators on a national level.[58]The idea is not new and is an integral part of the ICTY's Completion Strategy[59]. During the first half of the 1990's it was, however,

[56] IWPR Staff Report: *The Hague Tribunal and Balkan Reconciliation*; 2006; p.2; accessible under http://www.iwpr.net
[57] supra note [42]; p.18;
[58] Smith, Adam: *Trying War Criminals Locally* in New Republic; 2006; p.1;
[59] SC Res. 1504; 4th Sept. 2003;

impossible to engage local courts with war crimes proceedings, due to a lack of capacity, impartiality and their immanent link with respective criminal regimes.[60]

However, with the emergence of peace and stability in the region and with huge support and funding from the international community (especially from the EU), local judicial systems became operational again.

In paragraph 1 and 5 of SC Res. 1504 (2003) the transfer of cases to national courts was encouraged expressively. The ICTY's constant overload of cases and its immense spending primarily led to this development. The transfer of cases would, in essence, allow for the backlog of cases at the ICTY to be eased, by sending some lower- and middle-ranking cases to national courts. In addition to its impact on the ICTY caseload and resources, there is an advantage in sending cases back to the area in which the crimes were committed in the first place. It may be regarded as an element of the reconciliation process, with trials conducted closer to the locations of the crimes and the victims. Such trials may be perceived as having greater resonance (and, for some, legitimacy) if they are conducted under the auspices of the states of the former Yugoslavia rather than in The Hague. In sum, the transfer of cases will free up some of the ICTY's resources and complement trials in The Hague by nationalizing - where appropriate - the process of accountability.[61]

Most of the cases were transferred to courts in Serbia and Montenegro. However, in a report issued by the *Organisation for Security and Co-Operation in Europe* (OSCE) in October 2003 it was held, '*the national judiciary lacks full capacity to conduct war crimes trials in accordance with universally adopted standards*'. There remain '*enormous challenges'*, particularly in relation to the state's legal and institutional framework, securing evidence, witness protection, regional cooperation, ICTY cooperation and the application of the concept of 'command responsibility'.[62]

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[60] supra note [42]; p.20;
[61] Raab, Dominik: *Evaluating the ICTY and its Completion Strategy* in Journal for International Criminal Justice; p.82-102; Vol.3; 2005; p.92;
[62] OSCE Report: *War Crimes before Domestic Courts*; 2003; accessible under http://www.osce.org/item/1330.html

Almost the same criticism was raised regarding war crimes trials in Croatia and in the Kosovo.
A rather different approach was made in a joint program between the Office of the High Representative for Bosnia and Herzegovina (OHR) and the ICTY in 2003. They put forward the idea of establishing the Sarajevo War Crimes Chamber (SWCC) within the judicial framework of the national system. The SWCC as a hybrid creation includes a temporary international composition of judges, prosecutors and administrative judges. This initial international composition was reduced step by step, but proofed being a great success compared to its solely national counterparts. The chamber itself contains of three panels: two for trials at first instance and one for appeals. Since it became operational, the court has rendered a significant amount of important judgments.

Although still working on a low capacity, the potential of local trials in respect of reconciliation should not be underestimated. Proceedings on a national level are less costly, less time consuming, better capable for the public and their impact on the local population is more long lasting then those of their international counterparts.[63]
Local trials complete and complement the work of the ICTY and bring accountability for war crimes back to where they have been committed in the first place. Still, criminal proceedings are just symbolic in a sense of being selective and limited and can therefore not provide for an all-encompassing judicial remedy.[64]

7.3.4 Truth and Reconciliation Commissions

Most commonly in complementing the work of judicial bodies in the case of post-conflict reconciliation, is the work of truth and reconciliation commissions. But truth commissions even bear a number of risks. Depending of who establishes such a commission, the actual findings may vary. They can be

[63] supra note [42]; p.21;
[64] supra note [38]; p.500;

used to manipulate public perception at home and abroad and can serve to whitewash past atrocities.[65]The Truth and Reconciliation Commission established by the Serbian President Vojislav Kostunica may fall under this category. The commission set up in 2001 was given a mandate for three years. Most of the appointees were nationalist Serbs, which, as does Mr. Kostunica himself, oppose the work of the ICTY and refrained for years to extradite Mr. Milosevic and others to The Hague. For this reason, the commission has widely been accepted as a fig leaf, to diminish or neutralize pressure put on the Serbian government from abroad to investigate in pending cases and contribute towards national healing.[66] The commission itself, not surprisingly, failed to produce any findings.[67]

Though, it must be noted that several other commissions have been set up in countries all over the Balkans and have produced credible and important facts. Supplemented by the work of a numerous number of NGO's, their work has proved to be highly valuable and important to accomplish the overall goal of reconciliation amongst ethnic groups.

7.3.5 Plea Agreements and Balkan Reconciliation

„.... Serbs would never allow themselves to become victims again!" (Biljana Plavcic)

With this statement one of the accused persons at the ICTY, Biljana Plavcic („The Iron Lady")[68] opened her defence speech before the court in 2001. She argued that during the whole time of Serbian history, Serbs have always been oppressed. This blind obsession to become victims again had allowed them to become victimizers.[69]

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[65] supra note [42]; p.23;
[66] ibid; p.24;
[67] http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=91&Itemid=163; visited 6th Feb. 2009;
[68] Case No. : IT-00-39 & 40/1
[69] Tieger, Allen :*Trading Justice for Efficiency* – Plea-Bargaining and International Tribunals Journal for International Criminal Justice Vol.3; 2005; p.672;

This opens the issue, of how difficult it was for the court to establish a historical record, proving the facts that led to the escalation of the conflict. However, the empirical evidence collected and the thousands of protocols from witnesses testifying before the bench do not replace the true remorse of an alleged perpetrator, when it comes down to national reconciliation. As we have seen above, the resources of the ICTY, both concerning time and funding, are highly limited. Therefore it is from utter importance to use the given resources distinctively. As the Court finally started its work in 1994, a large number of cases (about 160) were brought for trial to the ICTY. Years later about a hundred of these files had been closed. Since the beginning of its work, about 148 persons have been publicly reported. Of these, 50 have been tried, yielding 45 convictions and five acquittals.[70] So within the last 14 years, not even two thirds of all cases have been closed. Because the collection of evidence and the hearings of witnesses cannot be conducted in a short period of time, it is not unusual for a trial to take more than one year. In terms of the number of cases, the ICTY had tried and sentenced 50 individuals till 2004, which was the year when the UN questioned the ICTY's efficiency. The ICTY budget for 2002/2003 represents approximately 8.5% of the regular UN budget, although it was less then 1% of the entire range of expenditure on UN activities.[71]

The ICTY's first response to its growing caseload and expensive trails was to withdraw indictments against several lower-level officials. Next, the ICTY requested the addition of 27 '*Ad Litem'* Judges to support the 11 permanent judges. But this alone was not enough to increase the efficiency of the tribunal.[72]

Furthermore, due to the increase of caseload the tribunal faced, a new procedural instrument, commonly known from the Anglo-American judicial tradition, was introduced into the judicial process of the ICTY – Plea Bargaining.

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[70] supra note [63] ; p.1 ;

[71] Raab, Dominic: *Evaluating the ICTY and its Completion Strategy* in Journal for International Criminal Justice; Vol.3; 2005; p.96;

[72] Scharf, Michael: *Trading Justice for Efficiency* – Plea-Bargaining and International Tribunals, in Journal for International Criminal Justice; Vol.2; 2004; p.1076;

Although countless attempts have been made to propose a general definition of plea bargaining, none of those proved to be sufficient. Generally speaking,

> '*American Plea Bargaining is a procedural mechanism through which the prosecution and defence can arrive at an agreement for the disposition of a case, subject of the approval of the court. The agreement may present itself in several forms, but it usually consists of the defendant pleading guilty to an offence or a number of offences. In exchange, the prosecutor drops other charges, accepts that the defendant pleads guilty to a lesser offence or requests that the defendant receives a certain sentence*.'[73]

To put it in other words, plea bargaining consists of an agreement between the prosecutor and the defended. The prosecutor typically agrees to a reduced sentence in exchange for the defendant's waiver of his rights to appeal against the sentence and go on a 'normal' jury trial. The *„Rules of Procedure and Evidence"*[74] of the ICTY, seen as a hybrid between the Anglo-American law system and Continental-European law system, contain guidelines from both law traditions. Even though plea bargaining was not intended being used during the initial period of trials, it became an important procedural instrument of the ICTY in recent history. The legal basis for plea agreements before the tribunal is rule 62bis in the Rules of Procedure and Evidence.

During the very first years of the ICTY only a handful of trials have been resolved through negotiated dispositions. The majority of cases was resolved through normal trial proceedings. In detail, in the period between 1993 and 2003 only eight cases came to an end with a so-called 'Plea Agreement' between the OTP and the accused.[75] But as I mentioned before, the mandate of the ICTY is supposed to run out in a foreseeable future and all files should be closed by this time, and that is why plea agreements became a stable practice of the ICTY. Plea agreements accelerates the judicial procedure,

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[73] Langer, Maximo: *From Legal Transplants to Legal Translations*: The Globalization of Plea Bargaining in Harvard International Law Review; Vol.45; 2004; p.35;
[74] ICTY Rules of Procedure and Evidence http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf
[75] Cook, Thomas: *Plea Bargaining at The Hague*, Journal for International Criminal Justice; 2004; p.474;

because the main actors of this method, the OTP and the accused end the trial before it even began with the help of a guilt plea.

Since 2003, plea bargaining has become one of the main solutions for trials before the court, and the number of cases solved through an agreement has reached a peak. And while the judges of the ICTY initially determined that Plea Agreements would be improper for the special purpose of an international criminal court, seven years after its establishment the judges reversed their opinion and began to aggressively pursue guilt pleas. This shift occurred shortly after Judge Gabrielle Kirk-McDonald of the United States succeeded Antonio Cassese as president of the tribunal. Judge McDonald had been a federal judge in a country, where 95% of criminal cases are decided by plea agreements. After this paradigm-change, between 2001 and 2003, the ICTY entered 12 plea agreements, clearing 40% of ongoing the cases.[76]

Even though this method of procedure ensures a quick and efficient trial, many critics entered the stage claiming that plea agreements undermine the defendant's rights to a fair trial. Truly, in return of the reduction of the sentence the accused waivers, for instant, his right to appeal against his sentence and for a conventional trial.

The disadvantages of this procedure are quite obvious, because it is not unlikely that two accused persons, facing the same charge for a crime, receive a different sentence, just because the one who did not waive his right to go on a fair trial, gets no 'benefit' from the prosecutor, such as the one does who negotiated his guilt plea agreement. But on the other hand, proponents of plea agreements argue that negotiated guilt pleas accurately reflect '*each defendant's true criminal responsibility'*.[77]

The impact of guilt pleas before the court on reconciliation and peace building was and still is highly disputed amongst legal scholars. Some may argue that

[76]Scharf Michael: *Trading Justice for Efficiency* – Plea-Bargaining and International Tribunals in Journal for International Criminal Justice; Vol. 2; 2004; p.1074;
[77] Cook, Julian: *Plea Bargaining at The Hague* in Journal for International Criminal Justice; Vol.2; 2004; p.473;

guilt pleas represent a trade of justice for efficiency; others may argue that it is crucial for reconciliation that perpetrators admit their guilt.

In a phase of transitional justice, it is from utter importance, as I have already stated above, that guilt and responsibility is provided on a particularistic, rather than collective basis.[78]

Since the ICTY works on a selective basis regarding the prosecution of perpetrators, measuring the effect on reconciliation of these trials depend on opposite factors: First, the positive impact on victims who see their perpetrator tried. Secondly, the negative impact on victims who do not see justice to be done.[79]

James Meernik, by evaluating these assumptions, concludes that the impact of the ICTY trials on the society are rather glimpse. The reason given for this is the prosecutor's focus on high ranking and senior perpetrators, which are uneasy to link with the actual atrocities, that have taken place in the field.[80] But I will come back on the issue of plea bargaining in further detail in the following chapter.

7.3.5.1 Prijdor and Srebrenica – Why do they (not) return?

Two of the places gaining most attention from the international community and the ICTY are Prijdor and Srebrenica in Bosnia. Srebrenica nowadays almost stands as a proxy for all the atrocities occurred and for the whole conflict as such.

In both cities, before 1993, the population was divided evenly between the Serb and Bosniak population. But the situation changed dramatically in the years to come. The Serbian army by force took over the control of both cities and the killings on thousands of Croats, Bosniaks and others began in the fields and in nearby concentration camps.

The ICTY indicted seventeen persons for the killings in Srebrenica and twenty-three for the atrocities committed in the municipality of Prijedor.

[78] Nalepa, Monika: *Why do they return*? Evaluating the Impact of ICTY Justice on Reconciliation; Harvard; 2007; p.4;
[79] ibid.
[80] Meenik, James: *Former Yugoslavia Victor's Justice or the Law*? Judging And Punishing At The International Criminal Tribunal For The Former Yugoslavia in Journal of Conflict Resolution; Vol.47; 2003; p.138;

The most notable cases in this respect were the cases of Tadic v. Prosecutor and Erdemovic v. Prosecutor.
However, even having established such a sound caseload on those two happenings, the impact on the region concerned proved to be rather different. Whilst Prijedor is one of the leading municipalities to which former refugees are returning, the percentage in Srebrenica is amongst the lowest.[81]
One of the reasons given for this is the fact in the case of Prijedor, the ICTY put several low-ranking officials on trial. Dusko Tadic, for instance, was recognized by a large number of victims as a perpetrator. In his case, over 153 victims delivered testimonies to the court. This did not apply for Srebrenica. The only remarkable case, in this respect, was the proceedings against Drazan Erdemovic.
After pleading guilty and revealing his accomplices, he was sentenced to a term of ten years imprisonment (later reduced to five years). Even though the Erdemovic case was ground breaking and led to further indictments of nineteen persons (mostly high-ranking officials), it also put the courts credibility into question. The guilt plea of Erdemovic clearly shows, why this instrument of dispute settlement is so controversial. Indeed, without the co-operation of Drazan Erdemovic, the proceedings against others would not have happened so easily, his sentence does not reflect the true nature of his crimes committed. Victims did not see justice to be served.[82]

Victims, according to some NGO's, did not start to return to their homes until 2003 in Srebrenica. In contrast, victims and refugees in the municipality of Prijedor started to return earlier to their homes. The judgments delivered in the Prijedor proceedings were more vigorous and deterring and more low-ranking officials had been tried.
After the Erdemovic case and the guilt plea, the ICTY revised his strategy towards plea-bargaining in order to prevent future outcomes like in Srebrenica.

[81] supra note [70]; p.16;
[82] ibid. p.18;

In order to assure a positive outcome of a trial, regarding its impact on the society, three different aspects are crucial: The indictments, the trial chamber and the sentencing process.

The indictments aspect contains the number of persons indicted by the court and the charges they face. The trial chamber deals with the actual trial: how many charges did the defendant face, did he/she enter a guilt plea, how many witnesses were examined. The sentencing process mainly focuses on the actual sentences handed out and whether or not it appears objectively suitable for the crimes committed. [83]

Other crucial factors, which determine the overall setup of the region concerned, are: The size of the ethnic minority, war suffering, the economic situation and the degree of nationalism. All those factors come into play for the return of former inhabitants.

The more a society has suffered in the war, the less likely it is for them to return. Furthermore, the smaller an ethnic minority in a certain region is, the less likely it is for them to return and finally, refugees are less likely to return to areas, where nationalist parties win elections.[84]

Another very important factor that comes into play for the return of refugees to their homes is, whether or not the defendant pleaded guilty for the crimes committed. As Monika Nalepa points out, guilt pleas do increase the returns and the absolute effect is larger, compared to conventional judgments. [85]

Guilt pleas involve the disclosure of information regarding the wrongdoings of the person in question and other persons involved. The offered truth about the character of the war crimes in question is traded for a sentence reduction. Although those pleas reduce the level of justice in the most legalistic sense, the information provided can lead to reconciliation and further investigations. Hence, indirectly, guilt pleas do contribute to justice. Still, the long-term effect of deterrence is undermined by judgements based on guilt pleas. The ICTY, however, was very eager to focus on high-ranking perpetrators and was therefore willing to pay the price of bypassing low- and middle-class criminals.

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[83] ibid. p.21;
[84] supra note [72]; p.147;
[85] supra note [70]; p.25;

7.4 Concluding Remarks

The work the ICTY has done regarding Balkan reconciliation is truly remarkable. Even though critics claim that the court has acted slowly and un-efficiently, the historic record created by the tribunal is truly outstanding. Never before in history, such a sound amount of material has been gathered, so many witnesses have been heard and so many key-perpetrators stood trial before an international criminal tribunal. The conflict record thus produced has led to stabilization and reconciliation in some key areas of the Balkan. But still, the true nature of the tribunal and its achievements are hard to evaluate on the short term. The long-term perspective will show, how effective the tribunal's work was. After more than 160 trials already completed, prosecuted senior officials such as Tadic, Milosevic and Bilijana Plavcic, the true nature of the conflict and the atrocities committed can not be denied by future generations. This achievement alone, apart from many others, justifies the major spending of the court and will provide for a credible predecessor for future tribunals.

7.5 App.I .: **Important Guilt Pleas before the ICTY**

Case Name	Case No.	First Amended Indictment	Plea Agreement entered
Cesic "Brcko"	**(IT-95-10/1)**	26 November 2002	8 October 2003
Rajic "Stupni Do"	**(IT-95-12)**	14 January 2004	25 October 2005
Bralo "Lasva Valley"	**(IT-95-17)**	19 July 2005	19 July 2005
Zelenovic	**(IT-96-23/2)**	26 June 1996	17 January 2007
Plavsic "Bosnia and Herzegovina"	**(IT-00-39 & 40/1)**	7 March 2002	30 September 2002
Momir Nikolic "Srebrenica"	**(IT-02-60/1)**	27 May 2002	7 May 2003
Obrenovic "Srebrenica"	**(IT-02-60/2)**	27 May 2002	20 May 2003
Deronjic "Glogova"	**(IT-02-61)**	30 September 2003	30 September 2003
Banovic) " Omarska Camp and Keraterm Camp"	**(IT-02-65/1**	21 November 2002	26 June 2003
Babic	**(IT-03-72)**	17 November 2003	22 January 2004
Jankovic & Stankovic. "Foca"	**(IT-96-23/2)**	7 October 1999	16 January 2007

8. Transitional Justice and The International Criminal Court

Since the establishment of the International Military Tribunal in Nuremberg in 1946 by the victory powers, the world has torn from handing over competences to an international judicial body dealing with mass atrocities committed during times of war. In the late 1990's that policy changed by establishing the two 'sister tribunals' for the former Yugoslavia (ICTY) in 1993 and for Rwanda (ICTR) in 1994.

This approach, of establishing two independent judicial bodies on the basis of a Chapter VII Resolution by the United Nations Security Council (UNSC), was a significant step forward towards the erection of an international regime for criminal justice and accountability. Nevertheless, both tribunals faced two major handicaps – they are both timely and territorially limited in their jurisdiction. The mandate given to them was due to run out in the next years, according to the UN imposed Completion Strategy.
Bur nevertheless, in 1998 a new player appeared on the international screen – the International Criminal Court (ICC).

8.1 Rome 1998 and the Politics

The Rome conference was meant to mark a millennium moment for the Human Rights Movements. Additionally to hundreds of representatives from national governments, a vast number of representatives from about 175 NGO's, led by Amnesty International and Human Rights Watch, attended the gathering, lobbying for their interests. It was the first time in the relatively short history of modern international criminal law that NGO's were given a forum to promote their ideas. In 1995, three years prior to the final negotiations in Rome, the *Coalition for an International Criminal Court* (CICC) was founded,

gathering a huge number of individuals and organisations promoting ideas for an independent and permanent criminal court.[1]

But from the very beginning of negotiation for an international criminal court, it was rather unclear, how it would actually be shaped. Wide disagreement was predominant amongst the international community. About 1.700 different drafts were submitted as 'alternative choices' to state representatives in and prior to Rome. But most of the state representatives recognised the importance of such an institutions and knew about their unique chance.
As Hans Köchler put it: *'…the creation of the International Criminal Court may be considered as a genuine revolution in the system of modern international law'*.[2]

Indeed, the fact that so many different states opted for the establishment of such a judicial institution on a multilateral basis can clearly be held as significant. But as Geoffrey Robertson notes, '*Cynics thought at the time that even the most enthusiastic states would take years to make the necessary amendments to their national laws and the necessary sixty ratifications would not be deposited for at least a decade'*.[3]
However, those cynics were about to be surprised, when in 2002 the ICC became operational. It was clear from the very beginning of the negotiations, that a broad compromise had to be struck and that it was from utter importance for the success of the yet to be created court, to found its birth on a wide-ranging consensus.
During the actual conference, delegations split in three different groups. The '*like-minded'* group of 42 states, led by Canada and Germany, wanted a powerful prosecutor and a court which is clearly independent from the SC, equipped with powers to prosecute war crimes on a global basis.
On the other hand, the US, France and China promoted the idea of an court controlled by the SC, where they could use their veto-powers to stop

[1] Glasius, Marlies: *How Activists shaped the Court*; 2003; p.2; accessible under http://www.crimesofwar.org/icc_magazine/icc-glasius.html#top (Feb.02 2009)
[2] Köchler, Hans: *Global Justice or Global Revenge*? – International Criminal Justice at the Crossroads; Vienna; 2003; p.185;
[3] Robertson, Geoffrey: *Crimes Against Humanity* – The Struggle for Global Justice; London; 2006; p.420;

embarrassing investigations. The third group of countries - such as Iraq, Iran, Libya and Indonesia – did not want a court at all.

Pressure groups, such as Amnesty International argued for an all-powerful prosecutor. In a paper they expressed their views on the issue, holding that 'State practice demonstrates that prosecutors are unlikely to bring cases where the evidence is weak', which makes it therefore necessary to prosecute large-scale atrocities on an international level.[4] The final outcome of the negotiations provided for a mixture of all those ideas.

The ICC was intended to mark a common international effort to eliminate a climate of impunity amongst those, most responsible for the most heinous crimes. Above all, the ICC was furthermore created to complement the national judicial systems by prosecuting persons responsible fro genocide, crimes against humanity and war crimes where national systems could not provide for an effective remedy.

As Darryl Robinson notes: *'It is expected that the ICC will contribute to a climate of accountability not only through the 'multiplier effect' of its complementarity jurisdiction, as it encourages states to more diligently apprehend and prosecute international criminals*'.[5]

On paper, after long hours of negotiations in Rome until the very last minute, the statute appeared to be a success and managed to serve the interests of states and NGOs alike. Especially the definitional sections of the crimes enshrined in the statute were able to consolidate many of the conceptual advances in human rights law. Crimes against humanity were established as '*offences, which may be committed at times of comparative peace as well as internal or international war, while war crimes may be committed during an internal conflict*'[6]. Sexual violence was finally marked as a war crime, following the definitions of the ICTY/ICTR and the defence was granted far reaching powers. Concessions, however, were made throughout the negotiations

[4] Amnesty International Paper: *The International Criminal Court*: Making the right choices; Part I; p.76; 1997; accessible under http://www.amnesty.org/en/library/info/IOR40/011/1997 (Feb. 12 2009)

[5] Robinson, Darryl: *Serving the Interests of Justice*: Amnesties, Truth Commissions and the International Criminal Court in European Journal for International Law; p.481-505; Vol.14; 2003; p.482;

[6] supra note [3]; p.422;

process in order to keep the United States and other key states aboard. Those flaws remain embedded in the statute even after the United States had decided to oppose the court. Many concerns were raised that the court, initially intended to serve the principle of independence, was due to become a political institution. Yet, politicization of courts in cases of international crimes is much less virulent in the framework of a permanent institution than in national or regional (ad hoc) proceedings.[7]

A permanent and supranational structured institution, such as the ICC, best avoids the '*one-sidedness of the current pursuit of universal jurisdiction'* in regards to claims for universal jurisdiction by national judges.[8] The ICC is in a position to overcome the weaknesses and disadvantages ad-hoc tribunals bear and may enjoy universal legitimacy and credibility. The fact that the jurisdiction of the court provides for the prosecution of heads of states and the reason that the court does not serve as an UN organ in the first place does aggravate this conclusion.

8.2 The Statute

'Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time…'[9]

Art. 1 of the Rome Statute establishes the court as a permanent institution with the jurisdiction to try persons its prosecutor accuses of the most serious crimes of international concern. It is equipped with legal personality, which opens the way to enter into legally binding agreements with sovereign states and other institutions, which possess the same capacity. The ICC is furthermore established as a permanent international body with 'complemetary' jurisdiction to complement national courts that are 'unable or unwilling' to carry out investigations in their own capacity.

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[7] supra note [2]; p.186;
[8] Kissinger, Henry: *The Pitfalls of Universal Jurisdiction* in Foreign Affairs; Vol.80; 2001; p.96;
[9] Rome Statute; preamble text;

The mistakes and errors done at Nuremberg and at the ICTY/ICTR, to house the judicial and the prosecutorial body under the same roof, has regrettably been repeated. At Nuremberg and at the ICTY/ICTR, the affiliation between the judges and the prosecutor became a large issue and was therefore often subject to intense discussion, the ICC missed to circumvent this critical point.

The most direct mechanism to trigger the investigative powers of the ICC is provided in Art. 13(b) of the statute, whereby a '*situation*' is referred to the court by the SC acting pursuant to Chapter VII of the UN Charta. The same method applied to both ad hoc tribunals, by declaring the situations in the Balkans and Rwanda as a '*situation*', threatening international peace and security. Therefore, there is no more need to establish another future ad hoc tribunal, if the veto-powers can agree on a referral to the ICC.[10] In the event of disagreement, however, the situation becomes more complicated.[11]The court cannot acquire jurisdiction without a SC Resolution unless, the conduct in question occurred on the territory of a statute member or the suspect is a national of a state, which is a contracting party to the ICC statute. Both requirements were fulfilled in the case concerning the Lord's Resistance Army in Uganda, but Uganda referred the situation to the ICC, a third mechanism to trigger the courts investigative powers.

Lastly, the prosecutor may start investigating into a situation *proprio motu* (e.g. on his or her own initiative). But some legal hurdles remain in this path: A pre-trial chamber of the court has to revise and proof the evidence collected and has to authorize whether or not 'the commencement of the investigations' shall take place[12].

Furthermore, investigations *proprio motu* come with a number of disadvantaging features:

In order to even commence investigations, the state concerned (or the national state of the accused) has to be contracting party to the court. Secondly, the prosecutor has to provide sufficient evidence to convince the

[10] supra note [3]; p.442;
[11] supra note [2]; p.188;
[12] Art.15 Rome Statute;

pre-trial chamber to authorize further proceedings. Thirdly, Art. 16. Of the Rome Statute provides for another hurdle to take:
Art.16: '*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions*.'

The SC thereby possesses the powers to stop any further investigations for a period of twelve months, renewable on an annual basis. The result of this mechanism, critics claim, might be that either the SC refers a situation to the court or simply tolerates the courts proceedings. This provision was included into the statute, although highly disputed amongst delegations in Rome, in order to keep the P5 aboard. It was clear from the very beginning of the negotiations for an international criminal court that the United States would not agree to a statute, which includes no cast-iron guarantee that no American would ever be indicted.[13]

Art. 20 of the statute serves the principle of *'ne bis in idem'* so that there can be no proceedings brought against a suspect before the ICC for conducts for which he/she has already been convicted or acquitted in national proceedings. However, this rule is subject to the qualification that the national proceedings have been carried out in accordance with international standards. If the proceedings were intended to shield the accused against ICC investigations, Art.20 does not take grip. Art.17 applies the same test for initial investigations. If a suspect is already being dealt with under national investigations, in a way, which appears genuine and effective, the ICC has to drop any further measures[14].

[13] supra note [3]; p.443
[14] Hunt, David: *The International Criminal Court* – High Hopes, Creative Ambiguity and an Unfortunate Mistrust in International Judges in Journal of International Criminal Justice; p.56-70; Vol.2; 2004; p.63;

8.3 Lessons learned from the ad hoc tribunals experience

Fifteen years after the establishment of the International Criminal Tribunals for Yugoslavia and Rwanda, their work serve as a good and picturesque example of the tasks to come for the ICC. After having concluded more then 160 proceedings against alleged perpetrators at The Hague and 21 completed trials in Arusha, the experience from those two tribunals is highly valuable for the ICC and its future proceedings.

In the system designed for the ICC, states will have greater control over decisions where the dividing line should be drawn between the ICC's jurisdiction and their own.[15] This, according to Claude Jorda, will have a significant impact on the courts work. The disadvantage of a treaty-based court is the mere fact that all the contracting states have the power to change the rules in a General Assembly, according to the statute. This will indeed complicate the work of the court significantly.[16] Still, the proceedings according to Art.13(b) of the statute will not be affected in this sense, since the SC can act irrespectively of individual states claims. Furthermore it remains yet to be seen, whether or not sate co-operation with the ICC will meet the high expectations of the international community. Although the acceptance of the court has been very positive it remains unclear, if the authority of the court will be enough to carry out effective investigations in situations of war and internal conflicts.

Other issues, regarding lessons-learned from the ICTY experience, are far more clear. Some might be discussed here:

The failure to complete investigations before indictments were issued for confirmation before the court, though understandable in the light of the early pressure to present results, resulted in the need for many amended indictments and a delay for proceedings at the ICTY. Furthermore, due to a bad co-operation amongst the separate investigative units of the ICTY, some

[15] Jorda, Claude: *The major hurdles and accomplishments of the ICTY*: what the ICC can learn from them in Journal of International Criminal Justice; 2004; p.7;
[16] supra note [14]; p.62;

cases, which could have been resolved in one common trial, were carried out separately and therefore more cost and time intense.[17]

Secondly, the importance of outreach and information provided to people in the former Yugoslavia was carried out too late in the ICTY history. The court had been operational for more then two years, before justice Kirk-McDonald initiated the Outreach Program in 1996.[18] The ICC has to be aware of this issue and has to co-work closely with local authorities and NGO's in the region to promote its values and ideas. A lack of regional support amongst the local population might hamper the investigative efforts of the ICC significantly and the utter importance of witness protection might be at stake as a result.

Thirdly, the investigative-staff of the court needs to receive a special training and education dealing with traumative experiences of victims. Experiences at the ICTY and ICTR show that most of the staff was barely capable of dealing with the experiences they witnessed and heard themselves. [19]

Fourthly, the co-ordination amongst senior-staff members of all bodies of the court has to be enhanced in order to provide for more effective and shorter trials.[20]

The experiences gathered from the ICTY and ICTR are highly valuable for future ICC proceedings. However, their tasks differ in many ways. Whilst the ICTY was eager to create an overall picture of the highly complex Balkan conflicts, with more than 15.000 alleged perpetrators and many situations to investigate, the ICC will per se focus on the 'Big Fish'. This limited scope enables for the ICC to leaf many cases of low- and middle-ranking officials to national proceedings. The involvement of additional approaches, such as Truth and Reconciliation Commissions, will be crucial for the ICC to work effectively. It remains yet to be seen, how the Court can cope with this challenges. Furthermore, the prosecutor, when acting on his/her own motion (*proprio motu*) will face many difficulties regarding the enforcement of his/her

[17] supra note [14]; p.62;
[18] Kirk-McDonald, Gabrielle: *Problems, Obstacles and Achievements of the ICTY* in Journal of International criminal Justice; Vol.2; p.558-571; 2004; p.564;
[19] Schrag, Minna: *Lessons Learned from ICTY Experience* in Journal of International Criminal Justice; p. 427-434; Vol.2; 2004; p.433;
[20] ibid.

actions. The advantage of the ICTY, as already stated in the previous chapter, are the far reaching Chapter VII powers, endowed by the SC. The ICC will be equipped with those instruments in a very limited manner, namely only when carrying out proceedings pursuant to Art.13(b).

8.4 Obstacles to overcome

With the signing of the Rome Statute in July 1998, more then 120 nations agreed on the establishment of a permanent judicial body that is mend to deal with humanitarian issues, both globally and permanently. In April 2002, 60 nations had ratified the statute, what finally put the court operational. Nevertheless, the court, from its very beginning, had to deal with several issues, which hamper its work.

First of all, the ICC is not, as it was the initially proposed by some nations like Germany, an independent body, hence it is strongly bound to the co-operation with the UNSC and its permanent members, due to a compromise reached in Rome, to keep the United States on board during the negotiations[21]. Secondly, when the court finally began, to carry out its first investigations, the problem of state referrals (Art. 14 of the Rome Statute) became a major issue, especially regarding to the cases in Uganda and the Democratic Republic of Congo (DRC). Finally, the third major issue, in my opinion, was the abstention and 'de-signing' of the US to the statute in 2003.
These three major problems are mend to be solved, in order to give the court its powers, to make it a court, worth the legacy of its predecessors, of both Nuremberg and the ICTY/ICTR.

[21] supra note [3]; p.422;

8.4.1 A dual-court approach?

After all, according to Art. 13, the Rome Statute provides three different ways, in triggering the ICC's jurisdiction. First and foremost, the ICC has jurisdiction over the crimes defined in the Statute either committed by countries, which have ratified the Statute or if the crime is committed on the territory of a member state by a non-member state. [22]
Secondly, the UNSC, acting under Chapter VII of the Charta refers a situation to the ICC, even if the state concerned not being a member state of the Statute.[23]Thirdly, a state can, according to Art. 14 of the Statute refer itself to the courts jurisdiction.

As it happened in 2004, the UNSC passed Resolution 1564 of 18. September 2004, mandating the establishment of an '*international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of Genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable*'.[24]
After the commission issued their report to the UNSC, it was decided, that the issue should be referred to the ICC for further inquisitions. Nevertheless, before that a different approach favoured by the United States and some African states was brought before the UNSC as well. The approach proposed the establishment of another ad hoc tribunal as a joint venture with the ICTR in Arusha, Tanzania. However, this approach was refused, due the bad experiences with such tribunals regarding to high costs and a slow response time.[25]

[22] Art. 13 (c) Rome Statute
[23] Art. 13 (b) Rome Statute
[24] UN Doc. S.Res/1562 (2004); Para. 12
[25] Happold, Matthew; *Darfur, the Security Council, and the International Criminal Court* in Journal for International Criminal Justice; Vol.2; 2006; p.3

After a short period of investigation, the Office of the Prosecutor (OTP) came to the conclusion that there was enough evidence collected, to start further investigations and prepare first indictments.
Nevertheless, the investigations in Darfur turned out being not as easy as expected. To start investigations in a region, where the conflict is still vividly capable, was a new challenge for the ICC. Neither was it easy to examine the witnesses, in order not to reveal their identity, which may have caused their death, nor was the support by the Sudanese authorities as big as expected.[26]
However, within a short period of time, loads of documents were produced by the OTP, hundreds of witnesses were interviewed, so that the case could be presented to the pre-trial chamber of the court.
The referral of the Darfur case to the ICC was as well a major breakthrough for the court supporters on the one hand, but it also held several advantages for the people concerned in the region:
First of all, the members of the SC, who formerly opposed the jurisdiction of the ICC and displayed strong antagonism abstained the voting in the council and gave the court an opportunity to act.
Secondly, the ICC acting on behalf of the UNSC under a Chapter VII resolution gives wide-ranging powers to the OTP. The court's actions would be backed up by all Chapter VII mechanisms and could be triggered more easily.
Thirdly, the court and the UNSC drew an outstanding link between peace building and justice, by showing that peace could be brought to a region by holding perpetrators accountable for atrocities committed.[27]
Soon after the case was issued before the court, a list of accused persons was produced.

However, the UNSC referral is not as convenient for the ICC as it appears on the first sight. Resolution 1593 contained several points, which seemed to expend the interpretation of the Rome Statute to the outmost.

[26] Schabas, William; *United States hostility to the ICC: It's all about the Security Council* in Journal for International Criminal Justice; Vol. 2; 2004; p.14
[27] supra note [1]; p. 2

First of all, the funding of the case was, contrary to Art. 115 (b) of the Statute, led to the ICC. The UNSC refused to bear the costs for as well the investigations and the trial. This brought a huge burden to the Court and especially to the OTP, which had to raise funding for this case at the State Assembly of the ICC. Remarkably, the expenses of the two ad hoc tribunals in The Hague and Arusha are paid by the UN, according to Art.32 of the Statute.[28] However, the reason that the Darfur case was not funded by the UNSC, emerged from a wide compromise, necessary for the United States to acquiescence the voting.[29]

The funding issue brings up the question, whether or not the court, when acting on behalf of the UNSC, creates a different regime, as when acting on its own investigations.[30]

Secondly, the UNSC in its mandate made wide-ranging exceptions for the OTP's competences. As the resolution points out:

'Nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State'.[31]

This part of the resolution is especially 'unfortunate' for several reasons. First and foremost, the UNSC shaped the case for the OTP and its investigating powers. However, it is within the competence of the UNSC to refer cases to the ICC, but the Statute in Art.13 (b) literally refers to 'situations' and not single cases[32]. So, in my opinion, the UNSC exaggerates its powers, by pre-defining the filed of operation for the OTP ex ante. The competences of the OTP in this regard should remain untouched to keep the courts independence beyond any doubt.

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[28] ICTYSt. Art. 32;

[29] Ohlin, Jens; *The ICC – Two courts in one?* in Journal for International Criminal Justice; Vol.2; 2006; p.2

[30] supra note [47];

[31] Security Council, Minutes, 5158th Meeting (31 Mar 2005) UN Doc S/PV.5158, Para. 5

[32] supra note [25]; p.4;

Secondly, it is highly doubtful whether to make judicial exceptions for non-party state peacekeepers *inter alia* is lawful under the regime of the Rome Statute, since it is not provided for in the ICC statute.[33]

However, these two facts, the funding and the shaping of the investigations ex ante, might bring one to the conclusion that depending on whether or not the court is acting on behalf of the UNSC or on its own initiative, two different 'Courts' appear. As Ohlin points out, the Court is best viewed as two courts: "*an independent criminal court enacted by the parties of the Rome Statute but, in the case of referrals by the Security Council under Article 13(b) of the Statute, an organ for restoring collective peace and security that transcends the classic goals of criminal law to adjudicate individual guilt*"[34].

8.4.2 The United States and the ICC

The second main problem, the ICC has to deal with, is the abstention of the U.S to the Rome Statute. In 1998 in Rome, during the last round of negotiations, it was not as clear, as it appears today, that the U.S would refuse from joining the courts jurisdiction. However, during the negotiations, two strong groups of states emerged, who promoted different ideas, of how the court should be established. One, the more 'like-minded' group, led by Germany and France, preferred a court genuinely independent from the UNSC with a strong prosecutor. Nevertheless, the U.S also wanted a court, but one under the control of the UNSC; literally one, that would never work against the interests of the U.S. The model preferred by the U.S and Canada was one under the control of the Security Council, where a veto of the permanent members could block investigations.[35]

Throughout the whole negotiations, efforts were made to keep the U.S aboard. Lots of these efforts are still likely to see in the current statute, even though the U.S refused to join, like Art.16 of the Statute.

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[33] supra note [50]; p.5;
[34] supra note [29]; p.1;
[35] supra note [39]; p. 421;

The main reason for states such as France and Germany to refuse the U.S proposal was that, if the UNSC could block or even stop investigations from its very beginning, permanent members of the UNSC could always protect their allies, and therefore impunity would still be an issue, even more likely then it was before.

The Bush jr. administration, following the Clinton administration, which had actually signed the Rome Statute, 'unsigned' the statute in 2002 and the 'the Hague Invasion-Act'[36] was introduced, which actually allowed the president to give order to free American service staff members, which are held in custody by the ICC, to be freed, even with military force, without permission of the congress, what underlined the strong opposition the U.S had against the court.

But still the question remains, what causes the strong opposition of the U.S towards the ICC?

To say it in Bill Clinton's words: *It's all about sovereignty, stupid!* The United States, as the only remaining Super-Power after the cold war, with hundreds of thousand of military and non-military service members spread all over the world, has a particularly strong interest in not loosing any of their sovereignty, by letting a court rule about the actual legitimacy of their work. In his testimony before the Senate Foreign Relations Committee on 23 July 1998, David Scheffer, US ambassador at large for war crimes issues, stated that the establishment of the court could '*inhibit the ability of the United States to use its military to meet alliance obligations and participate in multilateral operations, including humanitarian interventions to save Civilian live*'.[37]

However, this argument is, as Robertson argues, complete nonsense, due to the complementarity mechanism provided in the Rome Statute, which enables member states to deal with occurring human rights violations at the first hand, before the ICC actually steps in.[38]

Furthermore, as the number of ratifications increased (and so did the concerns of the U.S about its nationals being arrested on foreign territory,

[36] American Service-Members' Protection Act – 30; July 2003

[37] See http://www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html.

[38] supra note [39]; p. 464

according to the territorial principle in the statute) the U.S started rapidly to negotiate bilateral Art.98(2) agreements with party states. Those agreements basically include non-surrender agreements of U.S citizens to the court. Art.98(2) of the Rome Statute prevents the ICC from insisting on the extradition of its suspect, if that would put the extraditing state in breach of a treaty obligation to a third state. The provision was intentionally used to protect diplomats and was never mend to establish a back door through which state parties, under the pressure of the U.S, sign a bilateral agreement not to surrender their nationals.[39]

8.4.3 'Self-referrals' – a double track approach toward justice?

The first two cases brought before the ICC in early 2004, the situation in Uganda (referred to the ICC on 29 January 2004) and in the Democratic Republic of Congo (referred on 19 April 2004), were based on self-referrals by Uganda and the DRC.[40]

A third referral by the by the Central African Republic was issued in 2005. The common feature of all these cases lies in the fact that all three conflicts are wholly internal. However, a second common feature is the fact that the self-referral was always issued by the government fighting against rebel groups. In all three cases, the OTP was asked to start investigations on crimes alleged by the rebel groups fighting against the central authorities.

However, self-referrals hold a lot of advantages for the OTP, concerning the assured co-operation of the state authorities, hence they have a special interest in trying those alleged persons.[41] Nevertheless, it must be borne in mind, that the state authorities are as involved in the armed conflict as the rebel groups and are therefore likely to commit the same atrocities, as the rebel groups. [42]

However, the Prosecutor has wisely stated, that once he investigates in a

[39] supra note [56]; p. 465;
[40] supra note [1]; p.2;
[41] Gaeta, Paola: *Is the practice of "self-referrals" a sound start for the ICC in* Journal for International Criminal Justice; Vol.3; 2004; p.1;
[42] supra note [1]; p.2;

'situation', he will do so across the board and not just looking for the crimes committed by the various rebel groups.[43]

Nevertheless, a question mark must be put along the habitus of states, referring their internal conflicts to the ICC. Some concerns might be issued:

First of all, the state authorities, by referring the case to the ICC, denounce the rebel groups as international criminals. This might open the way to fight those alleged perpetrators in a more cruel way then the authorities would have done initially, without international back up.

Secondly, it must be born in mind that the self-referral and the waiver on complementarity by the party, intentionally is just issued on crimes committed by the rebel groups and not by the state authorities. For crimes committed by the state, the ICC should have no competence, hence the authorities would investigate in those cases themselves.

Thirdly, Art.14 of the Statute, which deals with self-referrals, was intentionally meant for war-torn states with a lack of competence to start investigations. As it is clear form the sixth preambular paragraph of the Statute, every state has '*the duty…to exercise its criminal jurisdiction over those responsible for international crimes*'. [44]

The foundation of the International Criminal court in 1998 and its birth in 2002 mark a significant step in international law to make the impunity of grave breaches in international criminal law history. Nevertheless, the ICC is still struggling with problems, in order to establish a working regime of global justice. As I tried to point out, the obstacles for the ICC are less according to its function, then more according to its novelty in the international arena.

First, the problems that the ICC is facing due to the abstention on the U.S are not new. In 1982, during the last round of negotiations for a new international high-seas regime (UNCLOS II), the U.S finally refused to sign the new treaty, even though they were a strong supporter of the initial idea. However, several years later, after a new round of negotiations and an intense revision of the

[43] supra note [60]

[44] Kress, Claus: *"Self-referrals" and "waivers of complementarity": some considerations in law and policy; in* Journal for International Criminal Justice; Vol.3; 2004; p.1

critical chapters, the U.S finally joined the convention.[45] The lessons learned from this must be, that it is not the end of the day yet!

Secondly, according to the UNSC issue: The court is obviously highly depending on a strong cooperation with the SC and its veto-powers. Nevertheless it must be borne in mind, that the Chapter VII resolutions, on which the Darfur referral was build up, constitutes the strongest legal mechanism within the international peacekeeping regime. However, the UNSC should not abuse these powers by watering down the Rome Statute.

Thirdly, the self-referral cases in Uganda and the DRC gave the ICC a great opportunity to gain both, international awareness and a first chance to proof its ability. However, the ongoing Lubanga Case might have the same effect as the Tadic case had for the ICTY. Back in the days, the ICTY was struggling with major problems of integrity, but the Tadic case marked a turning point for the tribunal, by showing its effectiveness[46]. Maybe the Lubanga case can do the same for the ICC.

8.5 The International Criminal Court and the Promotion of Justice

Huge expectations rest on the shoulders of the ICC from its early stage on. Human Rights groups as well as national states and the international community have large expectations for the court to stop a regime of impunity, which was predominate in the last century. It is expected that the ICC will contribute towards a climate of accountability not only through the demonstrative effect of its own prosecution but through its complementarity jurisdiction.[47]This approach was meant to encourage national states to carry out investigations on a domestic level, before the ICC, due to Art.17 of the Statute, would step in. However, even during the negotiations at Rome one issue was discussed vividly. How should the ICC be embedded in the concept

[45] Reismann, Michael: *Learning to deal with rejections: The ICC and the United States in* Journal for International Criminal Justice; Vol.2; 2003; p.1

[46] Bassiouni, Charif: *The ICC-Quo vadis*?; *in* Journal for International Criminal Justice; Vol.2; 2006; p.3

[47] Robinson, Darryl: *Serving the Interest of Justice:* Amnesties, Truth Commissions and the International Criminal Court in European Journal of International Law; p.481-505: Vol.14; 2003; p.482;

of Transitional Justice?

As Boraine held:' *It is to be hoped…that when the International Criminal Court comes into being, it will not, either by definition or by approach, discourage attempts by national states to come to terms with their past…It would be regrettable if the only approach to gross human rights violations comes in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights*'.[48]

Many authors have argued that there should be some discretion for the ICC included in the statute, in order to give way for alternative judicial and non-judicial remedies in times of transition of states from turmoil into democracies.[49]

But at a time, when it was hard to predict when and how effectively the court would come into being, it was even more difficult to see, how it would interact with quasi-judicial approaches. At the first hand, the very purpose of the ICC is to ensure to carry out investigations and prosecutions against the most serious offences, and to prompt national states to overthrow the considerations of expedience and *realpolitik* that had so often led to trade of justice for impunity and peace.

The drafters of the Rome Statute chose wisely not to dig too deep into these critical issues, because it was rather unlikely to reach a consensus amongst the state-parties on this topic. However, the drafters of the statute agreed on including a clause into the actual treaty, which would left the door open for alternative forms of justice. The most likely mechanism at which the ICC will decide whether to defer to quasi-judicial mechanisms and national programs is pursuant to the discretion of the prosecutor to abstain from prosecution 'in the interest of justice', as stated in Art.53 of the statute.[50]

The basic argument for this interpretation of Art.53 is that the ICC basically must initiate investigations in a certain situations, if the relevant conditions are

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[48] Boraine, Alex: *A Country Unmasked*: South Africa's Truth and Reconciliation Commission; 2000; Oxford; p.208;

[49] Yav Katshung, Joseph: *The relationship between the International Criminal Court and Truth Commissions:* Some thoughts on how to build a bridge across retributive and restorative justices; 2005; p.2; accessible under: http://www.iccnow.org/documents/InterestofJustice_JosephYav_May05.pdf. (Feb. 12th 2009)

[50] supra note [47]; p.483;

met. However, under exceptional circumstances and where it would not be in the interests of justice to interfere with reconciliation mechanisms, the ICC can refuse to initiate proceedings. Especially in cases, where lower level offenders would fall under the jurisdiction of a truth and reconciliation commission, or where they were even granted amnesties, combined with judicial prosecutions of senior offenders, the ICC is likely to hamper the reconciling process. However in cases, where even high-ranking offenders would be granted amnesties, the ICC must step in.[51] This assumption derives from the mere fact that blanked amnesties would actually establish an anti-thesis towards the purpose of the ICC.

It must be stated at the outset that there is no contradiction or inherent hostility between the objectives of the ICC and truth and reconciliation commissions. Truth commissions may add a valuable part to the investigations of a criminal proceeding. Furthermore, compared to the highly formalized proceedings of criminal trials and investigations, truth commissions may establish a welcome alternative, especially in terms of to victim's rights. Furthermore, they may complement the work of a judicial tribunal by facilitating compensations for victims, educating the public, promote reconciliation and by making recommendations for the future.[52]

Thus, trial prosecution and truth commissions serve valuable objectives, which are not inherently in conflict. The very problem, indeed, occurs, where blanked amnesties were handed out. The *raison d'etre* of the ICC is to not let go serious international crimes unpunished.[53]

8.5.1 Discretion not to Proceed: In the Interests of Justice

Art.53(1) of the ICC statute governs the discretion of the prosecutor, whether to launch investigations after the jurisdiction has been triggered either by a state referral or a SC referral, or not. Furthermore, Art.(53) provides that the prosecutor shall launch proceedings unless there is '*no reasonable basis'* to

[51] Bell, Christine: The 'New Law' of Transitional Justice in Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development, The Nuremberg Declaration on Peace and Justice by K Ambos(ed.); Berlin, 2007, p3;
[52] supra note [47]; p.484;
[53] ICC Statute; preamble; para.4;

proceed. More specifically, the Statute in Art.53(1)c requires the prosecutor to take *'… into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice*.'

But the decision of the prosecutor to initiate proceedings, if considered reasonable, is by itself subject to supervision of the Pre-Trial chamber, according to the rules of procedure and evidence. Only if the Pre-Trial chamber agrees with the conclusions of the prosecutor, investigations are due to take action. In cases, however, where the prosecutor concludes not to start investigations, the Pre-Trial chamber may only ask him to re-consider his decision, according to Art.53(3)a of the statute.

The fundamental question however, remains whether the merits of *'interest of justice'* only applies to criminal justice or to a broader definition of justice alike. Interpreting the provision in the context of the whole statue, the only supportable interpretation seems to be the latter.[54] Art.53(2)c specifically states that the prosecutor may take broader factors, including compassionate considerations such as the age of the accused or the gravity of the crime and the interests of the victims, into account. Thus, the discretion of Art.53 has to be interpreted broadly.

This interpretation is furthermore in conformity with the *Vienna Convention on the Law of Treaties* (VCLT). Art. 31 of the VCLT states that the interpretation of a treaty shall be conducted '*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*'. It clearly follows from the preamble text of the ICC statute that the ICC should serve as a last resort against impunity and that other measures to deal with large-scale atrocities should be taken into account as well. This could denote an intention to allow '*the interest of justice*' to encompass wide-ranging considerations not relating directly to a criminal trial.[55] It might nevertheless be surprising, however, that human right groups, such as Amnesty International or Human Right Watch, prefer a rather narrow

[54] supra note [47]; p.488;

[55] Dukic, Drazan: *Transitional Justice and the International Criminal Court* – in 'the interests of justice'? in International Review of the Red Cross; Vol.89; 2007; p.697;

interpretation of Art.53. Their basic assumption is, bearing in mind the preamble of the Rome Statute, that justice is always served by prosecuting crimes within the ICC's jurisdiction.[56]
It was furthermore argued that the ICC's *raison d'etre* is to prosecute and punish serious international crimes and that the court constitutes a safeguard against impunity. Even further, it can be assumed that the SC, according to Art.16 of the statute, has the power to stop any investigations, if it appears clear that alternative approaches would have a wider and more effective influence on the situation at hands.

8.5.2 The Obligation to Prosecute and the Legality of Amnesties

There has been an ongoing discussion throughout recent years, if there is an obligation under international law to prosecute certain crimes. This debate was again initiated parallel to the ongoing discussion of discretion, regarding Art.53 of the ICC statute. Neither international customary rules nor international general principles oblige states to exercise jurisdiction over international crimes. Antonio Cassese, former president of the ICTY, however, believes that it is possible to argue that *'in those areas where treaties provide for such an obligation, a corresponding customary rule may have emerged or be in the process of evolving'*.[57]

International Conventions, such as the 1948 Geneva Conventions, provide for the legal basis of jurisdiction to punish certain crimes. But do they furthermore include obligations in this respect? The Geneva Conventions, for example, stipulate that persons guilty of genocide shall be punished and state parties must enact the necessary legislation and provide for effective remedies.[58] Those provisions are subject to international custom and are binding amongst states, even without a conventional treaty basis. Therefore it appears clear that for the crime of genocide that an inter-state obligation to prosecute

[56] Hall, Christopher: *Suggestions concerning International Criminal Court prosecutorial policy and strategy and external relations; 2003*; p.28; accessible under http://www.icc-cpi.int/library/organs/otp/hall.pdf (Jan.15th 2009)
[57] Cassese, Antonio: *International Criminal Law*; New York; 2003; p.301;
[58] *Convention on the Prevention and Punishment of the Crime of Genocide*; Dec. 9th 1948; Art.4-5;

genocide exists, endorsed by conventional and custom law.[59]
The same might apply for war crimes and crimes against humanity, even though the obligation to prosecute might arise from a different legal source. For crimes against humanity several multilateral treaties exist, which enshrine that those crimes should not go unpunished. However, the general acceptance of these treaties is not comparable to the Genocide Convention. It is therefore difficult to argue that the same obligation applies to war crimes and crimes against humanity, as it does regarding to genocide.[60] But it is indeed crucial for the deterrence of future atrocities that those most heinous crimes do not go un-punished.

The granting of impunity and the non-prosecution of those crimes would send a wrong signal to other regimes, which might continue their vicious policy. The more distinct the international community confronts regimes with their wrongdoings and the more stringent the policy of prosecution is set forth, the harder it is for criminal regimes to believe that they will enjoy impunity for their acts.[61]
Even in the event that truth and reconciliation commissions have been established to shed light on past atrocities, the natural need for justice should not be underestimated. Human rights and victims groups have thus vigorously pushed for justice even in the event of the establishment of non-judicial bodies.

8.5.3 The Legality of Amnesties

It was common practice in several post-conflict societies to grant wide-ranging amnesties for alleged perpetrators in order to bargain a peace accord. This practice was very often subject to long discussions and shall just be discussed in the following very briefly.
An overall obligation to prosecute certain crimes under international law would introduce a full-ban on granting amnesties in times of transition. Although

[59] supra note [55]; p.702;
[60] ibid.
[61] supra note [47]; p.489;

bases for amnesties exist under international law, they never went without discussion. Additional Protocol II to the Geneva Conventions in Art.6(5) provides for such an amnesty clause. At the same time, however, the *International Committee of the Red Cross* (ICRC) urges for a rather narrow interpretation of this provision, since the overall intend of the protocol calls for the protection of victims. [62] The ICRC notes that international humanitarian law does not exclude amnesties as long as *'the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance'*.[63]

Recent developments in this field furthermore proof a shift in policy regarding the granting of general amnesties. As a good example for this development serves the *Special Court for Sierra Leone* (SCSL), established under UN mandate in 2000 after several years of a raging war between rebel groups and state authorities in Sierra Leone. In a peace accord between the rebel groups and the authorities of Sierra Leone an amnesty clause was included in the treaty for most of the rebel leaders. The UN, however, declared that these amnesties should not include prosecutions in relation to genocide, war crimes and crimes against humanity and other serious violations of international humanitarian law. Subsequently, in Art.10 of the statute of the SCSL the UN repeated this provision. Art.10 provides:

'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.'

But, as already discussed in the previous chapters, such amnesty should be granted to minor offenders in order to support the process of national healing. This issue, however, is unlikely to appear in the case of the ICC, since its jurisdiction *inter alia* will mainly focus on the key perpetrators. On a moral level, there is a significant difference between the situation of low-level perpetrators and those who orchestrate the crime. There is indeed a greater case for deference to the judgment of a democratic society as to how to deal with those individuals who were manipulated by propaganda and swept up in

[62] supra note [55]; p.707;
[63] ibid; This assumption is furthermore endorsed by the ICRC customary law study.

a fleet of evil.[64] For those offenders, one can easily imagine the value of sincere forgiveness and reconciliation. The situation for those persons most responsible for serious crimes, however, is rather different. For those architects of genocide and war crimes the granting of amnesties is utterly problematic. Those individuals may be responsible for the death of maybe hundreds or thousands of civilians. To let them go un-punished would essentially disturb the relation between the authorities and the victims. It is therefore crucial for victims to see their perpetrator tried, in order to uphold the importance of basic common values and to send a message of deterrence to other potential perpetrators.

Thus, during recent years a general assumption of illegality of amnesties for the most serious crimes seems to have appeared. However, as Cassese notes, 'a general obligation for states to refrain from enacting amnesty laws' has yet to occur and is not supported by current state practise.[65]

8.6 Genuine Proceedings

The principle of complementarity, embedded in Art.17 of the ICC statute, provides for national states to indicate proceedings at first hands, before the ICC steps in. A case at the ICC would be declared inadmissible, if genuine national proceedings take place and the state decides to investigate into a certain matter.

During the ongoing negotiations in Rome in 1998, some delegations (most notably the delegation of South Africa) sought to explicitly recognize Truth and Reconciliation commissions in Art.17. The majority of states, as well as most of the NGO's, however, refused to endorse this attempt. Most of the states opted for the view that Art.17, in correlation with Art.20 (*ne bis in idem*), only applies to trial proceedings.[66]

One of the very first questions regarding Art.17 of the statute was concerning

[64] supra note [47]; p.495;
[65] supra note [57]; p.315;
[66] supra note [47]; p.499;

the interpretation of the term '*investigation*'. What kind of investigations has to be carried out in order not to trigger the ICC's jurisdiction? The court would clearly interpret the term as criminal investigations.[67] Other interpretations of the term investigations would provide for investigations of a truth and reconciliation commission as well, if the definition comprises a diligent and methodical effort to gather information and evidence and ascertain the facts of the conduct in question. The definition of Art.17 regarding the terms 'unable or unwilling' in relation to national prosecution does not come into play here. However, the point raised by the RSA delegation opens a significant issue, of how the ICC will co-operate cope with truth and reconciliation commissions and how common efforts could be carried out, according to the ICC statute.

8.7 Concluding Remarks

The ICC has yet to proof, how it will cope with mass atrocities. So forth, the only cases pending at the moment derived from state referrals and can therefore not be seen as genuine prosecutions of the court. Even though a sharp compromise between national states, NGO's and other institutions has been stroke in Rome in 1998, many issues, such as the interpretation of Art.17, 20 and 16, remain unresolved and will be subject to discussions for years to come.

In an interview, conducted in Vienna early in 2009, I had the opportunity to speak with Manfred Novak, UN Special Rapporteur on Torture and Director of the Ludwig Boltzmann Institute for Human Rights, about his expectations on the future of the ICC.[68] In his view, the future for the ICC will be brighter than most of his colleges would assume. He strongly supports the idea that the ICC will lead to an end of impunity for serious human rights violations. Antonio Cassese once described the ICTY as a '*giant without arms and legs'*.[69]He referred to the ICTY in this respect, due to the lack of co-operation of states involved in proceedings with the court. Up to date, it is unpredictable how this

[67] Holmes, R.: *The Principle of Complementarity* in R.S. Lee (ed.) The International Criminal Court; London; 1999; p.77;
[68] Interview conducted on Jan. 12th 2009
[69] http://www.nytimes.com/specials/bosnia/context/0726yugo-warcrimes-tribunal.html (Feb.1st 2009)

situation will affect the ICC. First of all, it depends on the way, how the ICC proceedings are carried out. If they are conducted in accordance with a SC referral, the SC can endow the ICC with all necessary powers to initiate and carry out effective proceedings. A rather different picture might appear in the case that the prosecutor acts in his/her own capacity *proprio motu*.

In cases of self-referrals of states, the co-operation should be based on a wide-ranging confidence between the ICC and the state in conduct, in order to provide for a rapid advancement of the investigations. Since the ratifying process amongst states, which can clearly be held as the leaders of human rights abuses, is still rather poor, a lot of work needs to be done to create an overall and global regime of justice and accountability.

In order to establish this global regime, some considerations might be taken into account. As Wayne Sandholtz notes, there are several factors, which may lead to the adoption or refusal of the ICC jurisdiction[70]:

- *Major military powers will be less favourable to the ICC, preferring to avoid any potential interference with the use of force internationally (realism).*
- *Democracies will be more favourable to participation in the ICC, accepting the international application of rule-of-law and human rights values they embrace at home.*
- *States already embedded in regional systems with functioning supranational courts (the EU, the ECHR, possibly the ACHR) will be more likely to join the ICC because they have already made and adapted to similar grants of supranational authority.*
- *An additional hypothesis suggests that states that provide large numbers of troops for U.N. operations will not be enthusiastic about the ICC because their personnel would offer more potential targets for prosecution.*

Those assumptions are obviously hard to deny but also do not go far enough. His findings do not take into consideration the enormous pressure states may

[70] Sandhotz, Wayne: *Europe, America and the International Court*; accessible under: http://www.princeton.edu/~hmilner/Conference_files/Transatlantic/Abstract-Sandholtz.pdf. (Feb.02 2009)

face, if they do not join the regime. Russia, for example, joined the Council of Europe and the ECHR jurisdiction in May 1998. Prior to this, nobody would have expected to see Russia joining this regime. Since that time, an enormous caseload has been produced by the court, involving Russian plaintiffs and human right standards had been held high in Russia, compared to the prior state. Nowadays, almost one third of the cases referred to the Strasbourg court comes from Russia. This development shows, how significant such regimes can be and how they can be used to promote international human right standards.

One can only hope that the success of the European Court of Human Rights serves as a good example for the ICC.

9. Conclusion and Findings

As I tried to point out in the previous chapters, the impact of judicial bodies on post conflict societies is sometimes hard to evaluate and depends on a variety of factors.

Most notably is the perception of a court's work in the region concerned and amongst the affected population. Regrettably, this aspect was not considered during the Nuremberg and Tokyo trials. For the work of the ICTY it can be held that the Outreach Program, aimed to distribute information of the court's work in the Balkans, came too late. This specific approach of the ICTY enables for the local population to get informed about the work of the tribunal. The program was designed to *'provide a comprehensive proactive information campaign stressing the Tribunal's impartiality and independence, as well as countering the endemic misconceptions that had prompted widespread disillusionment with the Tribunal in the former Yugoslavia'*.[1] Since the launch of this program, the degree of information about the courts work has risen significantly and therefore supported more moderate political parties in countries, such as Serbia, Croatia and the Kosovo. For the ICC it remains yet to be seen, how the court will cope with this issue, but one can hope that it will learn from the mistakes of its predecessors. A strong engagement, however, between the ICC and NGOs and the civil society is vital for its future success and its perception.

Secondly, victims and witnesses have to be protected in a manner by the court that if they testify before the bench, the infliction of harm after their return to their homes has to be prevented.

Thirdly, the court has to be supported by an efficient and distinct work of forces in the ground. The ICC and the ICTY both have to deal and struggle with this issue. The international community therefore has to provide for a sufficient support in this respect.

Fourthly, judicial bodies must not be used as political instruments. Their independence and impartiality has to be immanent beyond reasonable doubt

[1] Humphrey, Michel: *International Intervention, Justice and National Reconciliation*: The Role of the ICTY and ICTR in Bosnia and Rwanda in Journal of Human Rights; p.495-505; Vol.2; 2003; p.1

in order to gain credibility amongst the affected population and states. This factor does not just apply to judicial institutions but to non-judicial institutions, such as Truth and Reconciliation Commissions alike.
Lastly, judicial institutions have to be used in combination with a variety of measures, such as Truth and Reconciliation Commissions, retributive aims and social work, especially by engaging the civil society. Their work has to be seen as complimentary to non-judicial mechanisms, and vice-versa. It must be noted that several commissions have been set up in countries all over the world and have produced credible and important facts. Supplemented by the work of a numerous number of NGO's, their work has proved to be highly valuable and important to accomplish the overall goal of reconciliation amongst ethnic groups.

The importance of the legal bodies in the concept of transitional justice is their institutionalized status; the work accomplished by a structure of laws cannot be accomplished by a structure of sentiments.[2] Politically, it is the task of the state to recover the status of a victim. International law, in this respect, provides this recovery for a victim against a state. Usually, state violence does not violate the rights of a single person more then compared to a normal criminal offence, but as representatives of a particular social or ethnic group, state crimes do stigmatize the whole ethnic or religious entity. By identifying those offences, international law helps to identify and remedy those stigmas.
But in a conflict as complex as the one in the Balkans, it is often unclear to determine distinctly, who the key perpetrators were. Given the sheer enormous amount of persons, who were involved in criminal conducts in the Balkans, it is obvious to see that one international court cannot deal with all these cases. International criminal prosecution therefore must not claim to deal with every single case, but to break ground for subsequent cases to be dealt with either through national judicial systems or non-judicial mechanisms. Without penalizing gross human rights violations reconciliation may be doomed to failure. The assumption that justice was directly linked to long-lasting peace, was crucial for the creation of the ICTY and influenced from the

[2] Mulaj, Klejda: *Impact on Criminal Justice on Reconciliation*: The Case of the Former Yugoslavia; 2007; p.6

experience of the Nuremberg legacy, which helped to turn post-Nazi Germany into a sustainable democracy.

This direct link between justice, peace and reconciliation has to be recognized and used wisely in order to ensure the success of future courts and tribunals. It remains yet to see hoe the ICC will integrate into the concept of transitional justice, but a sound basis for upcoming success has to be laid down in Rome in 1998. A strong signal has to be sent out to criminal regimes all over the world that their wrongdoings and their most heinous crimes will not go unpunished. For the local population indeed the removal of some key political figures from their position, is one of the most significant effects of an international criminal court. As Payman Akhavan states: *'…the removal of leaders with criminal dispositions and a vested interest in conflict makes a positive contribution to post-conflict peace building. In concert with other policy measures, resort to international criminal tribunals can play a significant role in discrediting and containing destabilizing political forces. Stigmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence. Even if wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power*.'[3]

However, the vacuum left after the removal of the political elite, has to be filled in order to guarantee the further development of a transitional society. Therefore, judicial remedies always have to go hand in hand with political and administrative approaches.

It remains yet to be seen, how future generations will judge the work of the contemporary tribunals and it is yet to be seen, how the ICC will cope with the tasks ahead. However, the plain establishment of these judicial bodies can on its own be seen as truly remarkable and groundbreaking. Some years ago this development would not have been foreseeable and many cynics would have denied these evolvements. The international community has to furthermore commit itself to these approaches in order to once reach the point in history,

[3] Akhavan, Payman: *Beyond Impunity*: Can International Criminal Justice Prevent Future Atrocities? In The American Journal of International Law; p.7-31; Vol.95; 2001; p.1;

where judicial institutions have the powers to ensure the enforcement of basic human rights on a global scale and where gross human rights violations would never go unpunished again.

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http://www.sudbih.gov.ba/ - Bosnian War Crimes Chamber

NGO's and Scholar Institutions:

http://www.documenta.hr/eng/ – Croatia based NGO

http://www.globalpolicy.org – NGO

http://www.ictj.org - International Centre for Transitional Justice

http://iwpr.net – International War and Peace Reporting

http://avalon.law.yale.edu - Completed collection of documents concerning the Nuremberg Trials

http://www.ichrp.org - International Council on Human Rights

http://www.humanrights-geneva.info - Human Rights Tribune

http://www.univie.ac.at/bim - Ludwig Boltzmann Institute for Human Rights

http://www.icwc.de Documents concerning the Nuremberg Trials

http://www.amnesty.org - Amnesty international

http://www.hrw.org - Human Rights Watch

http://www.icrc.org - International Committee of the Red Cross

Abstract:

International Criminal Courts and Tribunals in the Concept of Transitional Justice and their Impact on Post-Conflict Societies

In meiner Diplomarbeit versuchte ich zu evaluieren, welche messbaren Auswirkungen internationale Strafgerichtshöfe auf post-Konflikt Gesellschaften haben. Aus diesem Grund habe ich drei verschieden-konzepierte Tribunale und Gerichte (Nürnberger Prozesse, Jugoslawien Tribunal und Internationaler Strafgerichtshof) auf Arbeitsweise, rechtliche Hintergründe und politische Aspekte hin untersucht.

Diese drei verschiedene Gerichtshöfe, ein Sieger-Tribunal, ein *ad hoc* Tribunal und ein vertragsbasierter permanenter Gerichtshof, unterscheiden sich deutlich in vielerlei Hinsicht, verfolgen allerdings das gleich Ziel – rechtliche Verantwortlichkeit für Kriegsverbrecher und Konfliktbewältigung.

Durch das verstärkte Auftreten solcher Strafgerichte und Tribunale in vielen Konfliktgebieten weltweit seit der frühen 1990er Jahre, gelangten diese immer mehr in den Fokus der internationalen Gemeinschaft.

Die Etablierung des Jugoslawien-Tribunals in Den Haag im Jahre 1993 kann in dieser Hinsicht als wegweisend und bahnbrechend gesehen werden. Zum ersten mal seit den Nürnberger Prozessen, die in den Jahren nach dem zweiten Weltkrieg in Deutschland abgehalten wurden, wurden mutmaßliche Kriegsverbrecher vor Gericht für ihre Taten zur Verantwortung gezogen. Die Auswirkungen der Urteile, sowohl von Nürnberg als auch von Den Haag, haben seither signifikant die Nachkriegsgesellschaft in den jeweiligen Regionen beeinflusst.

Wo sich in dieser Tradition von Gerichtshöfen der erste globale und permanente Akteur, der 1999 geschaffene Internationale Strafgerichtshof (IStGh), einordnen wird ist nichtsdestoweniger durchaus fraglich. Der IStGH als vertragsbasierter Gerichtshof steht vor grossen Herausforderungen. Nicht

nur, dass dem Gericht die Kapitel VII Kräfte der UN Charta fehlen, wie sie das Jugoslawien Tribunal besitzt, auch fehlt eine breite Unterstützung der internationalen Staatengemeinschaft.

Nichtsdestoweniger war die Etablierung des IStGH ein wichtiger Schritt in Richtung Konfliktbewältigung und 'Post-Conflict Peace Building'. Wo diese Entwicklung jedoch münden wird, ist schwer vorhersehbar.

Curriculum Vitae

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High School

1994-2002 Bundesrealgymnasium Tanzenberg, 9063 Maria Saal/Austria

Civil Service

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Studies

02/2004 Beginning of the Study of Politics at the School of Politics, Vienna
Special Focus:
International Politics
International Peace and Conflict Studies
EU and International Relations

04/2008 Graduation as *Mag.phil.*
Topic of Master Thesis:
International Criminal Courts and Tribunals in the Concept of Transitional Justice and their Impact on Post-Conflict Societies

10/2004 Beginning of the Study of Law at the Vienna School of Law
Special Focus:
Law of International Organisations
Law of International Relations
International Dispute Settlement
EC Competition Law

03/2009 Graduation as *Mag.iur.*

09/2007 - 06/2008 Academic Residence at the University of Southampton/Great Britain

Further Information:

- Member of the University of Vienna *High Potential Students* Program since 2006
- Receipt of Academic Excellence Scholarships from Private Funding in 2006, 2007 and 2008 awarded by the University of Vienna
- Numerous Field Trip Participations to Institutions all over Europe - including Brussels, The Hague, Paris, London, Vienna