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The legality of ad hoc tribunals
- proper justice or politicized peace?

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1 Research topic

1.1 Discription of topic and purpose of study

Lately, the involvement of super powers in both international and, what seems to be, internal relationships have become more imminent. An opening of national borders have changed the dynamics of our world where we are no longer lone entities seeking the best for only our nation. Instead there seems to be somewhat of a common opinion of an overall responsibility to ensure safety and justice for people, no matter their nationality. There is a clear pattern showing a slow and steady change from sovereignty to mutual responsibility which has brought major changes to how society addresses armed conflicts and the aftermaths thereof. As history shows an almost stagnating view of nation sovereignty in relating to all inter-State matters, there is now an indication that this concept of “every man/State to himself” is undergoing drastic changes. This means that not only are we slowly changing from a society of autonom individuality to interchangeable dependability, we are also in the process of replacing impunity with responsibility in regards to both inter- and intra-boarder war crimes.

The last decade was ground-breaking for the further¹ development of individual responsibility in relation to armed conflicts. This has since lead to a rapid development in demanding responsibility for crimes committed in armed conflicts through *ad hoc* justice. There have been various responses to this development and both positive and negative views have been expressed regarding this type of justice system. The purpose of this study is therefore to investigate the legality of such justice and its institutions in relation to their compatibility with international and/or national law and custom. As the area of *legality* is extensive I intend to focus on two major issues; the creation of ad hoc tribunals and the lack of jurisdictional universality. The former will be separated into the question of the *ex post facto* rule and the legality of UN influence. The latter will be analysed in relation to the politics involved in ad hoc justice as their jurisdiction is limited in both time and geographical borders, something scholars find both vital and disturbing alternately. The reason for this study is therefore to clarify whether ad hoc justice serves its purpose of “justice” the best as lately, and especially with the trial and execution of Saddam Hussein, there have been numerous objections and a spread of scepticism among advocates regarding this version of justice.

¹ See more under Introduction.

1.2 Limitations and research questions

Due to the size and purpose of this study I will not investigate the UN as an organisation, nor its implications regarding the legality of its actions, as this is related to the organisation as a whole and not limited to the creation of ad hoc tribunals. Should questions arise regarding the legality of certain UN or SC behaviour I will investigate its ramifications on the creation of these tribunals but not whether it is an acceptable or legal UN behaviour according to the UNC. I will also not investigate the society change from sovereignty to mutual responsibility.

To fulfil the purpose of the study regarding the clarification of the legality of ad hoc tribunals the following research questions will be answered:

- Does ad hoc justice correspond with the principle of legality?
- In creating international ad hoc tribunals, is the SC misusing their enforcement capabilities in relation to the UNC?
- Is the lack of jurisdictional universality an indication that ad hoc justice serves political and economical purposes rather than peace, justice and reconciliation?

1.3 Legal sources and method

This study is based on qualitative data² in the form of written documents examined through textual analysis.³ This method served the purpose the best as the aim was to examine legitimacy and legality, two rather complex and abstract concepts that naturally evoke many opinions of both national and international scholars in the area. Also, because of the recent developments and growing interest in ad hoc justice there was extensive material available from a large number of important authors and advocates and I considered it most valuable to use their views on the topic as I wanted to present an objective overview of the legality of ad hoc tribunals.

² Can be defined as non numerical data, hence including a vast variety of information such as in-depth interviews, direct observation or written documents.

³ This type of analysis has been defined as “any technique for making inferences by objectively and systematically identifying specified characteristics of messages” (Ole Holsti – an American political scientist and academic) as well as “the study of recorded human communications, such as books, websites, paintings and laws” (Earl Babbi – sociologist and author of *The practice of social research* (1975) Wadsworth), see Wikipedia for more information <www.wikipedia.org>.

The materials used in this study come from written sources such as books, articles from various international/national legal journals and other publications from the Internet in the form of web journals. I used data bases available at Göteborg University Library such as Westlaw International and Oxford Journals Online. I also found Google Scholar to be very useful as this is a very current topic and Google could therefore provide an abundance of articles written by a large variety of scholars. Other useful websites were Global Policy Forum, Global Research and Open Democracy as they all provided great starting points which then led to a great number of valuable reports on the subject. I used keywords such as ad hoc legality/legitimacy/tribunals with various combinations such as the names of the States associated with ad hoc tribunals (the Former Yugoslavia, Rwanda, Sierra Leone, Cambodia, East Timor and Iraq), the SC, the UN, ICTY, ICTR, impartiality, justice vs. peace, the principle of legality and so forth. I used books on the subject only when after repeatedly coming into contact with vital authors. I have come across scholars such as Edward S. Herman, Noam Chomsky and William S. Schabas repeatedly, and therefore used much of their doctrines. I also found a great deal of material through references and bibliographies in both books and articles, as well as links from various websites I visited. There are also a few exceptions to the written material where I have found useful information in recent TV documentaries as well as interviews from the web.

1.4 Disposition

The first part of this study will declare the background to current ad hoc tribunals and the reasons for them coming about. This will be followed by the creational process and its relation to the principle of legality as well as the UN, focusing on the complexity of the interpretation of rules governing such an establishment as well as critique by leading scholars. The second chapter will then elucidate the problematic issues of the lack of universality in ad hoc justice and its influence on the justice process as a whole. It will also distinguish the Western States' hold of the rest of the world regarding the determination of when and where ad hoc justice should serve and thereby view whether this form of punitive system serves the purposes of justice, peace and reconciliation the best. The third chapter is that of the concluding analysis of the extent to ad hoc tribunal's legitimacy and legality, where the answers to the research questions given earlier are given by discussing the findings. Chapter four will discuss the alternatives to ad hoc tribunals and give a short report on their chances of success, which is then followed by the conclusion.

2 Introduction

We have all heard the famous saying: “All is fair, in love and war”, and for many people this may seem true; all *must* be fair in love and war. For when looking back at history, and bearing in mind what people have experienced in armed conflicts all over the world, one believes that the saying is a reflection of the truth. So the question is: Can one do what one wants in an armed conflict and thereafter? According to international conventions regulating armed conflicts, another saying serves the truth better: “The right of belligerents to adopt means of injuring the enemy is not unlimited.”⁴ This is also what has controlled armed conflicts and actions of such conflicts throughout history. However, in case of non-compliance there has been little or no repercussions for people responsible for such disruption of international law.

Some 60 years ago, the context of international peace and justice⁵ was given a new face.⁶ At that time the victorious States of the Second World War decided it was time to introduce individual responsibility onto the international arena. This took the shape of two international war crimes tribunals, The Nuremberg Tribunal and The Tokyo Tribunal.⁷ For the first time in history natural persons were indicted and *ex post facto*⁸ deemed responsible for atrocities committed in an armed conflict. The revolution was a fact in the early 1990s as we slowly went from impunity to individual responsibility in relation to international criminal justice with the additional international ad hoc criminal tribunals for the former Yugoslavia and Rwanda.⁹ The initial meaning was that these two tribunals were the start of a new international justice system, a continuing step in the direction towards a powerful, solid international legal system which would restore and maintain international peace and security. *Crimes of War* journalist Anthony Dworkin at the time claimed that “it is a landmark event,

⁴ Art. 22 The 1907 Hague Regulations, which in Art. 35 of AP I 1977, becomes: “In any armed conflict, the right of the Parties to the conflict to choose the methods or means of warfare is not unlimited.”

⁵ The relationship between “peace” and “justice” will be further explored in this study.

⁶ However, this was not the first time international criminal justice was discussed. Already in 1919, after the First World War, the victors had provided for some provisions in the Versailles Treaty on the punishment of the major parties responsible for war crimes, for more information on this see A. Cassese, *International Law* (2001) 266. There are reports of even earlier ad hoc tribunals, for more information on this see Edoardo Greppi, ‘The evolution of individual criminal responsibility under international law’ (September 30, 1999) (no. 835) *International Review of the Red Cross*, 531-553, at ICRC

<<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jq2x?opendocument>> at 13th of May 2007.

⁷ Hereinafter referred to as *Nuremberg* and *Tokyo*.

⁸ Note that in this context *ex post facto* simply refers to the fact that the Statutes of the mentioned criminal tribunals were created *after* that of the occurrence of the atrocities, and the term does *not* imply that the tribunals violate the principle of legality nor that they lack jurisdiction for such crimes. This remains to be explored in this study.

⁹ A. Cassese, *International Law* (2001) 267f.

and its significance for our new ‘age of global terror’ is just as great as the reflection it will cast on Europe’s decade of ethnic cleansing ... a form of legal globalisation.”¹⁰

However, the course of this radical, modern development of international law has not always been seen upon as a positive one. There are many articles and books written on the subject, many of which express an opinion on the wrong-doings of these first (as well as later ones) ad hoc tribunals.¹¹

The most common argument against the first two tribunals Nuremberg and Tokyo is their negative version of justice, so called “victor’s justice”,¹² as opposed to *international* justice. As the tribunals were created by the victorious States (Great Britain, The United States of America, France and The Soviet Union) questions rose regarding the tribunals’ objectiveness.

Already during the war the Allies and representatives of the exiled governments of occupied Europe met to discuss options regarding how to handle the Nazis at the end of the armed conflict.¹³ Several of the world leaders at the time were opposing the idea of a justice system and were more interested in “an-eye-for-an-eye”, meaning executions without preceding trials.¹⁴ They considered the crimes committed by the Nazis during the Second World War to be “so black that they fall outside the scope of any judicial process.”¹⁵ Fortunately – or not? – the Americans pushed for a post-war justice system where leaders were to be indicted for

¹⁰ Anthony Dworkin, ‘The trial of Milosevic: global law or war?’ (February 13, 2002) *Open Democracy* <http://193.41.101.59/conflict-yugoslavia/article_203.jsp> at 15th of May 2007.

¹¹ For example see Pal Radhabinod, ‘Judgment’ in *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE)* 29 April 1946 - 12 November 1948 (ed. by B. V. A. Röling and C. F. Rüter. Amsterdam: University Press Amsterdam) 1977; Noam Chomsky, ‘If the Nuremberg Laws were applied....’ (1990) *Chomsky Info* <<http://www.chomsky.info/talks/1990----.htm>> at 2nd of April 2007; William A. Schabas, ‘Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals’ (2000) 11(3) *European Journal of International Law* 521-539; Patrick L. Robinson, ‘Ensuring fair and expeditious trials at the International Criminal Tribunal for the Former Yugoslavia’ (2000) (11)3 *European Journal of International Law* 569-589; Edward S. Herman, ‘The Hague Tribunal: The Political Economy of Sham Justice – Carla del Ponte addresses Goldman Sachs on justice and profits’ (November 20, 2005) *Global Research* <<http://www.globalresearch.ca/index.php?context=viewArchivesByMonth>> at 20th of April 2007; and many more to come in this study.

¹² See more under chapter 4.

¹³ Doug Linder, ‘The Nuremberg Trials’ (2000) *UMCK – Famous World Trials, Nuremberg Trials* <<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergACCOUNT.html>> at 13th of May 2007.

¹⁴ Ibid; Rob Cawston, ‘Nuremberg and the legacy of war’ (November 21, 2005) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=3049>> at 15th of May 2007.

¹⁵ Rob Cawston, ‘Nuremberg and the legacy of war’ (November 21, 2005) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=3049>> at 15th of May 2007. Another quote expressed the same idea, where the Nazi crimes were considered “beyond the scope of human justice – that their fate was a political, rather than legal, question”, see link from University of Missouri – Kansas City School of Law (UMKC) at Court TV Library, *The creation of the Tribunal and the Law behind it* (1999) <<http://www.court tv.com/archive/casfiles/nuremberg/law.html>> at 2nd of April 2007.

atrocities committed during the war which was why the IMT was created in August 1945 with trials commencing in October that same year.¹⁶

The question of individual responsibility after the Second World War was always exclusively only going to encompass that of the leaders of the losing parties of the war. Even though an international criminal tribunal was created, the question of “justice” still remained in greater parts political rather than legal, as it was not as far-reaching as it would have needed to be for any acceptable justice to be served. In all fairness, the Nazis were not the only ones guilty of having committed atrocities during the war.¹⁷ However, this was never mentioned nor discussed at the time by the victorious States,¹⁸ and therefore it remains a problem in current attempts to create “justice” with ad hoc tribunals in the aftermaths of atrocities committed in armed conflicts.¹⁹

The real reasons for the creation of ad hoc tribunals will most likely never be openly expressed by the adjudicates. However, it has been emphasised by many scholars that it ought to be obvious that the main objective of an ad hoc tribunal is *not* justice for all those exposed to various atrocities, as the result is not equivalent to, nor – it seems – aspiring to be, pervasive justice. So what do ad hoc tribunals aspire to achieve? What is the underlying purpose of an ad hoc criminal tribunal exercising individual responsibility for the most atrocious events of armed conflicts? Perhaps even more importantly, do ad hoc tribunals serve a favourable function? The creation and the procedures of ad hoc tribunals require in-depth scrutiny in order to recognise the effects, both positive and negative, of this type of punitive system.

It deserves mentioning that although Nuremberg and Tokyo were the first attempts of the international society to *actively* create justice in the aftermaths of a war,²⁰ IHL has a long and

¹⁶ For more information see *The Avalon Project at Yale Law School – The Nuremberg War Crimes Trials* <<http://www.yale.edu/lawweb/avalon/imt/imt.htm>> at 13th of May 2007.

¹⁷ Noam Chomsky, ‘If the Nuremberg Laws were applied...’ (1990) *Chomsky Info* <<http://www.chomsky.info/talks/1990----.htm>> at 2nd of April 2007.

¹⁸ However, Russians tried to pin the Nazis for their massacre of Polish officers in Katyn. The attempt failed and Russia admitted responsibility for this event almost 50 years later, see Rob Cawston, ‘Nuremberg and the legacy of war’ (November 21, 2005) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=3049>> at 15th of May 2007. According to said article “the court was never likely to investigate alleged Allied crimes, such as the firebombing of Dresden in 1945, which were to become matters of sustained controversy only years later.”

¹⁹ See chapter 4.

²⁰ Cassese, *supra* note 6.

prosperous history of prohibiting de-humanising procedures and weapons of war.²¹ Nonetheless, the criminal provisions of the 1949 Geneva Conventions had never been applied before the establishment of the ICTY in 1994,²² manifesting the need for an operational authority to actively introduce the rules to the international society. Also, IHL has not and does not serve its main purpose by being forthcoming but instead as a deterrent from continuing to act in certain ways, as laws and prohibitions as a rule are not thought of until after a certain weapon/procedure has caused a great deal of damage. Ad hoc tribunals should therefore be seen as a supplement to IHL, where the latter serves as a guide regarding international customary law and therefore what can be penalised in the former.

There are some positive attitudes towards the Nuremberg development of individual justice and Benjamin Ferencz for instance – the chief prosecutor for the US at the tribunal – stated in the trial against the Nazi *Einsatzgruppen* that: “The case we present is a plea of humanity to law ... if these men be immune then the law has lost its meaning and man must live in fear.”²³

3 The creation and procedure

3.1 *The principle of legality*

3.1.1 *International ad hoc tribunals*

The core principle of any justice system is that of the prohibition of retroactive offences (*nullum crimen sine lege*) along with the prohibition of retroactive penalties (*nulla poena sine lege*). A common name for these two rules is *the principle of legality*.²⁴ As the idea of ad hoc tribunals is to indict people for alleged atrocities committed in armed conflicts²⁵ according to

²¹ For more information on the history of IHL, see Marcus Tullius Cicero, *De Officiis*, with an English translation by Walter Miller (1913) London, Heineman, Harvard University Press 37 [Book I §XI], 83 [Book I §XXIV]; Leslie C. Green, ‘What one may do in combat – then and now’ in Astrid J. M. Delissen and Gerard J. Tanja (eds.) *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991) Dordrecht: Martinus Nijhoff 269, 273; Jonathan Crowe, *Course Material for LAWS7933* (Sem 2, 2005) T C Bernie School of Law, University of Queensland; Judith Gardam, ‘Proportionality as a restraint on the use of force’ (1999) (20) *Australian Yearbook of International Law*; Eloise Lönnberg, *Restrictions on the means and methods of warfare – Key rules, development since 1945: Do the current restrictions on the means and methods of warfare protect those affected by contemporary warfare?* (2005) at T C Bernie School of Law, The University of Queensland, 2ff.

²² A. Cassese, *International Law* (2001) 268.

²³ Rob Cawston, ‘Nuremberg and the legacy of war’ (November 21, 2005) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=3049>> at 15th of May 2007.

²⁴ William A. Schabas, ‘Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals’ (2000) 11(3) *European Journal of International Law* 521-539, 522.

²⁵ It was stated in the *Tadić* case in the ICTY that the Statute covered internal as well as international armed conflicts, see *Prosecutor v. Dusko Tadić Decision on the Defence Motion for Interlocutory Appeal on*

statutes drafted *after* such atrocities have taken place, the principle of legality might seem overlooked. A statute for an ad hoc tribunal can obviously not be created before the initiation of an armed conflict, as the potentially criminal acts are yet to be committed. Nonetheless, according to the principle of legality people should not have to face the risk of being indicted for actions committed during said types of conflicts, if they at the time of the committing were not considered illegal. The dilemma bears traits of a catch 22.

However, already in the Nuremberg trials, the accused Nazi war criminals invoked said principle:²⁶

It was urged on behalf of the defendants that a fundamental principle of all law – international and domestic – is that there can be no punishment of crime without a pre-existing law. ‘Nullum crimen sine lege, nulla poena sine lege.’ It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time of the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

The argument was met and instantly overturned in the judgement of 30 September-1 October 1946, where the court proclaimed that the attacker “must know that he [...was...] doing wrong” and it would be “unjust if his wrong were allowed to go unpunished.”²⁷

Nuremberg hereby attempted to rule out any eventual future confusion or misunderstanding regarding the legality of introducing individual responsibility *ex post facto*²⁸ for crimes committed at international (or regional)²⁹ level. As perhaps expected, this reasoning was not deemed satisfactory by persons indicted in later ad hoc tribunals, and some of them have therefore tried to use that same argument to escape responsibility. As a result of that, ad hoc

Jurisdiction (2 October 1995) ICTY (official website) <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>> at 3rd of April 2007.

²⁶ W.A. Schabas, ‘Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals’ (2000) 11(3) *European Journal of International Law* 521-539, 522-523.

²⁷ *Ibid*, 523.

²⁸ *Supra* note 8. Although this was in fact what they were doing, they were most careful *not* to use that term: “The London Charter of the International Military Tribunal, was named to avoid using words such as ‘law’ or ‘code’ in an effort to circumvent the delicate question of whether the trial would be ex post facto.” See Court TV Library, *The creation of the Tribunal and the Law behind it* (1999) <<http://www.courtstv.com/archive/casefiles/nuremberg/law.html>> at 2nd of April 2007.

²⁹ *Regional* refers to the fact that not all tribunals have been international, such as the ad hoc tribunals and courts of Cambodia, Sierra Leone, East Timor and Iraq, see more in depth scrutiny later in this study.

tribunals have faced problems of recognition, where the indictees have refused to accept the tribunals as legal institutions and even today some are trying to refer to the principle of legality and, therefore, the lack of jurisdiction for the tribunal.³⁰

Several decades after Nuremberg, the ILC made an attempt to further clarify the reason for the seemingly deviant interpretation of the principle of legality, explaining that it is “not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment.”³¹ It hereby seems like non-compliance with the principle of legality was considered legal as long as the atrocities were sufficiently horrendous.

As referred to earlier, the ICTY has taken a stand in the matter as well, claiming that actions that are in violation of common Article 3 of the Geneva Conventions³² and are wrongful as

³⁰ Some examples: *Milosevic* claimed on his first day in the ICTY that he needed neither confess nor deny, for he saw the court as a false tribunal with false indictments against him, see *Milosevic inför rätta* i SVT 1, 4 mars 2007; *Hadzihasanovic et al*, were “[t]he Defence contended that neither customary nor conventional international law provided for criminal responsibility of superiors in a non-international armed conflict as applied under Article 7(3) of the Statute of the International Tribunal for violations of Article 3 (Violations of the laws or customs of war) of the Statute at the time of the alleged offences were committed and that, therefore, all counts in the Amended Indictment fall outside of the jurisdiction of the International Tribunal, as defined by the Secretary-General and endorsed by the Security Council.”, comment from the ICTY see *The Prosecutor v. Enver Hadzihasanovic et al. - Case No. IT-01-47-PT* (12 December 2002) ICTY (official website) <<http://www.un.org/icty/Supplement/supp38-e/hadzihasanovic.htm>> at 3rd of April 2007; *Tadić*, were the defendants “claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged.” It is met by the tribunal saying that it was up to the tribunal itself to challenge the legality of the establishment, see *Prosecutor v. Dusko Tadić Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) ICTY (official website) <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>> at 3rd of April 2007.

³¹ ‘Report of the International Law Commission on the Work of its Forty-Eight Session, 6 May-26 July 1996’, UN Doc. A/51/10, 29-30. See also ‘Report of the International Law Commission on the Work of its Forty-Seventh Session’, UN Doc. A/50/10, 183.

³² Common article 3 of the *Geneva Conventions* of 1949 reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or

well as would “shock the conscience of civilised people” are “in the language of Article 15(2) of the ICCPR³³...criminal according to the general principles of law recognised by ... the community of nations.”³⁴ It was also stated in *Tadić* that the “State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach”.³⁵

It has been concluded by scholars that the interpretation of Article 15(2) of the ICCPR should read: “[W]hile, of course, it is not enough that the alledged act is merely immoral, it is enough that it is regarded by the community of nations as fundamentally criminal. If it is, then the fair demands for specificity are met by proof that the conduct of the accused corresponds to the fundamental criminality of the crime charged, even though the correspondence is not perfect in every detail.”³⁶

3.1.2 Regional ad hoc tribunals

The question of the principle of legality has been raised in the internal tribunals as well, like in the SICT,³⁷ where Saddam Hussein and his co-defendants were on trial for crimes committed about two decades before Article 12 of Law Number 10³⁸ came into effect; the law

part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

³³ Article 15 of the *ICCPR* reads as follows:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

³⁴ M. Shahabuddeen, ‘Does the principle of legality stand in the way of progressive development of law?’ (2004) (2) 4 *Journal of International Criminal Justice* 1007-1017, 1011. The article discusses this type of “the broad interest of society”-argument and why this is not a currently accepted international view on the principle of legality.

³⁵ *Tadić* [IT-94-1-AR72] Appeals Chamber, 2 October 1995, §97.

³⁶ M. Shahabuddeen, ‘Does the principle of legality stand in the way of progressive development of law?’ (2004) (2) 4 *Journal of International Criminal Justice* 1007-1017, 1011.

³⁷ There are several different names for the Iraqi tribunal, for more information on this see J. Peterson, ‘Unpacking Show Trials: Situating the Trial of Saddam Hussein’ (Winter 2007) (48)1 *Harvard International Law Journal*, 257-292, 257 note 6. For the purpose of this study, the SICT refers to the proceedings against Saddam Hussein and his former assistants in Iraq.

³⁸ Law Number 10 was issued in Iraq in October 2005, abolishing the 2003 statute but containing similar provisions establishing “The Supreme Iraqi Criminal Tribunal”. Art. 1(2) gives the SICT limited subject matter jurisdiction regarding prosecuting certain criminal offenses that occurred between July 17 1968 – May 1 2003. Such offences are f.eg. crimes against humanity as defined in art. 12 of the same law. The law was to come into effect on the date of its publication in the Official Gazette, art. 40, and as the law was published on October 18, 2005, that is the official date to go by; see A. Aliraqiya ‘The Supreme Iraqi Criminal Tribunal Law’ (October 18, 2005) 10 *Official Gazette* and I. Saliba, ‘The *Nullum Crimen* Principle And The Trial of Saddam Hussein’ (July

by which Saddam was indicted and, subsequently, hung. The difference between international and internal tribunals is that the latter are regional tribunals based on domestic *as well as* international law.³⁹ It therefore adds another layer to the problem, as some countries, like Iraq for instance, have enacted laws prohibiting the establishment of crime and punishment by “analogy, precedent or other novel means.”⁴⁰ An act therefore needs to be established as a crime by law before the act is committed in order for prosecution to be applicable and certain interpretations of existing international law to be considered illegal.

However, according to Principle II of the *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal* nations cannot always resort to national law when deciding the illegality of an act as the Principle states: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed that act from responsibility under international law.”⁴¹ Principle III then continues: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.”⁴² The balancing act as well as the determining factor in this is of course: what law decides? Is domestic law subsequent to international law or vice versa?

The same problem was also raised in Cambodia and East Timor, where the atrocities occurred over a time period of four and twenty-four years respectively. In the case of Cambodia and the Pol Pot regime with the Khmer Rouge, the tribunal was not created until 25 years after the initiation of the atrocities, something that could complicate the judicial process in regard to retroactive offenses: “As the Group of Experts noted in relation to Cambodia, when addressing cases during a particular historical era, the law to be applied must be that which was then applicable. In relation to the international crimes identified as being within the jurisdiction of the Special Panel, these must reflect customary international law at the time of

2006) *The Library of Congress* <http://www.loc.gov/law/public/saddam/saddam_prin.html#A> at 3rd of April 2007.

³⁹ Also referred to as “internationalised domestic tribunals”, see Suzannah Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in international justice’ (2001)(12)2 *Criminal Law Forum* 185-246, 185.

⁴⁰ I. Saliba, ‘The Nullum Crimen Principle And The Trial of Saddam Hussein’ (July 2006) *The Library of Congress* <http://www.loc.gov/law/public/saddam/saddam_prin.html#A> at 3rd of April 2007.

⁴¹ See <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf> at 30th of April 2007.

⁴² Ibid.

the commission of the offence.”⁴³ In the case of East Timor, this meant that “prosecution of a ‘private’ act of torture⁴⁴ committed in 1980 on the basis of Regulation 2000/15 would be incompatible with international standards. This legislative failing is [however] somewhat alleviated by the fact that the criminality could be prosecuted under the Indonesian Criminal Code, applicable throughout the occupation, but this would be subject to the statute of limitations.”⁴⁵

The issue has been dealt with in a handful of nations in situations of extraditing persons for crimes committed in other countries. In the case of Imre Finta, a naturalized citizen in Canada, the court reached the conclusion that there is an exception to the principle of legality when the Canadian Supreme Court ruled that: “A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed seems ... to be an exception to the rule against ex post facto laws.”⁴⁶ The Canadian Supreme Court chose to speak of the awareness of immorality with the perpetrators so that the retroactivity of the law in question could not “be considered incompatible with justice.”⁴⁷

Spain came to a similar conclusion in the case of Adolfo Scilingo, a military officer from Argentina, as the *Tribunal Supremo* (Spanish Supreme Court) concluded that the nature of the crime rendered it *jus cogens* – “a fundamental norm of international law that no country could ignore”⁴⁸ and therefore did not constitute a retroactive punishment.

The Netherlands Special Appeals Court, in a case relating to crimes against humanity, reached the conclusion that certain acts will be deemed criminal even without pre-existing law, as it is not permissible “that extremely serious violations of generally accepted principles of

⁴³ Suzannah Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in international justice’ (2001)(12)2 *Criminal Law Forum* 185-246, 220.

⁴⁴ As “1980 customary international law required that the act be committed ‘by or at the instigation of a public official’ and ‘for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.’” See *ibid*, 221. *Note added by author*.

⁴⁵ *Ibid*, 221-222. *Brackets added by author*.

⁴⁶ American Society for International Law (Apr. 19, 2005) *Audiencia Nacional of Spain: Sentence for Crimes Against Humanity in the Case of Adolfo Scilingo* from I. Saliba, ‘The Nullum Crimen Principle And The Trial of Saddam Hussein’ (July 2006) *The Library of Congress* <http://www.loc.gov/law/public/saddam/saddam_prin.html#A> at 3rd of April 2007.

⁴⁷ I. Saliba, ‘The Nullum Crimen Principle And The Trial of Saddam Hussein’ (July 2006) *The Library of Congress* <http://www.loc.gov/law/public/saddam/saddam_prin.html#A> at 3rd of April 2007.

⁴⁸ *Ibid*.

international law ... should not be considered punishable solely on the ground that a previous threat of punishment was absent.”⁴⁹

The United Kingdom and France, however, came to some alternative conclusions. In the case of the extradition of Pinochet from the U.K. to Spain, the House of Lords concluded that “[e]ven though the ... alleged conduct of Senator Pinochet ... [was] a criminal offence under international law ... section 134 of the Criminal Justice Act of 1988 did not apply retroactively to such conduct.”⁵⁰ The UK therefore decided that international law was subsidiary to domestic law.

France likewise ruled, in the case of George Boudarel, on the supremacy of national law over international law and concluded that “the Charters of the International Military Tribunal of Nuremberg ... are limited to the actions committed on behalf of the European countries of the Axis (during the War); and, therefore, that the actions committed subsequent to the Second World War cannot be described as crimes against humanity”⁵¹ wherefore the charges were dismissed. In another similar case in France the “High Court held that customary international law cannot be used to supply a remedy in the absence of a law proscribing the offence of crimes against humanity.”⁵² Once again domestic law was considered primary to international law.

It is important to highlight the difference between these mentioned trials and the ad hoc tribunals and courts of previously mentioned nations, as the latter are regional ad hoc tribunals and courts, based on – but outside of – their specific nation’s judicial system. The issue whether to go by domestic law or international law is therefore, like described earlier, highly relevant as certain acts that constitute a crime under customary international law might not be considered criminal under Iraqi, Cambodian, East Timorese or Sierra Leonean law. It is then up to these countries to further investigate the legality of such tribunals as well as the national legality of their statutes. The problem is evident in Iraq for instance, as Iraqi scholars contend

⁴⁹ Rauter, Special Appeals Court, Netherlands (12 January 1949) ILR 1949, in William Schabas, ‘Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals’ (2000) 11(3) *European Journal of International Law* 521-539, 530.

⁵⁰ I. Saliba, ‘The Nullum Crimen Principle And The Trial of Saddam Hussein’ (July 2006) *The Library of Congress* <http://www.loc.gov/law/public/saddam/saddam_prin.html#A> at 3rd of April 2007. See also *Regina v. Bartle, et al. (ex rel Pinochet)*, [1999] 2 WLR 825, 840 <<http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>> at 18th of April 2007.

⁵¹ *Ibid*, Saliba.

⁵² *Ibid*.

that the SICT and the following execution of Saddam Hussein was illegal under Iraqi code and constitution.⁵³ This means that the SICT only had international rules and guidelines to base the tribunal on, which is considered subsidiary to national law in Iraq.⁵⁴

On the one hand, regardless of international rules – of which the challenge of getting countries to accept implementation into domestic law can be daunting – there is the additional layer of international customary law that, according to international standards, is applicable no matter the region or domestic regulation as it is considered a primary source of international law. On the other hand, the complex question of what was considered *custom* at the time of the alleged acts remains, as well as the question of which of the two types of law should be seen as primary vs. subsidiary law. As seen above, some countries refuse to recognise international customary rules if their own justice system lacked jurisdiction for a certain act at the time they were committed.

Regardless of the outcome of debates of by-passing the principle of legality in ad hoc tribunals, it is important to realise that this is a vital question. By way of clarifying the issue, a longer reference to Suzannah Linton's⁵⁵ article on the three first internationalised domestic tribunals is of interest:⁵⁶

Much harm is done by rushing through inadequately considered legislation. The legislation needs to accord fully with international standards of human rights. In view of the particular problems in prosecuting historic atrocities, great care must be taken to ensure that the legislation complies with the principle of legality, in particular of *nullum crimen nulla poena sine lege*, and the prohibition of retroactive criminal legislation. As not all the provisions of the ICC Statute reflect existing customary international law, and

⁵³ Stated by Rizgar Mohammad Amin, an Iraqi Kurd and one of the former judges in the questionable trial of Saddam Hussein, see Mahdi Darius Nazemroaya, 'Saddam Hussein's last words: To the hell that is Iraq?! – What the media has deliberately concealed' (January 31, 2007) *Global Research* <<http://www.globalresearch.ca/index.php?context=viewArticle&code=NAZ20070129&articleId=4620>> at 20th of April 2007. This of course raises the question of sovereignty vs. international responsibility. Like mentioned before, this will not be further investigated in this study, see note 75.

⁵⁴ *Supra* note 40.

⁵⁵ Ms. Linton is an advisor to the International Committee for Human Rights in Sarajevo, Bosnia-Herzegovina, and part of the International Legal Assistance Consortium, Sweden. She is a member of the International Bar Association, the American Society of International Law, the International Law Association (Committee on Reparation for Victims of War) and the European Society of International Law. For more information on her previous work, see the University of Hong Kong's website – Academic Staff at <<http://www3.hku.hk/law/staffPage.php?pageId=1120&userId=184>> at 3rd of May 2007.

⁵⁶ Suzannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in international justice' (2001)(12)2 *Criminal Law Forum* 185-246, 243.

even less so customary international law applicable in earlier eras, drafters must exercise caution in reliance on its provisions. That being said, there needs to be some way of ensuring there is a uniform understanding and application of customary international law by the internationalised domestic tribunals...

3.2 UN Charter chapter VII

Ad hoc tribunals have been created in a number of ways, the most spoken of being those of the Former Yugoslavia (ICTY) and Rwanda (ICTR), which were created by the UN and established by the SC resolutions 827 and 955 respectively.⁵⁷ The ICTY and ICTR are therefore not treaty-based but are UN subsidiary organs, established according to the power invested in the UN through chapter VII of the UNC – or at least supposedly so.⁵⁸ Then there are the internationalised domestic tribunals in Cambodia (the ECCC) and The Special Court of Sierra Leone (SCSL) which are bilateral agreements between the UN and the governments of Cambodia and Sierra Leone.⁵⁹ Following these there is the ad hoc court in East Timor which is based on the same type of agreement. There is also the recently high profile SICT, which was established by the US-installed Iraqi Governing Council and approved by the Iraqi Transitional National Assembly.⁶⁰ The last one has been given much critique by its opponents as they think of it as a “political show trial”.⁶¹

3.2.1 “Threat to peace and security”

Chapter VII of the UNC is devoted to “[a]ction with respect to threats to the peace, breaches of the peace, and acts of aggression” and the main Article 39 says that the SC “shall determine the existence of any threat to the peace ... and shall make recommendations, or decide what measure shall be taken ... to maintain or restore international peace and security.”⁶² It is this particular Article that has been the key invite for critique from all around the world regarding the legality of the establishment of international ad hoc tribunals.

⁵⁷ ICTY (official website) ‘ICTY at a glance’ (February 2007) and ICTR (official website) ‘ICTR General information’ (April 2007) both at <<http://www.un.org>> at 2nd of April 2007.

⁵⁸ The issue of whether this is actually a power held by the UN will be further investigated in this chapter.

⁵⁹ Extraordinary Chambers of the Courts of Cambodia (official website) <www.eccc.gov.kh> Special Court of Sierra Leone (official website) ‘About the Special Court of Sierra Leone’ <<http://www.sc-sl.org/about.html>>; both at 2nd of April 2007.

⁶⁰ Global Policy Forum (2007) ‘The Iraq Tribunal: Trying Saddam Hussein and Other Top Baath Leaders’ <<http://www.globalpolicy.org/intljustice/iraqindex.htm>> at 2nd of April 2007.

⁶¹ Ibid. For more information on the definition of a “show trial”, see J. Peterson, ‘Unpacking Show Trials: Situating the Trial of Saddam Hussein’ (Winter 2007) (48)1 *Harvard International Law Journal*, 257-292.

⁶² UNC Article 39.

One of the main arguments against the legality of such an establishment is that the SC does not have the power to take a measure like the creation of an international tribunal.⁶³ In *Tadić* in the ICTY the non-legality arguments proclaimed by the accused were met by the courts. In the *Tadić* case the court declared that the question of subject-matter jurisdiction was something the court was able to judge on its own.⁶⁴ However, the question of whether the action taken by the UN to establish the tribunal was legal was a different matter all together.⁶⁵

The Trial Chamber has heard out the Defence in its submissions involving judicial review of the actions of the Security Council. However, this International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.

In *Kanyabashi* in the ICTR the accused went further and contended that the SC could not create such a tribunal as “there was no threat to international peace and security when the Tribunal was created”.⁶⁶ Here, as well as in *Tadić*, the tribunal judged their own jurisdiction and upheld the creation by the SC as legal and therefore established their legality as an international ad hoc tribunal.⁶⁷ Hence procedurally they consider themselves “as capable of looking into the legality of their own creation”,⁶⁸ whereas on the question of establishment they have chosen not to interfere with the SC and its decision to create international war crimes tribunals. Nonetheless, the ICTR declared that “the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security”⁶⁹ and “the cessation of atrocities of the conflict does not necessarily imply that

⁶³ See Brigitte Stern ‘Juridical institutions and security’, *United Nations and Global Security Initiative* <<http://www.un-globalsecurity.org/index.asp>> at 10th of April 2007; J. E. Alvarez ‘Rush to closure: Lessons of the Tadic Judgement’ (1998) (96)7 *Michigan Law Review* 2031-2113 (chapter IV specifically).

⁶⁴ See DECISION ON THE DEFENCE MOTION ON JURISDICTION (rule 73), 10 August 1995, ICTY-IT-94-1-T §45-83.

⁶⁵ Ibid §5. See also §24 on the alteration of “threat to peace and security” depending on the situation at hand.

⁶⁶ Brigitte Stern ‘Juridical institutions and security’, *United Nations and Global Security Initiative* <<http://www.un-globalsecurity.org/index.asp>> at 10th of April 2007; see also DECISION ON THE DEFENCE MOTION ON JURISDICTION (RULE 73), 18 JUNE 1997, ICTR-96-15-T §18(1).

⁶⁷ Ibid §19-22.

⁶⁸ Brigitte Stern ‘Juridical institutions and security’, *United Nations and Global Security Initiative* <<http://www.un-globalsecurity.org/index.asp>> at 10th of April 2007.

⁶⁹ See DECISION ON THE DEFENCE MOTION ON JURISDICTION (rule 73), 18 June 1997, ICTR-96-15-T §20.

international peace and security [has] been restored, because peace and security cannot be said to be re-established adequately without justice being done.”⁷⁰

All the same, this issue is still surrounded by wide-spread scepticism as scholars fail to be convinced by the judgements declared by the tribunals. Specialists in international law have expressed concerns regarding the difficulty in determining when and how the SC misuse their powers, stating that in creating the tribunals “the council arrogated (1) the primacy of the tribunal over national courts ... and (2) the right to suspend national penalty systems in regard to the definition of criminal acts and the applicable punishment.”⁷¹ Therefore the establishment of the two tribunals changed some of the core elements of the UN “[b]y allowing the tribunal to issue binding decisions under chapter VII. [T]he council [hereby] altered two fundamental provisions of the UN Charter: (1) that such decisions may be issued exclusively by the Security Council and (2) that they are subject to veto by the permanent members.”⁷² The intervention of the UN under these circumstances has also been viewed by the third world as “disguised big power interventionism” where it is not law and justice, but in fact politics, that serve as the driving factor.⁷³

It ought to be clear that the creation of the first two international criminal tribunals was of great significance not only to the international society in handling massive atrocities not acceptable to our society, but also to the UN and – most significantly – the outsiders’ *view* of the UN as the prevailing international organ for upholding international peace and justice. For with resolution 827 and 955 respectively, the UN and the SC found a way to by-pass not only their own (as seen above) but also other major international legal standards.⁷⁴ The idea of sovereignty⁷⁵ of States was the prevailing view of the international society before this forced-

⁷⁰ DECISION ON THE DEFENCE MOTION ON JURISDICTION (rule 73), 18 June 1997, ICTR-96-15-T §26.

⁷¹ Jerzy Ciecchanski ‘Misuse of enforcement by the U.N. Security Council’ (Winter 1994-95) (IX)2 *Swords and Ploughshares* (special ed. Civil Conflict Resolution).

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Such as the above mentioned *nullum crimen sine lege, nulla poena sine lege* principle.

⁷⁵ The transformation of the international society from *sovereignty* to obligations to uphold human rights will not be further explored in this study. For more information on the matter see, A. Cassese, *International Law* (2001); A. Pellet, *State sovereignty and the protection of fundamental human rights: an international perspective* (2000) Pugwash Online – Conferences on science and world affairs <<http://www.pugwash.org/reports/rc/pellet.htm>>; D. Held, *The Changing Structure of International Law: Sovereignty Transformed?* (19th of March 2003) <<http://www.polity.co.uk/global/pdf/GTReader2eHeld.pdf#search=%22International%20law%20sovereignty%20human%20rights%22>>; Globalization Issues, *Intervention vs. Sovereignty: Should sovereignty be violated to end deadly conflict?* (27 oktober 2000) <<http://globalization.about.com/library/weekly/aa102700a.htm>> 20th of April 2007; K. Mills, *Sovereignty Eclipsed?: The Legitimacy of Humanitarian Access and Intervention* (4 juni 2000) The Journal of Humanitarian Assistance <<http://www.jha.ac/articles/a019.htm>> at 12th of April.

upon method to create justice in the aftermaths of atrocities. However, all of a sudden with these resolutions the UN intervened and instigated obligations on all States in a matter that formerly would have been classified as an inter-state affair. Whether this is a positive or negative change seems to be a matter of opinion, which can be seen throughout this study.

3.2.2 *Internationalised domestic tribunals and the UN*

After the establishment of the two international ad hoc tribunals the UN, as mentioned earlier, tried a “hybrid” approach in reaching agreements with various countries for the ensurance of creating justice. The examples can be seen in the previously mentioned Sierra Leone, East Timor, Iraq and Cambodia. Like international ad hoc tribunals, these tribunals have sometimes faced the problem of recognition.⁷⁶ However, as these hybrid tribunals and courts are not created solely by the UN or on the basis of chapter VII, the issues mostly prominent are those surfacing the principle of legality, which have been discussed earlier.⁷⁷ However, there are issues regarding whether these tribunals are the right forum for these particular conflicts, as some of them were established decades after the end of the conflict, which will be further discussed in the following chapter.

4 **The lack of universality**

Some of the ad hoc tribunals and courts have been accused of constituting “show trials”⁷⁸, either in the sense that the defendants – rather than facing facts – make a show out of the proceedings,⁷⁹ or in the sense that the trial is simply a “facade designed to ease international

⁷⁶ “This lack of transparency – coupled with the influence of the US – has further compounded public distrust, reducing the legitimacy of the process in the public eye, and possibly affecting the evidence that will be presented at the trials themselves”, see Veerle Opgenhaffen & Hanny Megally, ‘Saddam’s trial, the needs of justice’ (October 19, 2005) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=2940>> at 15th of May 2007. For more on Iraq and the SICT see Global Policy Forum (2007) ‘The Iraq Tribunal: Trying Saddam Hussein and Other Top Baath Leaders’ <<http://www.globalpolicy.org/intljustice/iraqindex.htm>> with numerous articles on the failure of the SICT; For examples on the other tribunals see; Global Policy Forum, ‘Ad Hoc Court for East Timor’ (2007) <<http://www.globalpolicy.org/intljustice/etimorindx.htm>> at 16th of April 2007, on the failure of the Ad Hoc Court for East Timor; J. Kurlantzick, ‘Trial and Error: Cambodia’s War Crimes Tribunal’ (July 12, 2006) *Carnegie Endowment* <<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18530&prog=zch>> at 16th of April 2007, on the anticipatedly weak tribunal of Cambodia (ECCC). On Sierra Leone listen to ‘An update on Sierra Leone’s War Crimes Tribunal’ (August 12, 2004) *NPR’s The Tavis Smiley Show* <<http://www.npr.org/templates/story/story.php?storyId=3847716>> at 16th of April 2007.

⁷⁷ See chapter 3.1.2.

⁷⁸ See *supra* note 61.

⁷⁹ Editorial, ‘Saddam and the Bar’ (November 29, 2005) *Washington Times*, A20; R. Chandrasekaran, ‘Rights Court Run by Iraqis Is Approved by Council’ (December 10, 2003) *Washington Post*, A1.

pressure for a UN-sponsored tribunal.”⁸⁰ The latter has in the past been referred to as “victor’s justice”, as after both the World Wars the idea of international individual responsibility in relation to war crimes only applied to the participants on the losing parties of the armed conflict.⁸¹ The reason for this was of course political. According to Eric Posner⁸² the Nuremberg trials introduced the rule of law into international politics. However, it “was quickly realized that the logic behind the rule of law implied that everyone who participated in the Nazi regime would have to be punished, a result that was incompatible with political needs - enabling Germany first to feed its own people, then to participate as a liberal democracy in the postwar international order. ... [The] early, idealistic effort to punish nearly everyone involved in Nazi atrocities was abandoned.”⁸³

This chapter aims to clarify the reasons behind this continuation of “victor’s justice”, which seems to have been given the new tap of “Western justice”, as Western States play a vital role in most international as well as internal armed conflicts today. In all of the current ad hoc tribunals and courts, there are jurisdictional limitations as to who can be indicted as well as when the act had to have taken place. This chapter therefore also aims to investigate the legality of this lack of universality, where certain “perpetrators” are left outside the legal process due to these time and geographical limits.

4.1 Covering up the involvement of Western States?

Even though the UN, along with other international and/or regional organisations,⁸⁴ have intervened in a handfull of armed conflicts with the official goal to create justice and strengthen a sense of peace, debates have risen concerning the interesting aspect of the *type* of

⁸⁰ Global Policy Forum International Justice, ‘Ad Hoc Court for East Timor’ (2007) *Global Policy Forum* <<http://www.globalpolicy.org/intljustice/etimorindx.htm>> at 16th of April 2007; see also A. Boraine, ‘Justice in Iraq: Let the UN put Saddam on trial’ (April 21, 2003) *International Herald Tribune*, 8.

⁸¹ The jurisdiction of the IMT was submitted to certain limitations regarding who could be indicted and for what. For eg. see the *Charter of the International Military Tribunal – Article 6. Jurisdiction and general principles*: “The Tribunal establishment by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.” Also see the *Charter of the International Military Tribunal for the Far East – Article 5. Jurisdiction Over Persons and Offenses*: “The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.”

⁸² Eric Posner is a Law professor at the University of Chicago and the co-author of the book *The limits of international law* (2005) Oxford University Press.

⁸³ Eric Posner, ‘Justice within limits’ (September 26, 2005) *New York Times*. Brackets added by author.

⁸⁴ Such as NATO in the former Yugoslavia for instance.

ad hoc tribunal created, depending on the location of the atrocities. For instance, whilst the armed conflicts in both Rwanda and the Former Yugoslavia were deemed so atrocious and violent that the SC had no choice but to intervene referring to their exclusive right to use force spelled out in Chapter VII of the UNC,⁸⁵ one “settled” for courts based on bilateral agreements in both one of the most brutal conflicts in Africa (Sierra Leone) as well as in East Timor, where dictator Suharto is believed to be “responsible for the deaths of twice as many people as the former Iraqi and Serbian leaders combined.”⁸⁶ The ulterior motive of such choices have been discussed and debated in detail and the common determination is that the establishment of ad hoc tribunals is mainly ruled by politics and international relations, and not by the desire for justice and/or peace. Like so imminently described by Dr. Harold Crouch, an expert on Indonesia at the Australian National University:⁸⁷

Suharto always did what the West wanted him to do; that's the main difference between him and Saddam and Milosevic.

The ICTY for instance has been accused of – instead of bringing justice to the region of the Former Yugoslavia – contributing to chronic instability and facilitating the dismantling of the nation, as well as leading an attack on Serbia.⁸⁸ This is also one of the main fears of Western intervention in non-Western armed conflicts such as in the Former Yugoslavia, Rwanda or Iraq; that instead of promoting peace and justice, which is always the claimed focus of these types of tribunals, it administrates aggressive wars based on political and economical objectives.⁸⁹ The bombing of the Former Yugoslavia, for instance, began laying the

⁸⁵ Article 42 reads as follows: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

⁸⁶ S. Lekic, ‘Suharto Avoids International Tribunal’ (March 28, 2006) *Global Policy Forum* <<http://www.globalpolicy.org/intljustice/tribunals/timor/2006/0328suharto.htm>> at 16th of April 2007.

⁸⁷ Ibid.

⁸⁸ Edward S. Herman, ‘The Hague Tribunal: The Political Economy of Sham Justice – Carla del Ponte addresses Goldman Sachs on justice and profits’ (November 20, 2005) *Global Research* <<http://www.globalresearch.ca/index.php?context=viewArchivesByMonth>> at 20th of April 2007; Michael Glackin, ‘Saddam’s death won’t close Pandora’s box’ (November 6, 2006) *Daily Star – Lebanon* via *GlobalPolicy* <<http://www.globalpolicy.org/intljustice/tribunals/iraq/2006/1106pandora.htm>> at 23rd of April 2007. See more under chapter 4.

⁸⁹ The Nuremberg Tribunal found aggressive war or “war as an instrument of national policy” to be “the greatest sin”, see Marjorie Cohn, ‘How America gets away with murder: illegal wars, collateral damage and crimes against humanity, Michael Mandel (Pluto Press, 2004) 302 pp’ (2006) (19)4 *International Journal for the Semiotics of Law*, 457-462, 461.

foundation for the upcoming war already in the 1992⁹⁰ when it was advocated to “[discourage] other advanced industrialized nations ‘from challenging our leadership’ or ‘aspiring to a larger regional or global role.’ The document⁹¹ declares, ‘Our overall objective is to remain the predominant outside power in [the Middle East and Southwest Asia] to preserve US and Western access to the region’s oil.’”⁹²

Later on, Michael Mandel⁹³ pointed out in his book *How America Gets Away With Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity* that the ICTY “had nothing to do with trying and punishing criminals, and everything to do with lending crucial credibility to NATO’s cause.”⁹⁴ A major flaw of the ICTY according to Mandel, is that of the exemption of NATO to be tried in the tribunal,⁹⁵ as they too committed crimes similar if not even worse than those committed by Serbs.⁹⁶ The tribunal has even been described as “an agent of the dominant Western powers and therefore of neoliberalism broadly viewed.”⁹⁷

This flaw in impartiality of ad hoc tribunals has been a debated issue in the SICT as well, as the Iraqi tribunal only has jurisdiction to try and convict Iraqi citizens and residents,⁹⁸ a set-up

⁹⁰ In a draft of the Pentagon Defense Planning Guidance on post-Cold War Strategy, prepared under the direction of Paul Wolfowitz, see Marjorie Cohn, ‘How America gets away with murder: illegal wars, collateral damage and crimes against humanity, Michael Mandel (Pluto Press, 2004) 302 pp’ (2006) (19)4 *International Journal for the Semiotics of Law*, 457-462, 460.

⁹¹ The draft, see *ibid.* Note added by author.

⁹² *Ibid.*, 460.

⁹³ Michael Mandel has an LLB (Osgoode), BCL (Oxford) of the Bar of Ontario, and has a primary scholarly interest in international criminal law.

⁹⁴ See p. 132 in said book (Pluto Press, 2004).

⁹⁵ Technically the statute of the ICTY does not *expressly* exempt individuals from NATO to be tried by the court, see Article 8 – Territorial and temporal jurisdiction: “The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.”

However, the reason for the *actual* exemption of justice for NATO and their clients, was the fact that the ICTY was to a rather large extent lead, supervised and funded by NATO. As declared by Herman; “[T]he institution was created by the NATO powers, ... it was funded heavily by these powers and closely allied NGOs ... it was staffed with NATO country personnel, ... and its high officials were vetted by NATO-power leaders; and it depended on NATO for information and police service.” See Edward S. Herman, ‘The Hague Tribunal: The Political Economy of Sham Justice – Carla del Ponte addresses Goldman Sachs on justice and profits’ (November 20, 2005) *Global Research*

<<http://www.globalresearch.ca/index.php?context=viewArchivesByMonth>> at 20th of April 2007.

⁹⁶ Edward S. Herman, ‘The Hague Tribunal: The Political Economy of Sham Justice – Carla del Ponte addresses Goldman Sachs on justice and profits’ (November 20, 2005) *Global Research*

<<http://www.globalresearch.ca/index.php?context=viewArchivesByMonth>> at 20th of April 2007.

⁹⁷ *Ibid.*

⁹⁸ Article 1(2) of the SICT Statute reads as follows: “The Tribunal shall have jurisdiction over every natural person, whether Iraqi or non-Iraqi *resident* of Iraq, accused of committing any of the crimes listed in Articles 11, 12, 13 and 14 of this law, committed during the period from 17 July 1968 to 1 May 2003, in the Republic of Iraq or elsewhere, including the following crimes:

believed to have been pushed by the Americans who had more than a lot to do with both the armed conflict as well as the establishment of the tribunal in Iraq.⁹⁹

However, it could be argued that this ‘politicized Western intervention’-argument is weakened by the fact that Saddam Hussein was tried by a tribunal created through a bilateral agreement and not by a UN resolution. Nonetheless, Saddam was tried and convicted for one specific act of war crime,¹⁰⁰ whereas other far more vicious but perhaps more questionable acts - in the light of Western co-operation in such events¹⁰¹ - were left outside the investigating eye of the tribunal.¹⁰² In the light of such co-operation, some say that the guilty verdict for Saddam should be seen as a guilty verdict on America as well.¹⁰³ So even though the tribunal in itself theoretically was not established by Western intervention, critique has surfaced that the SICT was established (as well as highly supported and steered by the Americans)¹⁰⁴ as an attempt to keep past support for Saddam Hussein unravelled¹⁰⁵ and, like

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- A. Genocide;
 - B. Crimes against humanity;
 - C. War crimes; and
 - D. Violations of Iraqi laws listed in Article 14 of this law.” *Italics by author.*

⁹⁹ Barry Lando, ‘Did Saddam die for our sins?’ (January 9, 2007) *TomPaine.com*

<http://www.tompaine.com/articles/2007/01/09/did_saddam_die_for_our_sins.php> at 23rd of April 2007.

¹⁰⁰ Hussein was sentenced to death for crimes against humanity for the killings of 148 Shiite men and boys from the town of Dujail after an assassination attempt there in 1982.

¹⁰¹ Barry Lando, ‘Did Saddam Die for Our Sins?’ (January 9, 2007) *Tom Paine*

<http://www.tompaine.com/articles/2007/01/09/did_saddam_die_for_our_sins.php> at 23rd of April 2007.

¹⁰² The previous US support for Saddam Hussein is a matter that has disappeared under the radar of both US media as well as American administrators in reporting the anticipated indictments of the SICT. Nonetheless, the truth of Western participation in many of the atrocities committed by Saddam in Iraq as well as neighbouring States (Iran being the most prominent case and exposed to vicious killings in the 1980’s) remains the same. Like described in the article by Barry Lando; “[A]s Saddam’s forces were carrying out their liquidation of the Kurds, American officials from the Reagan and George H.W. Bush administrations blocked attempts of the US Congress and the U.N. to condemn the Iraqi tyrant. They had similarly squelched earlier efforts to condemn Saddam for his chemical attacks against Iranian troops. ... Saddam had been America’s de facto ally in what would become a bloody eight-year war against Khomeini’s Iran. The United States fed the conflagration, providing billion dollar loans, weapons and satellite intelligence that enabled the Iraqis to precisely target Iranian troops with chemical weapons. Ironically, even after the war had ended, the Bush White House—with its eyes fixed on Iraq’s huge petroleum deposits and potential markets—continued to defend and push trade with Saddam’s regime.” See *ibid.*

¹⁰³ According to the Independent “[i]t couldn’t be a more just verdict - nor a more hypocritical one. ... Have ever justice and hypocrisy been so obscenely joined?” Robert Fisk, ‘This was a guilty verdict on America as well’ (November 6, 2006) *The Independent* <<http://news.independent.co.uk/world/fisk/article1959051.ece>> at 23rd of April 2007.

¹⁰⁴ In his article ‘The War on Law Itself’ in the *Al-Ahram Weekly* (February 24, 2005) the author Curtis Doebbler (one of the lawyers that represented Saddam Hussein) states that: “This illegitimacy is based first and foremost on the fact that the tribunal was created by a decree of the occupying power from among judges that have been vetted for their political allegiance to those same powers when courts and judges already existed in Iraq. The destruction of the judiciary and the creation of biased courts is contrary to the responsibilities of the occupying powers to ensure the integrity of the judiciary in the country under occupation as established in Article 64 of the Fourth Geneva Convention.”

with the ICTY, legitimising previous US intervention.¹⁰⁶ Nonetheless, according to Eric Posner “one suspects that early supporters of an international forum for Saddam must secretly feel relieved that international judges do not have to confront the problem of how to treat a defendant whose seizure resulted from an invasion that violated the United Nations charter.”¹⁰⁷ Therefore the regional tribunal solved the problem of afterfollowing questions regarding this NATO invasion, where perhaps an international tribunal would have had to let Saddam go due to a lack of due process?

Here the interesting difference between the above mentioned “show trial”¹⁰⁸ and what is often referred to as its cousin “political trial” can be mentioned, as some critics say that Saddam’s trial can be defined by both. According to Jeremy Peterson, law clerk to the Honourable Ruggero Aldisert, United States Court of Appeals for the Third Circuit, a “political trial” is a trial “in which governments and private groups have tried to enlist the support of the courts for upholding or shifting the balance of political power”; that is to say, where ‘political issues are brought before the courts.’¹⁰⁹ The sift through the indictments of some (or perhaps all) of the ad hoc tribunals certainly resemble the description of a “political trial”, for how else can the exclusion of Western participation in the armed conflicts referred to be explained? Undoubtedly, the trial and execution of Saddam Hussein shifted the balance of political power in Iraq, most of which was beneficial for the occupying powers US and Great Britain.¹¹⁰ The reason for why Saddam was tried in a regional rather than in an international ad hoc tribunal is likely to have had a lot to do with the various repercussions the

On more of the involvement of the US in the SICT as well as the RCLO, see Global Policy Forum (2007) ‘The Iraq Tribunal: Trying Saddam Hussein and Other Top Baath Leaders’ <<http://www.globalpolicy.org/intljustice/iraqindex.htm>> at 2nd of April 2007.

¹⁰⁵ Ibid.

¹⁰⁶ “It is ... important to recognize that without the US invasion, these trials would never have occurred. But that in turn underscores a bitter reality that the Bush administration must now confront:

Military intervention can be justified when it changes things for the better. It does not have to be perfect. But conducting a military occupation that has lost the ability to change the situation for the better for those being occupied is unwise and ultimately untenable. It is also immoral. US involvement in Iraq is again perilously close to being just that.” See Jim Hoagland, ‘Morality in Iraq, then and now’ (August 27, 2006) *Washington Post* via GlobalPolicyForum <<http://www.globalpolicy.org/intljustice/tribunals/iraq/2006/0827morality.htm>> at 23rd of April 2007.

¹⁰⁷ Eric Posner, ‘The politics of Saddam’s trial’ (October 31, 2005) *Open Democracy* <<http://193.41.101.59/articles/View.jsp?id=2977>> at 15th of May 2007.

¹⁰⁸ *Supra* note 61.

¹⁰⁹ J. Peterson, ‘Unpacking Show Trials: Situating the Trial of Saddam Hussein’ (Winter 2007) (48)1 *Harvard International Law Journal*, 257-292, 268.

¹¹⁰ As described by Barry Lando; “The White House and its allies wanted Saddam replaced not by a popular revolt which they couldn’t control, but by a military leader, more amenable to US interests.” See Barry Lando, ‘Did Saddam Die for Our Sins?’ (January 9, 2007) *Tom Paine* <http://www.tompaine.com/articles/2007/01/09/did_saddam_die_for_our_sins.php> at 23rd of April 2007.

two different courts offered, as an international court never would have insured the death of the former head of state.¹¹¹ Like described by Martin Kettle, legal correspondent for the Guardian in Iraq:¹¹²

The only reliable rule is that enemy leaders who are dead as well as overthrown are generally a lot less trouble than the living to those who have ousted them. The corpses of Hitler, Mussolini, Allende and Ceausescu all prove the point, in their different ways. With the living, on the other hand, politics will always loom as large as power. ... Remember Charles I after his capture in 1647, or the problems that Napoleon repeatedly caused his opponents in defeat. Or the difficulties that the overthrown Tsar presented to the Bolsheviks.

In the case of East Timor, the US Secretary of State Colin Powell, in co-operation with Kofi-Annan first suggested a Truth and Friendship Commission, which according to people in East Timor “would pave the way for the perpetrators to keep enjoying their impunity”, hence “[i]t appears that the underlying aim of the commission is to put bilateral relations between East Timor and Indonesia ahead of justice for the victims or rights abuses. It is obvious that pragmatic politics always puts aside justice for victims in the name of leaders who claim to represent them.”¹¹³ The underlying reason for the lack of US interest in an ad hoc tribunal for East Timor, a nation that has been highly promoting such tribunals in the past, is of interest to this study as one ponders the motives behind this new, alternative US-stand point.

In the face of mentioned arguments it seems obvious that politicized, biased justice that fails to bring the justice it claims to be the root of its creation should not be regarded as justice at all, unless as a continuation of the Nuremberg creation of “victor’s justice” – although in the new tap of “Western justice”. In conclusion it seems like countries are treated differently regarding international actions taken against vicious attacks or crimes committed in armed conflicts. And the deciding frame for such actions seems to be ruled, to a large extent, by

¹¹¹ No international ad hoc tribunals have allowed for executions as the death penalty violates international standards.

¹¹² Martin Kettle, ‘Saddam’s arrest is a mixed blessing for his captors – enemy leaders who are dead as well as overthrown are a lot less trouble’ (December 16, 2003) *Guardian Unlimited* <<http://www.guardian.co.uk/Columnists/Column/0,,1107917,00.html>> at 23rd of April 2007.

¹¹³ Statement made by Adirito de Jesus Soares, a lawyer and human rights advocate, is a former member of East Timor's Constituent Assembly in his article ‘East Timor: Justice for whom?’ (February 2, 2005) *Jakarta Post*; see also Jesus Soares, ‘Thirty-year wait for justice for Timor Leste’ (December 10, 2005) *Jakarta Post* both articles via *East Timor and Indonesia Action Network* <<http://www.etan.org>> at 3rd of May 2007.

previous and/or current relations with strong Western States. Like described by Edward S. Herman:¹¹⁴

[A] US ally can commit really massive human rights violations and war crimes and be entirely free from penalty, receive economic and military aid and diplomatic support and be treated as an honoured leader (Suharto, until May 1998, Croatia's Franjo Tudjman till his death in 1999, Ariel Sharon today), and can retire in comfort (Haiti's Cedras, El Salvador's Guillermo Garcia, Indonesia's Suharto).

4.2 Justice and peace – conflicting criterias?

The prosecutor of the ICTY, Carla Del Ponte, declared in a speech at Goldman Sachs in London in October 2005 that the tribunal in Hague is “an international organisation tasked with bringing peace, security and justice”¹¹⁵ to the region of the Former Yugoslavia. She went on to say that the ICTY is “part of the international effort aimed at reconstructing the countries of the former Yugoslavia [where the] primary objective is to bring justice,”¹¹⁶ adding that justice will contribute to reconciliation in a region that strongly needs it. Like previously mentioned the ICTR likewise declared in *Kanyabashi* that “peace and security cannot be said to be re-established adequately without justice being done.”¹¹⁷ Birgitte Stern held that point when she declared that “a lesson should be kept in mind ... on the relations between juridical organs and security, [and] that is that peace and security cannot be established without justice being done.”¹¹⁸

The problematic aspect of these sometimes referred to as conflicting criterias is well defined both in the article “The Hague Tribunal: the political economy of sham justice” by Edward S.

¹¹⁴ Edward S. Herman, ‘Godfatherly Global Justice: Milosevic, Sharon and Suharto’ (July 4, 2001) *Spectrezine* <<http://www.spectrezine.org/war/EdHerman.doc.htm>> at 23rd of April 2007. Edward S. Herman is an economist and media analyst with a specialty in corporate and regulatory issues as well as political economy and the media. He is Professor Emeritus of Finance at the Wharton School of the University of Pennsylvania. He also teaches at UPenn's Annenberg School for Communication.

¹¹⁵ Carla del Ponte, ‘The Dividens of International Criminal Justice - CARLA DEL PONTE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA ADDRESS AT GOLDMAN SACHS, LONDON’ (October 6, 2005) *UN – ICTY* <<http://www.un.org/icty/pressreal/2005/speech/cdp-goldmansachs-050610-e.htm>> at 23rd of April 2007.

¹¹⁶ Ibid.

¹¹⁷ See under 3.2.1, *supra* note 70.

¹¹⁸ Birgitte Stern, ‘Juridical institutions and security’, *United Nations and Global Security* <http://www.globalsecurity.org/papers_cat/use_force.asp#5> at 2nd of April 2007.

Herman, as well as in the previously mentioned book by Michael Mandel,¹¹⁹ both from which this study will extract several interesting arguments.

Herman illustrates that there may be a conflict between pursuing “justice” and “peace” and that it is important to recognise this, as it will facilitate the understanding of the reasons behind the establishment and proceedings of ad hoc tribunals, such as the ICTY. He is of the clear opinion that it is no coincidence that the work of the tribunal lead to chronic instability in the region of the Former Yugoslavia and in this “certainly failed to contribute to ‘peace’” and in fact claims that “[the Tribunal’s] very design was to facilitate war, a dismantling of Yugoslavia and a specific attack on Serbia.”¹²⁰ He goes on to say that “[t]he role of the ICTY in this peace-sabotage business was to indict Serb leaders in order to demonize them and make them ineligible for any peace negotiating process.”¹²¹ The topic is touched upon by Mandel as well, who declares that the idea of the ICTY was to “justify their [the American’s] intention to go to war, collateral damage and all, by branding their proposed enemies as Nazis. It was also an obvious attempt to derail the peace process.”¹²² There are other scholars that agree in these accusations. Jerzy Ciechanski¹²³ stated in his article ‘Misuse of enforcement by the UN Security Council’¹²⁴ that the tribunal may be held responsible for aggravating and prolonging conflicts still in progress. For instance, at the time the Bosnian-Serb president Karadzic was indicted by the tribunal, the UN were already under negotiation with the president in order to put a stop to the killings in the region: “Quite obviously, the tribunal’s action is likely to complicate those negotiations!”¹²⁵

As harsh as some of these accusations might be, there seems to be some truth to them. The reason for the creation of the ICTY was according to Del Ponte to create justice and peace as well as reconciliation in a region with a long history of war and conflict. But where in lies the justice when only half of the actual war criminals are deemed responsible? If both parties to

¹¹⁹ *Supra* note 94.

¹²⁰ Edward S. Herman, ‘The Hague Tribunal: The Political Economy of Sham Justice – Carla del Ponte addresses Goldman Sachs on justice and profits’ (November 20, 2005) *Global Research* <<http://www.globalresearch.ca/index.php?context=viewArchivesByMonth>> at 20th of April 2007; also see above chapter 4. *Brackets added by author.*

¹²¹ *Ibid.*

¹²² Michael Mandel, *How America gets away with murder: Illegal wars, Collateral damage, and Crimes against humanity* (2004) 126. *Brackets added by author.*

¹²³ Jerzy Ciechanski was at the time of the statement a graduate of Warsaw University Law School, having completed a doctorate on the extension of UN functions in maintaining peace and security.

¹²⁴ Jerzy Ciechanski, ‘Misuse of enforcement by the UN Security Council’ (Winter 1994-1995)(IX)2 *Swords and ploughshares – Special ed. Civil conflict resolution.*

¹²⁵ *Ibid.*

the conflict are responsible for similar actions, is it not justice to make sure that individuals of both sides have to face up to what they have done? The injustice of ad hoc tribunals sometimes show a clear pattern where, according to Herman regarding the ICTY for instance “Serb actions are invariably ethnic cleansing, [whereas] Croatian actions of comparable or greater anti-civilian scope are merely ‘military operations’, never ethnic cleansing, in accord with a clear political agenda.”¹²⁶ *Prima facie* it seems to be a violation of international legal standards and purely acts of favoritism, which clearly does not belong in attempts to create “justice” in war struck regions. A longer reference to Herman’s article is relevant here, as it clearly demonstrates the difference in international reactions to similar behaviour emanating from different nations:¹²⁷

Del Ponte notes that Croatian General Ante Gotovina was indicted in 2001 for war crimes in Operation Storm, but a number of questions arise: Why did it take six years after the event for Gotovina to be indicted, whereas Bosnian Serb General Mladic and President Karadzic were indicted within days of the Srebrenica massacre and before the facts of the case could be minimally verified? Why has NATO never sent military forces into Croatia to capture Gotovina as they have done on several occasions in Bosnia and Serbia seeking Mladic and Karadzic? Could this indictment have been connected to the seizure of Milosevic and the need to give the appearance of balance? Why was Croat President Tudjman not indicted for these war crimes, in parallel with Milosevic (who the ICTY has striven mightily and unsuccessfully to link to the Srebrenica massacre, whereas Tudjman’s link to Operation Storm is clear)? Why were Clinton, Albright and Holbrooke not indicted for documentable approval and support for Operation Storm? ... The answers to these questions, and the key to Del Ponte’s double standard and misrepresentations, clearly rest on the fact that the massive ethnic cleansing operation by the Croats in Krajina was carried out with U.S. approval and logistical support, whereas the Serbs were the targeted U.S. enemy.

¹²⁶ Edward S. Herman, ‘The Hague Tribunal: The Political Economy of Sham Justice – Carla del Ponte addresses Goldman Sachs on justice and profits’ (November 20, 2005) *Global Research* <<http://www.globalresearch.ca/index.php?context=viewArchivesByMonth>> at 20th of April 2007. *Brackets added by author.*

¹²⁷ *Ibid.*

The “coverup” of Krajina and Operation Storm in the ICTY is now a relatively undisputed fact, but still something not commented by the ICTY as a fault or flaw in the attempt to create the justice so convincingly spoken of by the tribunal and its confidants.¹²⁸

The same concerns were brought up regarding the SICT. The outspoken goals for the SICT were the same as for all the other ad hoc tribunals: to provide justice for victims, contribute to peace and reconciliation, as well as promoting the rule of law. However, Allen S. Weiner¹²⁹ was of the opinion that the trial of Saddam Hussein, as the high profile case in the SICT, was unlikely to ever live up to these goals. Rather, he claimed, it seemed likely that the trial would “inflame sectarian tensions than ... soothe them, at least in the short term. It gives Hussein a platform from which to challenge the Shiite-dominated government and to rally Sunni insurgents. Shiites and Kurds, frustrated by delays in having Hussein face the justice they believe he deserves, may escalate attacks against Sunni or Baathist targets. The net result may be a spiraling pattern of vigilantism and counter-vigilantism.”¹³⁰ He went on to say that “[e]ven under the best of circumstances, the Hussein trial could not possibly accomplish all three of these goals simultaneously.”¹³¹ Other scholars worded these concerns in relation to the opening of the trial, where they claimed that a failure of the court to be impartial “could aggravate tensions and perpetuate injustice”,¹³² and likewise “if the trials turn out to be well-run and fundamentally impartial they could help establish the principle of the rule of law in

¹²⁸ For more information on the coverup and some of the debates around this, see Centre for Research on Globalisation, *Coverup at the Hague Tribunal* (July 2003) <<http://www.globalresearch.ca/articles/CHO307D.html>> at 25th of April 2007. The article contains several scholars’ views and links to other sources on the same topic. See also E. S. Herman, ‘Atrocities management’ (1999) *Znet* via *MusicTravel* <<http://musictravel.free.fr/political/political19.htm>>; Christopher Black and E. S. Herman, ‘An unindicted war criminal’ (February, 2000) *Zmagazine* <<http://www.zmag.org/zmag/articles/feb2000herman.htm>>; E. S. Herman, ‘Clinton is the world’s leading active war criminal’ (December, 1999) *Zmagazine* via *Third world traveller* <http://www.thirdworldtraveler.com/International_War_Crimes/ClintonWarCriminal_Herman.html>; James Petras, ‘NATO in Kosova’ (October, 1999) *Zmagazine* <<http://www.zmag.org/ZMag/articles/oct1999petras.htm>>; Alexander Cockburn, ‘The other war criminal – Bill Clinton’ (June 3, 1999) *San Jose Mercury* via *Agitprop* <<http://agitprop.org.au/stopnato/19990607clintoncriminal.php>>; Joseph Farah, ‘Clinton’s dirty little war’ (April 5, 1999) *World Net Daily* <http://www.wnd.com/news/article.asp?ARTICLE_ID=14713>; all at 25th of April 2007.

¹²⁹ Allen S. Weiner is the Warren Christopher professor of the practice of international law and diplomacy at Stanford University.

¹³⁰ Allen S. Weiner, ‘Hussein’s trial, Iraq’s future’ (December 4, 2005) *Los Angeles Times*.

¹³¹ *Ibid.*

¹³² Veerle Opgenhaffen & Hanny Megally, ‘Saddam’s trial, the needs of justice’ (October 19, 2005) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=2940>> at 15th of May 2007.

Iraq ... [c]onversely, anything that smacked of a show trial would probably reinforce the sense of exclusion among Iraqi *Sunni* Muslims.”¹³³

Scholars expressed concerns about the two conflicting criterias in the case of East Timor as well. In 2002 the *Commission for Reception, Truth and Reconciliation* was created as a way to investigate the human rights violations and promote reconciliation rather than legal action in the nation.¹³⁴ Senior vice rector of the United Nations University in Tokyo, Ramesh Thakur, claims that “[p]eace and justice can sometimes collide. Justice is retributive, backward-looking and can be divisive. Peace is integrative, forward-looking and should be conciliatory.”¹³⁵ He goes on to say that “a criminal trial is not always the best avenue to communal healing ... [and a] purely juridical approach to transitional justice traps communities in past hatreds.”¹³⁶

Even in the case of Sierra Leone and the SCSL victims of the atrocities expressed distress regarding establishing a war crimes tribunal whilst in the process of rehabilitation and reconciliation. In an article by Lansana Fofana, who spoke to some of the victims of the civil war after the opening of the SCSL in Freetown, people feared that the court would only make the situation worse. A man who was attacked himself as well as losing several relatives during the war stated that “we must put the past behind us. This is no time for score-settling or trials. We must forgive and reconcile.”¹³⁷

There is a clear pattern in all the ad hoc tribunals regarding the irreconcilable differences between peace and justice which one cannot easily disregard from. But perhaps even more importantly in the light of this discussion one has to consider the differences between peace and “selective peace”. It ought to be rather evident that for justice to have a chance it needs to be widespread, not selective. When this problem has reached an operable and satisfying result, one can start to ponder whether the two criterias “peace” and “justice” share the same values. However, before we have reached the point where ad hoc tribunals bring peace to all

¹³³ Anthony Dworkin, ‘The trials of global justice’ (June 15, 2005) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=2604>> at 15th of May 2007.

¹³⁴ Global Policy Forum, ‘Ad hoc court for East Timor’ (2007) <<http://www.globalpolicy.org/intljustice/etimorindx.htm>> at 3rd of May 2007.

¹³⁵ Ramesh Thakur, ‘East Timor: When peace and justice collide’ (August 31, 2005) *International Herald Tribune* <<http://www.iht.com/articles/2005/08/30/news/edthakur.php>> at 3rd of May 2007.

¹³⁶ Ibid.

¹³⁷ Lansana Fofana, ‘Putting people on trial may ignite fresh conflict’ (March 11, 2004) *Inter Press Service*.

parties, the discussion is superfluous and ultimately pointless. For if justice is tainted to begin with, what kind of politicized peace is to be expected?¹³⁸

4.3 Politicized peace?

One of the main issues and most criticized aspects of ad hoc tribunals and international interference in internal armed conflicts, apart from the discussed issue of *how* the international community interferes (such as who is indicted and why), is *when* they interfere. Like described earlier, the UN has not always chosen to intervene to ensure peace and justice.¹³⁹ Rather it seems that interference is steered by whether Western States have something to gain or hide. Looking at when and where the UN (with much help from Western States) have established international or internationalised domestic ad hoc tribunals, one cannot help wondering about the underlying reasons. Looking at the ad hoc tribunals in chronological order, one can see some sort of cover up or political interest (or lack thereof) in nearly all of them:

- In the case of the ICTY many believe that the tribunal was established to cover up involvement of the US in the armed conflict, as well as legitimising the previous NATO invasion.¹⁴⁰
- Regarding the ICTR some expressed concerns regarding Western State involvement in the murder of Rwandan President Habyarimana and the shooting down of his plane on April 6, 1994. This event is believed to have triggered the genocide which started later that same day. Some also believe that Western States provided weapons to one side of the conflict.¹⁴¹

¹³⁸ It deserves mentioning that the two criterias may be conflicting in the light of this type of international, politicized, Western power justice. However, there might be other ways to create justice in the aftermaths of armed conflicts and/or atrocities in which peace can be fused, see more under chapter 6.

¹³⁹ See chapter 4.

¹⁴⁰ Ibid.

¹⁴¹ Linda Slattery, 'Suppressed report raises question of US role in Rwandan civil war' (March 23, 2000) *World Socialist Web Site* <<http://www.wsws.org/articles/2000/mar2000/rwan-m23.shtml>> at 3rd of May 2007. According to the article Western States such as the US and France had a lot to do with the emergence of the genocide, with supplying some of the rebels with weapons leading to the attack ("The *Toronto National Post* does not name the foreign government, but points out that during the inquiry into the Rwandan genocide held by the French government 'evidence emerged that the missiles used in the attack had been confiscated in Iraq by the American military during the Persian Gulf war'. The newspaper also states that the US was 'the only one of three major players in the peace process that has not held a comprehensive inquiry into the mass deaths'") and that certain reports indicate "a much deeper involvement of the US in the Rwandan events than was previously known. It certainly coincided with US efforts in Central Africa to scupper the Arusha Agreement, setting the

- The lack of US interest in the establishment of the ECCC was an interesting change in the US's attitude towards ad hoc tribunals. The US did not push for a tribunal like they had in the past, and according to someone that closely followed the tribunal negotiations in Cambodia: "[T]he Americans also were not willing to call China out for its veto, publicly condemning Beijing. 'Cambodia isn't an issue to that many people in Washington, and some want to bury the past [U.S. involvement],' he says. 'The Chinese position made it convenient for the United States to not spend too much diplomatic effort pushing for the tribunal.'"¹⁴²
- In Sierra Leone, instead of promoting an international tribunal like in Yugoslavia and Rwanda, the US instead backed a non-judicial peace agreement where the rebels would, instead of facing criminal charges, get back in power. Some say the sudden change of opinion "shows the limits of the West's concern for Africa."¹⁴³ No political or economical interest – no legal assistance in reaching previously sought-after peace and "justice".
- The US involvement and strong interest in the conflict as well as the establishment and proceedings of the ad hoc tribunal in Iraq is hardly a secret, not unlike the reasons for it. With the previous invasion in Iraq and its failed attempt to find weapons of mass-destruction, the SICT is believed to have been established in order to justify the illegal invasion of Iraq, as well as cover up the previous backing of Saddam Hussein where the US provided the former Iraqi president with means to continue the war in Iran.¹⁴⁴ Hence the US needed to legitimize its efforts in bombing the nation. Both the findings of the former president Saddam Hussein, as well as the verdict delivery in his aftercoming trial were tainted with dubious timings, and both served the Bush administration's popularity in a time when the American people were losing faith in the Iraqi war which would have served Bush and his confidants badly.¹⁴⁵

scene for the military defeat of the French-backed Hutu government and the installation of a pro-American regime."

¹⁴² Josh Kurlantzick, 'Trial and error: Cambodia's war crimes tribunal' (July 12, 2006) *The New Republic Online* <<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18530&prog=zch>> at 3rd of May 2007.

¹⁴³ Steven Mufson, 'U.S. backs amnesty in Sierra Leone' (October 18, 1999) *Washington Post*.

¹⁴⁴ See chapter 4.1.

¹⁴⁵ Tom Engelhardt, 'November surprise?' (October 17, 2006) *The Nation*. See also Ellen Knickmeyer, 'Hussein trial halts again, setting off wave of criticism' (January 25, 2006) *Washington Post*, where the author declares that "The United States has made the prosecution of Hussein ... one of its priorities since U.S. troops invaded Iraq in 2003. The Bush administration spent hundreds of millions of dollars of a \$18.4 billion reconstruction package for Iraq to exhume mass graves and gather forensic evidence. It refurbished courthouses, trained Iraqi judges and provided most of the security for the courts. Americans drafted many of the statutes under which Hussein and his associates are being tried."

In light of these political purposes for Western support (or lack thereof) for ad hoc tribunals, one has to ask oneself whether peace actually is the underlying purpose? Perhaps the need to control the international society has taken over, and attempts to create “peace” and “justice” with the help of ad hoc tribunals are simply ways to ensure wealth and international support for the most powerful nation in the world?

4.4 Individualised responsibility – ignoring the need for reconciliation?

As described earlier the idea of individualised responsibility for international war crimes was an invention of the last century.¹⁴⁶ As IHL is undergoing constant changes with the development of various weapons and types of warfare, perhaps this was an expected progress. For when super powers and super States, and therefore their leaders, play a bigger part on the international arena, it seems only natural for the idea of sovereignty and immunities of acting heads of States to evolve in the same direction; more power, more responsibility.

The reason for the introduction of individualised responsibility can therefore be said to be related to the growing interest in international peace.¹⁴⁷ As society grows and borders are erased through international relations, the need for peace can sometimes outweigh the opposing idea of “survival of the fittest” that follows the principle of sovereignty. These days we are at our fittest when united. However, the world population is growing and with it the need for supplies which – in certain parts of the world – reduces the world’s resources. All of a sudden there are new deciding factors on where or when a war may break out.¹⁴⁸ A small, internal conflict can turn into something far worse as developed countries see the possibility to “make a buck” at the expense of less developed countries. International intervention and media outbursts on selective events are facts of today’s modern world – and with it the chance of regional reconciliation is greatly reduced. The pattern can be seen in many of the ongoing armed conflicts currently aired in the media.

Like seen in this study, for international intervention to have the wanted effect it is vital that justice goes both ways. One cannot impose obligations and penalties for certain behaviour

¹⁴⁶ *Supra* note 6.

¹⁴⁷ As seen above the interest of peace is not general but rather selective, as politics and economy play a vital role in deciding the level of intervention.

¹⁴⁸ See above chapter 4.3 on the double standard of the super powers the United States and Great Britain.

that is praised upon in other geographic areas,¹⁴⁹ as this not only contradicts IHL standards but also ignores the need for reconciliation, despite earlier promises by people in power.¹⁵⁰ One has to ask oneself: what is more important, justice or peace? With a blaming system like an ad hoc tribunal certain people are satisfied, which undoubtedly means that there will be others that are dissatisfied. There are always at least two sides to every conflict,¹⁵¹ and it ought to be a simple equation to realise that reconciliation in the region stand a better chance of long-lasting effects than dubious blame on certain specific actors of the war. This is not to be misunderstood, as blame laying can be seen an important step in an attempt to reach peace. People feel comforted by the fact that someone is pronounced responsible and pays the price for their horrible experiences in the past, which can serve as a contributing factor in moving forward and continuing their lives in a peaceful and fairly content manner. But is it the most important step? Look at Kosovo and the Former Yugoslavia for instance: the gains made in stabilizing peace and reconciliation due to the introduction and establishment of the ICTY¹⁵² more resembles a cease-fire which already stands the risk of failing to bring the peace it was meant to. The remaining States of the Former Yugoslavia are now in the process of negotiating a politically functioning future and reach an amicable compromise. Sadly it is not looking very promising and warnings of a new Balkan war have already surfaced.¹⁵³

This problem is relevant in the case of Cambodia as well, although for different reasons. The issue here is that the ECCC was established over 25 years after the initiation of some of the

¹⁴⁹ See chapter 4.1.

¹⁵⁰ Such as Del Ponte, *supra* note 115 and 116.

¹⁵¹ According to an article by Eric Posner, the Saddam trial for instance, can be viewed from two different political angles. On the one side the US and the EU (the left) can view it as a positive development of international individual responsibility where State leaders still face the threat of being indicted and found guilty. However, keeping in mind the illegal invasion as well as the mistreatment of the war prisoners at Abu Ghraib, it could also “send the political message that unilateral use of military force can properly be used to enforce international criminal law. This message would benefit the US government, which will always be able to discover international criminal law violations in the nations it might like to invade; but it would discomfort the left, which does not trust the US government and has long sought to subordinate the use of force to international law.” Then there is the other side to the story, where “[o]n the right (in the United States, mostly), there is awareness that international criminal law makes no distinction between powerful nations like the United States and weak nations like Iraq. If, then, the US wants to persuade the world that Saddam’s conviction justifies the American invasion of Iraq, then it must implicitly agree that all leaders who violate international law should be punished.” For more on this topic, see Eric Posner, ‘The politics of Saddam’s trial’ (October 31, 2005) *Open Democracy* <<http://193.41.101.59/articles/View.jsp?id=2977>> at 15th of May 2007.

¹⁵² Though perhaps even more by NATO’s interference in the conflict, see above chapter 4.1.

¹⁵³ A member of Kosovo’s negotiating team in Vienna Ylber Hasa, stated: “[The] package includes serious compromises in favor of the Serbs...so if anybody tries to buy time, I don’t think anyone will win. We’ll just lose the possibility of a political solution. ... If you want to see a new Balkan war, that is the perfect scenario.” See Elise Hugus, ‘Eight years after NATO’s “humanitarian war”’ (April 2007) (20)4 *Zmagazine* via *MusicTravel* <<http://musictravel.free.fr/political/political19.htm>> at 26th of April 2007.

worst atrocities known to history that took place in Cambodia.¹⁵⁴ Scholars therefore say that the need for an ad hoc tribunal was possibly greater than in any of the other countries that introduced internationalised courts, as “impunity is a central human rights problem in Cambodia”¹⁵⁵ and “[p]ersistent impunity in Cambodia will ... undermine the international community’s commitment to global justice”¹⁵⁶ However, there is the interesting aspect of the noteworthily lengthy time period of 25 years between the initiation of the atrocities and the establishment of the tribunal. One could argue that the citizens of Cambodia had a long time to process the happenings of the late 70’s, why the establishment of a tribunal tearing up half-healed sores perhaps will not be beneficial for the process of reconciliation. How long time is “reasonable” for people bearing the scars of atrocities to see justice done? When is justice in the shape of individualised responsibility for war crimes no longer wanted in the light of closure for the people involved? When does the purpose of “good” fail and instead bring “bad”?

There is also a second issue relevant in the case of Cambodia, which is of course the temporal limitation on the court’s jurisdiction. In creating the courts the creators had to make some concessions in order to reach an agreement with the Cambodian government. This meant that the ECCC has jurisdiction over crimes committed from April 1975 to January 1979. This means that everything pre-1975 and the Vietnamese occupation post-1979 is excluded.¹⁵⁷ One then has to ask oneself: if it was important enough to create an ad hoc tribunal so long after these specific atrocities, why was it not important enough to include pre-Khmer Rouge and post-Khmer Rouge atrocities? It indicates that this major flaw of the ECCC was a creation of political pressure in order to create a tribunal at all.

¹⁵⁴ From 1975-1979 approximately 1.7 million people, or a fifth of the Cambodian population, fell victim to the Khmer Rouge and the Pol Pot regime, see David J. Scheffer, ‘Justice for Cambodia’ (December 21, 2002) *New York Times*; Susan E. Cook, ‘Prosecuting genocide in Cambodia: the winding path towards justice’ (May 2001) *Crimes of war – The Tribunals* <http://www.crimesofwar.org/tribun-mag/mag_index-arch01.html>; Marwaan Macan-Markar, ‘Khmer Rouge Tribunal hits a new snag’ (November 28, 2006) *Asia Times* <http://www.atimes.com/atimes/Southeast_Asia/HK28Ae01.html> all at 1st of May 2007.

¹⁵⁵ Amnesty International, ‘Cambodia – The murder of trade unionist Chea Vichea: still no justice’ (31 July, 2006) <<http://web.amnesty.org/library/Index/ENGASA230082006>> at 1st of May 2007.

¹⁵⁶ David J. Scheffer, ‘Justice for Cambodia’ (December 21, 2002) *New York Times*.

¹⁵⁷ Noah Novogrodsky, *The promises and limits of International Criminal Justice: the “Extraordinary Chambers” in Cambodia* (February 2-3, 2006) A Roundtable discussion through the Institute of Asian Research <<http://www.iar.ubc.ca/centres/csear/PDF2/present-novogrodsky2.pdf>> at 20th of May 2007.

Though it would be hard to argue that justice, even if late, is worse than no justice at all,¹⁵⁸ critique can still be directed to the UN and the way they handled the process of establishing the ECCC. It was a drawn out process that took several years to complete. And even as it was completed and the process of bringing “justice” could commence,¹⁵⁹ the tribunal was still highly criticized for failing in its mission to bring justice to those that deserved it the most: the survivors and victims of the Pol Pot regime who failed to be involved in the proceedings.¹⁶⁰ And if a court established to bring justice where injustice has had a grip of the nation for centuries, fails to satisfy the demands of its citizens, what kind of justice are we talking about? It almost seems like the court was created for a need for public satisfaction rather than for the people it was meant to conciliate.

4.5 Lack of impartiality and due process

As international ad hoc tribunals have been established they have, as seen above, been traced with suspicions of lack of impartiality and neglect for due process for various reasons. The ICTY and ICTR had to deal with the mistrust not only of the people from the region, but also opinionated scholars who believed that the tribunals were created for all the wrong reasons.¹⁶¹ But even the four regional tribunals, the so-called internationalised domestic tribunals,¹⁶² have had to face up to critique regarding their impartiality and therefore the indictes’ right – or lack thereof – to a due process.

In the light of the actions of the international community and the UN regarding the Saddam Hussein trial for instance, Philip Alston¹⁶³ said that the world was left with the impression “that if the crime is sufficiently horrible, due process is no longer needed.”¹⁶⁴ According to

¹⁵⁸ Naturally there are other forms of “justice”. This study aims to further investigate the alternatives to ad hoc tribunals and individualised responsibility, see chapter 6.

¹⁵⁹ See the PRESENTATION AND COMMENTS ON THE DRAFT LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA (29 December and 2 January, 2000-2001) 5th session of the 2nd legislature, National Assembly <<http://www.camnet.com.kh/ocm/government60.htm>> at 1st of May 2007.

¹⁶⁰ Karen J. Coates, ‘The aftershocks of the Khmer Rouge’ (April 17, 2005) *The Boston Globe* via *Boston.com* <http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/04/17/the_aftershocks_of_the_khmer_rouge/> at 1st of May 2007.

¹⁶¹ See above, chapter 4.3.

¹⁶² *Supra* note 39.

¹⁶³ Philip Alston is a Special Rapporteur on extrajudicial, summary or arbitrary executions, an independent expert appointed by the UN Human Rights Council.

¹⁶⁴ UN Press Release, *TRAGIC MISTAKES MADE IN THE TRIAL AND EXECUTION OF SADDAM HUSSEIN MUST NOT BE REPEATED*, 3 January 2007.

Alston, some of the rules regarding the SICT should never have been allowed to pass, as they failed to uphold international standards. Even though it can be expected that some of the proceedings of such a tribunal may not slavishly follow international rules, it is of high importance that the indictees are allowed a due process, as many of the victims also feel that although a trial is important, a fair trial is vital.¹⁶⁵ The fact that several of the defense lawyers were murdered during the trial (one within one day of the commencement of the proceedings), as well as judges replaced¹⁶⁶ – mostly believed to be due to political grounds, although the reason given was lack of impartiality – did of course have a negative effect on the proceedings, and only made previous opponents object even more.¹⁶⁷ Deplorably there are more suspicions regarding the lack of impartiality regarding the involvement of the US in the SICT, as it has generally been looked upon strictly as a way for the super power to dodge responsibility for the escalation of the conflict as well as a way of legitimising the illegal invasion by NATO.¹⁶⁸ And as the US was greatly involved in the creation of the court, such as training Iraqi lawyers and judges, it has had to face up to many accusations and questions of impartiality.¹⁶⁹

Then there is the element of the media, especially in the case of Saddam Hussein as his was the most prominent case in the SICT. As Saddam's trial was of great interest to both Iraq and the rest of the world, the outcome of the trial was always going to be highly influenced by media. In the reports from the trial Western media chose to forget about the US involvement in the conflict and simply focus on the "evil dictator",¹⁷⁰ yet another reason for why the SICT

¹⁶⁵ SVT, *Saddam's sista strid* (19 februari 2007).

¹⁶⁶ BBC, 'Judge replaced in Saddam's trial' (September 19, 2006) via *Global Policy Forum* <<http://www.globalpolicy.org/intljustice/tribunals/iraq/2006/0919replaced.htm>> at 2nd of May 2007.

¹⁶⁷ Eric Posner, 'Justice within limits' (September 26, 2005) *New York Times*; Robert Verkaik, 'Saddam on trial: ten reasons justice may not be served' (November 29, 2005) *The Independent*; Brian Conley and Omar Abdullah, 'Saddam's execution likely, fair trial less so' (June 26, 2006) *Inter Press Service*; UN Press Release, *EXPERT ON JUDICIARY EXPRESSES CONCERN ABOUT SADDAM HUSSEIN TRIAL AND VERDICT AND CALLS FOR INTERNATIONAL TRIBUNAL*, November 6, 2006.

¹⁶⁸ See above, chapter 4.1 and 4.3.

¹⁶⁹ Global Policy Forum (2007) 'The Iraq Tribunal: Trying Saddam Hussein and Other Top Baath Leaders' <<http://www.globalpolicy.org/intljustice/iraqindex.htm>> at 2nd of April 2007.

¹⁷⁰ John Collins, 'The low profile: CNN and the New York Times execute a denial of history' (December 31, 2006) *Electronic Iraq* via *Global Policy Forum* <<http://www.globalpolicy.org/security/issues/iraq/media/2007/1231husseinexecution.htm>> at 2nd of May 2007. The article concludes that such censorship is designed to "reassure Americans" that they really are blameless participants in "a cosmic struggle against 'evil'."

can be viewed as an impartial instrument created only to serve political and economical purposes of Western States.¹⁷¹

Cambodia faced its problems with impartiality and accusations of corruption as well. With the establishment of the ECCC followed a heated debate on what type of tribunal would serve the purpose of peace and justice the best. According to a UN Group of Experts a domestic court was not an option, as the nation suffered (and still does) from grave manipulation and impartiality within the justice system, which would not serve the people of Cambodia.¹⁷² Earlier Amnesty International had expressed concerns regarding the Cambodian justice system and the fact that it was highly controlled by people in the government:¹⁷³

Amnesty International has seen many instances of unfair trial in the country since the adoption of the new constitution in 1993. Basic safeguards to ensure fair procedures are simply non-existent in most cases, and ignored in others. At present, it is almost impossible to obtain a fair trial in Cambodia's courts, even on common criminal charges, with no political elements involved.

The lack of impartiality and due process in this type of punitive system is a vital question, as the prevailing reason for such tribunals is to create justice. Like described earlier, if justice is tainted, where does that leave the rest of the process? If the process fails to create justice for the parties involved but instead rather for the parties with interests in the conflict – political or economical – it seems the reason for the individual responsibility system is failing its purpose. The question of lack of impartiality is therefore one of the core issues regarding these tribunals, as justice cannot be served if the goals fail to come about.

5 Analysis and summarization

In order to determine whether ad hoc tribunals are legal and legitimate venues in the aftermaths of war, one has to set out some ground rules as to what is considered “legal”. The most obvious way to do this is to refer to international and domestic standards and customs of

¹⁷¹ Not to mention that Saddam Hussein was always ever going to be found guilty and portrayed as guilty long before the commencement of the proceedings, in Iraq as well as in international media, which derails from the international principle of “innocent until proven guilty”.

¹⁷² Suzannah Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in international justice’ (2001)(12)2 *Criminal Law Forum* 185-246, 188.

¹⁷³ Amnesty International, ‘Kingdom of Cambodia, No Solution to Impunity: the case of Ta Mok’ (April 22, 1999) <<http://web.amnesty.org/>> at 20th of April 2007.

legal courts and tribunals. Another important factor is to which extent these tribunals meet their ultimate goal of justice,¹⁷⁴ as this goal sometimes works as a way of legitimising the tribunals even when their legality can be questioned.

5.1 Ground rules regarding the definition of legality

As defined earlier in this study, there are certain ground rules that have to be fulfilled in order to legally create an ad hoc tribunal. They have to be in line with international and domestic rules according to the following:

- They have to respect *the principle of legality* as this is one of the core principles in international as well as domestic law.
- They have to take into account *chapter VII* of the UNC, as this chapter rules the right of the UN to use means to restore and/or protect international peace and security.
- They have to make sure they deliver *overall justice* that serve the warstruck nations the best, as the reasons for the tribunal are to create peace and promote reconciliation.

With reference to earlier mentioned research questions, this chapter aims to give answers to said questions in order to correctly analyse the material presented.

*5.1.1 Does ad hoc justice correspond with the principle of legality?*¹⁷⁵

As seen above there have been many concerns regarding the principle of legality and ad hoc tribunals as they are created after many of the atrocities have taken place.¹⁷⁶ Needless to say, this a very interesting aspect of ad hoc tribunals, as one ponders the authenticity of previous argumentation by scholars. Interesting as it is to reform international law to better accommodate current world situations, is it legally acceptable to interpret certain foundational principles of international law according to various needs? Is that not precisely what the principle of legality for instance, is trying to avoid? As horrible as it is when atrocities take place, it is not of even greater importance in re-building States after such events that no more cruelties of sorts occur – in other words, that people are deemed responsible of crimes ex post

¹⁷⁴ This analysis will focus on the “justice” criteria as the other two criterias “peace” and “reconciliation” are generally meant to be a natural development of justice being done. The other two criterias will therefore only be viewed upon from the perspective of whether justice is actually being served, and the impact this has on “peace” and “reconciliation”.

¹⁷⁵ See chapter 3.1 for further examination on this topic.

¹⁷⁶ See chapter 3.1.

facto? This is a time when the need for *proper* justice, where justice sometimes has been lacking for decades or more, is heavier than the need for revenge. It might not be the right time for elaborate interpretations of important legal principles.

Regarding the internationalised domestic tribunals the same issue raises interesting questions. For in these cases, there are two types of law at work: international and domestic. Like described earlier, the determining factor is to decide what law conquers over the other. However, this question is dangerously close to becoming an issue of sovereignty vs. international responsibility, which is outside the scope of this study.¹⁷⁷ But when countries like Iraq for instance proclaims the illegality behind analogy interpretations of international law in order to illegitimize an atrocious act committed in an armed conflict, and Iraq itself lacked jurisdiction for said act when it was carried out, how can the SICT still try and convict people of crimes committed long before this was in fact a punishable act?

One could argue that States do not have the liberty to choose not to allow for interpretations of international law in order to criminalize certain behaviour, just like set out in *The Principles of International Law Recognised in the Charter of Nuremberg Tribunal and in the Judgement of the Tribunal*. And without touching the matter of sovereignty too much, is that not what can be expected of the world today? Like mentioned earlier, today's society is to a large extent an international one and there is no longer the segregation between countries there once was. Nations and States fuse into larger communities in order to protect themselves and their citizens.¹⁷⁸ Therefore the argument of international law as subsidiary to domestic law is slowly but surely losing its footing and I find it safe to say that in certain situations the primacy of international law in order to protect our people from certain State-behaviour is justified. This also seems to be the common opinion in several nations that have had to face up the problem, see chapter 4 of this study.

It is here important to comment on the fact that the slight deviation from the principle of legality can somewhat be legitimized by the fact that ad hoc tribunals are created only when serious violations of international and/or domestic law have taking place. We are talking about appalling atrocities for thousands or perhaps even millions of people. The need for a development of international customs and standards are therefore to be expected, and perhaps

¹⁷⁷ *Supra* note 75.

¹⁷⁸ With the European Union as the ultimate example.

even desirable. In other words, the *legitimacy* of ad hoc tribunals in relation to deviation from the principle of legality can be explained with the extent of the horrendous brutalities taken place in armed conflicts. Whether this extends to *legality* is a more complex question that needs extensive further in-depth scrutiny which cannot be fulfilled in this study. After all, the interpretation of law is a complex matter where the question of right and wrong is not necessarily included. However, a law is not a law without an interpretation of that law. And such interpretation can change the original purpose of a law and give it an entirely different function, without this being in any way illegitimate or illicit. That is to say, the legality of such a development is legitimate in relation to what it is trying to achieve.

*5.1.2 In creating international ad hoc tribunals, is the SC misusing their enforcement capabilities in relation to the UNC?*¹⁷⁹

As seen in chapter 3 of this study certain criterias have to be fulfilled for the UNC chapter VII to be applicable. Among other things there needs to be a “threat to peace and security”. In relation to these criteria, some scholars referred to in this study argue that the SC did not have the power to make the decision to create a tribunal like the ICTY or the ICTR.¹⁸⁰ Like seen in earlier chapters, they argue that the SC, with the creation of the international tribunals, changed core elements of the UN Charter which they then describe as “disguised big power interventionism”. According to the referred to scholar Ciechanski, “chapter VII should be interpreted and used restrictively [and] ... cannot be a license for unchecked intervention.”¹⁸¹ It therefore seems that with the creation of these two international tribunals, the SC managed to use chapter VII of the UNC in a way never intended by the UN and, in a manner of speaking, circumvented its own principles! It seems almost superflous to try and determine whether this process was tainted with Western interests, as the SC seemingly fails to convince that its mission ever was to “restore justice” but rather a way to succumb to its strongest and most powerful member States.¹⁸² The SC hereby found ways to overcome the earlier

¹⁷⁹ See chapter 3.2 for further examination of this topic.

¹⁸⁰ See under chapter 3.2.1.

¹⁸¹ Jerzy Ciechanski ‘Misuse of enforcement by the U.N. Security Council’ (Winter 1994-95) (IX)2 *Swords and Ploughshares* (special ed. Civil Conflict Resolution).

¹⁸² This is not to say that international law and justice does not need to be of a very flexibel nature to serve the purpose of declaring rights and correcting wrongs. However, bear in mind that the UN is an international organisation, steered by the community of nations but to a large extent ruled by the five veto-powered States. The question of an international tribunal was not agreed upon by a common understanding among the States at hand, but rather decided through SC resolutions, which is why this particular process is surrounded by certain suspicions regarding its impartiality and political agendas.

mentioned need for a “threat” by determining that the threat does not have to be prevailing but rather simply existing in the way that justice is yet to be done.¹⁸³

Regarding whether this means that the SC misused their powers is difficult to determine, as the prevailing interpretation is that the SC’s prerogatives under chapter VII cannot be misused, for “[o]nce the procedural conditions are met (majority of votes, no veto cast), the Security Council may adopt any resolution it wishes.”¹⁸⁴ Therefore, one can determine that at least the establishment of the international tribunals the ICTY and the ICTR, while not in line with former international standards or (perhaps) what could have been an expected development of the UN as an organisation (and thereby international law as a whole), might still be in line with progressive development of today’s international standards. For if the look of both international and internal armed conflicts are changing, is it not only fair that the most important international organ regarding the determination and ruling of such matters undergoes the same changes? However, this is somewhat a question of the legality of the UN and their right to interfere in international and/or national relations, which cannot be examined in detail in this study.

Nevertheless, like mentioned earlier one can determine that in creating the two international ad hoc tribunals for the Former Yugoslavia and Rwanda the SC – in allowing the tribunals to issue binding decisions under chapter VII – by-passed two of the most important principles of the UN, which are that (1) binding decisions may be issued exclusively by the Security Council and (2) that such decisions are subject to veto by the permanent members. But like also described before, the question of whether this is equivalent to the SC misusing their powers is more or less a question that should be answered within the UN with reference to previous arguments on the possibility of misuse of power by the SC.

¹⁸³ This is an immensely important question in regard to the institution of the UN as a whole, something the former Secretary General chose to highlight shortly before he stepped down, for more information on this see Andrew Srulovitch, ‘In larger freedom: Kofi Annan’s reform proposal’ (March 29, 2005) *Conference of Presidents of Major American Jewish Organisations* via *Committee on UN and related matters* <<http://www.conferenceofpresidents.org/media/user/images/UNReform.pdf>> at 23rd of May 2007.

¹⁸⁴ Jerzy Cieshanski ‘Misuse of enforcement by the U.N. Security Council’ (Winter 1994-95) (IX)2 *Swords and Ploughshares* (special ed. Civil Conflict Resolution).

5.1.3 *Is the lack of jurisdictional universality an indication that ad hoc justice serves political and economical purposes rather than peace, justice and reconciliation?*

The prevailing issue on the question of legality of ad hoc tribunals is that of what type of justice is imposed on the individuals and States at hand. For generally speaking, a legal instrument, allegedly designed to create justice, peace and reconciliation,¹⁸⁵ is supposed to bring universal/overall justice,¹⁸⁶ not selective justice. Like described by Michael Mandel: “If you study the theory of justice¹⁸⁷ you will find no tolerance for selective justice. That’s because justice is based in equality, and it is a serious violation of equality to voluntarily leave some wrongdoers unpunished.”¹⁸⁸ One can assume that the same goes for international instruments of justice as well, such as ad hoc tribunals, and in light of this theory one cannot treat States in need differently according to the role they play in international politics and/or economy. According to the research in this study, concerns have been expressed by leading scholars that ad hoc justice does not serve the people it is supposed to serve, but rather interests of the Western world. We have seen that in case of both the international tribunals as well as the internationalised domestic ones, suspicions have surfaced regarding the underlying purpose of the tribunals. In some cases ad hoc tribunals are accused of contributing to the hostilities and instabilities instead of bringing justice to the region. This problem of “victor’s justice”¹⁸⁹ is a widespread concern and is of great importance in the debate about ad hoc tribunals. And according to Mandel, this pattern of selective justice and selective impunity is not about to change anytime soon:¹⁹⁰

The only rational assumptions are that international criminal law will be firmly subordinated to power, that impunity will be a perk of economic and military hegemony, and that the usual suspects will continue to be rounded up while America gets away with murder.

¹⁸⁵ Whether *any* legal instrument is actually capable of establishing all these three criterias at once is, although a very interesting topic, not explored in this study.

¹⁸⁶ There is also the popular term “transitional justice”, which refers to “the idea that legal accountability for atrocities committed by an outgoing regime can help to heal divided societies.” See Anthony Dworkin, ‘The trials of global justice’ (June 15, 2005) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=2604>> at 15th of May 2007.

¹⁸⁷ Such as proclaimed by the classical justice theorist Immanuel Kant for instance, who saw punishment as a “categorical imperative”, see *The Metaphysical elements of justice: Part I of The Metaphysics of Morals* (1965) 100-102. *Note added by author.*

¹⁸⁸ Michael Mandel, *How America gets away with murder: Illegal wars, Collateral damage, and Crimes against humanity* (2004) 235.

¹⁸⁹ Can also be referred to as “Western justice” as it serves the Western States, or more accurately, the US and the EU.

¹⁹⁰ Michael Mandel, *How America gets away with murder: Illegal wars, Collateral damage, and Crimes against humanity* (2004) 233.

Not even people working in the ad hoc tribunals are convinced that this type of punitive system serves the purpose of justice the best, something clearly demonstrated by Louise Arbour¹⁹¹ in an ICTY press release in 1999:¹⁹²

Irrationally selective prosecutions undermine the perception of justice as fair and even-handed, and therefore serve as the basis for defiance and contempt. The *ad hoc* nature of the existing Tribunals is indeed a severe fault line in the aspirations of a universally applicable system of criminal accountability. There is no answer to the complaint of those who have been called to account for their actions that others, even more culpable, were never subjected to scrutiny. Why Yugoslavia? Why Rwanda? Why the 1990s? Why only 1994?

However, Arbour also made the interesting point that this type of selective justice was not really unjust, only “less just”.¹⁹³ I fail to see the validity of this type of argument, as “less just” justice cannot be regarded as justice in a wider scale, especially not while keeping the idea of justice as “equality” in mind. And the fact that she at the time of the speech was finalising her indictment towards Milosevic, whilst working with the larger criminals NATO as her patrons,¹⁹⁴ strongly perishes her argument.

In light of this rather contaminated justice, the question of what type of peace is to be expected emerges. Like seen in this study, some scholars say that “peace” is not the right choice of word, as the justice served is relative to international relations, past and present. Therefore “politicized peace” is more accurate, as international politics and economy are far more determining factors whether ad hoc tribunals are likely to be established, than the onset of injustice. This problem is seen in both international as well as internationalised domestic

¹⁹¹ Louise Arbour has a prosperous legal career in Canada as background and is the current UN High Commissioner of Human Rights.

¹⁹² ICTY Press Release, *INTRODUCTORY STATEMENT BY JUSTICE LOUISE ARBOUR, PROSECUTOR ICTY AND ICTR AT THE LAUNCH OF THE ICC COALITION'S GLOBAL RATIFICATION CAMPAIGN*, 13 May, 1999 (JL/PIU/401-E).

¹⁹³ “Not that the impunity of some makes others less culpable, but it makes it less just to single them out. It therefore runs the risk of giving credence to their claim of victimisation, and even if it does not cast doubt on the legitimacy of their punishment, it taints the process that turns a blind eye to the culpability of others.” See *ibid.*

¹⁹⁴ Michael Mandel, *How America gets away with murder: Illegal wars, Collateral damage, and Crimes against humanity* (2004) 235.

tribunals, as it seems that Western States have a role to play in all of the current ad hoc courts and tribunals.¹⁹⁵

Then there is the debated issue of whether the two criterias sought by the tribunals are conflicting. Some scholars are of the clear opinion that peace and security cannot be established without justice being done. But then there is the other side to the debate, where some claim that pursuing justice and peace at the same time, through the same means, is impossibility. Like seen in this study, justice is retributive and backward-looking whereas peace is conciliatory and forward-looking. Whilst justice seeks to correct the wrongs of the past, peace is meant to heal the wounds in order to set the standard for the future. It is somewhat natural to see the two elements as fairly antagonistic principles. In relation to this issue the natural question regarding the legitimacy of ad hoc justice emerges, and one asks oneself if there is no better way to reach justice, peace and reconciliation than to cast blame? Nonetheless this study shows that ad hoc justice has often failed to bring the peace and stability needed in the region, why this punitive system fails to be convincing regarding its importance in the aftermaths of international as well as domestic armed conflicts.

For the purpose answering the proposed question of the lack of universality (due to the limitations in time and geographical borders regarding who can be indicted and what for) and whether politics and economy are steering the establishment of ad hoc tribunals, the analysis of the arguments brought forward in this study shows a clear indication that this is in fact the case. It would seem that the background to any of the current ad hoc tribunals are not goverened by the manifested purpose of justice, but rather by the need to uphold the idea of a just international society in order for Western States to maintain control of certain politically and economically important States of the East.¹⁹⁶

6 Alternatives

If ad hoc tribunals fail to bring stability, peace, justice, reconciliation and likewise to warstruck nations, then what type of justice system should the international society resort to in the case of crimes committed in armed conflicts? This chapter aims to clarify some of the

¹⁹⁵ See chapter 4.3.

¹⁹⁶ This East-West relationship can perhaps be identified with the current North-South debate in international politics, which will not be further analysed in this study.

alternatives to ad hoc tribunals, and give a short analysis of their chances of success in reaching justice and its relating criterias.

6.1 The ICC

In 1998 the need for a permanent court of international criminal justice became apparent with the extradition request by Spain to the United Kingdom of Senator Pinochet of Chile and the afterfollowing trial reaching the House of Lord's.¹⁹⁷ In 2002 the International Criminal Court was established, after having reached its required number of 60 ratifications. In 2005 the court reached the important number of 100 State parties to the statute, and in that surprising even the creators of the court as they had anticipated it would take a decade just to reach the all so important number of 60.¹⁹⁸ Nine years after this development we can actually see what has happened in this new version of international justice.

The ICC has jurisdiction over events that have taken place after its creation in the territory of a member state, and over nationals of a member state, meaning that a State needs to be a member of the court to enjoy its protection as well as compulsory follow its statute. Therefore the court does not have jurisdiction of non-member States, such as the US. This was initially thought of as the biggest flaw of the ICC, apart from the lack of universal jurisdiction, with fear that the efficiancy of the court would be seriously undermined with some still convinced this is the case.¹⁹⁹

However, certain events undermined this theory of lack of power of the court due to US unwillingness to join. According to known scholar William A. Schabas the lack of universal jurisdiction has rather been something that has served the court well, as never-expected States have ratified the statute. The reason for this, according to Schabas, "is because a court with universal jurisdiction would be free to operate, at least in theory, anywhere in the world. If then Sierra Leone thought the court could protect its territory, this result was accomplished automatically without any need for Sierra Leone to actually join the court. Jurisdiction based

¹⁹⁷ For more information on this outcome see chapter 3.1.2 as well as I. Saliba, 'The *Nullum Crimen* Principle And The Trial of Saddam Hussein' (July 2006) *The Library of Congress* <http://www.loc.gov/law/public/saddam/saddam_prin.html#A> at 3rd of April 2007.

¹⁹⁸ William A. Schabas, 'The enigma of the International Criminal Court's success' (February 17, 2006) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=3278>> at 15th of May 2007.

¹⁹⁹ For instance Marlies Glasius, *The International Criminal Court: A global civil society achievement* (2006) Routledge: a study into the enormous contribution to the unforeseen success of the court thanks to NGOs, social movements, pressure groups and other non-state actors.

primarily on territory, as is now the case, means that if a state wants to protect its own territory it must join the court.”²⁰⁰

Despite this belief of success in spite of pre-determined problems, IO's too have expressed fear of the US campaign against the ICC.²⁰¹ For instance, the US have signed so called “impunity agreements”²⁰² with over 100 States, half of which are State parties to the court. This would imply that regardless of whether the State is a State party to the ICC, they would still honour the impunity agreement with the US and therefore hinder any ICC investigations. This can of course cause the ICC severe problems when trying to uphold the statute. However, as this is yet to have been experienced it is hard to determine the extent of the possible damage in the ICC in the search of justice. The progress of the ICC so far is a positive one, where (theoretically) any upcoming disruption of international or national law can be dealt with by the court – hence not needing to involve the problem of legality or the principle of legality, as the court only has jurisdiction over crimes committed after its creation whereby the issue of ex post facto is never raised – so long as the atrocities/crimes take place in the territory of a member State or by an individual belonging in a member State.

6.2 Truth and reconciliation commissions

The last century also invented of a new form of “justice”, one that focuses on restorative justice rather than retributive justice. This happened with the establishment of the truth and reconciliation commission in South Africa. This form of justice is supposed to “direct attention to the needs and participation of the victims and, in that way, help repair the damage done.”²⁰³ This commission focused on revealing the true history of South Africa, and in return giving amnesty to those willing to tell the truth about what happened during those horrendous years of the apartheid rule. And although the purpose was initially just to grant amnesty to those guilty of horrendous crimes, the by-product of the commission proved to be far more

²⁰⁰ William A. Schabas, ‘The enigma of the International Criminal Court’s success’ (February 17, 2006) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=6&debateId=28&articleId=3278>> at 15th of May 2007.

²⁰¹ Amnesty International, ‘International Criminal Court: Concerns at the fourth session of the Assembly of State parties’ (November 4, 2005) AI Index: IOR 40/027/2005, Part B X.

²⁰² These agreements provide that a government will not surrender or transfer US nationals accused of genocide, crimes against humanity or war crimes to the ICC, if requested by the Court. The agreements do not require the USA or the other state concerned to investigate and, if there is sufficient evidence, to prosecute such a person in US Courts.

²⁰³ Gillian Slovo, ‘Making history: South Africa’s Truth and Reconciliation Commission’ (December 5, 2002) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=3&debateId=130&articleId=818>> at 16th of May 2007.

important for the victims of the former apartheid system: a revaluation of the true South African history.

But does it work? Does it bring the reconciliation it seeks to find? According to people in South Africa, “the issue of reparations for victims, another of the TRC’s responsibilities, has to date been its most singular failure.”²⁰⁴ However, the same person also states that: “I believe that the truth, however painful, needs to be faced for healing to begin. The reconciliation that I experienced was with what happened, not with the perpetrators.”²⁰⁵

Outside viewers of the TRC has also cast accusations on the shortcomings of the commission. Like stated by Nahla Valji²⁰⁶ in an article published in *Open Democracy*:²⁰⁷

A key criticism of the TRC model has been its focus on individual instances of gross human rights violations, which served to deflect responsibility from the broader structures of apartheid and those who benefited from them. Government has since perpetuated this denial of responsibility by refusing to hold to account businesses and individuals who profited from the repression of the old regime. In aligning itself with business, government has issued a wholly inadequate and one-dimensional reparations policy, and has forced some victims to seek the desired redress from class action reparations lawsuits currently underway in the United States.

The model of a truth and reconciliation commission was tried in Sierra Leone as well, although this time the commission worked parallel to the ad hoc court. Scholars reached the same conclusion in the case of Sierra Leone as it seems they did in the case of South Africa: truth and reconciliation commissions work, just like internationalised tribunals work, but neither work on their own.²⁰⁸

²⁰⁴ Gillian Slovo, ‘Making history: South Africa’s Truth and Reconciliation Commission’ (December 5, 2002) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=3&debateId=130&articleId=818>> at 16th of May 2007. Gillian Slovo’s mother was killed during the apartheid system, which lead to her father later helping to create the TRC.

²⁰⁵ Ibid.

²⁰⁶ Nahla Valji worked at the Centre for Human Rights, Pretoria, and is now at the centre for the study of violence and reconciliation, where she was a researcher in its Race and Reconciliation Project. She is also completing an MA alongside a joint diploma in Refugee and Migration Studies from York University, Toronto.

²⁰⁷ Nahla Valji, ‘South Africa: no justice without reconciliation’ (February 7, 2003) *Open Democracy* <<http://193.41.101.59/debates/article.jsp?id=5&debateId=130&articleId=1326>> at 16th of May 2007.

²⁰⁸ “For internationalised tribunals to be correctly understood, they must first be recognised as being one of a range of transitional justice options, from those of a judicial nature to non-judicial truth seeking mechanisms, available to nations seeking to address a legacy of violence. A single initiative on its own is unlikely to bring about a peaceful, stable and restored nation. The answer may lie in a combination of options.” See Suzannah

According to reknown scholar William A. Schabas “[t]he real lesson of the Sierra Leone experiment is that truth commissions and courts can work productively together, even if they only work in parallel. This complementary relationship may have a synergistic effect on the search for post-conflict justice as part of the struggle against impunity.”²⁰⁹

It seems that although the vastly different approach of restorative justice has a chance of serving the victims of the armed conflict better than a simple trial, it still might not have the chance of bringing all the criterias needed in order for the people to be able to live on peacefully and blissfully together. As seen in this study, “blame laying” is also an important part of the process of healing, which is why Schabas’ opinion of a mixed justice system might work better than a simple recollection of the truth in a truth and reconciliation commission.

6.3 National trials

Before the revolution of international individual responsibility in relation to crimes of war with Nuremberg, Tokyo and later the ICTY and the ICTR, there were no international criminal courts. There were however, as seen in this study, early attempts to penalise certain crimes of war in ad hoc settings.²¹⁰ Nonetheless, the idea of national courts dealing with such horrific crimes of war, without any international input, seems virtually impossible. Looking at the cases at hand: the Former Yugoslavia, Rwanda, Sierra Leone, Cambodia, East Timor and Iraq, one fails to see how any of these international and *internal* conflicts could have been saved simply by initiating national trials. Rwanda for instance, had no functioning legal system, physical or theoretical, at the time of the establishment of the ICTR, which was one of the reasons for why the court was place in Arusha, Tanzania,²¹¹ and the same has also been shown in the case of Cambodia.²¹² Relying simply on a domestic justice system is therefore not a functioning solution, shown not only by the scarce number of national trials regarding these crimes *before* the establishment of the international ad hoc tribunals, but also by the obvious problem of the increase in *internal* conflicts, where justice is unlikely to be served as

Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in international justice’ (2001)(12)2 *Criminal Law Forum* 185-246, 185.

²⁰⁹ William A. Schabas, ‘A synergistic relationship: the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’ (2004) (15)1-2 *Criminal Law Forum* 3-54, 5-6.

²¹⁰ See Introduction, *supra* note 6, Greppi.

²¹¹ See Report of the Secretary-General, dated 13 February 1995 (S/1995/134) section IV and the afterfollowing UN Resolution 977, dated February 22, 1995 (S/RES/977).

²¹² See chapter 4.5 in the case of Cambodia.

one side of the conflict is likely to be in power and therefore controlling the current “justice system”. It would also mean, in case of an international conflict, that one nation would only be able to charge its own citizens, whereas one would have to look to the opposing party of the conflict to press charges against *their* own citizens. It is an untenable solution that is not only improbable but, most likely, impossible to rely on on its own.

6.4 Preventative measures

According to the UNC the UN is at liberty to take certain actions in the case of non-compliance with judgements of the ICJ by its member States, as Article 94(2) of the UNC reads as follows:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The ICJ is the “principle judicial organ of the United Nations ... and forms an integral part of the present Charter,” according to Article 92 of the UNC. This means that member States of the UN have to follow judgements made by the ICJ in relation to questions concerning international peace and security, a decision making area exclusive to the SC.²¹³

Regardless of this power of the SC to control and prohibit the outbreak of war in all of its member States (meaning virtually the entire world), the Article has not had the desired effect and the SC has been accused of not taking the role entrusted upon it to “systematically take measures against a State which does not abide by a decision of the ICJ, in order to give effect to the judgment”²¹⁴ seriously.

For example: in the case of the Former Yugoslavia, Bosnia and Herzegovina requested the SC on two separate occasions in 1993²¹⁵ to “take immediate measures under chapter VII of the

²¹³ See UNC Article 39.

²¹⁴ Brigitte Stern ‘Juridical institutions and security’, *United Nations and Global Security Initiative* <<http://www.un-globalsecurity.org/index.asp>> at 10th of April 2007.

²¹⁵ April 16 and September 15.

Charter [...] to enforce the order of the International Court of Justice”²¹⁶ and “take necessary measures under chapter 7 of the Charter in order to enforce the order of 13 September 1993 of the International Court of Justice”²¹⁷ respectively. The SC did not take action on any of the requests.²¹⁸

It seems that even when given a clear opportunity, as well as after repeating requests, the SC still fails to act and use the full extent of their powers. Sadly, the case of Bosnia and Herzegovina is not the only one where the SC has failed to act, vividly demonstrating that Article 94 is not being used to its full extent leaving much room for improvement.²¹⁹ I therefore fail to see that this type of preventative measure alone can solve the problem of ensuring justice, peace and stability in the world without some major changes in the SC’s attitude towards nations asking for help.

7 Conclusion

The question of the legality of ad hoc tribunals includes several complex issues, such as the definition of *legality* or *justice*. This study has shown that the manifested criterias of current ad hoc tribunals such as justice, peace and reconciliation are sometimes seen as conflicting and even contradictory and perhaps not even the underlying reason for why the tribunal was initially created.

It has been shown that the legality of ad hoc tribunals is an intricate issue that can be subdivided into several different aspects. Regarding the question of the principle of legality, or the *ex post facto* rule, the analysis shows that there is no clear “yes” or “no” whether ad hoc tribunals overstep their boundaries with indicting people according to statutes created after the occurrence of atrocities. Instead there are two differing views. According to a strict interpretation of the rule some scholars say that ad hoc justice is in violation of this fundamental legal principle. However, in today’s constantly developing society where belligerent wars have become part of our every day lives, it is also natural to modernate even basic principles of law, if it means protecting our civilisation. The deviation of the principle should therefore be regarded, regardless of what one thinks of the legality of such

²¹⁶ UN Document S/25616.

²¹⁷ UN Document S/26442.

²¹⁸ *Repertory of Practice of United Nations Organs*, Supplement No. 8, Volume VI (1989-1994).

²¹⁹ In the case of Nicaragua the SC again failed to act on the request of the General Assembly, see *ibid*, part B.

development, as a *legitimate* course of action in order to preserve and protect peace and safety for States in need. Its legality can be condoned through its legitimacy to act for the people.

The second issue involves even greater issues of complexity, with the involvement of the UN and the SC in creating the two international tribunals of the last decade. The study shows that the creation incorporated changes of core UN elements²²⁰ never intended by the creators of the organisation. The UNC was also interpreted in ways foreseen by neither member States nor the international society as a whole. Yet once again one cannot determine that this anomaly of the UNC in itself suggests the lack of legality of ad hoc tribunals created through this channel. However, like described earlier this study aims to study the legality of ad hoc tribunals, not of the UN as an organisation.

The third and most extensive issue of ad hoc tribunals is that of the lack of universality and its indication on what type of justice these institutions are imposing on the States and people under its jurisdiction. There are widespread concerns regarding the legality of a court with non-universal jurisdiction, as some international and/or national perpetrators are purposefully spared from indictment. Ever since the creation of the first international ad hoc tribunal in the Former Yugoslavia there has been an ongoing debate around this issue, which has resulted in a comprehensive doctrine of which some is displayed in this study.

We have seen that many scholars are of the opinion that the underlying reasons for the lack of universality are political and economical, as the tribunals are both established and funded mostly by Western States. These States have no intention of having its citizens tried by either an international or another State's ad hoc tribunal. In the creation of ad hoc tribunals, there have also been concessions made, in order to reach an agreement. We have seen Cambodia as the ultimate example of this. In other words, the lack of universal jurisdiction displays the faulty justice served by these institutions, which enables Western States to maintain overall international control. The "East" looks to the West for support and guidance even when the West has contributed to the conflict in the first place, leaving the West to decide who gets indicted and why. Iraq and the Former Yugoslavia are perfect examples of this scenario. This indication of "politicized peace" enables critics to substantiate the idea of non-justice in relation to ad hoc courts, which has been clearly demonstrated in this study. The fact that

²²⁰ Such as giving the tribunals the right to impose obligations on its member States, which is normally submitted to the veto power States, see chapter 3.2 and 5.1.2.

many scholars argue that justice and peace/reconciliation are antagonistic principles again shows that it is very likely that the establishment of ad hoc tribunals are based on political purposes and not due to some consuming need to facilitate peace and reconciliation. This leaves us with the notion that the manifested purpose of “justice” is just another fabrication by the States involved in the creational process in order to serve Western interests. As this study has shown, current ad hoc tribunals are faced with overwhelming critique around the fact that they fail to bring the peace and reconciliation promised by its instigators and, as explained earlier, are also criticized regarding the type of justice they are providing. “Less just” does not fulfil the purpose of justice.

This leaves us only with one question: if an institution created to bring justice and promote peace and reconciliation in a warstruck nation fails to fulfil its expressed purposes due to other interests, is that then a legal establishment? Like demonstrated in the study, the legality of an institution is sometimes explained by the legitimacy of a wanted outcome, as this might serve the civilisation better than the unlegalisation of the process that would reach this outcome. In applying this theory to the question of the legality of ad hoc tribunals, as they evidently are failing to fully achieve their outspoken goals, this would mean that this type of ad hoc justice and its tribunals are illegitimate and therefore non-legal institutions. However, some scholars believe that a better method would be to integrate a truth and reconciliation commission with an ad hoc tribunal. That would instead indicate that the illegality of the ad hoc tribunal would have the possibility to be legitimized by the truth and reconciliation commission, as the latter is more likely to promote the purposes of peace and reconciliation, whereas the ad hoc tribunal then could focus on bringing justice by indicting people guilty of war crimes. Nevertheless, this does not solve the problem of the permeating political interests of Western States running the establishing process of ad hoc tribunals, yet again illegitimizing these types of courts. If the real purposes of ad hoc “justice” are based on Western interests rather than justice itself, then the legality of the courts are lost and ad hoc tribunals are just another tool in the ongoing international struggle to sustain political power.

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