

# Should Peace Be Built by Delivering Justice? An Assessment of the Duty to Prosecute Crimes against International Law

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## **Should Peace Be Built by Delivering Justice?**

An Assessment of the Duty to Prosecute Crimes against International Law

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### **Abstract**

Although in post-conflict settings there arises the question whether criminal prosecution must be compromised in the interest of peace consolidation, the international community today shows an increased commitment to apply judicial mechanisms to deal with the atrocities of the past. Current practices intend to release tension between peace consolidation and criminal justice objectives through a series of institutional innovations that aim at adjusting the parameters of post-conflict tribunals to the fragile local context. The main focus of this article is to provide an overview of how international law addresses the duty to prosecute and discuss key factors which influence how judicial mechanisms affect transitional justice processes in war-torn societies. Additionally, the article illustrates the contemporary practice in prosecuting crimes against international law on the basis of a case study on war crimes trials in post-conflict Kosovo. The assessment leads to the conclusion that hybrid models of judicial and non-judicial mechanisms prove to be the most suitable approach to reconcile criminal justice with the priorities of peace consolidation.

# Should Peace Be Built by Delivering Justice?

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## List of Acronyms

ACHR	American Convention on Human Rights
AU	African Union
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
EULEX	European Union Rule of Law Mission
GC	Geneva Convention
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
KLA	Kosovo Liberation Army
NATO	North Atlantic Treaty Organization
SCSL	Special Court for Sierra Leone
SITF	Special Investigative Task Force
TRC	Truth and Reconciliation Commission
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series

## I. Introduction

Dealing with past atrocities poses a serious challenge for fragile post-conflict states. While the Allies of World War II established a system of criminal prosecution, which was also reflected in the Genocide Convention of 1948 and the Geneva Conventions of 1949, the early post-conflict efforts of the United Nations (UN) were characterized by amnesty-for-peace deals (Stahn 2002). The “peace vs. justice” debate evolved in the wake of the South and Central American examples where granting amnesties was coupled with the establishment of alternative non-judicial mechanisms, such as truth commissions, instead of conducting criminal prosecution (Hayner 2006 and Seibert-Fohr 2005).<sup>1</sup> Opponents of judicial mechanisms argue that due to their destabilizing effect, launching criminal law measures jeopardizes the peace consolidation processes of post-conflict societies (Orentlicher 1991).

Nevertheless, since the last decade of the 20th century, international criminal justice has experienced an intensive normative and institutional evolution. The progress of the modern regime gained momentum, as after 40 years of stagnation caused by the ideological contest of the Cold War, the revitalized Security Council (UNSC) activated the concept of the “Law of Nuremberg” as part of its mandate to maintain international peace and security. Serious crimes committed on the territory of the former Yugoslavia and the genocide in Ruanda gave reason for the UNSC to establish two ad hoc Tribunals acting under Chapter VII of the UN Charter. The ad hoc Tribunals conveyed a completely different message than that of the post-World War II Nuremberg and Tokyo Tribunals (Werle 2007). The so-called victor’s justice attitude was replaced by the image of an independent, impartial and fair judicial body. This concept was coupled with the emerging notion that prosecuting genocide and other systematic serious violations of international humanitarian law are concerns to “the international community as a whole” (Rome Statute, Article 5(1)). Through the establishment of the International Criminal Court (ICC) in 1998, ad hoc justice was transformed into a permanent, treaty based and potentially universal institution. The Statute of the ICC (hereinafter Rome Statute), entered into force in 2002, served as a codification of customary law rules of international criminal law, defined the core crimes against international law, and confirmed the fight against impunity.

Even though the establishment of the ICC was considered to be the evolutionary peak of international criminal justice, the euphoria about a success story lessened during the last few years (Jessberger and Geneuss 2013). Both models of international courts met with critique on the long duration of their proceedings, high cost of their operations and, especially in the case of the ICC, on their struggle to find a balance between law and politics (Orentlicher 2013 and Galbraith 2009). At the same time, alternative judicial forums emerged for prosecuting crimes against international law. The UN invented the

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<sup>1</sup> Examples include the following countries where the adoption of amnesty law was complemented by the establishment of truth commissions: Argentina (National Commission on the Disappeared 1983-1984), Chile (National Commission on Truth and Reconciliation 1990-1991), El Salvador (Commission on the Truth for El Salvador 1992-1993), Haiti (National Commission for Truth and Justice 1995-1996), Guatemala (Historical Clarification Commission 1994-1999).

concept of hybrid tribunals such as the Special Court for Sierra Leone (SCSL), or the Extraordinary Chambers in the Courts of Cambodia (ECCC), which simultaneously apply international and national law in a local setting. Moreover, hybrid tribunals combined with the establishment of truth commissions started forming a mixed justice and reconciliation model. This model treats truth commissions as a complement to prosecution rather than a competing or mutually exclusive mechanism for dealing with the atrocities of the past (Stahn 2002).

Beside hybrid tribunals, national courts have recently been shown an increased capacity to try crimes against international law on-site while applying national law (Orentlicher 2013). Former leaders were brought before local courts in several countries which experienced a sudden regime change such as in Iraq or Egypt. The latest development in the field of criminal justice has been the establishment of a new special court in The Hague to try serious crimes “committed in 1999-2000 by members of the Kosovo Liberation Army (KLA) against ethnic minorities and political opponents” (Government of the Netherlands 2016). The novelty of the Kosovo Specialist Chambers and Specialist Prosecutor’s Office lies in the fact that although the court will be made up of international judges, it will apply Kosovar law and function as a national institution which administers justice abroad. The Press Release of the Dutch Government on the establishment of the court suggests that the reason for hosting the procedure is to ensure an impartial and independent atmosphere for witnesses while testifying against former members of the KLA, who are considered to be freedom fighters by sections of the Kosovar society.

The establishment of the new court gives rise to the revitalization of the discussion on the impact of criminal justice in war-torn societies. It is a highly contested issue whether judicial mechanisms positively contribute to social reconciliation processes in post-conflict settings (Akhavan 2013 and Clark 2012). A prompt prosecution of crimes committed by the members of former warring factions could gravely jeopardize the peace consolidation in societies which are only at an early stage of reestablishing the rule of law and public trust in state institutions but also often remain divided along the lines of the prior conflict. Through inappropriate actions and their early timing, the process of dealing with atrocities of the past may contradict the short-term peacebuilding priorities of creating physical and political stability and the aim of addressing the root causes of social conflicts in the long run. Tensions between the objectives of delivering criminal justice and building sustainable peace raise the question of whether there is an absolute duty to prosecute in international law, or it can be refrained from conducting trials in the interest of peace consolidation (Seibert-Fohr 2005). This article focuses on the assessment of how international law and the international community deal with this issue. In the first part, I will outline the arguments for and against the application of criminal law instruments as part of the transitional justice process in the aftermath of violent conflicts. The second part provides an overview on the rules of international treaties and international customary law which refer to a duty to prosecute. On that basis, it will be analyzed to what extent international law permits States to decide whether they apply judicial mechanisms for dealing with the atrocities of the past. Subsequently, Part III evaluates the key factors which influence the impact of criminal justice on post-conflict societal processes. Finally, the article will conclude with the

assessment of the transitional justice process in Kosovo, which led to the latest new institutional innovation in the field of criminal justice.

## 2. Transitional Justice in Post-Conflict Societies

### 2.1. Defining the Context

The term “transitional justice” has recently entered the vocabulary of international relations (Freeman and Djukic 2008). While combining judicial and non-judicial mechanisms<sup>2</sup> the concept is “associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation” (United Nations, 2004, p.4). Based on this definition, criminal prosecution, applied as a judicial mechanism in the framework of a transitional justice process, must provide a positive impact on the reconciliatory processes of post-conflict societies. This notion was reaffirmed by the UN Secretary-General’s Report on Rule of Law and Transitional Justice in Post-Conflict Societies, which specified a number of objectives that international criminal tribunals seek to achieve. The comprehensive list included

*bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.* (United Nations 2004, 13)

The literature refers to the future oriented objectives of addressing rule of law, peace consolidation, and reconciliation as the “transitional justice aims” of criminal justice (Galbraith 2009). Nevertheless, a universal practice of how to achieve these aims has not developed. Just as there are a vast number of scenarios for the course of an armed conflict, transitional justice in the aftermath and the needs of societies to deal with injustices of the past vary from country to country as well. Galbraith (2009) divides post-conflict societies into the following four groups based on the power structure of former warring factions during the transitional period from the conclusion of a ceasefire agreement to sustainable peace.

- In “untransitioned societies”, the pre-war regime remains in power such as the Sudanese Government remained unchanged after the end of the hostilities in Darfur.
- In “abruptly transitioned societies”, the former regime was thoroughly overturned and in most of the cases a transitional government exercises power until the next elections. The post-conflict Kosovo represents a prominent example for this category, where after the withdrawal of the Serbian forces in 1999 the UN and its international partners took over the administration of the province and performed

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<sup>2</sup> The judicial mechanisms, often referred to as “retributive justice”, embrace the criminal prosecution and the establishment of its institutional framework. Non-judicial mechanisms include, among others, truth-seeking initiative, reparations, institutional reforms and vetting procedures (Suhrke, Wimplemann and Dawes, 2007, p.2).



executive, legislative and judicial powers until the transfer of responsibilities to the local authorities (and partially to the European Union) took place in 2008.

- In “slowly transitioning societies” each of the former warring parties retains some power, such as both of the Serbian and Bosnian parties were able to keep some territories under their control after the adoption of the 1995 Dayton Peace Agreement which regulated the end of the war in Bosnia and Herzegovina.
- Finally, the main characteristic of “uneasily transitioned societies” is that even though the mass atrocities occurred well in the past and they have a no immediate effect on the actual political power relations, the process of coming to terms with the past is still ongoing. An example is illustrated by Germany at the time of the Eichmann Trial in Israel in 1961.

The borders between the four types of post-conflict societies are, however, blurred. A common trait of the post-conflict phase, especially in abruptly and slowly transitioning societies, is the fragile security situation and the risk of relapsing into violence. The increasing involvement of the international community in transitional justice processes of the post-conflict countries generated an intensive discussion on the question of which mechanisms are to be prioritized in order to effectively achieve “transitional justice aims” and at the same time maintain stability. The aforementioned “peace vs. justice” dilemma contrasts arguments for and against applying judicial mechanisms in unstable and depolarized settings.

## **2.2. Arguments in Favor of Applying Judicial Mechanisms**

The main argument for conducting criminal trials is their contribution to eliminating the “culture of impunity” by providing justice to the victims and punishment to the perpetrators in the framework of a legitimate procedure (Bock 2010). To this end, criminal convictions aim at ensuring a twofold impact (Orentlicher 1991). On the one hand, legal punishment functions as an elementary compensation for the atrocities committed on the victims (Werle 2007). On the other hand, condemnatory sentences may have a deterring effect which prevents future crimes and contributes to the creation of a more secure environment. The same point of view was confirmed by the Trial Chamber of International Criminal Tribunal for the Former Yugoslavia (ICTY) as it stated “retribution and deterrence serve as the primary purposes of sentence” (International Criminal Tribunal for the Former Yugoslavia 1999). Furthermore, criminal procedures may support the society’s peace consolidation process in the following practical manners. Firstly, they may provide support for breaking the cycle of violence through the imprisonment of offenders. Removing those individuals from the society who are responsible for committing serious crimes prevents their involvement in public or political sphere and their confrontation with victims in their direct living environment. Arrest warrants and ongoing proceedings may cause the retreat of fugitive suspects which could also reduce the risk of relapsing into conflict. In addition, formal proceedings serve to prevent that victims seek justice in an arbitrary way. Secondly, proponents argue that prosecution strengthens the rule of law and the credibility of state institutions, especially that of the judiciary, and supports the reestablishment of public trust in the criminal justice system which is supposed to provide protection against

arbitrariness and the abuse of power, as well as promote equality before the law (Huysse 2005). The validity of norms, violated by the former regime or any parties of the conflict, may be reaffirmed through conducting transparent and official trials. Thirdly, criminal proceedings have a special fact finding and acknowledging function. Through testimonies and statements of witnesses and defendants, they clarify and document historical facts of the former conflict (Galbraith 2009). In this context, the sentences seek to symbolize an official acknowledgement of the perpetrators' guilt, the victims' suffering, and the committed injustice. Finally, in a psychological manner, instead of a culture of "collective guilt", individual charges in post-conflict trials may contribute to avoid the stigmatization of an entire community and counteract the division of the society along the lines of former adversaries (Werle 2007).

### 2.3. Arguments against Launching Judicial Mechanisms

Nevertheless, in post-conflict settings, prosecution is only one of the challenges that decision-makers have to face with, such as the reestablishment of physical security and infrastructure, resettlement of refugees and internally displaced persons, or disarmament. Renouncing or postponing criminal justice are often justified by concerns on its destabilizing impact or by the urgency of meeting socio-economic objectives before any criminal law measures take place. Opponents emphasize that a prompt prosecution, initiated by the transitional government, may be considered as "emergency or victor's justice" by the defeated, or surrender party, and embrace an imminent risk of a new *coup d'état*, or renewed insurgency (Huysse 2005, 105). In addition, a long physical and social exclusion of particular sections of the population through custody or imprisonment could result in the establishment of anti-government sub-cultures instead of fostering their reintegration. For that reason, the adoption of amnesty laws often better serves the interests of the successor government than launching prosecutions. A further argument against criminal justice is the offender focused character of legal proceedings (Bock 2010). They may be impairing for the victims in several ways. On the one hand, re-victimization is a disapproved secondary effect of testifying in courts because it often imposes a serious psychological burden on victims (Orentlicher 2013). On the other hand, it may create serious societal tensions if criminal proceedings, based on the lack of evidence, end with an acquittal and do not meet the expectations of the victims. In fact, criminal institutions are challenged to live up social expectations in all post-conflict settings. In order to deliver a judgement, courts have to judge a very complex conduct of the accused in a situation of war and on the bases of evidence which is often destroyed or covered. This led to an acquittal in several cases of the ICC and ICTY (Clark 2012). Even if guilt is individualized, criminal instruments are not appropriate to bring all of the perpetrators into justice. It is doubtful that they can succeed in providing remedy to all victims when they have capacities to try only a tiny percentage of suspects.

When confronting pro and contra arguments for applying criminal law instruments in the aftermath of violent conflicts, the question arises to what extent belongs to the States' discretion to renounce legal mechanisms. Defining the scope of governmental decision-making powers requires an assessment of those relevant rules of international treaty law

and customary international law which contain references to a right and/or a duty to prosecute.

### 3. Transitional Justice and International Law

The subject-matter jurisdiction (*ratione materiae*) of criminal trials for dealing with injustices of the past includes systematic mass atrocities committed in the context of an international or non-international armed conflict, or by an oppressive regime. Nevertheless, international law does not contain any explicit definition of the criminalized atrocities which may be addressed by the right and/or duty to prosecute.<sup>3</sup> In order to qualify an act as a crime under international law, international criminal law theory tests the issue whether the values protected by the criminalization belong to the interest of the entire international community. Bassiouni (2003, at 24) describes international crimes as “those international law normative proscriptions whose violation is likely to affect peace and security of humankind or is contrary to fundamental humanitarian values, or which is the product of state action or a state favoring policy”.

The Preamble of the Rome Statute confirms this understanding, as it defines crimes within the jurisdiction of the ICC as “the most serious crimes of concern to the international community as a whole” which “threaten the peace, security and well-being of the world”. In the view of Werle (2007), crimes gain an international dimension if they meet the following criteria: each perpetrator can be individualized and the offence is indictable, the offence is part of the international law regime, and its culpability is independent from a transformation into the national legal system. The four core crimes included by the Rome Statute- the crime of genocide, crimes against humanity, war crimes, the crime of aggression- show the above mentioned attributes. Nevertheless, Article 22 of the Rome Statute suggests that the ICC’s list of serious crimes is not exclusive. As the Statute “shall not affect the characterization of any conduct as criminal under international law” (Article 22(3)), the four core crimes may be extended by offences criminalized through customary international law.

#### 3.1. The Right to Prosecute

Crimes against international law endanger the greatest interests of the whole international community because their impact is not limited to the territory of the state where they have been committed. International criminal law responded to their transnational character through introducing the principle of universal jurisdiction. The principle

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<sup>3</sup> The scholarly literature enumerates 20 offences which qualify as crimes under international law: aggression, war crimes, unlawful use of weapons, crimes against humanity, genocide, apartheid, slavery and slave-related practices, torture, unlawful medical experimentation, piracy, hijacking, kidnapping of diplomats, taking of civilian hostages, unlawful use of mail, drug offences, falsification and counterfeiting, theft of archaeological and national treasures, bribery of public officials, interference with submarine cables, international traffic in obscene publications, theft of nuclear materials, falsification and counterfeiting, and bribery of foreign public officials (Bachman 2010, p.290 and Werle 2007, at 182).

*is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim. (The Princeton Principles of Universal Jurisdiction 2001, 16)*

The application of universal jurisdiction for crimes including genocide, crimes against humanity, war crimes and torture is widely accepted as part of international customary law. From a practical point of view, in order to ensure a gapless enforcement of international criminal law, universal jurisdiction enables the decentralized prosecution of international law crimes by the international community. Nevertheless, within this framework, the ICC is required to take actions only in exceptional cases when States fail to do so. Critics on the universal jurisdiction address the risk of potential misuse through unlawful or unproportioned interference into the domestic affairs of States and the emergence of competing rights to prosecute for multiple States (Werle 2007).

### **3.2. The Duty to Prosecute**

Beside the principle of universal jurisdiction, international treaty law also contains several provisions which refer to the duty to prosecute certain crimes against international law.

#### **3.2.1. The Duty to Prosecute in International Law Treaties**

##### **3.2.1.1. The Duty to Prosecute in the Rome Statute**

In the Preamble of the Rome Statute the State Parties reaffirm that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. In addition, the sixth recital of the Preamble expresses the duty of every State “to exercise its criminal jurisdiction over those responsible for international crimes”. Apart from these general references, the Statute does not include any further explicit provisions which would oblige the Parties to conduct prosecution.

There are contradictory views on the scope of the aforementioned paragraphs. Some argue that the duty to prosecute in the Rome Statute must be laid out through interpreting the notion of the principle of complementarity (Wouters 2005). According to the Preamble and Article 1 of the Statute, the ICC “shall be complementary to national criminal jurisdictions”. The complementarity principle establishes jurisdiction for the ICC when States are not willing or not able to conduct an investigation or prosecution (Rome Statute, Article 12(2)). In addition to these criteria, being a Party of the Rome Statute is also connected with certain conditions. Its ratification presupposes the willingness and the ability of States to prosecute the core crimes and requires the existence of national criminal law, which establishes criminal jurisdiction to do so (Ambos 2006). Thus, without including an explicit duty to prosecute, the Rome Statute applies a conceptual pressure on the State Parties to accomplish the objectives and apply the instruments of international criminal justice (Kreicker 2006).

According to the opposing view, the Preamble cannot be interpreted as an implicit obligation to prosecute. Since the adoption of the Rome Statute was a result of consultation, legally binding obligations imposed on the Parties must be explicitly formulated instead of merely referring to them in the Preamble. Since States would be unwilling to unanimously accept the notion of universal jurisdiction, an overall obligation cannot be deducted from the Statute (Tomuschat 2002).

A middle ground position is suggested by Cassese, Gaeta and Jones (2002) in their Commentary on the Rome Statute by arguing that the primary addressee of the recital is the State on whose territory international crimes have been committed and the State of nationality of the alleged offender. In addition, they note the possibility “that the Statute also provides an impetus for other States to prosecute alleged offender on the basis of other jurisdictional principles, in particular the universality principle” (Cassese *et al.*, at 1906).

### 3.2.1.2. The Duty to Prosecute in the Geneva Conventions of 1949

The four Geneva Conventions (GC) oblige State Parties “to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention” (Article 49 of GC I, Article 50 of GC II, Article 129 of GC III, and Article 146 of GC IV). The punishable crimes against international humanitarian law are specifically enumerated by the Conventions<sup>4</sup> and were extended by the first Additional Protocol in 1977 (Article 85). The scope of the duty, specified by the Geneva Conventions, includes an obligation to search for wanted persons and bring them before local courts regardless of their nationality unless opting for their extradition to another Contracting Party which is willing to hold them to account.

However, the obligation to search for, prosecute, or extradite alleged offenders is limited in various manners (Kreicker 2006). Firstly, the relevant articles, which impose the duty, do not oblige the Parties to prosecute all acts of war but only a certain crimes enumerated in the above mentioned articles. Secondly, interpretations of the relevant article point out that despite the duty which oblige all Parties to take actions, the actual addressee is the country of residence of the accused. Primarily, this State is obliged to prosecute unless it makes use of its right of choice between extradite or prosecute when another State has requested the extradition of the accused (principle of “*aut dedere aut judicare*”). Finally, the list of grave breaches and therefore the obligation to extradite or prosecute alleged offenders in the international humanitarian law regime is applicable only in international armed conflicts (Ambos, 1997). Although Article 3 common to the four Geneva Conventions entails certain rules with regard to conflicts without international character, they do not impose any obligations to apply criminal sanctions. The 2016 Commentary on the Geneva Conventions of the International Committee of the Red Cross (ICRC), however, points out that despite the fact that criminal

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<sup>4</sup> According to Articles 50/ 51/ 130/ 147 of the Geneva Conventions, the list of the grave breaches include the following crimes: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

responsibility for violations of rules of the second Additional Protocol on protection of the victims of non-international armed conflicts was not envisaged during the 1974-1977 negotiations, it cannot be ruled out that such a norm has already been materialized in customary international law. Many enacted national laws confirm that a growing number of States are willing to exercise universal jurisdiction for prosecuting serious violations of international humanitarian law in non-international armed conflicts (International Committee of the Red Cross, 2016).

### **3.2.1.3. The Duty to Prosecute in the UN Genocide Convention**

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide contains an absolute obligation to prosecute persons responsible for committing the crime of genocide. Through Article I, the Contracting Parties confirm “that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. The obligation to punish is reaffirmed by Article IV, while Article V obliges the Parties to enact the necessary changes in their national law to enable the punishment of perpetrators. According to Scharf, it is a noteworthy limitation that according to the Convention’s definition, genocide may be committed against national, ethnical, and racial or religious groups and any acts directed against “political groups” have deliberately been excluded by the drafters (Scharf 1997, 22). Although the Convention indicates the subsidiary jurisdiction of an international court, States where the crime of genocide was committed are ultimately responsible for taking action. Through this provision the Genocide Convention introduced a model for both of direct and indirect implementation (Orentlicher 2013). The envisaged model of indirect implementation was finally put into practice in the 1990s through the establishment of the UN ad hoc Tribunals and the ICC. However, during the first few decades after the Convention’s adoption, apart from the famous Eichmann-trial in Israel, no consistent state practice has developed which could reaffirm the existence of a customary international duty to prosecute individuals in national courts for genocide committed in another State’s territory. Nevertheless, the *erga omnes* character of the rights and obligations enshrined by the Genocide Convention, including the principle of universal jurisdiction, were later confirmed by the International Court of Justice (ICJ) in its judgement of the “Bosnia and Herzegovina vs. Yugoslavia” case (International Court of Justice 1996, para.31).

### **3.2.1.4. The Duty to Prosecute in the Torture Convention**

Since the Rome Statute refers to the act of torture with regard to the crimes against humanity and war crimes as well, analyzing the related rules of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter Torture Convention) is highly relevant. The Convention requires that each State Party ensures the criminalization of torture under its national criminal law and “make[s] these offences punishable by appropriate penalties” (Article 4). However, the Torture Convention addresses with the duty to criminalize and penalize a wider circle of State Parties than any of the aforementioned treaties. In this context, they are required to establish jurisdiction when the offences are committed in any territory under their jurisdiction, when the alleged offender, or victim, is their national or when the Parties

consider it as appropriate. The latter includes cases when alleged offenders are present in any territory under the Party's jurisdiction and it does not extradite them to another State with a jurisdiction on the basis of one of the criteria above (Article 5).

Nevertheless, the wording of the Torture Convention points towards a lesser standard with regard to the scope of duties than an absolute obligation imposed by the Genocide Convention. While the latter requires that the person who committed genocide "shall be punished" by "effective penalties" (Genocide Convention Articles 4 and 5), the Torture Convention calls State Parties for "submitting" cases of alleged torture to the "competent authorities for the purpose of prosecution" (Article 7(1)). Orentlicher (1991, 2604) concludes that the Torture Convention does not explicitly express a duty to prosecute "let alone that punishment be imposed and served". In addition, it has been argued that its phrasing reflects on the evolution of international standards of due process which aims at ensuring procedural rights of criminal defendants such as the presumption of innocence (Scharf 1997). Being consistent with these rights, the Torture Convention avoids a formulation of a predetermined outcome of the judicial proceedings and acknowledges the existence of legitimate reasons for the termination of investigations.

### **3.2.1.5. The Duty to Prosecute in the General Human Rights Conventions**

For an analysis of the scope of duties entailed by the general human rights conventions, the American Convention on Human Rights (ACHR), the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Human Rights Convention, ECHR), and the International Covenant on Civil and Political Rights (ICCPR) are the most relevant documents. Unlike the aforementioned international treaties, these conventions do not include any explicit duty to prosecute and punish violations, instead, they articulate an obligation for State Parties to ensure the exercise and guarantee the protection of human rights. Some scholars argue that the duty to ensure rights implies a duty to prosecute human rights offenders. A connection between these duties can be inducted from the interpretation of the „respect and ensure" (ACHR, Article 1(1); ECHR Article 1; ICCPR Article 2(1)) and „effective remedy" (ACHR Article 25, ECHR Article 13; ICCPR Article 2(3)) provisions of the diverse conventions (Ambos 1997).

The Inter-American Court of Human Rights (1988, para.164) interpreted the affirmative duties enshrined by Article 1 of the ACHR in the judgement of the precedential Velásquez-Rodríguez case in which the Honduran Government was found responsible for serious violations of the Convention with regards to the unresolved disappearance of Manfredo Velásquez in 1981. Through Article 1, the Parties of the ACHR commit themselves to ensure that the rights and freedoms recognized by the Convention can be enjoyed by every person without any discrimination. The Court stated: „As a consequence of this obligation, the States must prevent, investigate and punish any violation of rights recognized by the Convention, and moreover if possible [...] provide compensation" (*ibid.*, para.166). In addition, it was argued that the protection of human rights requires not only the adoption of norms but also the implementation of effective action (*ibid.*, para.167). Examples for these actions may include enhanced standards for conducting investigations which should be carried out „in a serious manner and not as a

mere formality preordained to be ineffective” (*ibid.*, para.177). The content of the Velásquez-Rodríguez judgement was reaffirmed in a number of further cases of the Court as well as in the decisions of the Inter-American Human Rights Commission.<sup>5</sup> In decisions in cases related to torture and forced disappearance, the Commission pursued the same model of „investigation-punishment-compensation” that was introduced by the judgement in the Velásquez-Rodríguez case. Nevertheless, unlike the Court decisions, the argumentation of the Commission in these cases was based on Article 25, “the right to judicial protection” instead of Article 1 ACHR. In the view of Ambos (1997), the reason why the case law of the Inter-American human rights bodies put an emphasis on effectively ensuring human rights and conducting high quality investigations serves as a response to the human rights violations committed by Latin-American States against their own population.

The European Court of Human Rights also addressed the duty to prosecute in connection with Article 1 of ECHR which requests efforts for ensuring the rights and freedoms protected by the Convention. Several European Court decisions confirm that sanctioning human rights violations is part of the contractual commitments.<sup>6</sup> In the case of “X and Y v. The Netherlands”, a significant judgement was adopted by which the Court affirmed the responsibility of the Netherlands for non-compliance with Article 8 of the ECHR- the right to respect for private and family life- after the Dutch justice system did not permit for the mentally disabled Ms. Y to personally initiate a criminal process against the person who attacked her (European Court of Human Rights, 1985). While the Netherlands emphasized that seeking compensation through a civil action is available for Ms. Y, the Court denied this argument by stating:

*The protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspect of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions (Ibid. para. 27).*

Similar to the aforementioned Conventions, the ICCPR lacks any explicit duty to prosecute, but offers its Parties a broad discretion for implementing the related rules. The General Comment No. 3 on ICCPR states that „each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights” (United Nations Committee on Economic, Social and Cultural Rights 1990, para.4). Relevant for the implementation of the duty to prosecute is Article 2 Section 3 which establishes the “right to effective remedy” in the case of violations of rights and freedoms protected by the ICCPR. It imposes an obligation on the Parties to develop a legal protection system, provide remedy by competent authorities and ensure the enforcement of remedies when they were granted. However, the phrasing of the ICCPR does not explicitly require that remedies are available solely through legal proceedings. This suggests that States can compensate human rights violations through

<sup>5</sup> Examples include judgements in the cases “Alboetoe et al. v. Surinam (4. 12. 1991), “El Amparo” (18.1.1995), “Neira Alegria y Otros” v. Peru (19.1.1995) and “Caballero Delgado y Santana” v. Colombia (8.12.1995), (Ambos 1997).

<sup>6</sup> The literature refers to the following judgements: Ireland v. United Kingdom, European Court of Human Rights, Ser. A., 1978, (Schlunk, 2000) and Mrs W v. United Kingdom, Application 9438/81 (1983) 32 Decisions & Reports 190, (Orentlicher 1991).



applying a wide-range of judicial and non-judicial instruments (Orentlicher 1991). It is, however, desirable that the Parties sanction the violation of certain human rights by the means of criminal law. This view was confirmed by the UN Human Rights Committee regarding violations of the right to physical integrity. The General Comment No.20 on the prohibition of torture explained:

*State Parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts [...] Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible, [...] Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.* (United Nations Human Rights Committee 1992, paras. 13-14)

This understanding appears in a number of its latter decisions and General Comments of the Human Rights Committee. For instance, General Comment No.6 encouraged the Parties to “take measures not only to prevent and punish deprivation of life by criminal acts but prevent arbitrary killing by their own security forces” (1982, para.3) or in the case of “Baboeram vs. Surinam” the Committee (1985, para.16) “urged” Surinam “to take effective steps ... to investigate the killings ... [and] to bring to justice any persons found to be responsible for the death of the victims, pay compensation for the surviving families and ensure that the right to life is duly protected in Surinam”.

### **3.2.2. The Duty to Prosecute in Customary International Law**

In sum, the aforementioned international law treaties contain a universal duty to prosecute the crimes of genocide, torture and war crimes committed in the context of international armed conflict with the exception of the Rome Statute which purposely leaves the question open if third States are obliged to prosecute the core crimes. Nevertheless, the existence of a duty to prosecute in international customary law is a contested issue (Kreicker 2006 and Schluck 2000). The high number of ratifications of the Genocide Convention, the four Geneva Conventions and the Rome Statute, suggest that States are ready to commit themselves to fulfil the obligations imposed by these treaties. The ICJ confirmed the customary international law quality of the Geneva Conventions in its “Nicaragua decision” (1986) and in its Advisory Opinion on the Legacy of Threat or Use of Nuclear Weapons (1996) as well as acknowledged that the rules of the Genocide Convention are part of customary law in its decision in the case “Bosnia-Herzegovina vs. Yugoslavia” in 1996. As none of the non-party States have raised any objection either against the GC or the Rome Statute, the universal acceptance supports the assumption that a duty to prosecute genocide and war crimes evolved into customary international law (Kreicker 2006).

However, it is difficult to identify any customary law obligations with regards to crimes against humanity and war crimes committed in the context of non-international armed conflicts. The view that a duty to prosecute perpetrators of crimes against humanity is part of customary international law, contested by the argument that this position is based on non-binding UN Resolutions and not widely ratified international conventions rather than on any extensive state practice (Scharf 1997). As States apply the instruments of criminal law for dealing with human rights violations non-uniformly and non-

exclusively, the current practice cannot provide sufficient evidence for the existence of customary international law duty.

Over the last decade, national courts showed an increased willingness to try persons who committed war crimes in non-international armed conflicts. Based on that fact, a study of the ICRC on Customary International Humanitarian Law (2005) concludes that a universal jurisdiction of States to prosecute war crimes without an international context is now transformed into a norm of customary international law. Nevertheless, it is disputed whether sufficient state practice evolved which reaffirms a duty to prosecute violations of international humanitarian law for States other than those that suffered from the intra-state conflict on their territory (Wouters 2005).

In addition to the verbal and physical acts of States, the UN practice highly influences the evolution of customary international law. Since the end of the Cold War, the UNSC has adopted a number of binding resolutions in which it called for bringing those perpetrators to justice who are responsible for committing crimes against international law.<sup>7</sup> Furthermore, the UN Secretary-General repeatedly reaffirmed that the UN peace-making policy does not support peace agreements which encourage or condone amnesties that prevent prosecuting the core crimes of the Rome Statute and further gross violations of human rights (United Nations 2004, para. 10). The practical implementation of this understanding shows certain contradictions. While there are several examples when the UN did not acknowledge amnesties granted by peace agreements such as in the case of the Sierra Leonean Lomé peace accord, they supported the amnesty of Haitian military leaders and endorsed a promise of blanket amnesty for Yemen's former leader in exchange for his resignation in 2011 (Scharf 1997 and Orentlicher, 2013).

In conclusion, international law contains only a few concrete and absolute duties which may limit the discretion of States to determine their own transitional justice processes. As the relevant international law treaties were adopted before the emergence of the concept, the aforementioned rules could barely provide guidance on how to achieve transitional justice aims. How contemporary international law will incorporate the regulation of transitional justice depends mostly on the evolution of customary international law which is shaped by state practice and the *opinio juris* of the international community. According to recent tendencies, more and more States show commitment to come to terms with the atrocities of the past by applying the aforementioned judicial and non-judicial mechanisms.<sup>8</sup> Nevertheless, concerns about the effectiveness of criminal law instruments in fostering the restoration of peace and national reconciliation were raised not only by scrutinizing the content of substantial law. Once criminal proceedings are conducted, their impact on social repair depends not anymore on the question whether States comply with the international law duty to prosecute serious crimes, but rather on the performance of the diverse judicial bodies.

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<sup>7</sup> Examples include Security Council Resolutions 748 (1992) on Libya S/RES/748, 31 March 1992 and 837 (1993) on Somalia, S/RES/837, 6 June 1993.

<sup>8</sup> About 14 of 27 peace agreements adopted between 1990 and 2006 included provisions for transitional justice (Schurke, Wimpelman and Dawes 2007).

## 4. Achieving Transitional Justice Aims

Claims for pursuing transitional justice aims through applying criminal law instruments have recent origin. While until the late 80s, especially in Latin America, prosecution was considered to be a mechanism which counteracts peace and reconciliation (Seibert-Fohr 2005), a decade later the UN introduced an opposing concept and promoted the positive impact of criminal justice on peacebuilding<sup>9</sup>. Living up to the expectation of finding balance between delivering justice and simultaneously fostering peace and reconciliation posed a challenge, especially for the ad hoc Tribunals and the ICC. When assessing the performance of national or international courts, three important factors can be identified which influence the reconciliatory impact of criminal justice.

### 4.1. Appointing the Appropriate Judicial Forum

Choosing the right judicial forum has a paramount importance for achieving the objectives of criminal trials and, particularly in post-conflict settings, for providing the proceedings legitimacy and future acceptance (Bachmann 2010). Today, based on the complementarity principle, the scope of involvement of the international bodies in local transitional justice processes depends on the capacities and the willingness of the specific post-conflict state.

Since the 1990s, the establishment of the diverse judicial bodies has had different legal bases. Firstly, in the case of the UN ad hoc Tribunals, the UNSC determined that both of the situations in Ruanda and the former Yugoslavia constituted a threat to international peace and security and established these Tribunals as subsidiary organs by making use of its competence to impose binding measures permitted by Chapter VII of the UN Charter. Secondly, as it is set out in Article 13 of the Rome Statute, the ICC exercises jurisdiction with respect to the core crimes when a situation is referred to the Prosecutor by a State Party, by the Security Council, or in the case when the Prosecutor initiates investigations on their own initiative (*proprio motu*). Thirdly, the establishment of a hybrid- international-national- court is often the result of an agreement between the host State and the UN, while the national criminal proceedings will be conducted on the basis of national criminal law.

There are different models to regulate the primacy among the diverse judicial forums. According to the Nuremberg-model the International Military Tribunal had an exclusive jurisdiction to try high ranking Nazi war criminals. With the evolution of international criminal procedural law, international courts gained a concurrent jurisdiction to national courts for prosecuting crimes against international law (Werle 2007). Through the model of the UN ad hoc Tribunals, the international bodies took precedence over national courts. As the ICTY Statute states “[t]he International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal

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<sup>9</sup> The founding Resolution of the ICTY is one of the UN documents which reflected this notion. It explicitly mentions “an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the restoration and maintenance of peace.” (United Nations Security Council 1993a, Preamble).

may formally request national courts to defer to the competence of the International Tribunal” (Article 9). Based on the principle of complementary, in the model of the ICC, the Rome Statute recognizes the Member States’ first responsibility and right to prosecute the core crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, namely “the State is unwilling or unable genuinely to carry out the investigation or prosecution” (Article 17(1)(a)). Former ICC Chief Prosecutor, Moreno-Ocampo interpreted the philosophy of the complementary principle as a mechanism to encourage national institutions to meet their primary responsibility to investigate and prosecute core crimes in a regime where the primary responder are States instead of the ICC (International Criminal Court, 2003).

According to several scholars, international trials are required in “failed states” scenarios, where the local law enforcement bodies are unable or ineffective and the situation demands an impartial, non-domestic criminal process (Orentlicher 2013 and Akhavan, 2013). According to the UN’s current understanding, through the ad hoc Tribunals and later the ICC, impartial, independent and neutral judicial bodies were established which apply and develop international law (Mafwenga, 2000). However, it was hardly to anticipate at the time of their foundation that 20 years later the ad hoc Tribunals will still be operating. Even if the International Criminal Tribunal for Rwanda (ICTR) completed its mandate in 2015 and the ICTY is about to close the last cases, the model proved to be time consuming and put enormous financial burden on the international community (Wäspi 2000). Similar concerns exist with regard to more recently established hybrid tribunals as well as the ICC. Studies point out that the long-lasting proceedings of international courts created a “justice delayed-justice denied” attitude which discouraged and disappointed the victims (Galbraith 2009, 81).

In addition to critique about the duration of the trials, there are further issues which influence the societal perception on the effectiveness of international criminal justice. A study which evaluated whether, and to what extent the ICTY has aided inter-ethnic reconciliation in Croatia denied the existence of any empirical proof of such contribution (Clark 2012). This conclusion is based on three factors which are clearly identical with the general points of criticism on international criminal justice. Firstly, the Tribunal was able to engage only with a very small number of trials. 161 indictments have not been perceived as satisfying compared to the gravity and scale of the atrocities that the people experienced during the disintegration of the former Yugoslavia. Secondly, the outreach services to inform the local population about the work of the Tribunal proved to be insufficient. Even though the ICTY does have regional outreach offices, the information gap resulted in a general lack of interest in the foreign proceedings and created a criminal justice process without national ownership (Lindemann 2007). Finally, there were multiple domestic factors which counteracted the work of the ICTY and national reconciliation such as a division in the truth perception of the Croatian society along ethnic lines. Due to the “ethnicization of memory” the population acknowledged and accepted the historical records and judgements of the ICTY only when they supported their own ethnic narratives (Clark 2012, 414). Hence, each decision of the Tribunal has an enhanced significance in confirming or denying the injustice committed against the victims. This phenomenon was illustrated by the prominent example as the ICTY Appeals Chamber’s acquittal of two Croat suspects, Ante Gotovina and Mladen Markac,

raised allegations of anti-Serb bias in Serbia, while the acquitted were celebrated as heroes in Croatia (Clark 2012).

While the UN ad hoc Tribunals have a narrow scope of jurisdiction, the ICC is supposed to contribute to transitional justice processes by delivering so-called “global justice”. Despite its limited institutional capacities, through its universal approach, the ICC must satisfy a global audience (Orentlicher 2013). The challenges to fulfill this expectation have varied in each and every situation where the Court conducted prosecution or preliminary investigations. Tensions between the then chief Prosecutor, Moreno-Ocampo, and the African Union (AU) were one of the most serious issues that the Court had to face during its first years of operation. The ICC’s steady focus on African countries until 2016, coupled with European efforts to try Rwandan suspects for the crimes of genocide, triggered the AU’s protest against the “abuse of universal jurisdiction” and several other aspects of the Court’s work (Orentlicher 2013, p.521). In 2010, the AU requested their Member States not to cooperate in the arrest of the Sudanese President Omar al Bashir, who has remained at large and incumbent president since issuing the ICC’s arrest warrants in 2009. The lack of ability in enforcing its arrest warrants put serious pressure on the Court and undermined its credibility.

Anti-ICC rhetoric was revealed regarding further situations under investigation as well. The recently elected Kenyan president Uhuru Kenyatta, accused of crimes against humanity, won the elections through presenting himself as a victim of neo-colonialism (BBC News, 2013) while the “civil society” of Northern Uganda appeared to oppose almost unanimously the ICC’s investigations (Ssenyonjo 2007). Further criticism touched upon the Prosecutor’s selective approach in terms of the prosecuted crimes. Examples of focusing on the prosecution of “representative crimes” such as rape, sexual abuse or forced recruitment of child soldiers made the impression that delivering justice for “regular crimes” is neglected by the ICC (Glasius 2009, p.505). As the Ugandan Thomas Lubanga has only been charged with the conscription and use of child soldiers, civil society groups heavily condemned the narrowness of the charges (Women’s Initiative for Gender Justice, 2006). This issue triggered more intense protests when it was connected to gender-related violence. After the Prosecutor announced that he will focus on sexual crimes in the situation of Central African Republic (International Criminal Court, 2007a), civil society groups spoke up against the stigmatization of the country as a “gender case” since similar crimes were also frequently committed in other situations (Glasius 2009). The controversial performance of the Court led to the withdrawal of Burundi, South Africa and the Gambia from the ICC in 2016 and triggered the development of certain local institutional alternatives to international criminal justice such as the International Crimes Division set up in Uganda and Kenya. Furthermore, in 2014, the AU Assembly of Heads of State and Government adopted a Protocol on Amendments to the Protocol on the Statute of the African of Justice and Human Rights (hereinafter Malabo Protocol) which added a third chamber with jurisdiction to crimes under international law and transitional crimes to the yet to be established African Court of Justice and Human Rights. Although, due to the low number of ratifications the Protocol has not yet entered into force and the establishment of the African Court is still pending, the idea of a regional criminal court constitutes an

institutional novelty in the field of international criminal law. It is, however, still unclear what impact the regional court will have on the ICC's actions and its position in the international diplomatic arena.

Today, the global body's selective judicial intervention in a small number of situations has become a general characteristic of international criminal justice. According to the existing models, aiding this selectivity is required from national courts through trying further low-ranking perpetrators. Beside a presumed capacity to conduct larger-scale prosecutions, there are further advantages of "local justice" of hybrid and national courts which are in contrast to the "deprivatized" attitude of international criminal trials (Sterio 2006, 378). Local proceedings appear to generate an increased attention and acceptance from the side of the population. They can demonstrate the willingness of the post-conflict government to ensure the rule of law and establish a credible and functional justice system. While international courts seem to ignore the historical and cultural features of the post-conflict country, local proceedings may deal more effectively with these contextual attributes (Sterio 2006). Although national trials can benefit from the proximity of the crime scenes and the witnesses as well as from the direct access to evidence, they tend to be hindered, especially in abruptly transitioning societies, by the fragile post-conflict political situation on the ground and to be targeted by political influence or the rivalry of the local political elite (Werle 2007). Besides the security and political concerns, the effectiveness of local and hybrid courts is dependent on the voluntary cooperation with neighboring countries where, due to the transnational character of crimes against international law, evidence and wanted suspects may be located. In addition, local trials often suffer from financial deficits, lack of personnel and infrastructure which makes them unable to comply with a predetermined schedule and causes a serious backlog of cases. Hybrid tribunals are not subsidiary organs of the UN, but funded by the host state and voluntary contributions of Member States which makes them struggle with the lack of sufficient financial assistance (Ambos 2006).

In sum, there are arguments for and against each different form of judicial bodies that prevents the application of tailor-made institutional solutions to unique post-conflict settings. While the procedural rules of international criminal law and the involvement of the UNSC can provide guidance for determining which court should be given precedence in a particular case, today, the model of the primacy of international tribunals appears to be outdated. Although the harsh criticism that has continuously been expressed against the ad hoc tribunals and the ICC induced certain improvements in their operation, the major outcome of the ineffectiveness of international courts has been the development of alternative institutional frameworks. Despite the aforementioned financial shortcomings and the lack of compulsory cooperation from third states, hybrid courts are assumed to be the lead innovations because they are able to combine most effectively the strengths of the international courts with the advantages of local prosecution in post-conflict settings (Katzenstein 2003). The hybrid model can sufficiently aid the legitimacy deficit of untrusted local judicial institutions and the lack of local ownership of international trials. Apart from building domestic capacity for a functioning justice system, hybrid courts are also expected to ensure an independent, impartial and neutral attitude of international tribunals despite the local seat and "do domestic justice while upholding international law and complying with international fair

trial standards” (Nouwen 2006, 191). Nevertheless, the defining characteristics of hybrid courts, such as the mixture of local and international personnel and laws as well as their domestic seat, are not the main strength of this institutional model. Although these common elements can be deduced from the former examples of hybrid solutions in Cambodia, East Timor, Sierra Leone or Kosovo, the structure of existing tribunals “does not by any means set in stone the limits for all conceivable form of hybrids” (Higonnet 2005, 4). Despite these defining features hybrid courts may significantly differ in their legal bases, legal personality and institutional frameworks. In comparison with the ad hoc tribunals and the ICC, the hybrid model’s flexibility in creation and organization lends all these courts a *sui generis* character and enables the adjustment some of their parameters to the local setting. This is confirmed by the features of the Kosovar Specialist Chambers and Specialist Prosecutor’s Office that broke with the practice of local seat and will operate in The Hague in response to the difficulties to try former KLA members in Kosovo.

#### 4.2. The Prosecutor’s Discretion

Once an international court is involved in a country’s process of dealing with the atrocities of the past, its success in achieving transitional justice aims depends in large extent on the prosecutor’s discretion. As international tribunals have capacity to try only a small number of perpetrators, each indictment has a symbolic role and great significance. On the one hand, the increasing practice of charging high-ranking, even incumbent political and military figures, confirms that immunity does not apply for prosecuting crimes against international law (Coliver 2000). On the other hand, prosecutors make efforts to pursue individuals of all parties of the prior conflict to reaffirm the impartiality and independence of international criminal trials. Both the SCSL and the ICTY have been successful in this regard. It was a prominent example for that sort of prosecutorial effort, when in 1999 the ICTY Prosecutor Carla Del Ponte expressed her willingness to prosecute crimes committed against the Serbian minority in Kosovo despite the ambiguities concerning the scope of the Tribunal’s jurisdiction in the post-conflict period. At the time of the Del Ponte’s statement, the ICTY was under enormous pressure not only to prove its impartiality by filing charges against Kosovo Albanian leaders but also to justify the indictments for crimes being allegedly committed after the UN took over the administration of the province in June 1999 (Wierse 2008). In 2001, Del Ponte opened investigations regarding “allegations about the activities, against Serbs and other minorities, of unidentified Albanian armed groups in Kosovo from June 1999 until the present”. She explained that “the jurisdiction of the ICTY covers on-going events in Kosovo [...] because the continuing violence [...] does indeed satisfy the legal criteria for the definition of “armed conflict” for the purposes of crimes set out in the statute of the Tribunal” (International Criminal Tribunal for the Former Yugoslavia 2001). This understanding served not only as a broad application of the prosecutorial discretion but also provided a broad interpretation of the term of an “armed conflict” by defining it in the context of Kosovo as a continuous process which did not end with the withdrawal of Serbian forces in June 1999.

The prosecutorial discretion of the ICC is regulated by Article 53(2) of the Rome Statute which allows the Prosecutor to decide whether to proceed in a case when doing so is not

“in the interest of justice [...] including [...] the interests of victims”. When interpreting the scope of the Prosecutor’s discretion, the ICC’s Policy Paper on the Interests of Justice (2007b) points out that the application of Article 53 must be in accordance with the objectives and the purposes of the Statute, namely the prevention of serious crimes and fight against impunity. It differentiates between the concepts of “interest of justice” and “interests in peace” and suggests that issues of the latter belong to the scope of responsibility of the Security Council. Furthermore, the Policy Paper concludes that Article 53 cannot apply for issues of morality, politics and influence of the peace process when it comes to a decision on opening investigations. Although the Court exercises jurisdiction for crimes which threaten the peace, security and well-being of the world, “it should not be conceived of so broadly as to embrace all issues related to peace and security” (International Criminal Court 2007b, p.8). Instead, the Court aims at taking into account the interest of victims by ensuring the protection of their safety, physical, psychological well-being, dignity, and privacy. This interpretation suggests that the established jurisdiction over genocide, war crimes and crimes against humanity, and the act of aggression, are non-negotiable and are in accordance with the contemporary UN policy of rejecting “amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes” (UN Secretary-General, 2004, para.64(c)). Since the ICC’s practice lacks decisions on refraining from actions on the basis of inconsistency with the interest of justice, it is challenging to assess how the Court’s narrow interpretation would affect post-conflict reconciliation. However, the overall success in achieving transitional justice aims will not solely depend on the conduction of criminal trials but also requires a well-balanced application of judicial and non-judicial mechanisms.

#### 4.3. **Balanced Combination of Judicial and Non-Judicial Mechanisms**

In the view of several scholars, criminal justice needs to be exempt from excessive expectations. Since there is no direct link between judicial mechanisms and reconciliation, a positive impact in this regard can only be an incidental outcome, but not purpose that post-conflict trials must serve (Akhavan 2013, Clark 2012, and Skaar 2012). While it is expected that prosecution will “strengthen rule of law and thereby peace and democracy”, it has been argued that the statistical evidence cannot confirm this view (Shurke 2014, 273). Equally controversial is the issue whether trials have a positive effect on human rights protection. Although certain studies concluded that judicial mechanisms undertaken in conjunction with other transitional justice measures contribute to an improved human rights record (Skaar 2012), some transitional justice scholars advocate for the detachment of legal measures from expectations towards reconciliatory effects, since the promotion of “peace and reconciliation require more than trials alone” (Clark 2012, 422) and needs to be a “broad societal effort” (De Greiff 2010, 20). It raises, however, the question on how much leeway the complementarity principle allows for combining judicial and local non-judicial mechanisms.

The narrow interpretation on the “interest of justice” of the aforementioned ICC Policy Paper was coupled with a broad understanding of complementarity. In the view of Mnookin (2013), complementarity between judicial and non-judicial measures serves most efficiently the purpose of managing tensions between peace and justice. He argues



that Article 17 of the Rome Statute permits the Prosecutor to defer actions when a wide range of domestic investigations are undertaken. Since neither a uniform practice has developed, nor the Rome Statute provides any explicit provisions, it cannot be excluded that alternative non-legal mechanisms, such as the South African Truth and Reconciliation Commission, adequately satisfy complementarity. The Policy Paper supports this thesis by fully endorsing the complementary role of a wide range of mechanisms for addressing the immunity gap such as “domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice” (International Court of Justice 2007b, 8). The practical implementation of the complementary model is illustrated by the simultaneous establishment of hybrid tribunals and truth and reconciliation commissions (TRC) in Sierra Leone and East-Timor. The literature refers to the cooperation of the SCSL and the TRC in Sierra Leone as one of the best institutional solutions in the field of transitional justice (Ambos 2006).<sup>10</sup> Although the organs have had a different mandate, the cases of juvenile offenders created a connecting factor between their areas of jurisdiction. While the SCSL has been responsible for trying suspects older than the age of 15, the TRC functioned as the main mechanism to deal with younger offenders who were involved in the Sierra Leonean civil war as child soldiers (SCSL Statute, Article 7). The divided jurisdiction between the Special Court and the Commission represents best practice in complementarity between judicial and non-judicial mechanisms by successfully dealing with the issue of how to hold a special circle of suspects accountable in cases for which domestic or international criminal law might not provide a context-sensitive solution.

## 5. Kosovo in the Spotlight

### 5.1. The Early Years of the Transitional Justice Process

Kosovo’s modern history represents a unique case in terms of international conflict management. In the course of the breakup of the Socialist Federal Republic of Yugoslavia during the early 1990s, the separatist ambitions of the autonomous province were heavily suppressed by Serbia which led to the emergence of the Kosovo-Albanian paramilitary group, the KLA, and the eruption of a prolonged violent conflict. As a result of the military intervention of the North Atlantic Treaty Organization (NATO) in 1999, President Milosevic withdrew the Serbian forces from Kosovo and the administration of the province was taken over by the UN-led Interim Administration Mission (UNMIK). After Kosovo’s unilateral declaration of independence in 2008, Kosovo consented to be placed under international supervision and the continued presence of international organizations in which framework the European Union (EU) was assumed the lead role in matters related to the rule of law. The transitional justice process in Kosovo has

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<sup>10</sup> The Truth and Reconciliation Commission was established by the Truth and Reconciliation Act of the Sierra Leonean Parliament in accordance with Article XXVI of the Lomé Peace Accord. The TRC is mandated “to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.”; Statute of the Special Court for Sierra Leone (SCSL), S/RES/1315, 14. August 2000, the SCSL is mandated to try persons with „greatest responsibility for serious violations of international humanitarian and Sierra Leonean Law“, Art. 1 SCSL-Statute (Ambos 2006, at 66).

involved a variety of institutional solutions which reflect the above mentioned advantages and disadvantages of both international and hybrid trials as well as illustrated the challenges of complying with the duty to prosecute crimes against international law and achieving transitional justice aims through judicial mechanisms.

The main unique feature of trying war crimes and crimes against humanity being committed in the course of the conflict in Kosovo that trials were conducted by both international and hybrid courts. After Chief Prosecutor Carla Del Ponte announced to prosecute alleged crimes in 2001, she charged six former KLA commanders with crimes against humanity and violations of the customs of war in joint criminal enterprise.<sup>11</sup> The cases ended with the acquittal for four of the six accused. In the case of Haradinaj, Balaj and Brahimaj, the ICTY stated that “the direct evidence before it is insufficient to conclude that there existed a joint criminal enterprise the objective of which was to commit the crimes charged in the Indictment.” (International Criminal Tribunal for the former Yugoslavia 2008a, at 475). The Prosecutor failed to present sufficient evidence despite the fact that “[d]uring the trial the Chamber received evidence from almost 100 witnesses. Nevertheless, the Chamber encountered significant difficulties in securing the testimony of a large number of these witnesses. Many cited fear as a prominent reason for not wishing to appear before the Chamber to give evidence. In this regard, the Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe [...]” (*Ibid.* 2008b, 1-2).

The findings of the ICTY reflect on widespread witness intimidation which is dominating in post-conflict settings, especially in “abruptly transitioned societies” such as Kosovo, where according to the Council of Europe, the witness protection system has been the weakest in Europe (Council of Europe 2011). In particular, incriminating former members of guerilla includes the risk of retaliation. Both ICTY trials -against Limaj and Haradinaj- had the same scenario. Although most of the crimes in the indictments were ascertained, the evidence was insufficient for proving the responsibility of the accused “presumably also because witnesses were killed [...] or died unnatural death before they could testify, other could not be found a vast number of them had to be either compelled to appear in court or granted protection measures, but many of them nevertheless refused to speak or gave confused, reticent or contradictory statements” (Capussela 2014).

Convicting former KLA commanders has proved to be challenging in Kosovo on a national level as well. While the Kosovo Albanian population was “liberated” from the oppressive Serbian regime and created an ethnically homogenous society, trials have barely dealt with crimes of the former oppressors but should have brought those “war heroes” to justice who enjoyed extensive political and economic powers in the aftermath of conflict. The prior actions of the new political elite were considered as “feats” by the majority of the Kosovar society under which conditions criminal justice was condemned and unsupported by the local population.

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<sup>11</sup> The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-I, Indictment IT-03-66-PT, D287-D276 filed on: 7. March 2003; The Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj, Case No. IT-04-84-PT, Indictment IT-04-84-PT, D5962-D5927 filed on: 26. April 2006.

In this climate, during the period of 1999-2007, UNMIK was mandated to conduct war crime trials and lay down the foundations of the justice system, including providing training for juridical personnel as well as drafting and adopting the relevant legislature (UN Security Council 1999). The first trial, which ended with the conviction of former KLA members for war crimes committed during 1998 and 1999, took place in July 2003 (UN Security Council 2003, para.13). After the Mission's reconfiguration in 2007, the European Union Rule of Law Mission (EULEX) inherited from UNMIK 1,187 uncompleted war crimes files (Capussela 2015). While exercising their executive functions, EULEX judges and prosecutors were embedded in Kosovo institutions and entitled for the investigation, prosecution, and adjudication of cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes (European Council 2008). In 2010, EULEX reported about 888 cases for which the Prosecutor of the Special Protection Office issued a request for investigation (UN Security Council 2010). These investigations resulted in placing several war crime suspects under arrest whereby two prominent cases have had paramount importance. Firstly, EULEX investigated former transport minister Fatmir Limaj for war crimes together with nine further former KLA members (Capussela 2014). The charges were almost identical to those that were brought against Limaj and two other suspects in the ICTY trial on crimes against humanity and war crimes in 2003-2005. The trial ascertained that prisoners of a KLA camp under Limaj's command had been mistreated and murdered but there was no sufficient evidence for Limaj's direct or his command responsibility. In March 2011, EULEX arrested Limaj's co-suspects and placed him in house arrest in September 2011 after clearing issues about parliamentary immunity. A large part of the Kosovo Albanian population intensively criticized EULEX for prosecuting the case Limaj, who was one of the leaders of the "liberation war" pursued by the KLA. In 2012, a mixed panel of EULEX and local judges acquitted all defendants based on the argument that despite the evidence of mistreatment and murder of at least seven prisoners in Limaj's camp, the responsibility of the accused cannot be proven (EULEX, 2012). According to EULEX, the reason for the acquittals is that "the trial Panel found that, in important material respects, the evidence of [the main witness] was wholly unreliable" (EULEX 2013). The prosecutorial evidence was based almost exclusively on the content of the diary of a middle-ranking KLA fighter who reported to Limaj and commanded the concerned KLA camp.<sup>12</sup> Due to his incriminating evidence, the witness was placed under witness protection and relocated to Germany where he was found hanged from a tree in a public park. In addition to the challenge of supporting the indictment with sufficient evidence, the alleged suicide of the witness, and relocating him without his family at his brother's home to Germany where about one third of the Kosovar diaspora reside, pointed to serious shortcomings in EULEX's witness protection capacities as well (Capussela 2014).

Another representative case for Kosovo's post-conflict trials is that of 15 former KLA-fighters known as the "Drenica Group" which ended with 11 convictions (UN Security Council 2015). The indictments for alleged war crimes committed against civilian

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<sup>12</sup> According to Capussela (2014, p.57) this fact emerges from the first instance judgement. District Court of Pristina, case No. P 425/11, N.K et al., Judgement, 2 May 2012, p. 28, Available at: <http://www.eulexkosovo.eu>.

prisoners during the Kosovo conflict triggered the protest of thousands in Pristina. The opposition of the population was not the only remarkable circumstance around the Drenica Group case. In 2014, three suspects, including the mayor of Skenderaj, escaped from custody right before their prison transfer, while the hospital they were treated was blockaded by their families and supporters (Balkan Investigative Reporting Network 2014). The motive of their escape appears to be EULEX's decision to transfer the accused closer to a court where the trial was to be held in north Kosovo. Since north Kosovo is inhabited by Serbian minority and the suspects were accused of committing war crimes against Serbian civilians, such a decision provoked extreme reactions in a polarized post-conflict setting. Securing witness safety and credibility proved to be the biggest challenge during the two-year long trial. Some of protected witnesses were exposed before the trial by a broadcasted interview. More challenging, however, was that during the ongoing court hearing some of the witnesses completely changed the content of their testimonies that they gave during the investigation process (Ristic 2015).

## 5.2. The Road to the Establishment of a New Hybrid Body

The implementation of criminal law instruments in the post-war Kosovo has not been exhausted either by the ICTY trials or local proceedings. Between December 2010 and January 2011, the Council of Europe released, and then adopted a Report composed by the Swiss Senator Dick Marty, (hereinafter Marty Report) on inhuman treatments of civilian prisoners and illicit trafficking in human organs in Kosovo that were allegedly committed by the KLA in 1999-2000 (Council of Europe, 2011a). The Marty Report (para. 1) refers to itself as a follow-up of the revelations of the former ICTY prosecutor “who alleged that serious crimes had been committed during the conflict in Kosovo, including trafficking in human organs, crimes which had hitherto gone unpunished and had not been the subject of any serious investigation”. The document points out (paras. 6 and 10) that due to favoring the strategy of promoting short-term stability and “thereby sacrificing some important principles of justice”, international authorities such as UNMIK and EULEX either did not consider as necessary to investigate the allegations, or did it incompletely and superficially.

The Marty Report, especially due to the nature of the crimes, attracted widespread attention. The Parliamentary Assembly delivered a statement on the importance of criminal justice by reaffirming

*the need for an absolutely uncompromising fight against impunity for the perpetrators of serious human rights violations, and wishes to point out that the fact that these were committed in the context of a violent conflict could never justify a decision to refrain from prosecuting anyone who has committed such acts [...] There cannot and must not be one justice for the winners and another for the losers. Whenever a conflict has occurred, all criminals must be prosecuted and held responsible for their illegal acts, whichever side they belonged to and irrespective of the political role they took on. (Council of Europe, 2011a, paras. 14-15)*

The latter aspect referred to the aforementioned challenges of criminal prosecution of members of the political elite in abruptly transitioned societies, which in the case of Kosovo reflected in the newly gained political power and alleged affiliation with organized crime circles of former high-ranking KLA commanders. The European Union

reacted through the establishment of a Special Investigative Task Force (SITF) which was mandated to conduct independent investigation into the allegations of war crimes and organized crime of the Marty Report. In his statement from 29 July 2014, the Chief Prosecutor of SITF concluded that the most comprehensive investigation ever done in post-conflict Kosovo produced sufficient evidence to file indictments against certain senior officials of former KLA members for a campaign of persecution directed at ethnic minorities and fellow Kosovo Albanians who were labelled either as collaborators with Serbians or political opponents of the KLA leadership (SITF 2014). The institutional response was the establishment of the Specialist Chambers and Specialist Prosecutor's Office which applies Kosovar Law while located in The Hague.<sup>13</sup>

### 5.3. Lessons Learned from the Transitional Justice Process in Kosovo

Although it is difficult to deduce general lessons learned on issues of transitional justice due to the unique nature of each post-conflict setting, the involvement of the international community in Kosovo in the aftermath of the conflict reflects on certain common phenomena. Since 2001, judicial mechanisms have continuously been embedded in the Kosovar peacebuilding process. On the international level, the ICTY acquittals, due to lack of direct evidence to prove the participation of the accused symbolize the limited capacities of international bodies to conduct prosecution on the ground and obtain sufficient evidence to support the charges in their indictments. The persistence of pursuing further investigations and the statement of the Council of Europe attest an unprecedented commitment to the international community for fighting against impunity. On the other hand, due to the "failed state" character of Kosovo, undertaking prosecution on a national level has been the responsibility of the international community as well.

The effectiveness of the international missions in delivering criminal justice was influenced by the interplay of several factors. Firstly, war crimes trials in Kosovo suffered from the typical disadvantages of national courts operating in abruptly transitioned societies. The proceedings have seemed to be overburdened by security concerns, the intimidation and social exclusion of witnesses, and political interference in the judiciary (European Commission 2014). Secondly, the low level investigation of war crimes has appeared to be part of a strategy of giving precedence to short-term stability over risking renewed turbulence triggered by the indictment of national heroes of the Kosovo Albanian community. Both UNMIK and EULEX were challenged to reach a compromise with the new Kosovar political elite who emerged from the ranks of the former KLA leadership. The missions followed an approach of "negotiation instead of confrontation" which made the international presence in Kosovo vulnerable and affected by domestic political struggles (Capussela 2015, and Keukeliere *et al.* 2015). These factors have been

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<sup>13</sup> The Specialist Chambers and Specialist Prosecutor's Office established jurisdiction "over crimes against humanity, war crimes and other crimes under Kosovo law" in relation to allegations reported by Senator Marty as well as other crimes connected to those allegations. Furthermore, the Specialist Chambers defines itself as being "attached to each level of the court system of Kosovo" and function according to Kosovo law as well as customary international law and international human rights law. The new institution started to operate in April 2016 and the first indictments will be expected once the Rules of Procedure and Evidence enter into force. Retrieved from <https://www.scp-ks.org/en> (Last accessed: 13. 06. 2017)

reflected most of all in the passive performance of EULEX, since the deployment of the Mission was based on the consent of the Kosovar government. A 2014 study on EULEX's executive functions analyzed the Mission's performance in conducting investigations and concluded that in several cases EULEX acted only after "it became aware that its inaction was about to unveil, after its inaction already been unveiled or after the EU or international public opinion demanded investigation" (Capussela 2015). It is beyond the scope of this article to provide a detailed analysis why EULEX and the UN organs beforehand failed to open thorough investigations on the crimes unveiled by the Marty Report. With regard to EULEX, the progress in the cases of Limaj and the Drenica Group suggests that the Mission has had limited capacities in coordination, witness protection, and a vulnerable position in the Kosovar political arena.

In conclusion, the "peace vs. justice" issue in the context of Kosovo seems to gain a new notion. According to the quarterly reports of the UN Secretary-General, Kosovo remains today stable, and apart from certain minor cases, free from inter-ethnic violence. In the case of the homogenous Kosovo the destabilizing effect of criminal prosecution reflected not in the aggravation of inter-societal tensions, but rather generated a conflict between the Kosovar society and the international community. Both the aforementioned cases involved public demonstrations against EULEX's prosecution. What is more, while hundreds of veterans protested against the new court, the opposition parties boycotted voting on the adoption of the law which would have provided the legal basis for its establishment (Collaku 2015). While the concept of transitional justice is associated with a society's attempts to ensure accountability, serving justice and achieving reconciliation, the process of dealing with the past in Kosovo has rather illustrated the international community's struggle to pursue an appropriate model which effectively addresses the culture of impunity. While the model of hybrid courts with a local seat was not successfully put into practice, the next phase of transitional justice was determined by Kosovo's willingness to establish a national court in the Netherlands and agree on a hybrid institutional response to the international investigation. Whether the new model of a national court that administers justice abroad will successfully meet the aforementioned challenges of delivering criminal justice, is supposed to be the subject of further research once it fulfilled its mandate.

## 6. Conclusion

The Kosovo Specialist Chambers have been only one of the latest institutional developments in the field of criminal justice. The International Crimes Tribunal of Bangladesh and the Extraordinary African Chambers in the Senegalese Courts are further examples for the establishment of new types of judicial bodies which combine local justice with international features. These institutional innovations illustrate the commitment of States and international organizations not only to comply with the duty to prosecute, but also to develop new judicial bodies in order to maximize the effectiveness of criminal law instruments in fragile post-conflict settings. Nevertheless, today, the evolution of substantial criminal law faces more serious challenges. In addition to attempts of adopting universal rules to regulate the duty to prosecute war crimes and crimes against humanity committed in the course of non-international

armed conflicts, the nature of contemporary conflicts claims the regulation of how to hold transnational non-state actors accountable for committing crimes under international law. It is to expect that progress on substantial and institutional level will affect the impact of these legal mechanisms on the transitional justice processes as well.

Today's most down-to-earth expectation towards criminal justice is a positive contribution to the establishment of a culture of accountability (Akhavan 2013). It is getting widely accepted that challenging the global body, the ICC, with universal policy-making and simultaneously with adjustment to the society-specific needs of unique post-conflict settings overburdens its institutional capacities. Global justice will barely be able to develop the ability to fulfil the expectations of all sorts of scenarios. However, an additional political mandate cannot be decoupled from the judicial mechanisms in failed states situations where international bodies are required to fill an institutional vacuum. When a violent conflict or an oppressive regime left a non-functioning judicial system behind, there is a legitimate claim that the performance of the international bodies supports the reestablishment of the rule of law and rebuilds the trust in the judiciary. While success in these areas should positively affect the peace consolidation process and promote stability, the case of Kosovo illustrates that the implementation of this mandate faces serious difficulties. Meeting the challenge of choosing the suitable institutional model for the local context, finding a balance between prosecutorial selectivity and stability, as well as combining judicial and non-judicial mechanisms claims further institutional and doctrinal development. Best practice in simultaneous operation of a hybrid court and a truth commission with complementing jurisdiction in Sierra Leone shows that it pays off to explore the possibilities of how to put complementary between the diverse mechanisms into practice. The Sierra Leonean experience, suggests that an expedient strategy for maximizing the effectiveness of transitional justice measures must seek the broadest possible interpretation of the complementary principle. A more extensive application of complementarity would serve the objectives of both justice and reconciliation and encourage the evolution of new institutional solutions which may integrate both judicial and non-judicial mechanisms.

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