

Bachelor Thesis and Field Study Report

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HOW CAN RETRIBUTIVE JUSTICE FOSTER RECONCILIATION? ON THE IMPACT OF INTERNATIONAL AND HYBRID CRIMINAL TRIBUNALS, THE ICC AS A POTENTIAL SUCCESSOR AND ARISING CONSEQUENCES FOR EUROPE.

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List of Abbreviations

<i>AFRC</i>	<i>Armed Forces Revolutionary Council</i>	<i>OTP</i>	<i>Office of the Prosecutor</i>
<i>BiH</i>	<i>Bosnia and Herzegovina</i>	<i>PCPB</i>	<i>Post-conflict peace-building</i>
<i>CDF</i>	<i>Civilian Defence Forces</i>	<i>RPF</i>	<i>Rwandan Patriotic Front</i>
<i>ICC</i>	<i>International Criminal Court</i>	<i>RUF</i>	<i>Revolutionary United Forces</i>
<i>ICTR</i>	<i>International Criminal Tribunal for Rwanda</i>	<i>SC</i>	<i>Security Council</i>
<i>ICTY</i>	<i>International Criminal Tribunal for the former Yugoslavia</i>	<i>SCSL</i>	<i>Special Court for Sierra Leone</i>
<i>IDEA</i>	<i>Institute for Democracy and Electoral Assistance</i>	<i>SPSC</i>	<i>Special Panels for Serious Crimes</i>
<i>NGO</i>	<i>Non-Governmental Organization</i>	<i>SCU</i>	<i>Special Criminal Unit</i>
<i>OECD</i>	<i>Organization for Economic Cooperation and Development</i>	<i>TRC</i>	<i>Truth and Reconciliation Commission</i>
		<i>UN/UNO</i>	<i>United Nations Organization</i>
		<i>UNIMSET</i>	<i>United Nations Mission of Support for East Timor</i>
		<i>UNTAET</i>	<i>United Nations Transitional Administration in East Timor</i>

1. Abstract

In the first part of this work, the impact of international and hybrid tribunals (as instruments of Retributive Justice) on reconciliation after internal armed conflicts will be examined by performing a case study on four tribunals. The cases examined are the *International Criminal Tribunal for the former Yugoslavian (ICTY)*, the *International Criminal Tribunal for Rwanda (ICTR)*, the *Special Court for Sierra Leone (SCSL)* and the *Special Panels for Serious Crimes (SPSC)* in East Timor. Attention will be given to the preconditions under which those tribunals were held, to the benefits and problems connected to their implementation and to their outcome. The purpose of the case study is to learn about predominant factors (generalizations) that enabled, respectively prevented the tribunals to contribute to reconciliation.

Part II will deal with the International Criminal Court (ICC) that can be seen as a successor to international tribunals. Taking into consideration the generalizations of part I, it will be examined if it is likely that the ICC will, in its present form, contribute to reconciliation in societies after an internal conflict. Differences, advantages and disadvantages the ICC may have compared to international or hybrid tribunals shall be described.

In the last part of the work it will be identified how European governmental and non-governmental actors can, in the light of the findings of part I and II, enhance the impact of the ICC on reconciliation. First, concrete measures that would foster the ICC's contribution to reconciliation will be named. Thereafter, European actors appropriate to implement these measures will be identified and recommendations for those actors will be given.

2. Background and Derivation of the Research Question

2.1. Part I: Retributive Justice and Conflict Resolution

Since the end of the cold war, the face of wars especially of internal wars has changed considerably. Many scholars describe a shape-shifting process from classic civil wars towards new types of war¹. The new wars are characterized by increasing brutality and strategic use of violence against civilians,² they are hard to end and even if a ceasefire can be reached, it only marks the point where the difficult process of *post-conflict peace-building (PCPB)* begins. PCPB has various phases of de-escalation of which reconciliation is the final and maybe the most important one, as it is often argued that only reconciliation can bring long lasting peace.

"Reconciliation is an overarching process which includes the search for truth, justice, forgiveness, healing and so on. At its simplest, it means finding a way

¹ Compare for example, Ramsbotham, Woodhouse, Miall: 55-67

² Compare Heupel: 23-31

to live alongside former enemies - not necessarily to love them, or forgive them, or forget the past in any way, but to coexist with them, to develop the degree of cooperation necessary to share our society with them, so that we all have better lives together than we have had separately."

(IDEA: 12)

"Reconciliation – restoring broken relationships and learning to live non-violently with radical differences – can be seen as the ultimate goal of conflict resolution... it is the long-term process of reconciliation that constitutes the essence of lasting transformation that conflict resolution seeks."

(Ramsbotham, Woodhouse, Miall: 231)

There are societies where people seem to be able to live among former enemies more easily than in others, and there are various instruments for creating the preconditions for reconciliation - preconditions as trust, peaceful coexistence or a culture of democracy (compare IDEA: 24). According to Ramsbotham, Woodhouse and Miall reconciliation after a violent conflict requires to use at some point one of the following approaches: Amnesia, public justice or vengeance. Official amnesia can be a way to let go of the past, however, this approach is especially problematic from the viewpoint of the conflict's victims because:

"If the injustices experienced by ordinary people during and often also prior to conflict are not redressed, it is unlikely that citizens will place their trust in the new peaceful dispensation and participate in efforts to build peace."

(Mani: 4)

On the other side of the spectrum is vengeance. Although it is usually considered to be contra-productive to reconciliation one must consider that in some cultures it may be deemed as an appropriate way to restore a balance of justice necessary for reconciliation. However, in order to reach long-term reconciliation, usually measures in between the two extreme approaches are needed and that implies the creation of justice in some form. Rama Mani distinguishes in her book between three dimensions of what she calls "public justice" in PCPB processes. One dimension is *Legal Justice* and concerns the erosion or even the absence of the rule of law that is typical for post-conflict societies. Another one is *Distributive Justice* that seeks to deal with structural and systemic injustices, (e.g. political and/or economic discrimination) which can be both the underlying causes and the result of violent conflicts. Finally, and in the scope of this paper most interesting, there is *Rectificatory Justice* that deals with "injustice in terms of direct physical violence suffered by people during conflict" including gross violations of human rights, crimes against humanity and war crimes.³ According to Mani, concrete measures in the dimension of *Legal Justice* are for example the (re-) establishment of an effective court-system and combating corruption. *Distributive Justice* may come in the form of financial compensation, anti-discrimination programs or more symbolic actions

³ For the dimensions of public justice compare Mani: 5-9

such as putting up a memorial reminding of injustices experienced during conflict. There is a variety of approaches for *Rectificatory Justice* in transitional societies, including trials and prosecution, truth commissions, removal from office of perpetrators, or methods as healing or purges. *Rectificatory Justice* can thus have different forms, it can for example be retributive, restorative or compensatory. *Retributive Justice* is based on prosecution and, if appropriate, punishment. This is a difference to other forms of justice such as *Restorative Justice*, *Transformative Justice* or *Healing Justice* where the focus lies on compensation and mediation between victims, offenders and the particular community. The underlying idea of *Retributive Justice* is that "*perpetrators should not go unpunished*" (IDEA: 97). What are the instruments of *Retributive Justice*? One instrument is trials held within the national justice system. But Mani correctly remarks:

"Legal Justice, or the rule of law as it is referred to here, and the entire apparatus of the justice system, is usually either delegitimized, debilitated or destroyed during or prior to conflict."

(Mani: 6)

Hence, before it is possible to held appropriate trials within the particular justice system, one would have to rebuild the required structures – a process which will usually take several years. This is often not an option as it may be of vital importance for the reconciliation process to address the serious crimes committed during times of conflict as early as possible. As a result, the main instruments of *Retributive Justice* are tribunals⁴ that are often carried out with the help or even under the auspices and responsibility of some body of the international community. Their use is however not undisputed as both positive and negative effects are possible. In fact, many authors describe tensions or even a trade-off between the goal to achieve justice and the goal to achieve peace.

It is clear, that tribunals cannot be the panacea to all problems regarding *PCPB* or reconciliation. These processes have to be adapted to the particular social, economic, cultural and political circumstances and require many different instruments, among them reparation and capacity building. However, tribunals can both expedite and slow down reconciliation and may in some cases even tip the scales towards success or failure of the overall process. The question is whether there are common factors that determine the impact of international or hybrid on the reconciliation process in the country at hand. In other words: Under which conditions can tribunals have a positive impact on reconciliation? To answer this question, a number of reconciliation processes will be studied – more information on

⁴ The importance of tribunals could, however, decrease as the importance of the *ICC* as an instrument of *Retributive Justice* grows. This aspect will be addressed in part II of the work. The third instrument of *Retributive Justice* is "Administrative Justice" meaning mainly disciplinary measures outside the criminal court system (compare *IDEA*: 102). This instrument shall not be addressed in this paper also given its unsuitability for sanctioning grave violations of human rights.

the approach can be found in the next chapter. The purpose of studying those cases is to name the most important factors that determined the impact of tribunals in post-conflict societies, and to specify conditions that should exist if tribunals are to be used within the reconciliation process. Those findings could be used by those working in the field of conflict resolution. They could for example help with the decision whether the use of an international tribunal would contribute to reconciliation in a particular case, with setting goals to work towards before establishing a tribunal, or with prescribing certain standards for it. However, within this research the findings shall mainly serve another purpose: To analyze the potential that the *ICC* may have in regard to reconciliation processes and to identify possibilities for European actors to support the court.

2.2. Part II: The International Criminal Court

The *ICC* is often seen as a successor for international tribunals, in fact, its establishment can be seen as a consequence from the experiences made with the two ad-hoc tribunals in Yugoslavia and Rwanda.⁵ The *ICC* is supposed to deal with the most serious international human right crimes, either by providing incentives, guidance and backup to countries willing to prosecute offenders or by bringing to account suspected perpetrators itself if national courts are unable or unwilling to do so. The Court is based on the *Rome Statute of the International Criminal Court* (hereafter: *Rome Statute*) that entered into force in July 2002. According to the *Rome Statute* the *ICC* is determined to put an end to impunity, to contribute to the prevention of certain serious crimes and to guarantee lasting respect for the enforcement of international justice. The situations under investigation by the *ICC* so far, are all in countries with internal armed conflicts (compare part II of this paper). Given the mission and the competences of the Court, it could have a similar impact on reconciliation processes as any of the tribunals examined. Therefore an analysis of the framework and the way of working of the *ICC* will be made in order to assess its potential impact on reconciliation processes by comparing it with the findings of part I. After the analysis of aspects connected to the use of the *ICC* as an instrument of Retributive Justice it should be possible to say:

- If the *ICC* is in its current form likely to contribute to reconciliation after internal armed conflicts and thus,
- If the *ICC* is, in the light of the research's findings, suited as a successor to tribunals and if not where the problems are located.

The next step is naturally to think about ways how a positive impact of the *ICC* on reconciliation after internal armed conflicts can be fostered and this is where Europe comes into play.

2.3. Part III: The Role of Europe

⁵ Compare Van den Herik: 264-282

Europe and in particular the EU has to take a leading role in the field of reconciliation, and PCPB in general. It does not only have the moral obligation to exercise its considerable global influence, it lies also in its very own interest to do so. Although, in the middle run, an armed conflict within Europe is, at least within the *EU*, very unlikely, European interests, regarding economical, political or security issues, are threatened and impaired by the consequences of conflicts. Such consequences may be as diverse as economic crises, terrorism or massive refugee migration movements. Therefore it is no surprise that European International Governmental Organizations, particularly the *EU*, are active in conflict prevention, crisis management and conflict resolution. In the *EU Programme for the Prevention of Violent conflicts*, the commitment was stated to "*pursue conflict prevention as one of the main objectives of the EU's external relations*" and to continue to "*improve its capacity to prevent violent conflicts and to contribute to a global culture of prevention.*" The *EU*, respectively its member states, is not only the largest donor of development aid worldwide – measures concerning the Unions conflict prevention policies can also be found in the *Common Foreign and Security Policy (CFSP)* and the *European Security and Defence Policy (ESDP)* (compare Stewart: 92 and 102). Also the *OSCE*, an intergovernmental body and the leading regional security organization in Europe, is active in conflict prevention and post-conflict rehabilitation, it works "*to prevent conflicts from arising and to facilitate lasting comprehensive political settlements for existing conflicts. It also helps with the process of rehabilitation in post-conflict areas.*"⁶ Besides governmental and intergovernmental actors, the considerable importance of non-governmental organizations (NGOs) in conflict resolution is widely acknowledged and many of the worlds most important NGOs working in the field of conflict resolution are located in Europe. Examples are the *International Crisis Group* in Brussels or the *Berghof Center for Constructive Conflict Management* with their headquarters in Berlin. All of the actors listed above have different legal competences, capacities and experiences. The aim of part III is therefore to determine what measures should be taken by which European actors in order to support Retributive Justice, and hence reconciliation in post-conflict societies.

⁶ Compare *OSCE Website*: <http://www.osce.org/activities/13035.html>

2.4. Research Question and Sub Questions

Summing up all the aspects addressed above leads to the following research question and sub-questions:

(I) Under which conditions have international tribunals contributed to reconciliation after internal armed conflicts, (II) what does this imply for the potential impact of the ICC on such reconciliation processes, and (III) what measures should be taken by which European actors in order to enhance the impact of the ICC on reconciliation.

Sub-questions of Part I:

- a) In what way were tribunals supposed to contribute to reconciliation (what aims did they want to reach within which framework)?*
- b) Under which circumstances were the tribunals established (e.g. degree of acceptance in the society)?*
- c) How were they implemented?*
- d) What was their impact on the particular reconciliation processes?*
- e) What generalizations can be made regarding the use of tribunals? What are the most important preconditions that should exist before establishing tribunals and to which points should be paid attention when implementing tribunals?***

Sub-questions of Part II:

- f) In how far does the ICC, in the light of the findings of part I, have the potential to contribute to reconciliation after internal armed conflicts?*
- g) What shortcomings have to be overcome in order to enhance this potential of the ICC?*

Sub-questions of Part III:

- h) What concrete measures can foster the necessary preconditions or eliminate obstacles for international tribunals or the ICC to contribute to reconciliation?*
- i) Which actors are most appropriate to induce and/or implement such measures?*

3. Methodology

3.1. Approach and Case Selection Criteria

The method applied will be an *exploratory case study* of post-conflict societies that used tribunals as an instrument of Retributive Justice. Case studies have the advantage that usually a lot of information is available. The researcher can inspect the cases at hand in depth and use the important details for his or her research question. Further, the process of studying cases may reveal actual processes and provide the researcher with a sense of the causal mechanisms at work (compare Stoll: 358). In general, a case study approach is about:

"The use of historical material to explore theoretical ideas, develop coherent theoretical models of certain processes, or to test hypotheses that are derived from well-articulated theories... Exploratory case studies seek to develop or formalize a given theory inductively, through the examination of one or more historical cases. Through this approach the researcher wishes to identify the structure of relevant variables that are at work in that given case or the interrelations among these variables."

(Maoz: 273)

Stoll points out a weak point of case studies which is that it may be difficult to separate the critical from the trivial especially if only a small number of cases can be studied (compare Stoll: 359/360). Thus the selection of cases is of great importance, it should be systematically and well-founded. In the planned research described above, the studied cases shall be used to generalize to other (maybe future) cases that may in certain aspects be very different to the studied ones. Therefore, the planned research must have a high external validity, which is *"The validity of inferences about whether the cause-effect relationship holds over variations in persons, settings, treatments variables and measurement variables."*⁷ It is therefore important to select cases with differences in those attributes. This method is called "Diverse Case Strategy" or "Heterogeneity Sampling" - it has the objective to achieve a maximum variance along relevant dimensions and is thus likely to enhance the representativeness of the sample of cases.⁸ For that reason, the selection of cases shall include at least one case of ad hoc tribunals, conducted in very close co-operation with the UN, as well as cases where there was another form of cooperation between the particular countries jurisdiction and the international community (hybrid tribunals). Further, countries with different cultural backgrounds and different causes of their conflicts shall be selected. As mentioned before, the face of wars has changed since the end of the cold war, also there have been important developments in the approaches to conflict resolution. Since the generalizations aim at that type of wars, only PCPB processes that took place after

⁷ A definition by Shadish, Cook and Campbell

⁸ Compare Gerring: 97-101 and Shadish, Cook and Campbell: 24/92

1990 will be analyzed. As part of the case studies a review of various kinds of literature and official documents such as treaties, resolutions or decisions will be conducted. Further, an expert interview with Dr. Shinichi Takeuchi, will help to assess the impact of the *ICTR*.⁹

3.2. Selection of Cases

Before making a selection, one needs to have an overview of all cases that fulfil the following selection criteria. First, an internal armed conflict must have taken place in the respective society.¹⁰ Second, the particular conflict resolution process must have taken place not earlier than 1990. Third, the concept of conflict resolution must involve some form of international or hybrid tribunal or special court addressing large-scale human-right violations of that conflict. Given these prerequisites, there are five possible cases to choose from.

The most prominent cases are probably the ad-hoc tribunals in Rwanda and the former Republic of Yugoslavia – the *ICTR* and the *ICTY*. Both of them have been created by a resolution of the *UN Security Council (SC)* what has been a novelty in international and humanitarian law. The tribunals were supposed to prosecute the atrocities committed against civilians, in particular the ethnic cleansings in Bosnia and Herzegovina and the genocide in Rwanda. In Sierra Leone, a hybrid national-international criminal court has been set up at the government's request to deal with the gravest violations of humanitarian and Sierra Leonean law committed on its territory since November 1996. In East-Timor the *United Nations Transitional Administration (UNTAET)* had the authority to exercise all legislative functions including the administration of justice. In regulation No. 2000/11, *UNTAET* laid down the organization of courts in East-Timor. Section 10 of that regulation gave the *Dili District Tribunal*, the exclusive jurisdiction to deal with serious criminal offences between January and October 1999 – a time where large-scale human rights violations were committed by militia and the Indonesian army. It were the *Special Panels for Serious Crimes (SPSC)* within this court that dealt with the crimes. Yet another model for a special court can be found in Cambodia, the *Extraordinary Chambers in the Court of Cambodia (ECCC)*. The court was created by the government and the *UN* but is formally independent of them, it shall investigate those most responsible for crimes and serious violations of international and Cambodian law between April 1975 and January 1979.

⁹ Dr. Shinichi Takeuchi is director of the African Studies Group at the of the *Institute of Developing Economics* in Tokyo. He has written extensively on Rwanda as well as on post-cold war Africa in general.

¹⁰ The author acknowledges that there is hardly a conflict free of external influence by third countries. In this paper, "internal conflicts" shall refer to conflicts that can be characterized as "new wars" in which violence was strategically used against civilians. For more information regarding "new wars" compare Heupel.

In this paper it will be possible to examine four cases. The *ICTY* will be included as it is the only European case available, and, its establishment marked a new era in international humanitarian law. The underlying cause for the conflict were ethnic tensions and the strive for independence that broke free after the collapse of the Soviet Union. Given its unique structure, which will increase the heterogeneity of the sample, the second choice is the *SCSL*. The underlying cause for this conflict in western Africa was a rebel movement of the Revolutionary United Front (*RUF*) that started in the late 80's. Also the *SPSC* in East-Timor has distinct features and should therefore be included in the sample of cases. It is a normal court with national judges but when it decides over certain crimes connected to human rights violations during the conflict, it comes together in a special composition of Timorese judges and foreign legal experts.

What remains to be done is to choose between the last two cases, the courts in Cambodia and Rwanda. The Rwandan court is an ad-hoc tribunal and its framework is similar to the one of the *ICTY* – it has been established only 18 months after it. The conflict had its origin in the ethnic tensions between Hutu and the Tutsi population that smouldered and broke free from time to time since Rwanda's independence in 1960. A composition of foreign and Cambodian judges works in the *ECCC* which were created by a Cambodian law after long negotiations between the *UNO* and government authorities have been held. Given the fact that the *ECCC*'s framework is different from all the other tribunals described above, they would enhance the diversity of our sample. However, another aspect speaks against including the *ECCC* in this research. The most important is, that they have only started their work recently which will considerably impede grounded statements on the implementation and particularly on the impact of the *ECCC*. This is aggravated by the fact that they are supposed to deal with crimes committed over 25 years ago. In this 25 years, not only have new atrocities and crimes be committed but also a huge variety of conflict resolution measures have been implemented, with varying and/or unclear outcome. Therefore, the fourth case to be included in the research will be the *ICTR*.

3.3. Procedures for Part I

There are no common schemes for assessing or evaluating the impact of conflict resolution and peace-building measures, in fact, the situation has been characterized as one of „*methodological anarchy*“ (compare Hoffman: 3). There are some general evaluation-tools from the field of development aid, however, they have limited validity as they can often not capture the complexity certain situation in peace-building contexts (compare *ibid.*: 12). Thus „*the challenge is to find the right balance between ,off the peg' tools that are too general and ,customised' tools that are too specific and make comparisons difficult*“ (Goodhand, J. cited in Hoffman: 12). The aim of this research is to develop an understanding of the

conditions under which tribunals are successful. For this purpose, the following approach shall be used:

The first step will be an analysis of the **aims and the framework of the tribunals**. This step correlates with an approach of a project called *Action Research Initiative*. In the first phase of evaluation, they address the following questions: What are the project goals? To whom do they matter and why? How will they be achieved?¹¹ The last question is particularly interesting – applied to this research it means to evaluate the structure of the tribunals. Examples therefore are the composition of domestic and international staff, the seat of the tribunal or the working language, or its funding mechanisms.

The next point to look at is the **preconditions** under which the tribunals were established. Post-conflict impact assessment must always be sensitive to the context in which it takes place, such as the stage of the conflict and its dynamics (compare Hoffman: 7). This context shall also be considered in the cases of this research. It will further be necessary to take a close look at the overall situation in which the tribunals were established. This includes the capacities of existing structures to back the establishment or work of the tribunal, and the perception of the tribunal within the conflict parties, the different groups in society, and possibly among other stakeholders that may have been relevant such as local, regional and national political actors. Finally, if there are any other salient issues that are likely to have affected the tribunals, they will be named as well.

Third, **the work of the tribunals** shall be described – in particular major obstacles and problems but also positive aspects. It will be described, how long it took to set up the tribunals and the reasons for possible delays, shortcomings or achievements. Information on the number of trials and judgements and on recognizable trends of the judgements (if any) will be provided. In short, all factors deemed important in regard to the research, shall be addressed. Single cases will only be described in detail if it seems necessary for the understanding of overall aspects.

The impact that tribunals had on reconciliation is of greatest importance. The underlying idea and the importance of reconciliation has already been described above. But how can the contribution of the examined tribunals to reconciliation be assessed? According to Ramsbotham, Woodhouse and Miall, reconciliation has four stages - those are described below.¹² The question to be asked here is thus, which of those stages has likely been influenced by the tribunals and how. In the body of literature on Retributive Justice and reconciliation, a variety of potential outcomes of international or hybrid tribunals is described.¹³ Below, those outcomes have each

¹¹ Compare Hoffman: 13-14

¹² More details on those pages can be found in Ramsbotham, Woodhouse, Miall: 231-245

¹³ The bullet points below on risks and possible benefits of retributive justice stem from IDEA: 98-107 and Theissen: 2-4. In both works, the findings of a number of other scholars were summarized.

been assigned to one stage of the reconciliation process that they may have influenced.

Stage 1: Ending the violence

In this stage, the conflict parties are supposed to accept the status quo *"at least to the point where a return to violence becomes unlikely"* because it is hardly possible to reconcile with an enemy who remains to be threat oneself. Tribunals could contribute to that stage by:

- Avoiding unbridled revenge by providing victims with a certain satisfaction;
- Breaking the cycle of impunity, thus preventing future human right abuses.

Tribunals could also have a negative impact on stage 1 if:

- They risk destabilizing a fragile peace;
- They provoke violent resistance from former combatants or the potential accused and their supporters.

Stage 2: Overcoming polarization

Ramsbotham, Woodhouse and Miall further describe that reconciliation is impossible as long as *"dehumanized images of the enemy are still current and mutual convictions of victimization are widely believed"*. It is one of the most often stated goals of tribunals to oppose such beliefs by:

- Individualizing guilt and accountability, thereby preventing entire population groups to be branded as inhuman villains.

Stage 3: Managing contradiction

This is a phase where the transformation of structural political and economic arrangements is aspired. It is obvious that tribunals will not directly induce such reforms, however, their work can still impact them in case they:

- Prevent return to power of perpetrators;
- Strengthen legitimacy and the process of democratization;¹⁴
- Increase awareness of human rights and humanitarian law.

On the flipside, they:

- May have crippling effects on governance which may hamper the overall process of PCPB

¹⁴ To make an extensive statement on a tribunal's impact on legitimacy and democratization is hardly possible, as this would go beyond the scope of this paper. Also, the connection between the rule of law and democracy is not undisputed, Mani does for example believe that they must not always be linked. For that reasons, the impact-assessment regarding democracy will be limited to points where the tribunal in question had an obvious effect on core values of democracy such as "inclusion, consensus building and accountability" (compare: Large/Sisk: 5).

Stage 4: Celebrating difference

The final stage implies a level of reconciliation where “*former enemies are reconciled to a point where differences are not only tolerated, but even appreciated*”. Ramsbotham, Woodhouse and Miall remark, that this stage is often not reached, it requires a transformation of identities which, if possible at all, takes many years to realize. No possible outcome of tribunals, described in the body of literature on reconciliation and Retributive Justice, can be linked to that stage. Therefore, this stage will not be considered in this paper.

Other aspects

In addition to the four stages above, there are some other aspects that may be of significance for this research. First, if they are any salient and important outcomes of the tribunals, even if they do not directly concern the reconciliation process of the society at hand, they shall be named. Second, it will be described whether the tribunals reached the goals they set themselves at the time of their establishment (if any). Assessing the political and symbolic value of an international criminal tribunal is, a difficult task, because its specific effect has to be separated from other measures such as the political evolution of a country. It gets even more difficult when assessing the deterrent effect of tribunals as one has to deal with the hypothetical case of what would have happened without the tribunal (compare Hazan: 27). Therefore each statement made on the impact of the tribunal (outcome observed) shall be linked to the way of working of the particular tribunals and possible alternative explanations will be taken into consideration. In how far this is possible greatly depends on the information available on the particular case. Generally, the literature and material available on the cases and accessible for the author was sufficient. In the case of Rwanda, both the interview with Dr. Takeuchi and a survey conducted by Longman back the statements made and thus enhance their validity. The availability of information on East Timor was less favourable. Although most scholars reviewed widely agreed in their assessment concerning the work of the SPSC the author could not find detailed information on certain aspects, including the funding of the process, the concrete impact of the outreach activities or the perception of the SPSC among certain groups.

3.4. Procedures for Part II

One way to assess the impact of the ICC on reconciliation, would be to examine its cases and apply similar criteria as those put up above for the tribunals. However, this would not be feasible. To analyze single cases of the ICC with a pattern similar to the one used for the tribunals would induce a massive workload whereas the result would be uncertain for various reasons. The fact that the ICC is a comparatively young institution makes it hard to assess its impact on a long-term process as reconciliation in post-conflict societies. Although the ICC has already

indicted persons connected to crimes in situation of several countries, no trials have been held so far. Further, it would be extremely difficult to build up linkages between single *ICC* cases and the process of reconciliation in the particular countries, also but not only because literature addressing this aspect is likely to be limited. Hence the approach used for assessing the potential of the *ICC* will be different – it aims at assessing the *potential* impact of the *ICC* on reconciliation.

First, the framework of the *ICC* will be analyzed and whereas the legal basis of the *ICC*, the *Rome Statute*, is obviously of great importance for this task, secondary literature on the *ICC* will be included in the analysis as well. The purpose of this analysis is to make a grounded statement on the *likeliness* that the *ICC* steers clear of the major problems and, on the other hand, makes use of the instruments and concepts that have had a positive impact when used as part of tribunals. For example one finding of Part I is that sufficient funding is a decisive factor for the impact of a tribunal. Hence, in Part II, the funding mechanisms for the *ICC* will be investigated by analyzing the *Rome Statute* and by referring to scholars that have written on that aspect. Thereafter it is possible to assess if the funding mechanisms of the *ICC* are likely to enable the court to contribute to reconciliation.

3.5. Procedures for Part III

In order to determine “best practices” the *ICC* to contribute to reconciliation, the first step is to review the measures or concepts that have been successful in the examined tribunals. Then, concrete actions will be identified, that could help the *ICC* to contribute to reconciliation in countries where it investigates crimes. If certain aspects of the *ICC* pose a problem it shall be named which part of the Court’s procedures, respectively its legal foundation would have to be changed in order to address these issues. The required support and the necessary changes may be very diverse, and so are the actors that can conduct, induce or support them. Hence when identifying appropriate actors to implement or induce such measures certain points must be taken into account. This includes the legal **competence** of actors. There are certain measures that can only be tackled by governmental actors such as changing or amending the legal framework of the *ICC*. Also the **capacities** of actors are important. A small NGO may not be appropriate to create a country-specific communication strategy for an international tribunal from the scratch up but it may be well suited to communicate the aims of the *ICC* to the local people. As the last example shows, the general or the situation-specific **experience** of an actor may be very important, too.

Part I: Case Studies and Generalizations

4. The International Criminal Tribunal for the Former Yugoslavia

4.1. Introduction, Aims and Structure

The *ICTY* was the first Tribunal established under Chapter VII of the UN Charter as a measure to maintain international peace and security. It bases on the *SC Resolution 827* passed in May 1993 and was the first international criminal court to enforce the existing body of international humanitarian law.¹⁵ The *ICTY* is an ad-hoc tribunal it was solely established to deal with certain offences committed on the territory of the former Yugoslavia since 1991. The *Statute of the International Criminal Tribunal for the Former Yugoslavia* sets down that the *ICTY* shall have the power to prosecute persons responsible for serious violations of international humanitarian law that are defined as: Grave breaches of the Geneva Convention of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5). Article 9 puts down that the Tribunal shall have primacy over national courts whereas Article 11 describes its organs, namely the chambers (three trial chambers and an appeals chamber), the prosecutor and a registry servicing both the chamber and the prosecutor. According to Articles 31 to 33, the Tribunal is located in The Hague, its expenses shall be covered by the regular *UN-Budget* and its working languages shall be English and French. The website of the *ICTY* further states the following aims of the Tribunal:

"In harmony with the purpose of its founding resolution, the ICTY's mission is fourfold:

- *to bring to justice persons allegedly responsible for serious violations of international humanitarian law*
- *to render justice to the victims*
- *to deter further crimes*
- *to contribute to the restoration of peace by holding accountable persons responsible for serious violations of international humanitarian law"*

(<http://www.un.org/icty/glance-e/index.htm>)

4.2. Preconditions

It is very hard to make a grounded statement on the exact stage of the conflict at the time the Tribunal was planned and established. This is because there were three wars on the former territory of Yugoslavia between 1991 and 2000, in which the three main conflict parties (Serbs, Bosnians and Croats) were involved. Although all of these wars are in many aspects interconnected, one can differentiate between

¹⁵ Compare: <http://www.un.org/icty/glance-e/index.htm>

the war in Croatia (1991 – 1995), the war in Bosnia (1992 – 1995) and the war in Kosovo (1999). In any case, when *Resolution 827* was adopted, and also when the Tribunal was established, the conflict in Yugoslavia was by no means settled - there was ongoing fighting and violence between the conflict parties. This also means that the capacities of the political, legal and societal structures and institutions that could have assisted the *ICTY* (such as criminal prosecution authorities) were very limited. Even more problematic, the willingness of an institution to cooperate with the Tribunal was dependent on the respective conflict party that controlled it but perception concerning the establishment of the *ICTY* was very different among the various stakeholders (compare Hôdzic: 4).

The Serbian political elite strongly rejected the establishment of the *ICTY* and put into question the competency of the *UNO* to create such a Tribunal at all. The government of Yugoslavia, which consisted mostly of Serbs, argued that war-crimes should be handled by national courts and under national laws. The Croats thought that the *ICTY* aimed at undermining the legitimacy of Croatia's war of independence and thus the foundations of the young state (compare Basic: 371). Therefore it is no surprise that systematic propaganda against the *ICTY* was spread by the media that was under control of the regimes of Slobodan Milosevic in Serbia and Franjo Tudjman in Croatia. As a result, the majority of both Serbs and Croats thought that the *ICTY* was biased, controlled by Washington and against their individual struggles (compare Hôdzic: 3). It was only the Bosnia's who were largely supporting the Tribunal, hoping for justice for crimes and atrocities committed during the conflict (compare Birdsall: 10-11). Regarding the International Community, most states expressed their support for the *ICTY*. Birdsall describes that: *"The majority of states were very supportive of the establishment of the court, stressing the need for the UN to act in the face of alleged violations of human rights in the territory of the former Yugoslavia"* (Birdsall: 8). Hôdzic draws a completely different picture, he describes that many states saw the *ICTY* as a fig leaf for not getting involved in the military conflict and that they *"did not believe that this court was going to ever indict anybody, let alone hold trials of those most senior in the political and military establishments in the region"* (Hôdzic: 4). No matter if Hôdzic is right or not, it is obvious that the *UN* member countries' "support" for the *ICTY* did not come at a high price as the costs for setting up the Tribunal should be covered by the regular *UN* budget.

4.3. Implementation and Work

"The struggle for the tribunal's legitimacy had to be fought on two fronts - in the region, in the countries of the former Yugoslavia and in the capitals of its international masters."

(Hôdzic: 4)

How did the *ICTY* take up its work under these conditions? The Tribunal, located in The Hague, was established soon after the SC resolution has been passed. This does, however, not mean that the first indictments were brought against the accused, let alone any sentences being passed short after. The first case of the *ICTY* was against Dusan Tadic who was indicted in February 1995 and first appeared before the court in April 1995. His first judgement was passed about two years later, and it was not before January 2000 that the appeals chamber finally sentenced him to a total of 20 years in prison. As the president of the local board of the *Serb Democratic Party in Kozarac* he has neither been a very high-ranking nor a very well known official – a characteristic feature of the first cases of the *ICTY*. One reason therefore is that most evidence has been available on low- and mid-level perpetrators another one may be that the Tribunal was hesitating or simply unable to prosecute the most high-ranking and well-known perpetrators such as Milosevic, Arkan and Seselj (compare Schrag: 3-4). Until today, the *ICTY* has indicted 161 persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia of which 55 proceedings are still ongoing. There are 106 concluded proceedings of which 5 have been acquitted, 11 people died before a judgement, 25 indictments were withdrawn, 14 have been referred to national jurisdiction and 51 have been sentenced.¹⁶ This data reveals one of the major problems of the Tribunal: Its slow working speed. The reasons therefore are diverse. First of all the *ICTY* has prescribed itself to the highest procedural standards and fairness what, important as it may be, leads to very complex cases. In the Tadic case, the prosecution and the defence together called 126 witnesses and presented 465 exhibits on 79 trial days.¹⁷ Besides that, the Tribunal had insufficient funds for its tasks although – or because – the costs should be covered by the regular UN budget. Schrag correctly remarks:

"There was little understanding, especially at first, at the UN about how expensive investigations and prosecutions are, especially in the midst of ongoing armed conflict. Even though the budget grew quickly, the OTP [Office of the Prosecutor] has been chronically underfunded."

(Schrag: 4)

Another problematic aspect concerning the funds of the Tribunal, at least in the first years after its establishment, was the short term funding plan. Funding was granted for periods sometimes as short as two months making long-term planning, especially regarding the engagement of new staff, very difficult (compare HRW 1998). Finally, there was a lack of cooperation and support from official institutions within *BiH* hindering an efficient work of the *ICTY* – this is especially true for the governments of Serbia and Croatia (compare Basic: 372). As a result, the *ICTY* had

¹⁶ Detailed information on all cases can be found on the website of the *ICTY*.

¹⁷ Compare *ICTY Case Information Sheet: Duško Tadi*
www.un.org/icty/cases-e/cis/tadic/cis-tadic.pdf

to build up judicial capacities, develop appropriate procedures, try to foster cooperation within *BiH* and ensure ongoing (financial) support from the international community. Being busy with those tasks, the *ICTY* failed to address one crucial aspect: To communicate its aims purpose and structure to the people in *BiH*.

"The ICTY did not invest a great deal of effort in communicating with its constituents in the former Yugoslavia during the first six years of its existence. It had no capacity to address them in the languages spoken in the region, leaving the information about the Tribunal reaching the audiences to be filtered by the media. The media largely controlled by the same regimes which saw the Tribunal as a great threat."

(Hôdzic: 4)

"At the local level, the work of the Tribunal was very distant to BiH citizens, in particular to those in the Republika Srpska. The Tribunal was mysterious and the subject of it was taboo. ... The primary source of information became the local political parties and the media. By providing insufficient or selective information, or presenting events in a way that benefited their interests, people in power influenced and shaped local images of the Tribunal. ... Therefore, instead of providing information about the rules, structures and even the kind of crimes for which one can be indicted by the Tribunal, the media focused on isolated events about the ICTY, reinforcing biases and misconceptions about its work in the mindsets of their target groups. ... if there was coverage of sentencing, the focus was on the length of punishment and not on the crimes for which the punishment was being delivered."

(Basic: 371)

Other parts of the Tribunal's strategy must also be criticized. Schrag writes that the coordination and training of investigative staff was not always sufficient and that *"the initial strategy of the ICTY not to target investigations at the most high-ranking and well-known perpetrators such as Milosevic, Arkan and Seselj may have undermined opportunities to win early public support, particularly in Bosnia"* (Schrag: 3). The strategy was understandable, as most evidence was available on low- and medium-ranking officials and also it was easier to prosecute them compared to high-ranking perpetrators. But it increased the number of cases and made the perception of the Tribunals work within the population of *BiH* worse than it was anyway due to the politically coloured media coverage. This perception proved to be very persistent even when the *ICTY* finally charged some well-known perpetrators.

The problems of the Tribunal, namely the slow working speed and the bad perception among the population of *BiH*, were also acknowledged by the *UN*. An expert group was established to evaluate the operation of the *ICTY* and the *ICTR* – its findings coincide with the statements made in this paper so far. Regarding the *ICTY*, the group has identified both reasons for pre-trial delays and prolonged trials, among them the limited number of judges and courtrooms, the large number of

motions raised by all parties and limited state cooperation (A/54/634: 18-30).¹⁸ Additionally, as noted before, there was hardly an understanding of the Tribunals work or aims among the population, and *"Government officials, international and local organizations and senior tribunal officials have criticized the damage caused by the lack of outreach"* (Mc Donald: 2). Later, efforts to communicate the purpose, structure, work and results to the peoples in *BiH* were undertaken, e.g. important documents and the website were being translated into local languages. However, it seems that those efforts have not been very fruitful. Pierre Hazan, describes the reasons for the rejection of the Tribunal more in detail and states that this was a reason why the *ICTY* *"never succeeded in asserting itself either during or immediately after the various periods of war, or even in the medium term, except in Bosnia"* (Hazan: 33).

4.4. Impact

Stage 1: Ending the violence

It is obvious that, the *ICTY* could not prevent unbridled revenge because most stakeholders had a rejecting attitude towards the *ICTY* and did not believe that its judgements would have any impact. This problem was aggravated by the circumstance that it took years before the first judgement was passed – years in which the conflict went on with atrocities committed by all conflict parties. Could the *ICTY* break the circle of impunity? It did for the 51 persons sentenced and probably also for some that were referred to national courts. This does, however not reflect the number of crimes committed, further the Tribunal was unable to prevent future human right abuses – both in *BiH* and elsewhere. Hôdzic correctly remarks that *"some of the most abhorrent atrocities of the war, including the genocide committed by the Serb forces in Srebrenica, took place after the Tribunal's establishment"* (Hôdzic: 3).

There are no clues that the Tribunal endangered a fragile peace. In the beginning there simply was no peace that could have been threatened by its existence and also later there are no indications that the *ICTY* has been a decisive factor for any conflict party's attitude towards peace-negotiations. The *ICTY* encountered resistance from the conflict's parties (e.g. a lack of cooperation) but this resistance never took a violent turn.¹⁹

Stage 2: Overcoming polarization

Did the *ICTY* individualize guilt and accountability? Hardly. First of all, the initial strategy not to prosecute the well-known perpetrators such as Milosevic and the slow working speed combined with the small number of cases are to blame for that.

¹⁸ The expert also group suggested actions to overcome the *ICTY's* problems – they are mostly procedural matters and will not be depicted here (for a detailed list of recommendations see A/54/634: 89 – 93).

¹⁹ A reason therefore is that the international community worked with a carrot and a stick, namely (financial) incentives and their military presence in the conflict region.

The media coverage aggravated the problem, it was not only biased but did also mainly concentrate on the sentence for the perpetrator and not on the crimes committed – let alone the suffering of the victims. Hôdzic describes how the popularity of the Tribunal was *"inversely proportionate to the number of those indicted coming from the ethnic community in question"* (Hôdzic: 4). The people cared for the number of accused from each ethnic group instead for the individual cases and crimes committed. It may therefore not surprise, that *"rather than being seen to bring individual accountability for the most serious crimes, the Court was inadvertently reinforcing collective ethnic divisions."* (Mc Donald: 2).

Stage 3: Managing contradiction

The *ICTY* could prevent that the sentenced perpetrators would come back to power – in some cases it was only because of the prosecution of the *ICTY* that perpetrators have been removed from office. However, the problem lies again with the relatively small number of sentences passed by the *ICTY* and the lack of a consistent prosecution strategy. It is very likely, that many crimes, similar to those sentenced in the beginning of the Tribunal, went unpunished, leaving victims to cope with their past and perpetrators remaining in office. In the literature used for this paper, no information could be found that the *ICTY* has considerably strengthened legitimacy or the process of democratization. It did obviously not foster inclusion or consensus building in the former Yugoslavia.

There are also no grounds to assume that the *ICTY* had crippling effects on governance for any of Yugoslavia's successor states. To a limited extent it may have increased the awareness for human rights and humanitarian law within *BiH* but it is not apparent that this contributed in any way to reconciliation. However, when it comes to the international level, the situation is different.

Other Aspects

One achievement of the *ICTY* is, that it drastically changed the international application of humanitarian law and the whole legal approach to humanitarian law. In his article, Birdsall investigates the consequences for the international legal system in detail.

"It can be argued that the ICTY is a norm entrepreneur, a means rather than an end in itself, making the enforcement of justice norms possible on an international basis. ...The protection of human rights is becoming increasingly recognised as constituting a responsibility of the international community as a whole if the state in question is unwilling or unable to protect its own people. ...The establishment of the ICTY constituted an important step towards the development of the permanent International Criminal Court (ICC) that was established through the Rome Statute in 1998."

(Birdsall: 20-22)

This aspect is definitely a merit of the *ICTY* – however it did unfortunately not have an effect on reconciliation process in *BiH*. Did the *ICTY* reach its individual goals? It did bring justice to persons allegedly responsible for serious violations of international humanitarian law – but only to a very small number of them. The *ICTY* rendered, at best, Justice to those victims directly involved with the trials e.g. as witnesses.²⁰ For the rest of the victims, this is very unlikely especially due to the media coverage of the cases which was biased and concentrated on the sentence for the perpetrator and the group he or she belonged to instead of the crimes committed let alone the suffering of the victims. As described above, the third goal (deterring further crimes) could not be reached at all.

The question if the fourth goal of the *ICTY* has been reached - *to contribute to the restoration of peace by holding accountable persons responsible for serious violations of international humanitarian law* – is pretty much the quintessence of this chapter. The answer is that this goal has not been reached, there was no significant contribution of the Tribunal to any of the three stages of reconciliation considered here. The *ICTY* was established under difficult preconditions – during an ongoing conflict, opposed by most conflict parties, and it had inadequate funding mechanisms. Therefore it may not surprise, that its work was difficult and slow – a problem aggravated by a bad communication of the *ICTY*'s aims to the people in *BiH* and by weaknesses of its prosecution strategy. Hazan mentioned the possibility of long-term impacts of the *ICTY* that cannot be estimated at this point:

"How far will the work of the ICTY help to pave the way for a consensus in ten or twenty years' time on the crimes committed in that region in the 1990s? If the ICTY proves to have been able to deter the denial of mass crimes and there are certain signs pointing in that direction, such as the fact that courts in Croatia, Serbia and Bosnia have tried their own war criminals, the Serbs' recognition of the Srebrenica massacres, and the apologies expressed by the authorities of the Republika Srpska then the work of international justice will have borne fruit."

(Hazan: 25)

Late fruits that would be indeed and probably this outcome could have been reached much better by a truth commission.

²⁰ To assist with the conviction of perpetrators may indeed help a victim to digest the horrors experienced. On the other hand there is the risk of "re-victimization" – especially if the accused is not found guilty.

5. The International Criminal Tribunal for Rwanda

5.1. Introduction, Aims and Structure

Like the *ICTY*, the *ICTR* has been set up by a resolution of the SC (Resolution 955; S/RES/955). It was established to prosecute persons responsible for serious violations of international humanitarian law (genocide, crimes against humanity, and others) committed in the territory of Rwanda between 1 January 1994 and 31 December 1994 (compare *Statute for the International Criminal Tribunal for Rwanda*: Article 1-5). The limited temporal jurisdiction differs the Tribunal from the *ICTY* that had no concrete end date. The *ICTR* may also deal with the prosecution of Rwandan citizens responsible for genocide and other violations of international law committed in the territory of neighbouring states during the same period (Article 7). The trial is seated in Arusha/Tanzania, its jurisdiction has (as the one of the *ICTY*) primacy over national jurisdiction and its working languages are English and French (Article 31). According to its website the purpose of the court is to "*contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region.*" Further goals of the *ICTR* concern the whole of Africa. It's alleged relevance for peace and justice on the continent is supposed to be reached by avoiding a repetition of genocide in Africa, evolving political and legal accountability especially in Africa, and creating and fostering awareness on international justice and humanitarian law in particular in Africa.²¹

5.2. Preconditions

In 1990 the conflict in Rwanda intensified when a rebel group named *Rwandan Patriotic Front (RPF)*, consisting mainly of Tutsis that lived in exile in Uganda, crossed the border to Rwanda in order to end the regime of President Habyarimana.²² In the following years, the *RPF* could not take the power in the country, neither could the government troops, although to a certain extent supported by third countries such as France, manage to defeat the rebels. After long negotiations, a peace agreement, the *Arusha Accord*, was signed in Tanzania in August 1993. This internationally monitored peace agreement should foster the establishment of power-sharing mechanisms in Rwanda but was unpopular especially among the Hutus.²³ Already during the early stages of conflict anti-Tutsi ideologies were massively used to aggravate the existing ethnic tensions and, as experts agree on, the genocide was planned and organized by the highest level of government (Webley: 5). On April 6th 1994 a plane that carried Rwanda's president Habyarimana as well as the Hutu president of Burundi was shot down whereas it is still unknown whether Tutsi forces or Hutu extremists are responsible for the attack.

²¹ For a more extensive description of the goals compare *ICTR Website*: <http://69.94.11.53/default.htm>

²² The armed wing of the *RPF* was the *Rwandan Patriotic Army*.

²³ For a detailed description of Rwandan history and important aspects of the development and the causes of conflict in Rwanda see Webley.

In any case it was the go-ahead for the genocide on the Tutsis in Rwanda that claimed around one million lives. Despite the genocide, the *RPF* was able to conquer Kigali in July and the government troops drew back and started to dissolve. Soon after, the *RPF* gained control of the whole country and installed a new government in August 1994. As a result millions of people, mainly Hutus, fled to neighbouring countries, fearing the retaliatory measures of the new government – a fear that was not unfounded.²⁴

What does this mean for the conflict's state at the time of the Tribunal's establishment? There was no more large scale fighting between the Hutus and Tutsis within Rwanda, but this was mainly due to the fact that the *RPF* has been victorious, (there was no official ceasefire let alone a peace agreement or a normalization of relationships between the parties). It may therefore not surprise that the tensions soon led to new violence and major violent conflicts (particularly the war in Congo), however, those were not carried out on Rwandan grounds. Regarding institutional capacities in Rwanda, it is not surprising that many of them were virtually non-existent in the aftermath of the long-year internal conflict. There was no functioning court system and no police force of any form that could have implemented arrest warrants from the *ICTR* or any other institution (Vandeginste: 264). Judicial experts were more than rare. Only 26 judges and 14 prosecutors, of which only three have had a formal judicial education, had survived the civil war (Stempel: 43). The government itself however was, under the given circumstances, still in acceptable working order as many of the moderate Hutus kept their posts in the new government.

Interesting is, that it was the new government that asked the *UNO* to establish an international tribunal. This is understandable as the government consisted of Tutsis and moderate Hutus which have both been the target of the genocide. However, the attitude of the government changed when details about the Tribunal's framework became public. The official reason was that the government wanted the *ICTR* to have the death penalty that was in their eyes the only adequate punishment for many of the committed atrocities. But the fact that also crimes committed after July 1994 should be punishable, has most likely also played an important role – this period included the time where soldiers of the *RPF* have seriously violated humanitarian law in Rwanda (compare: S/1994/1405). There was not much of a reaction from the Hutu high-ranking militaries that bore great responsibility for the genocide. One reason therefore may be that they did not consider the *ICTR* as a big threat, they had fled Rwanda and lived, often undercover, in neighbouring countries and thus felt safe from its grasp. Regarding the common people in Rwanda (regardless of their ethnicity) there was neither support nor disapproval for the

²⁴ Soldiers of the *RPF* have, according to a *UN-Experts* commission considerably violated humanitarian law in the aftermath of the genocide (compare: S/1994/1405).

ICTR at the time of its establishment. According to Dr. Takeuchi, people knew that some international court was about to be set up but they did not know any details about it such as its purpose, aims or structure.

5.3. Implementation and Work

In the time after the *ICTR*'s establishment there was an "*atmosphere of general hostility to the U.N.*" which was the result of the failure to stop the genocide.²⁵ Also, there was a lack of cooperation with and support from the Rwandan government and of third countries such as Kenya, Cameroon and Nairobi what was very problematic since many perpetrators found shelter in those countries (Magnarella: 51). Similar as with the *ICTY*, the tensions with the Rwandan authorities led to a bad media coverage of the *ICTR* and in turn to a declining reputation of the tribunal among Rwandans.²⁶ The tension between the *ICTR* and the Rwandan government continued to exist until 1997 before they gradually began to reduce. This was due to the fact that the Office of the Prosecutor had improved its contact with Rwandan officials and also because the *ICTR* gained proficiency and was able to overcome some of its most severe problems (Compare A/54/315: 23-28). In the beginning, one of the main obstacles for the *ICTR* was the lack of human resources, especially judges and lawyers. Many Rwandan lawyers were direct or indirect victims of the genocide, others have even participated in it and of the few remaining, many refused to represent persons suspected to have committed in the genocide. It was also hard to find qualified international judges willing to take the task and recruitment was further delayed because of complicated bureaucratic procedures within the UN administration. The *ICTR* was mainly sustained by voluntary contributions of the UN member states, and encountered similar problems as the *ICTY* when trying to ensure a steady availability of funds. The 1996 annual report of the *ICTR* to the General Assembly states that "*the effectiveness of the Tribunal had been affected by the short-term funding and lack of a proper infrastructure in the offices at both Arusha and Kigali*" (A/52/582).

Investigations were difficult because the court was located outside of Rwanda and many of the suspects resided or hid in neighbouring countries. Until 1996 there was no courtroom facility or a detention centre (Magnarella: 52). Under these circumstances, it was not before January 1997 when the first trial started, and, roughly about two years after of the *ICTR*'s establishment in September 1998, the sentence of that case²⁷ was finally handed down. Until today the *ICTR* has completed 27 cases, six persons are awaiting their trials, six other ones are on

²⁵ Website of Human Rights Watch:

http://www.hrw.org/reports/1999/rwanda/Geno15-8-05.htm#P1081_336018

²⁶ As the seat of the *ICTR* was in Arusha Rwandan newspapers could for example not provide regular coverage of the process due to budget restraints (compare Graybill: 202).

²⁷ The case of Jean Paul Akayesu, a former mayor that was found guilty to have allowed rape and torture of mainly Tutsi women under his authority.

appeal, 29 cases are in progress and one case has been referred to national jurisdiction. Among the 27 completed cases, five detainees have been acquitted. It must be noticed, that in the majority of cases, the accused were rather senior ranking persons (such as former ministers, military officers, political or military leaders) that bore great responsibility in the planning and coordination of the genocide. On the other hand, the *ICTR* has been criticized for not prosecuting members of the *Rwandan Patriotic Army* due to opposition of the incumbent government (compare Zorbas: 32/33).

Whereas the atmosphere between the *ICTR* and the Rwandan as well as other African governments developed positively²⁸ in the course of time, the perception of the *ICTR* among common people did hardly improve. One reason was that the *ICTR* did only in very few cases prosecute those that were "only" responsible for carrying out the genocide. Those were however the persons that the common people connected most strongly with the genocide as they were the ones who actually committed the violence. Now, the *ICTR* cannot really be blamed for that. There have been more than 100.000 persons suspected of being involved in the genocide and the statute of the *ICTR* did not provide further criteria who was to prosecute than those laid out in point 5.1. – any attempt to bring to court more than the "masterminds" of the genocide would have been doomed to failure. But the *ICTR* has largely disregarded the importance of communicating its aims and capacities to the people through an adequate outreach program. This is backed by a survey undertaken in 2002.²⁹ Asked if the tribunal has worked well (question 1) or if the information on the tribunal was reliable (question 2), many people questioned in the survey were not informed (37,7% (1)/38.6% (2)). Among the people considering themselves to be informed, the reputation of the *ICTR* was not too bad – 29,2% agreed or strongly agreed on question 1 whereas only 16,3% disagreed or strongly disagreed. Further it is likely that some of those who assessed the *ICTR* negatively, were affected by the government's propaganda at the time of the tribunal's establishment.

In a nutshell, the *ICTR* can be criticized for similar points as the *ICTY* in particular its lack of efficiency, its slow working speed and its limited number of cases. Further, the criticism of not prosecuting members of the *Rwandan Patriotic Army* is not unjustified, however, one must notice that those crimes were committed on a much smaller scale (compare Zorbas: 32). Despite the fact that only few *RPF* members were brought to court, many authors agree that "*the ICTR has managed to arrest the core of those responsible for the 1994 genocide, making the Rwandan genocide the most punished genocide of the 20th century.*" (Kimonyo/Twagiramungu/Kayumba: xviii – xix). Unfortunately, the potential this

²⁸ Compare Akhavan: 26

²⁹ Compare Longman: 207-225.

may have had on reconciliation in Rwanda has not been realized fully, as the following paragraphs will show.

5.4. Impact

Stage 1: Ending the violence

The situation in Rwanda was different to the one of former Yugoslavia. Many of the extremist Hutus responsible for the genocide had fled Rwanda after their defeat and lived in neighbouring countries – with the result that the major fights were over. As indicated above, soldiers of the *RPF* have committed atrocities in the aftermath of the genocide, but Akhavan writes that what the “*policy of accountability, aimed at discrediting the Hutu extremists, has also restrained the extend of anti-Hutu vengeance killings*” (Akhavan: 23). With “policy of accountability” he does refer to all measures of post-conflict justice in Rwanda, including national courts and the Gacaca tribunals. Akhavan beliefs that also the *ICTR* has played an important role in preventing unbridled revenge this must, however, be doubted. First, most people didn’t know a great deal about the Tribunal, and those inappropriately informed often had a negative attitude towards it. Second, as Akhavan writes himself, although there was no more large-scale violence in Rwanda, the conflict between the parties was carried out with undiminished brutality in other countries where new human rights abuses were reported (ibid.). As this violence was at least partly because of the still existing tensions between the conflict parties, it must be considered that if the *ICTR* would have been perceived more positively, people may have chosen another way than violence to settle their dispute. Also, the tribunal could not provide many victims with a certain satisfaction, because people were not properly informed on the tribunal and it was not only its location in Arusha that made it distant to the people.³⁰

“The involvement of the victims in the judicial process is almost completely lacking, and the possibility of victims obtaining reparation or compensation through the ICTR is nonexistent.”

(Vandeginste: 260)

Regarding the two indicators for a possible negative influence of the Tribunal on stage 1, there are no hints that it risked the efforts for peace in Rwanda and in spite of the general disapproval against the tribunal in the public, there was no violence which had a cause that can be ascribed to the *ICTR*’s work.

Stage 2: Overcoming polarization

On first sight, there are three reasons why the Tribunal could not significantly individualize guilt and accountability, thereby helping to overcome polarization. First, it took a long time until final judgements against perpetrators could be passed

³⁰ The working style of many *ICTR* investigators was not in line with the culture and habits of the Rwandan people; compare Biggar: 261

which can partly be explained by the preconditions under which the Tribunal was established. Nevertheless this poses a big problem to the victims who feel that justice has to be done fast. Second there is the limited number of cases the *ICTR* handled. Third, the Tribunal concentrated on senior-level officials but those were not persons integrated in the communities where reconciliation must take place. Individualizing guilt and accountability at the community level was mainly done by the *Gacaca tribunals*. This has likely impaired the *ICTR*'s ability to individualize guilt and accountability but on the other hand it was most likely the only feasible way to handle the large number of cases. Further, the *ICTR* was probably the appropriate forum to address the "big cases". As indicated above, the main problem was rather that nobody told the people at the community level why the cases were lengthy, why their number was limited, why the *ICTR* did mainly pursue senior-level officials or about the outcome of the cases. Besides some exceptions, "*the ICTR has been quite successful in making the alleged masterminds of the genocide account for their deeds*" (Van den Herik: 263). If people would have been informed, they may have assessed the work of the *ICTR* differently and it could thus have made a much bigger contribution to reconciliation. However, the way things went, it could not do so in the eyes of many Rwandans. Asked for how much contribution the *ICTR* would make towards reconciliation, 28,1% were not informed (which backs the thoughts made above), 23% said it would make no contribution, 9,9% answered with "limited contribution", 17,7% believed the tribunal would make a modest contribution, 15,5% saw a significant contribution and merely 5,7% a very significant contribution (compare Longman: 222). Hence, one cannot say that the *ICTR* made no difference but it could have been much better as well.

Stage 3: Managing contradiction

The *ICTR* has prevented the return to power of perpetrators, at least of those that played an important role in the genocide and some perpetrators have been removed from office because of the tribunal's trials. Besides their small number it is, however, not unlikely, that this would also have happened without the tribunal. As Dr. Takeuchi has pointed out, the government in Rwanda was very sensitive to the issue of officials who have possibly played their part in the genocide and even the popular and high-ranking members must answer to the public on their past, usually in the *Gacaca* tribunals.³¹ The above can also be said regarding crippling effects on governance – the effect without the Tribunal would most likely not have been very different from the actual one. Further, many officials responsible for the genocide fled the country anyway when the war drew close to an end.

According to Dr. Takeuchi, there are nevertheless some indicators that the *ICTR* has helped with strengthening legitimacy in Rwanda, especially in regard to the built-up

³¹ Even the Rwandan Defence Minister had to appear before a *Gacaca* tribunal in 1995.

of adequate institutions. A functioning court system is one example and already today, Rwandan courts can independently judge criminals and will be able to do so after the *ICTR* has finished its work in 2008. It is difficult to attribute this circumstance to the *ICTR* considering the diverse efforts of peace-building in Rwanda. However, some sort of pressure that came from the *ICTR* was important for the process even if the Tribunal was located in Tanzania. Dr. Takeuchi mentioned a concrete merit that can in his opinion be attributed to the *ICTR*: In 2007 the death penalty was abolished in Rwanda although in the beginning of the *PCPB* process, there was the claim that only the death penalty could be an adequate punishment for the gravest crimes. It is not easy to tell the impact of the Tribunal in other areas such as democratization but it must be clear that with its limited outreach the *ICTR* could never have had the same effect on inclusion, consensus building and accountability as the other forms of justice in Rwanda.

It is not apparent that the *ICTR* did considerably increase the awareness of human rights and humanitarian law – at least among common Rwandans. Again, it is mainly the lack of an outreach program that must be blamed for that. Among Rwandan politicians and military leaders, the presence of an international judicial body may have signalled the importance of human rights and that impunity for the most serious crimes would not be tolerated by the international community. However, this aspect was more of a symbolic nature – also given the limited temporal jurisdiction of the *ICTR*.

Other aspects

The same can be said for the rest of Africa – a continent where in many cases human rights have massively been violated without having to fear to be brought to account for this by any domestic or international authority. Obviously the *ICTR* was not a direct threat to any person violating human rights in Africa due to its limited jurisdiction. But it did send out a message, which was that nobody would be able to expect impunity for massive human rights violations even if the domestic jurisdiction in which they were committed was unable or unwilling to prosecute them. Dr. Takeuchi pointed out that this deterrent effect was more likely to be achieved among high-ranking officials, as common people in Africa would usually not know any details about the *ICTR*.

At this point, we will come back to the individual goals of the *ICTR*. Did the tribunal contribute to “*the process of national reconciliation in Rwanda and to the maintenance of peace in the region*”? As described above, it did, however, only to a very limited extend. Many problems encountered were similar to those of the *ICTY* although the *ICTR* was established under better preconditions than the *ICTY*. What surprises is, that impact on reconciliation was not necessarily restricted due to the disability of the court to prosecute those responsible for the genocide and prevent their return to power. Besides some problems that have rather been located in its

framework, such as its funding mechanisms, it seems as if major shortcomings of the *ICTR* could have been overcome with comparatively easy means. A proper outreach program, informing Rwandans on the aims, structure and outcome of the *ICTR*, and other measures bringing the tribunal closer to the people³² may have been the key to success. The other aims of the *ICTR*, listed on its website, are very ambitious and one can indeed ask the question whether it was wise to state them in the first place. Darfur is only the most current example, that the Tribunal could not prevent a repetition of genocide in Africa. Also it must be strongly doubted if the *ICTR* had any concrete impact on the evolution of political and legal accountability in Africa, let alone elsewhere. However, as the *ICTY* the *ICTR* has had an impact on the development of international justice and humanitarian law. Vandeginste remarks that *"although the number of completed trials remains worryingly limited, from the perspective of international criminal law and international human rights law, these achievements are remarkable"* (Vandeginste: 260). Van den Herik elaborates more in detail on the meaning of the *ICTR* on the development of public international law and other international law issues connected to the court (compare: Van den Herik: 264-282). However, important as this may be from an international point of view, it helped little with reconciliation in Rwanda.

³² E.g. by establishing some representation such as an ombudsman or a communication office in Kigali.

6. The Special Court for Sierra Leone

6.1. Introduction, Aims and Structure

In March 1991, the *Revolutionary United Forces (RUF)*, that was located in Liberia at that time, attacked Sierra Leone. Many see the *RUF* as a criminal rather than a political organization, it sustained itself mainly by the trade of the so called "blood diamonds" and did not have elaborated political aims. Especially from 1996 on, the *RUF* led a war on terror on civilians in Sierra Leone, sometimes in alliance with the *Armed Forces Revolutionary Council (AFRC)* (compare Dougherty 2004/2: 315). The violence reached its peak in 1999 but continued to be present during the whole duration of the conflict. Among the atrocities committed were systematic and widespread use of amputations, rape and arson, and particularly the *RUF* forced a large number of children into its fighting force. However, also the governments *Civilian Defence Forces (CDF)* committed atrocities, albeit on a smaller scale. After an incident in which *UN* peacekeepers had been attacked and taken hostage, Sierra Leone was in the centre of attention. Finally the international community recognized the need for some instrument of justice to address the atrocities committed in the country. However, the *ICTY* and the *ICTR* consumed large amounts of the regular *UN* Budget and the member states of the *SC*, were not ready to establish a further court with the same framework, in particular the same funding system. Instead, they gave preference to a funding system based only on voluntary contributions. The *UN Secretariat* objected and pointed out that a system of voluntary funding would not be feasible for practical and moral reasons. There were also other areas of disagreement between the *SC* and *Secretariat*, e.g. the jurisdiction and the number of chambers of the court (Compare Dougherty 2004/2: 319/320). In the end, it was the *SC* that got its way on most issues, which resulted in a new kind of international tribunal.

The *Special Court for Sierra Leone (SCSL)* was not established by a *SC* resolution but by an agreement between the government of Sierra Leone and the *UNO*, put into power on January 16th 2002. Thereby, the court was established outside of the regular *UN* system and could for example not make use of the *UN* charter chapter VII enforcement mechanisms as the *ICTY* or the *ICTR* (e.g. when trying to arrest perpetrators in third countries). On the other hand, not being bound to *UN* procedures, the *SCSL* enjoyed more flexibility for example regarding the recruitment of personnel (Perriello/Wierda: 44). The Court's permanent seat is Freetown/Sierra Leone, its working language is English. It has the power "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace

process in Sierra Leone" (Article 1).³³ The Court's jurisdiction applies to crimes against humanity and other serious violations of international humanitarian law (Articles 2 and 4), certain violations of the Geneva Conventions (Article 3), and certain crimes under Sierra Leonean law (Article 5). The SCSL has primacy over national courts and may only impose imprisonment but not death penalty (Articles 8 and 19). The trial chamber is composed of two international and one national judge, the appeal chamber of three international and two national judges. Those judges are appointed by the UNO respectively the Sierra Leonean government. As mentioned before the Court is not funded by the regular UN budget, it relies on voluntary contributions from states to fund its work.³⁴ The purpose or the aims of the SCSL are not explicitly stated in the statute, however the then General Secretary Kofi Annan identified four goals for the SCSL: to establish a credible system of justice and accountability, end impunity, contribute to national reconciliation, and help restore and maintain peace (compare Dougherty 2004/2: 316).

6.2. Preconditions

Throughout the war in Sierra Leone various attempts to establish a lasting peace agreement have been made, for example the *Lomé Peace Accord* of 1999. However, those agreements did not last and were largely ignored by the conflict parties. It was the *Peace Agreement of Abuja*, signed in May 2001, that should change the situation. As part of it a *Disarmament, Demobilization and Reintegration* program was implemented and began to show some impact. The government was able to re-establish control in all parts of the country and the civil war has been declared over in January 2002. In May 2002, only one year after the *Peace Agreement of Abuja*, elections were held, that brought a significant victory for the incumbent President Kabbah and left the political wing of the RUF without a single seat in parliament. The election had some irregularities but those did not significantly influence the outcome which is why the elections can, considering to the circumstances, be characterized as fair and representative. Unlike in Rwanda, where the violence only stopped because the RPF won and many Hutus left the country, the efforts for reconciliation in Sierra Leone seem to have a better basis. At the time the SCSL was established, the conflict in Sierra Leone was settled and the country was about to begin the lengthy process of structural and cultural peace building (compare Ramsbotham, Woodhouse Miall: 12).

³³ *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.*

³⁴ The United States, the Netherlands, Canada and Britain have provided approximately 80% of the voluntary contributions by states to the Special Court. Its average annual budget was only about 25 million US\$. For more information on funding of the court see: http://www.humanrightsfirst.org/international_justice/w_context/w_cont_04.htm

Another positive aspect was that the government controlled the whole country and was thus, able to help the *SLSC* with its tasks, in particular with the arrestment of suspected perpetrators – if they were on Sierra Leonean ground. Originally the government had only asked the international community to assist in conducting *RUF* trials but later it showed willingness to cede jurisdiction to the *SCSL*, provided considerable assistance to the court and integrated its statute into domestic law (Periello/Wierda: 13). The perception of the court in the public was less positive. At the time of the courts establishment there has been a high awareness of the *Truth and Reconciliation Commission (TRC)* that had a high reputation among Sierra Leonean and was much less divisive and controversial than the *SCSL*. In particular actors of the civil society were worried that the very narrow mandate of the court would result in impunity for the vast majority of perpetrators (ibid.). For the same reason, many people thought that "*the court was a waste of money and that money should instead be invested in the Truth and Reconciliation Commission*" (Keppler 2004: 37). The fact that the court would also prosecute members of the *CDF*, in which many people saw rather war heroes than criminals, provoked rejection of the court.³⁵ The Sierra Leonean elites, feared that the court may disrupt the efforts for peace and the *TRC* was seen as a more appropriate way to address difficult past. Large parts of the military saw the court as an instrument of US foreign policy. The reason therefore is that the USA were by far the largest donor for the Court's funds and that the chief prosecutor was an US citizen.

6.3. Implementation and Work

The ongoing discrepancies between the *SC* and the *UN* Secretariat regarding the framework of the court lead to considerable delays - one reason why the first trial of the *SCSL* could not start before March 2005 – the sentence was handed down in June 2007.³⁶ The accused, three senior members of the *AFRC*, were found guilty of war crimes including terrorism, murder, pillage, rape and a number of other crimes. They were sentenced to prison between 45 and 50 years. Shortly after, in August 2007, sentences for two former, very high-ranking members of the *CDF* were passed. Moinina Fofana and Allieu Kondewa were found guilty of several war crimes and sentenced to six respectively eight years of prison.³⁷ Altogether, only 12 persons have been accused by the *SCSL*, almost all of them high-ranking members of the *RUF*, the *CDF* and the *AFRC*.³⁸ This small number of cases has various reasons. First, the statute of the court stated to prosecute "*those who bear the greatest responsibility*", a juristic term that strongly limits the circle of potentially

³⁵ In particular the charge against Hinga Norman was highly controversial; compare Schabas: 1092

³⁶ Also, the physical infrastructure had to be built and personnel had to be recruited

³⁷ Comprehensive information on trials of all tribunals examined in this paper can be found on the website of *Trial Watch*: <http://www.trial-ch.org/en/trial-watch.html>

³⁸ Among the accused was also Charles Taylor, the former president of Liberia and strong supporter of the *RUF*.

accusable persons. The term was heavily disputed by the *UN Secretariat* that strived for a more inclusive formulation but in the end SC asserted itself against the Secretariat. However, there were also other aspects that forbid a larger number of cases. The budgetary constraints were high and much pressure was put on the Court to finish its work in a very short time period (its originally projected lifespan was only three years). In order to secure funding, capacities of the SCSL were bound, reducing the availability of staff for other areas. The funding mechanisms also implied planning insecurities for the court (compare Schabas: 1088 and Dougherty 2004/1: 5-6). The small number of cases also gave rise to the claim that the court was only deliberately choosing persons easy to prosecute, shielding other, high-ranking suspects such as Charles Taylor.³⁹ On the other hand, some people argue that the courts funding mechanisms kept the budget low and built pressure to work swiftly and efficiently (compare Periello/Wierda: 31). This statement may seem strange as the "cost per indictee" were even higher than those of the *ICTY* or the *ICTR*. However, one must take into consideration, that the court had to be build up from the scratch, including basic infrastructure such as a court building and detention facilities. Keppler describes the SCSL three years after its establishment as "*a highly functional operation*" and points out that the court makes "*significant strides towards bringing justice for atrocities that were committed during the Sierra Leonean armed conflict*" (Keppler 2005: 2/3). Dougherty has undertaken a critical review of the work SCSL's work and summarizes:

"Despite its miserly funding, the SCSL has been impressive in its first two years of operation. It has moved at a much swifter pace than its ad hoc predecessors... The SCSL targeted all groups in the fighting, strengthening its credibility and reinforcing the notion that no one is above the law. Vincent [first registrar of the court] has been tireless in his efforts to keep the SCSL running on a shoestring, and Crane [chief prosecutor] developed a clear prosecutorial strategy that allowed the court to move from investigations to indictments to trials in swift succession. ... The SCSL has broken new ground in several areas, both with respect to the structure of international criminal justice institutions and the definition of international crimes."

(Dougherty 2004/1: 17/18)

However, in the context of this paper it is particularly important how the people of Sierra Leone perceived the work of the court. After two or three years of operation, public concerns about the narrow mandate of the court and the small number of cases were remaining but in general the reputation of the SCSL rose considerably. "*People's perceptions shifted over time toward a sense that the court is a 'good thing'*" particularly among the civil society groups that can have a multiplication effect in the society and play an important role in peace-building and

³⁹ Those claims could however not be backed by the literature. Also the perception that the court was protecting high-ranking politicians changed rapidly after the arrest of Charles Taylor.

reconciliation.⁴⁰ The change of attitudes must mainly be attributed to the impressive outreach program of the *SCSL*. Right after the establishment, there was the danger that an adequate outreach program would fall victim to the strictly limited budget of the court. Creating an effective outreach program was an enormous challenge given the largely rural-based population and the high rates of illiteracy in Sierra Leone, nevertheless, "*The Special Court for Sierra Leone boasts the strongest outreach program of any tribunal to date*" (Perriello/Wierda: 35). Why was the program so successful? The head of the outreach program was a Sierra Leonean as well as the vast majority of his staff, many of them experienced in working with people. This was important as there are many different groups within Sierra Leone that often have distinctive cultural features and their own language. In the beginning of the program, large town-hall meetings were held countrywide in which the mandate of the court was explained and upcoming questions of the people were answered (compare Keppler 2004: 33). During these meetings and on other occasions, the court used materials such as explanatory booklets or posters to address the largely illiterate population. Later, the court made use of the local radio stations to spread news about the court and the trials on a weekly basis. "Train the trainers" seminars were also part of the outreach program and considered to be a great success. There was a critical point when the program almost had to be stopped due to a lack of funds of the court, luckily, the EU stepped in and helped out with money to continue the program. Besides the outreach program, the *SCSL*'s composition of staff (local as well as international) and particularly its location in Freetown made the court more accessible to the people (compare Keppler 2004: 32). The relationship between the court and the local press was also good, there was a lot of coverage which is why the court entered public debate.⁴¹

After the arrest of Charles Taylor in 2007, the reputation of the court got another boost. Until then, many people had been upset as four of the most high-ranking accused were long unavailable for trial – two of them died before the trial whereas two others, including Charles Taylor, had not been arrested. Inside of Sierra Leone, arresting suspects proved to be no problem. Although the Sierra Leonean government kept careful distance in certain aspects of cooperating with the court, it supported the *SCSL* in many crucial matters such as executing warrants of arrest.⁴² However, Charles Taylor could not be arrested as he stayed outside of Sierra Leone and thus outside of the court's jurisdiction. Unlike the *ICTY* and the *ICTR*, the court was not granted any enforcement powers under chapter VII of the *UN Charter* which meant that no country could be forced to extradite accused persons to the *SCSL*.

⁴⁰ Website of Human Rights Watch: <http://www.hrw.org/reports/2004/sierraleone0904/8.htm>; compare also Keppler 2004: 39.

⁴¹ Situation was different in very rural areas, where the court was not in public discussion and sometimes even largely unknown; compare Keppler 2004: 34.

⁴² For more information on the cooperation between the government and the court compare Keppler 2004.

Hence, Taylor was able to live in political asylum in Nigeria for several years until strong political and diplomatic pressure was exercised on the Nigerian government, in particular by the US.⁴³ Another concern both among Sierra Leonean and internationals was that the *SCSL*'s and the *TRC*'s work would interfere with each other and many people tended to support either the one or the other institution. However, Schabas, who reviewed the co-existence of the *TRC* and the court in detail, found out that the problems between the two institutions were rather minor and located in areas such as the competition for recruiting qualified personnel. He further pointed out that the fact that many Sierra Leonean did not know the exact difference between the two institutions is understandable, given the complexity of their relationship, and the institutions' mission should be considered as accomplished if *"average Sierra Leonean now understand that there are two institutions working towards accountability for the atrocity and victimization that they suffered"* (Schabas: 1099).

In short, one must say that the court worked very well under the given preconditions. Although a couple of scholars see some advantages in the limited budget of the *SCSL*, many difficulties encountered can be traced back to the funding mechanisms and the planning insecurities connected to them. Also the small number of cases can be linked to the small initial budget that required a clear strategy who was to prosecute and how. It is, however, not said that fewer cases meant less impact on the process of reconciliation as we can see below.

6.4. Impact

Stage 1: Ending the violence

The *SCSL* came into power when the civil war was officially declared over and no more fighting was going on between the conflict parties. The government was in control of all areas in the country and the successful elections held in May 2002 were a sign that the Sierra Leonean wanted to build up their future in peaceful way. There were no indications that violence between former victims and perpetrators may break out so the court did never threaten to destabilize the peace process. In a way, this also implies that the *SCSL* did not prevent unbridled revenge – people in Sierra Leone had experienced more than enough violence and sought other ways for achieving justice.

The Court increasingly provided victims with a certain satisfaction, as time went on. In the beginning people were rather sceptical of the *SCSL* as they felt that it may disrupt the efforts of the *TRC*, that its framework was inadequate or that the court was too distinct from Sierra Leonean. Later, when the outreach program showed impact, people realized that the *SCSL* was an important instrument of transitional

⁴³ Although people welcomed the arrest of Charles Taylor, some people still see the court dependent on the US and thus as a biased and distant institution. Compare also Perriello/Wierda: 2.

justice. The court gained much credibility after the arrest of Charles Taylor in 2006, although many people criticize that his trial, which is probably the most important one in the history of the court, will, for security reasons, not take place in Sierra Leone but in The Hague. It cannot be assessed here if the risk to hold the Taylor trial in Freetown would be too high, but in the past the Court has handled the critical case of Hinga Norman, without provoking violent resistance among his supporters.⁴⁴

The question whether the court prevented human rights abuses by breaking the circle of impunity is a difficult one. By accusing and sentencing high-ranking officials from all conflict parties, the court made clear that human right violations would not be tolerated. However, inside of Sierra Leone the risk that the sentenced may have committed new violations of human rights was comparatively low, given the fact that the conflict was settled. On the other hand, charging Charles Taylor, may have prevented future human rights abuses – it was due to pressure of the international community that Taylor had to resign from office in August 2003, and it is possible that he would have committed further human right violations on a great scale otherwise.

Stage 2: Overcoming polarization

The underlying causes for the civil war in Sierra Leone were not so much ethnic tensions but rather the struggle for power and control over the diamond mines. Therefore it were no delineated population groups fighting against each other but members of the rebel (*RUF/AFRC*) or the government (*CDF*) forces whereas civilians were often abused for their purposes by all parties. Further, especially the *RUF* and the *AFRC* forced many combatants including children to fight, and fighters were often drugged during the battles. Hence there were no population groups branded as inhuman but rather members of the particular fighting forces. The *SCSL* had neither the capacities nor the mandate to target enough perpetrators to individualize guilt – among the *RUF* and the *AFRC* this would have probably meant to accuse the large majority of their members. By charging all groups' masterminds most responsible for the atrocities committed, the court set an important sign, however it did not individualize guilt – this was rather in the responsibility of the *TRC*.

Stage 3: Managing contradiction

The *SCSL* charged high-ranking perpetrators of all conflict parties, including the three highest leaders of the *CDF*, Moinina Fofana, Allieu Kondewa and Hinga Norman (the later died before the end of the trial). They were still in office at the time of their arrestment and accused perpetrators of the *RUF* or the *AFRC* could have gotten into back into power some day as well – also because old command

⁴⁴ Norman died before the indictment on February 22nd 2007.

chains were often still existent. Yet, the Taylor case is probably the most impressive example that the *SCSL* prevented perpetrators to return to power, respectively to remain in power up to positions as high as a head of state.⁴⁵

The strategy of charging high-ranking officials, including the head of state of another country has also enhanced political accountability within Sierra Leone and, to a certain extend, in other countries, however, it would be too much to say that this has contributed do democratization in Sierra Leone or elsewhere. Thanks to the very good outreach program, the *SCSL* has very likely increased the awareness of human rights and humanitarian law among Sierra Leonean. People could see that violations of human rights are addressed and that even high-ranking perpetrators cannot allow themselves to be lulled into a false sense of security.

The court did not have any crippling effects on governance – far from it, the work of the *SCSL* had many advantages for the system of (legal) governance in Sierra Leone. After its completion, the court will leave the courtroom building as well as a much needed modern detention facility which will foster the ongoing process of substantial legal reform (compare Perriello/Wierda: 39). Regarding human resources the court provided and provides significant development opportunities (e.g. for criminal investigators or administrative staff) that will lead to a higher level of expertise in the national system. Finally the sector of civil society has developed during the last years by integrating certain civil society groups into the work of the *SCSL* (e.g. in conducting the outreach program).

Other aspects:

Before coming to a conclusion on the *SCSL*'s impact on reconciliation in Sierra Leone, some of its aspects of shall be recaptured. Perriello and Wierda correctly remark:

"The Special Court has enjoyed certain advantages by being outside of the UN system, but there have also been disadvantages to that arrangement. ... The disadvantages of the absence of Chapter VII powers or a link to the Security Council has on occasion been acutely felt by the Special Court, which continues to receive its main financial and political support from a few select member States."

(Perriello/Wierda: 44)

In the view of these problems, of which the funding aspect was certainly the most severe one, one has to say that the court did everything in its power to fulfil its mission. Interesting is especially what enabled the court to be successful. First, the *SCSL* has learned from the mistakes of its predecessors and invested in a proper outreach program. Second, the location of the court within Sierra Leone was important not only for national capacity building but also for bringing the Court

⁴⁵ Although the international pressure on Taylor was not only due to the *SCSL*'s accusations, it is likely that without the courts work, Taylor would have remained in power.

closer to the people. The reactions on the decision to hold the Taylor case in the Netherlands show that it makes a big difference to the people if perpetrators are charged within the own country or outside of it. Third, it seems as if the number of cases is not necessarily a significant factor for the way a tribunal is perceived and hence for its success in regard to reconciliation. The *SCSL* was „*the first stand alone hybrid justice mechanism with primacy over the domestic courts*“ (Keppler 2004: 2) and it has been successful. There are certainly lessons to be learned from the experiences of the *SCSL*.

The Court's individual aim to establish a credible system of justice and accountability can be considered as accomplished, although other institutions such as the *TRC* where most certainly very important too. In how far the Court ended impunity and helped to restore and maintain peace was already discussed above. But to what extent did the *SCSL* contribute to reconciliation in Sierra Leone? At first glance, the contribution is rather modest. The Court has mainly helped to manage contradiction, and has merely conducted eleven trials. However, despite the fact that there were eleven trials, the people of Sierra Leone have mainly a positive opinion on the Court. They felt that the *SCSL* has done Justice, and this is most important as there cannot be reconciliation without the affected people having that feeling. The *SCSL* did a good job and unlike the *ICTR* it was successful in letting the people affected by the crimes committed know that it did. The case of Charles Taylor will be the last and probably the most important one the *SCSL* conducts. Whatever the outcome is, we already know today that, with less means, the *SCSL* managed to achieve more than both the *ICTY* the *ICTR* and as we will see in the next chapter much more than the *SPSC*.

7. The Special Panels for Serious Crimes in East Timor

7.1. Introduction, Aims and Structure

East Timor has been under Indonesian occupation from 1975 until 1999 and in that period guerrilla-style fighting between East Timorese guerrilla forces and Indonesian forces continued. Also, systematic violence and brutality against civilians was used, mainly by the Indonesian forces, resulting in a large number of victims.⁴⁶ In 1999, the *UNO* fostered a referendum over the independence of East Timor from Indonesia or, alternatively, the inclusion of East Timor into Indonesia, with a certain status of autonomy. The referendum brought a turnout of 99% and a big majority of East Timorese (77,5%) voted for a total independence from Indonesia compare RoL: 14/15). Already in the run-up to the referendum, both the Indonesian military and militia consisting of supporters for the integration of East Timor into Indonesia used violence and intimidation against those in favour of an independent East Timor. The situation got even worse in the aftermath of the referendum, it is estimated that in only a few weeks, some 400.000 people were displaced, more that 1000 killed and between 60% – 80% of all property destroyed when "*militia groups, organized and supported by the Indonesian military and police, carried out a retaliatory scorched-earth campaign against the Timorese people*" (compare Hirst/Varney: 3). In order to maintain law and order, and to build up an administration to enable the self-government of East Timor, the SC established the *United Nations Transitional Administration in East Timor (UNTAET)*. *UNTAET* created a commission to investigate the violations of human rights and humanitarian law since 1999. The commission presented a report on the situation in January 2000. One of its recommendations was to establish an "*independent international investigation and prosecution body*" responsible for identifying and prosecuting those guilty of serious human rights violations. The commission further recommended the establishment of an international human rights tribunal "*to try and sentence those accused of by the independent investigation body of serious violations of fundamental human rights and international humanitarian law which took place in East Timor since January 1999...*" (compare A/54/726: Paragraphs 152/153).

However, the *UN* hesitated to create an international tribunal for various reasons. Hirst and Varney describe that the immense costs connected to such a tribunal (as the experiences from the *ICTY* and the *ICTR* has shown) played a role and that the *UN* tended to believe Indonesia, authorities that assured to pursue justice and that there would not be impunity. As a result, it was decided, to have two parallel jurisdictions, one located in and administered by Indonesia and one within the domestic legal system of East Timor administered by *UNTAET* (compare

⁴⁶ Information on the number of victims varies but it is reasonable to believe that several hundred-thousand people were killed. Compare Askin/Frease/Starr: 13.

Hirst/Varney: 4-5). Initially it was planned that the former, the *Ad-hoc Human Rights Court*, should prosecute Indonesian perpetrators and the latter, the *Dili District Court* East Timorese perpetrators. But it soon turned out that the *Ad-hoc Court* would not fulfil its purpose.⁴⁷ Therefore in June 2000 the structure of the *Dili District Court* was adjusted and the *Special Panels for Serious Crimes in East Timor* (SPSC), were created within the court.⁴⁸ The SPSC may prosecute crimes under the law of East Timor and/or international law including humanitarian law. The temporal jurisdiction of the SPSC is limited to the period between the 1st of January 1999 until the 25th of October 1999 but it has universal territory jurisdiction which means that it is irrespective whether: "(a) the serious criminal offence at issue was committed within the territory of East Timor; (b) the serious criminal offence was committed by an East Timorese citizen; or (c) the victim of the serious criminal offence was an East Timorese citizen." (compare Geiß/Bulinckx: 57/62). The SPSC was given exclusive jurisdiction to deal with serious criminal offences, namely, genocide, war crimes, and crimes against humanity committed at any time, as well as murder, sexual offences, and torture committed between January 1 and October 25, 1999 (compare Hirst/Varney: 5). Unlike the other tribunals examined, no particular aims of the court (such as contributing to reconciliation or preventing further human rights abuses) were laid down. Another difference is, that the SPSC is fully integrated in the national legal system, however, the chambers are composed of both international and domestic judges (usually in the ratio 2:1). The working languages of the SPSC are Tetum, Portuguese, Bahasa, Indonesia and English.

7.2. Preconditions

UNTAET was established in 1999 and operated until May 20th 2002 when East Timor officially came into existence as an independent state.⁴⁹ Although the people of East Timor had fought a long and hard struggle for independence, their efforts remained unsuccessful until the international community, exercised political pressure on Indonesia. The violence connected to the referendum caused the SC to pass resolution 1264 (September 15th 1999) which involved the dispatchment of international peacekeeping troops under Australian command to East Timor – the *International Force for East Timor (INTERFET)* mission. The first troops arrived only a few days later and on September the 28th and Portugal and Indonesia formally transferred any authority over East Timor to the United Nations. Further, on October the 19th 1999 Indonesia officially accepted the outcome of the referendum and

⁴⁷ The Ad-hoc Court can be described as a fig leave. It did only indict a small number of suspects and the few who had to appear before the court did not have to fear sentences appropriate under the particular circumstances. Compare: Askin/Frease/Starr: 19 – 28.

⁴⁸ The SPSC were created by UNTAET Regulation 2000/11

⁴⁹ Thereafter it was replaced by UNIMSET

declared East Timor not to be the 27th province of Indonesia anymore (compare Meier: 161).⁵⁰

After the last Indonesian troops left East Timor in late 1999, Indonesia showed no intention to re-annex East Timor, however, it is believed that it supported some militant groups to a certain extent. In spite of this, fighting, that was mainly limited to the border region between East- and West Timor, dwindled and finally stopped. Hence, when *UNTAET Regulation 2000/11* creating the *SPSC* was issued in June 2000 the conflict was at least contained. The conflict could also be considered as largely settled. On the political level, the former Indonesian president visited East Timor in February 2002 and apologized for mistakes made in the past and also the powerful Indonesian military made clear that it had no intentions to intervene with the transformation process in East Timor. The militant groups were left without political or military support and dissolved – many former members went to live in West Timor. After centuries as a Portuguese colony, 24 years of Indonesian occupation and almost three years under the authority of the *UN*, the transition to an independent state was not easy for East Timor – one of the poorest and most underdeveloped countries in the world. More than 40% of the people lived on less than half an US dollar per day, and only 17% spoke Portuguese (the official language) whereas 63% spoke Indonesian. There was widespread corruption and the capacities in all sectors of the society, including the administration, the health system, the security or the judicial sector were meagre (compare Meier: 99/100). It was a major task of *UNTAET* to build up a formal judicial system in East Timor (compare RoL: 1). Hence, at the time of its establishment, the *SPSC* could not rely on the existing structures when performing its tasks.

The new political elite of East Timor had a conflicting attitude towards a judicial body prosecuting the atrocities committed during the conflict mainly by Indonesia. On the one hand, it was acknowledged that crimes had happened that could not be ignored. On the other hand, there was the awareness that a tribunal prosecuting mainly Indonesian perpetrators may severely endanger the relations with this neighbour that was, particularly in economic terms, necessary for East Timor to survive. Some politicians tried to evade that problem by demanding a purely international tribunal similar to the ones in Yugoslavia and Rwanda. In that way, the young government could have kept a certain degree of neutrality in the process. But in general, East Timorese, experts and NGO's demanded a tribunal with international participation in East Timor (compare Linton: 204). Indonesia was reluctant to admit its direct and indirect (support for militias) involvement with the atrocities committed. It is therefore no surprise that it tried to avoid any legal

⁵⁰ It would go beyond the scope of this work to explain the reasons for Indonesia's behaviour in detail. Major motives were, the international pressure, combined with the fact that Indonesia's claims regarding authority over Indonesia had mainly historical/ideological reasons and were less based on financial and/or security interests.

procedures that would affect Indonesians, particularly members of the armed forces. When it got clear that the Indonesian *Ad-hoc Court* would not conduct any trials that would bring justice to the people of East Timor the *SPSC* was given the jurisdiction to prosecute Indonesian perpetrators, too. Already in advance, Indonesia made clear that it did not welcome this arrangement and, as we will later see, did never cooperate with the *SPSC*. There is hardly any information available on the perception of the tribunal among other groups in the East Timorese society, in particular among common people. The sector of civil society was after centuries of foreign rule underdeveloped. A member of *Yayasan Hak*, a foundation for law, human rights and Justice in East Timor stated:

"We East Timorese are often told to forget about the past, to put the past behind us and think about the future. How nice it would be if could somehow magically forget! But we cannot. ... This process of coming to terms with the past, this accountability for past crimes, is an absolutely necessary step if East Timor is going to move into the future."

(Joaquim Fonseca, cited in Meier: 101)

The civil society groups also opted for a purely international tribunal as they doubted the ability and/or willingness of national, let alone Indonesian institutions to try the perpetrators in appropriate way. However, after the experiences made with the *ICTY* and the *ICTR*, particularly the costs involved, the international community was reluctant to establish such a tribunal. Instead the *SPSC* was established – a new approach to Retributive Justice in transitional societies. Established by *UNTAET*, it was integrated in and thus part of the national judicial system. This new Hybrid-Court framework should avoid certain problems of the two ad-hoc tribunals – mainly the high costs connected to them – in the next paragraphs will be described why the outcome was different from what was expected.

7.3. Implementation and Work

Before analyzing the work of the *SPSC*, another institution closely connected to the *SPSC* has to be described. The *Serious Crimes Unit (SCU)* was also established by *UNTAET* but then placed under the control of the East Timorese government. It had the purpose to investigate and prosecute the serious crimes and bring them before the *SPSC*.⁵¹ As the *SPSC*, the *SCU* is mainly funded by the *UN* and staffed with foreign *UN* employees.⁵² Given its mandate, the *SCU* played a major role for the work of the *SPSC* as it decided who was to be prosecuted for what crimes and issued indictments, thus deciding who could be put on trial and who not. It must therefore be closely examined in this chapter. The *SCU* began its work in mid 2000

⁵¹ Initially, the *SCU* was supposed to prosecute other serious that do not fall under the jurisdiction of the *SPSC*. However, the *SCU* soon limited itself to investigate crimes committed during 1999 (compare Askin/Frease/Starr: 34)

⁵² The Prosecutor General was, however, East Timorese

and issued its first indictments in late 2000 (compare Hirst/Varney: 7). During its existence, that lasted until December 2004, the SCU issued 95 indictments involving 391 accused persons. At first glance these numbers are very impressive, especially when compared with the work of the tribunals in Rwanda and Yugoslavia. However, when taking a closer look at the prosecution strategy of the SCU it gets clear, how this was possible. Initially, the focus of prosecution laid on East Timorese militia members who were located and often already detained in the country and usually the indictments did not involve charges of crimes against humanity, genocide or war crimes but rather "ordinary" crimes such as murder. Among the hundreds of accused, the great majority have been low-level perpetrators (compare Askin/Frease/Starr: 37). Hirst and Varney further analyze that:

„Apparently, this was due to the failure of the SCU in its early period to focus sufficiently in its investigations and prosecutions on the contextual elements required to prove crimes against humanity.“

(Hirst/Varney: 7)

Later, in August 2001, a prosecution strategy was issued that stated that the focus should be on 10 "priority" cases. The cases should be selected based on the number and type of victims, the seriousness of the crimes and their political significance, and the availability of evidence (compare Hirst/Varney: 8). However, even in this 10 priority cases, the SCU did not limit itself to those who bore the greatest responsibility but indicted 183 persons connected to the 10 cases. In 2003, the SCU again changed its priorities and started to issue indictments against high-ranking Indonesian government officials and members of the military as well as East Timorese militia members. Those persons were not present in East Timor at that time which had the result that not a single one was brought to trial.⁵³ In short, there was no consistent prosecution strategy during the SCU's existence. Most of the indicted were low-ranking perpetrators, however, that does not mean that the SCU came even close to indicting *all* persons responsible for serious crimes committed in 1999. This lets the selection of persons to be prosecuted appear rather arbitrarily. Further, none of the indictments against higher-level perpetrators led to any arrest let alone a trial. In fact, there were times when the SCU indicted those persons *because* they were sure that this would *not* lead to trials that would burden the SPSC even further (Cohen: 14) But the focus on low-level perpetrators and rather easy cases had other reasons as well. The SCU was chronically under-funded and did, especially in the beginning not even have the most essential means to fulfil their tasks. They did for example not have enough vehicles and information could not be achieved properly due to resource shortages in the administration. An even bigger problem, also related to the lack of funds, was the staff available for the

⁵³ This was mainly due to the lack of support by the Governments of Indonesia and East Timor as well as the international community and the UNO – a problem the SCU/SPSC was well aware of (compare Cohen 13).

SCU. Translators, necessary for many parts of the SCU's work, had to be funded independently and generally there was not enough qualified personnel for the work at hand.

"Initially at least, many staff members were inadequately skilled. The unit had no criminal analysts and the seconded CIVPOL investigators were woefully insufficient in number. Although they brought a wide skills base to the unit, many had not carried out investigations before, let alone investigated complex cases such as those relating to crimes against humanity..."

Long-term planning and continuity were severely impeded by the short terms served by those in the office of the DGPSC. ... These difficulties were exacerbated by ongoing uncertainty about the lifespan of the SCU. Originally, the unit was to function only until mid-2001. This time period was extended gradually. Only toward the end of 2003 did the SCU achieve a measure of capability, but the unit was instructed to commence with downsizing within months."

Hirst/Varney: 20

The last part of this citation points towards the increasing pressure by the UN to finish the work of both the SCU and the SPSC very fast. In May 2004 the SC issued *Resolution 1543* which declared that the SCU had to bring to an end all investigations by November 2004 and that the SPSC would have to complete all cases by May 2005. Askin, Frease and Starr point out that „these are very short deadlines, particularly when compared to the number of years the Security Council has given the ICTY and ICTR to end their trials and responsibly wrap up their work.“ (Askin/Frease/Starr: 34). In the next paragraphs will be examined how the SPSC handled the indictments issued by the SCU.

The first trials of the SPSC began in January 2001 – at that time only one panel (chamber) operated whereas two more panels were created later. Until May 2005, when the Special Panels seized to operate, 55 cases involving 87 defendants have been held. 84 persons have been found guilty, 13 cases were withdrawn, one defendant was ruled unfit to stand the trial and only three defendants have been acquitted (compare Hirst/Varney: 9). The huge discrepancy between the number of indictments by the SCU and the number of trials and defendants before the SPSC was due to the fact that the large majority of the accused stayed in Indonesia. Those could not be held responsible as Indonesia refused to cooperate and neither the government of East Timor, the UNO, nor the international community exercised pressure on Indonesia. Hence, the large majority of the convicted were low-level East Timorese perpetrators, there was not a single Indonesian person put on trial (compare Cohen:15). It is still surprising that the SPSC managed to conduct such a large number of cases as it had to fight with many practical problems. The courtroom did for example not have a stable electricity supply until July 2004, and there were virtually no security arrangements to protect the premises even at times

when cases were held (Cohen: 10). Hirst and Varney provide a good summary of the problems the SPSC had to deal with:

"A significant problem throughout the life of the SPSC was a severe shortage of resources. This meant that judges were not provided with administrative support staff and had to do their own research, drafting, editing, and administration. Library resources were scarce and Internet access was unavailable until the end of 2001.

More significant still were difficulties with language and translation. The SPSC operated in Portuguese, Tetum, Indonesian, and English. Under UNTAET regulations, courts are required to provide translation and interpretation services in every case where a judge, witness, or party to a proceeding does not sufficiently speak or understand the language used in the court. However, translation and interpretation services were severely inadequate."

Hirst/Varney: 21/22

Even more severe, there were no qualified East Timorese judges for the panels that had to be composed of two international and one East Timorese judge each. As a result, young Timorese lawyers who had no training or experiences as judges were recruited to fill the gap (Cohen: 11). The appointment of those judges raised concerns about the ability of the panels to keep international standards and handle complex cases altogether. And the situation was even worse regarding the defence function for the accused. Initially there was no plan for a defence function to be provided by the UN. This meant, that Timorese public defenders were supposed to defend the rights of the accused. The problem was that these public defenders were not qualified and *"had no funds for investigation, to bring witnesses to Dili, or for interpreters, office supplies, or virtually anything else"* (ibid.: 16). This resulted in very serious shortcomings for the accused and thus for the trials themselves: In the first 14 cases, there was *no* witness called by the defending lawyers, for some of the defenders the trials before the SPSC were their *first case ever* – sometimes even the prosecutor coached the defence counsel during the trial (ibid). Finally, the UNO established a *Defence Lawyers Unit* that was however inadequately staffed during its existence from September 2002 to May 2005 during which it grew from three to seven lawyers (ibid: 17). As a result, massive concerns about the standards and the fairness of the trials have to be raised. Another problem did not directly impede the work of the SPSC very much but is one more example for the poor coordination and problems connected to the whole process of calling to account those responsible for serious crimes. The *Court of Appeal* started to function in June 2000 but could due to a shortage of international judges not work at all for 19 months between October 2001 until June 2003 (ibid: 10). This seriously impeded the rights of the accused. One important reason for this overall lack of consistency and coordination may be that there has never been a president or another equivalent head of the mission who was responsible for national and international representation, an official who could have cared for the interests and needs of the

special panels and coordinated the overall process (compare Hirst/Varney: 9 and Cohen: 9).

The outreach program of the *SPSC* can be called a farce. The whole outreach activities and also the public affairs function of the *SPSC* lasted on *one* United Nations Volunteer (Cohen: 34). Being responsible for all relations to the public and the press required this person to be in Dili almost all of the time. Further the "outreach program" suffered from a lack of staff, funding and resources as all the other departments, too. As a result, initiatives that involved Timorese communities could only been conducted on a very sporadic base and "*without the staff and support necessary for even a very modest sustained effort*" (ibid). The only major outreach effort addressing the communities was ironically made to inform them about the near end of the *SPSC*'s activities. Before coming to a conclusion regarding the work of the Special Panels, there is one other point that severely impeded their work and that has to be mentioned here. The *SPSC* and the *SCU* had to cope with a lack of cooperation from its most important "partners". The government of East Timor always kept careful distance to the *SPSC* and the *SCU* so that it would not endanger its relations to Indonesia. Later this lack of cooperation got worse. The government did for example hold back arrest warrants for Indonesian officials issued by the *SCU* that should be given to Interpol and high government officials often took position against the action or statements of the *SPSC* if they could have threatened the relationship to Indonesia(compare Hirst/Varney: 8 and Cohen: 93). The missing cooperation from Indonesian authorities is no surprise, however, the lack of support from the various organs of the *UNO* and even the *UNTAET/UNMISSET*⁵⁴ is. One reason for this is that it was easy for the *UN* to shift the blame to the government of East Timor if something went wrong as the *SPSC/SCU* was formally integrated in the Timorese judicial system. But since the *UN* had established the *SPSC/SCU* in the first place and funded these institutions as well as recruited their personnel it ultimately had to manage the whole process, too, and so it was inexcusable to simply blame the East Timorese government for shortcomings and problems. The *UN* and particularly the *SC* and the international community can be blamed for not putting more pressure on Indonesia to hold accountable those responsible for serious crimes in East Timor. Besides a general disinterest in East Timor, this behaviour was the result of the international community seeking assistance by Indonesia in the "war on terror".⁵⁵ Hirst and Varney add that the behaviour of the *UN* was "*the main cause for the serious crimes process' weaknesses*" and that the behaviour created "*an environment in which the Timorese*

⁵⁴ *UNMISSET* (United Nations Mission of Support in East Timor) was established as the successor of *UNTATET* in May 2002 and had the purpose to provide assistance to East Timor during its transition phase.

⁵⁵ To learn more about the lack of pressure on Indonesia compare for example Kingston.

leadership opted for active and public support of the Indonesian position” (compare Hirst/Varney: 26).

The list of shortcomings of the SPSC or the SCU could be amended by various other points, for example the lack of witness protection (compare Cohen: 31-34), or the premature end of the SCU and the SPSC induced by the UN just at the time when the institutions started to work in a more appropriate and effective way. But there is no need for that, as it should be clear by now, that almost all facets of the SPSC were flawed. As many scholars agree on, that was not the fault of the individuals who worked for the SPSC/SCU but due to a lack of *“political will, leadership, management and accountability”* (ibid.: 111). Mainly the international community, respectively the UN must be made responsible for the inappropriate framework, mandate, staffing administration and funding of the SPSC, but also the government of East Timor should have provided more support where possible.

7.4. Impact

Stage 1: Ending the violence

There are various reasons why the SPSC did not avoid unbridled revenge by providing the victims with a certain satisfaction and why the circle of impunity could not be broken. Putting on trial almost exclusively low-ranking, East Timorese perpetrators was problematic because it evoked the impression that some people can violate laws and human rights without getting punished. Most of those convicted received sentences in the range of seven to 15 years – a punishment that many people may consider inappropriate for the grave crimes committed. Further, the SCU did not issue indictments against *all* (or most) low-level perpetrators but there are at least 800 cases of murder plus an unclear number of other serious crimes that did not result in trials, either because they have not been investigated by the SCU or because the SPSC lacked the capacities to conduct the trials (compare Hirst/Varney: 17/18). In combination with the low standard of the trials, people must have gotten the expression, that merely a couple of show trials have been conducted. This is reinforced by following statements.

“Some have expressed concerns that if some form of justice program in respect of serious crimes does not replace the current regime, instability may result as the perpetrators of crimes return from West Timor. It has been suggested that victims, their families, or communities generally may take revenge on returning perpetrators, and equally that those involved in crimes may retaliate against victims or persons who involved themselves in the justice or reconciliation processes.”

“The lack of commitment in planning and support [of the SCU] ultimately contributed to the spread of a culture of impunity in the wider region.”

(Hirst/Varney: 30/31)

The SPSC did not provoke violent resistance from former combatants and the potential accused but the special chambers could still have contributed to the outbreak of violence. In April and May 2006 violence re-erupted in East Timor and although this certainly had various causes, *"there is no doubt that the lack of substantive progress towards the Rule of Law, and the development of a competent and responsive justice system in Timor-Leste contributed to this regression, and overcoming violence has indeed proven to be among the country's most serious challenges"* (RoL 2007: 4). Even if the SPSC or the SCU did not directly destabilize the peace process they have for sure squandered a chance to stabilize and foster the peace process.

Stage 2: Overcoming Polarization

As shown in the case studies of the other tribunals, individualizing guilt is hardly possible for international or hybrid tribunals as they can only handle a limited number of cases. Although the SPSC handled a comparatively large number of cases it could not individualize guilt, mainly for two reasons. First, conducting a number of trials and, at the same time, not doing so for a much greater number of perpetrators who committed the same crimes will not give people the impression that those responsible for crimes have been brought to account. This is exacerbated by the fact that not a single Indonesian has faced trial before the SPSC – the accountability has been put *"on the shoulders of the 'small fish' (who are Timorese) rather than on the organizers and instigators of the crimes (members of the Indonesian military, police, and government)"* (Hirst/Varney: 17). As a result, guilt has neither been individualized within the community level as the selection of low-level perpetrators has been arbitrarily, nor among the Indonesians as they did not have to face trial. Therefore neither the relations of East Timorese within their communities nor their relationship towards Indonesia has been significantly improved by the SPSC.

Stage 3: Managing Contradiction

The SPSC did not have crippling effects on governance as almost exclusively Timorese low-level perpetrators were put on trials. However, for the same reason, they could not prevent the return to power of perpetrators especially the Indonesian officials who are believed to bear greatest responsibility in the 1999 atrocities. In fact, the former general Wiranto, who the SCU suspects to be responsible for killings, deportations and crimes against humanity, even became minister of Politics and Security and later ran in Indonesia's 2004 presidential elections.⁵⁶ To be fair, it was not the SCU's or the SPSC's fault that Wiranto (as well as other accused perpetrators) continues to life undisturbed despite his suspected guilt. In fact, the

⁵⁶ Wiranto was only minister for about three months and got only about 22% of the votes at the elections. However, he still plays an important role for Indonesian politics.

Wiranto case is a good example of the lack of cooperation the serious crime's regime in East Timor received.

"To the discredit of the UN and the Timor-Leste government, both bodies disassociated themselves from the Wiranto arrest warrant. In so doing, they signaled to senior perpetrators that the serious crimes process did not enjoy the committed support of the international community or the national authorities. The actions of the UN and the government of Timor-Leste emboldened perpetrators, offended victims, and seriously undermined the integrity of the serious crimes process."

(Hirst/Varney: 10)

With high-level perpetrators not charged at all and low-level perpetrators only on a "random base" it is also clear that the SPSC could hardly increase the awareness of human rights and humanitarian law. This perception must have been created among the perpetrators, among the victims of the crimes and any other person taking a closer look at the SPSC. *"The fact that so many suspects will not be prosecuted has the real potential to undermine the messages of justice and deterrence"* (Hirst/Varney: 17).

There is no evidence that the SPSC have significantly strengthened legitimacy or democratization in East Timor. However, the serious crimes regime *could*, have made a contribution here. Integrated in the domestic system it *could* have been of great value by making the people believe in the rule of law, in regard to capacity building or by establishing appropriate judicial standards. But the inability of the Special Panels to prosecute those most responsible for the serious crimes, the low standards and also the totally inadequate outreach program lead to a situation where people could *not* put trust in the rule of law as particularly the re-outbreak of violence in 2006 shows. The contribution to capacity building was also limited as the UNTAET/UNIMSET mainly used international staff. For example, when the *Defence Lawyers Unit* was created as a response to the limited availability of qualified Timorese personnel, there was no training or qualification program for Timorese lawyers. Instead, the *Defence Lawyers Unit* was almost composed of international staff. In 2005 the UN ended their legal engagement, but since it was the UNO that staffed, ran and funded the respective institutions *"it seems highly improbable that the process will continue without the support of the UN"* (Hirst/Varney: 28).

Other Aspects

Unlike the other examined tribunals and special courts, the SPSC was not given any individual goals or a special purpose what already points towards an unclear mandate. They were also established under difficult preconditions and *"the United Nations failed so utterly to provide the resources (human, technical and financial), cooperation, oversight, and political backing necessary to meet the standards that have been set by other UN tribunals in Arusha, The Hague, and Freetown"* (Cohen: 6). Under these circumstances it may be surprising that the SPSC was able to

conduct so many trials and some mistakes and strategies will appear understandable for anybody who examines the whole process in detail. However, the people of East Timor will most likely not show understanding for the work of the *SCU* and the *SPSC* – as there was no outreach program, many of them will likely not even know any details on the institutions that were supposed to establish the rule of law in their country. Basically the only positive contribution made in regard to reconciliation is that the *SCU* and the *SPSC* have contributed to the historical record of the atrocities committed in 1999. But it has also squandered an opportunity to foster reconciliation in East Timor. If there is anything to be learned from this case it is that there is no cheap, quick or easy way to deliver justice.

8. Generalizations

Some universal issues that determined the impact of international and hybrid tribunals on reconciliation became salient during the four case studies and will be captured in this chapter. These findings will be used to make generalizations regarding conditions that enable the *ICC* to contribute to reconciliation. For that purpose, one should consider to put up appropriate categories under which those generalizations can be classified. In his paper, Pierre Hazan has examined the effectiveness of international tribunals and identified two different kinds of parameters – internal and external ones. External parameters refer to issues where the tribunal needs the support or cooperation of an entity (e.g. a state, organization or body) that is located outside of the tribunal's framework. Internal parameters refer to issues that are located within the responsibility of the tribunals such as the prosecution strategy or the handling of cases or other internal processes (compare Hazan: 29 – 30). This distinction shall also be made in this work, as the two categories will enhance the clarity of the generalizations and can later simplify the identification of appropriate strategies or actors that can improve the effect of the *ICC* on reconciliation. However, the categorization shall not imply that the issues in the two categories are isolated or independent from each other. It is likely that some of the external parameters influence the internal ones and the other way round.

8.1. External Parameters

8.1.1. Mandate

The most important external parameter for a tribunal is its mandate. It determines the framework to operate within and thus the power, flexibility and possibilities of the tribunal. In the cases studied above there have been three different origins of the mandates. The mandates of the *ICTY* and the *ICTR* were a result of *SC* Resolutions, the one of the *SCSL* originated of an agreement between the *UNO* and the Government of Sierra Leone whereas the mandate of the *SPSC* was created by an *UNTAET* Regulation. During the case studies it turned out that there was particularly one aspect of the mandate that influenced the impact of the tribunal on reconciliation – the question **who should be prosecuted for what kind of crimes**. The *ICTY* and the *ICTR* had the aim to prosecute "*persons responsible for serious violations of international humanitarian law*", with the difference that the *ICTR*'s temporal jurisdiction was limited to 1994 whereas the *ICTY*'s did not have an end date. The mandate of the *SCSL* was strictly limited, it read to prosecute "*persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law*". The *SPSC* had the broadest mandate, it had the "*exclusive jurisdiction to deal with serious criminal offences, namely, genocide, war crimes, and crimes against humanity committed at any time, as well as murder, sexual offences, and torture committed between January 1 and October*

25, 1999". The following points regarding the mandate of a tribunal can be captured: The broader a mandate is, the bigger the number of suspects and hence the workload and costs for the tribunal get. The *ICTY* and the *SPSC* had to handle a large number of indictees, the *ICTR*'s number was moderate due to its limited temporal jurisdiction and the *SCSL* had least cases. Bass correctly remarked that *"even the most prodigious effort ever to purge war criminals did not even come close to placing individual guilt where it belonged"* and that *"at best, a war crimes tribunal will punish the most guilty"* (Bass: 299/300). As resources are limited, a larger number of cases or indictees increases the risk for the tribunal to be unable to fulfil its mandate appropriately.⁵⁷ This implies various problems for their impact on reconciliation as tribunals are then unable to break the circle of impunity, individualize guilt and accountability or prevent the return to power of perpetrators *even of those most guilty*. Further, the broader the mandate, the bigger the expectations of the people towards the tribunal and the bigger the disappointment if it fails to deliver justice. In such cases, tribunals are not able to provide victims with a certain satisfaction or to increase the awareness of human rights and humanitarian law. Those problems could particularly be observed in East Timor where, despite of the large number of cases, most crimes that fall under the mandate kept unaddressed and gave victims the feeling to be left alone thus also severely damaging their believe in the rule of law. As laid out above, this has also contributed to the re-outbreak of violence in East Timor.

So what is a "good" mandate? First of all, it must be clearly defined and may not be too broad as particularly the experiences from East Timor but also those of Yugoslavia show. Of course, if there are sufficient resources, it is desirable to hold accountable as many perpetrators as possible – but in all of the examined cases resources were strictly limited or insufficient and this will likely be the case in all post-conflict societies. Perriello and Wierda correctly remark that:

"So far, the Special Court [the SCSL] has achieved some of its most notable successes in the area of efficiency. The decision to narrow the Court's mandate has already had a decisive impact on the cost and length of time required to complete the operations of the Court. Indictments were issued after only nine months, although the trials have been slower and will likely run into 2007. Nevertheless, the Special Court model has demonstrated an approach of fewer trials at a lower cost, while still adhering to international standards"

(Perriello/Wierda: 2)

The final issue regarding the mandate of a tribunal is, that its impact tribunal on reconciliation is **not dependent on the number of trials** held. The *SCSL* had the best impact on reconciliation and conducted merely four cases with eleven accused

⁵⁷ 15 years after its establishment, the *ICTY* still has not finished its work and it is most unlikely that the *SPSC* will ever take up its work again.

persons⁵⁸ whereas the *SPSC* conducted a large number of cases involving many accused and had the worst impact.⁵⁹

8.1.2. Framework

Certain aspects of a tribunal's framework influence the likeliness that it will have a positive impact on reconciliation. Many problems the examined tribunals had were related to a lack of planning security. This regards especially the **funding mechanisms**. The two ad-hoc tribunals were funded by the regular *UN* budget, their own budget grew rapidly and until 2006 they have cost the *UN* 1.6 billion US\$ and their annual costs where as high as 250 million US\$ (compare Hazan: 21/22). At the time of their establishment *"there was little understanding, especially at first, at the UN about how expensive investigations and prosecutions are, especially in the midst of ongoing armed conflict"* (Schrag: 4) and many member states were surprised with the tribunals costs that comprised 15% of the overall *UN* budget. As a result, the *UN* was reluctant to cover the costs of future tribunals by its regular budget. Hence, the *SCSL* had to rely on voluntary contributions and the court's budget was considerably lower than those of the ad-hoc tribunals. During the first three years, the court spent roughly 80 million US\$, thereafter the annual budget was between 30 and 36 million US\$. For the period between 2007 to 2009, during which the *SPSC* is expected to finish its work, the court has a draft budget of 53 million US\$. In the literature on East Timor reviewed for this work, all scholars agree that the *SPSC* was seriously under-funded. However, nobody provides concrete numbers and also the author could not find any precise information regarding the expenses for the *SPSC* and the *SCU* that were covered by *UNTAET/UNIMSET*. However, there is one point that all tribunals had in common which is that funding was insufficient for their mandates – often donors did not pay out the money as promised or were reluctant to give money for the tribunals in the first place. Further, funding was, often granted on a short-term base – sometimes as short as two months. Due to bureaucratic procedures and growing discontent over their cost within the *UN*, even the two ad-hoc tribunals had this problem, although their costs should have been covered by the *UN* budget. The situation was even worse for the *SCSL*. Senior officials had to spend a considerable amount of their time to secure funding, the voluntary contributions were usually short of estimated needs, and during the first years the court's existence was consistently threatened by the lack of money available. This seriously impeded long-term planning, in particular regarding the recruitment of staff but also in regard to the prosecution strategy and all other regular activities requiring a steady funding. It cannot be determined here which model for funding is most effective but the

⁵⁸ The case of Charles Taylor is still outstanding.

⁵⁹ It is, however, desirable and in most cases probably also necessary that the mass of crimes that cannot be handled by an international or hybrid tribunal are addressed in another forum such as the Gacaca tribunals in Rwanda.

following aspects should be considered: Financial means must be available steadily and enable long-term planning. Hence any funding arrangements, irrespective if they are on a voluntary base or not, should be made for cycles of one year or longer. Further it would be desirable to have sanctioning mechanisms for those that do not keep their financial promises.⁶⁰

There was another factor of the framework important for the success of the tribunals and that is the **time frame** provided to fulfil their mandate. Initially, none of the tribunals had a concrete end date in their legal bases until which to complete its work. However, when the *SCSL* was established, member states expected the Court to fulfil its mandate in only three years. As it had to rely on the contributions of the member states, this put considerable pressure on the court. Although the *SCSL* managed to work swiftly and efficiently under the given circumstances, there was no way to complete all cases within three years. Luckily the international community acknowledged the success of the *SCSL* and extended its mandate – the court is now expected to finish its work in 2009. Situation was different in East Timor. In 2004, just after the *SPSC* and the *SCU* started to work in a more appropriate way, the *UN* issued a resolution that set concrete end dates for their work. This deadline meant that both the *SPSC* and the *SCU* had to stop their activities long before they were even close to finish their work and this shattered their last chance to contribute to reconciliation in East Timor. An adequate time frame is a necessary precondition to deliver justice.

Another important aspect is the question of **ownership of the tribunal** or special court at hand. Established by a *SC* resolution, the two ad-hoc tribunals are located deeply within the *UN* system – hence the ownership also lies with the *UNO*. The *SCSL* was established by a treaty between the Sierra Leonean Government and the *UNO* and was thus not an integral part of the *UN* system. Ownership was neither with the government of Sierra Leone, the Court was more like an independent body, it has its own president and other senior members responsible for the progress of the court. Both systems had advantages and problems. Whereas the ad-hoc tribunals often had to struggle with the bureaucratic procedures within the *UN*, the *SCSL* was rather flexible and could work more efficient. On the other hand, it was easier for the *ICTY* and the *ICTR* to put pressure on other states as they have been established by a binding resolution of the *SC* and other countries were obliged to cooperate with the tribunals. The *SCSL* did not have that possibility. It cannot be decided which system is better but the experiences of East Timor show that one situation has to be avoided: That there is no clear ownership of a tribunal at all. Officially the *SPSC* were an integral part of the Timorese judicial system. However, the whole system had to be built up from the scratch and most of this process was coordinated, funded and carried out by *UNTAET/UNIMSET*. The first problem of the

⁶⁰ On the other hand it is unlikely that contributors would accept such mechanisms in the first place.

SPSC was that the government of East Timor could easily make the *UN* responsible for any shortcomings and the *UN* could do the same by claiming that the responsibility of the special panels was with the Timorese government. This situation was aggravated because there was no head of mission, president or a similar official responsible for coordination of the overall process. As a result, there was a massive lack of coordination and if problems occurred or something went wrong, often nobody felt responsible.

The last feature of a tribunal's framework that was significant for its impact on reconciliation was the **location** of the tribunal. The case studies have shown that if a tribunal is located in the country where the crimes have been committed, it can have a positive impact on capacity building in regard to physical infrastructure and human resources. It is also important for both the physical and the psychological accessibility of the court for the people of the respective country. The *ICTY* has been located in The Hague and the *ICTR* in Arusha/Tanzania. In that way, the tribunals could not considerably contribute to capacity building and normal people from Yugoslavia or Rwanda could not visit the tribunals and see them work. Further, the distance had the effect that the tribunals were not perceived as part of the national reconciliation process but rather as some distant institution, controlled by foreign powers. The *SCSL* and the *SPSC* were both located in the countries where the reconciliation process had to take place. In the case of Sierra Leone, the location had significant merits whereas in East Timor none of this could be observed. What was the difference? The *SCSL* built up the necessary infrastructure, including a modern court building and a detention facility from the scratch what brought work for many Sierra Leonean⁶¹ and created infrastructure that will be available for the domestic judicial system after the court has finished its work. It was easier for the people to visit the court and they were involved in the whole process from the beginning on. This aspect, in combination with the outreach program addressed later, gave many Sierra Leonean the feeling that the court is an integral part of their reconciliation process and not a far, unknown, foreign-controlled institution. Further, it makes an important difference for people if "their" perpetrators are indicted in their own country or not – as the reactions on the decision to hold the Taylor-trial in The Hague shows. Why could the *SPSC* not have similar positive effects? First off all, the court mainly used existing infrastructure and did for a long time not even improve the court building which was in a poor condition. Almost all staff at the *SPSC* and the *SCU* was international, especially after the *Defence Lawyers Unit* was established, thus the effect on capacity building was very weak. As the court was located in Dili, it was possible for the people to visit trials, but unlike in Sierra Leone, this did not bring the court closer to the people, it was always perceived as a foreign controlled institution. The main reason therefore was that the court did not

⁶¹ Also in other areas, such as the outreach team, the *SCSL* occupied Sierra Leonean when possible.

offer many Timorese a chance to participate in the process in any way and the insufficient outreach program as well as the poor work further prevented a more positive image of the court.

8.1.3. Cooperation and Support

The last subcategory of the external parameters refers to support from various actors that is necessary to contribute to reconciliation. To a certain degree, the relationships of a tribunal or special court are determined by its work and communication strategy but for some tasks it needs the cooperation of external entities. The topic of financial support has already been addressed above. At least equally important seems to be the political support. This starts with domestic actors, namely the respective **government**. International or hybrid tribunals do not have its own executive powers such as a police force. Therefore, tribunals need the cooperation of the national security forces to arrest accused perpetrators that are within the country. If a government refuses to support a tribunal in its country, its work can be seriously hampered. Beyond that the government sends a clear message to its population regarding its view on the tribunal. In Rwanda for example, people did not know much about the *ICTR*, but since the government took a negative view of the tribunal and let people know about its position, many people tended to reject the *ICTR*, too. In Yugoslavia, the conflict parties largely controlled the media and deliberately used propaganda to present a distorted picture of the *ICTY*. Even when the national authorities supported the tribunal, a lack of cooperation from **neighbouring countries** posed a threat to the effectiveness of international and hybrid tribunals. Due to a lack of cooperation from Indonesia, the *SPSC* could not charge a single Indonesian what is regarded as one of the chief reasons for its failure. One of the major critics regarding the *SCSL* was its inability to bring to account Charles Taylor who first was president of neighbouring Liberia and thereafter lived safe from the tribunals grasp in Nigeria. Such obstacles can often only be tackled with **international support** as the example of Sierra Leone shows. It was not before the international community, especially the USA, exercised strong political and diplomatic pressure on the Nigerian government that the *SCSL* could get hold of Charles Taylor (compare Perriello/Wierda: 2). As Jeffrey Kingston describes, the *SPSC* had the problem that the international community, was not willing to put pressure on Indonesia as it was a strategically important country in the war on terror.⁶² Support is particularly needed from global or regional major powers, as they are usually the only ones with sufficient political, economic or diplomatic influence. Hazan states that:

"Warring parties take the risk of prosecution into account as long as the tribunal is perceived as being determined and backed by the political and

⁶² International pressure can also be important to make the incumbent government(s) of the post-conflict societies cooperate.

military support of the major powers. But they [empirical observations] also show that the deterrent effect soon diminishes without prompt indictments and arrests."

(Hazan: 34-35).

8.2. Internal Parameters

8.2.1. Initial Strategy

Cohen describes that *"the initial appointments made in new tribunals largely determine the course that the tribunal will take"* and that mistakes made in the beginning *"may take years to make up for it and establish the standards and practices that should have been put in place at the very beginning"* (compare Cohen: 23/24). The experiences of the cases studies prove Cohen to be right. As described in point 4.3., the strategy of the *ICTY* not to target high-ranking and well-known perpetrators rose the number of cases and has undermined opportunities to win early support. The resulting bad perception of the court was very persistent. The initial strategy of the *SPSC* and the *SCU* to indict a large number of mainly low-level perpetrators for "ordinary" crimes such as murder was flawed. The revised strategy to concentrate on the ten priority cases, issued in August 2001, aimed in the right direction but came too late. After those ten indictments, the *SCU* continued to issue many more indictments against high-ranking Indonesian perpetrators – knowing that they would never be brought to trial. In short, the strategy was inappropriate, inconsistent and was considerably responsible for the tribunal's lack of success. The situation in Sierra Leone was different, here only a very small number of perpetrators were indicted. One reason therefore was that the mandate of the court already considerably limited the number of potential indictees. Another factor were the limited resources. The decision-makers in the *SCSL* were probably aware of the fact that a larger number of cases would have lead to lower standards and prevented the court from conducting its work in the timeframe given.⁶³ The "composition" of cases turned out to be very good. There was one case each involving accused of all major conflict parties and most of them had been in senior-level positions.⁶⁴ This strategy had two effects. First, the court could concentrate on few cases and thus worked more efficiently. Second, the *SCSL* sent out the message that crimes against humanity would not be tolerated, regardless of the position or the conflict party the accused belonged to. This is one major reason why the acceptance of the court grew as time went on both internationally and domestically although the small number of cases had been a major criticism in the beginning. The strategy of the *ICTR* was also not bad. It targeted mainly senior-level persons, which kept the number of cases relatively low. One problem was that the tribunal was unable or unwilling to prosecute members of the *Rwandan Patriotic Army* as they encountered resistance from the incumbent government – still the initial

⁶³ It turned out that even the cases conducted took more than twice the time estimated.

⁶⁴ Additionally there is the case of Charles Taylor.

strategy was comparatively good. It enabled the *ICTR* to hold accountable the core of those responsible for the genocide – why the impact on reconciliation remained limited will be addressed later. In short, the case study showed that it usually does not make sense for a tribunal to prosecute low- and/or mid-level perpetrators. Their number is usually too great and the resources of tribunals too limited to conduct so many cases while adhering to good standards. Exceptions may, however, exist, for example if a case involves a well-known perpetrator or has special symbolic value.

8.2.2. Outreach

"Several recent studies suggest that a lack of outreach greatly undermines the credibility, impact, and effectiveness of a mechanism such as the Court [the SCSL] and its impact on long-term stability and the development of the rule of law."

(Dougherty 2004/1: 12)

Particularly the cases of the *ICTR* and the *SCSL* showed that this statement is also valid in regard to reconciliation and that appropriate outreach activities are as important as the initial strategy of the tribunal. Both tribunals had quite successful strategies, at first glance, the *ICTR*'s may have been even better because it charged more perpetrators under difficult circumstances. However, only the *SCSL* could convert this into a significant contribution to reconciliation. The reason therefore was that the *SCSL* ran a proper outreach program and the *ICTR* not, at least not in the beginning. Hazan states:

"Major trials are thus only of value if they are effective from the educational point of view. That is their sole merit. Criticizing international tribunals on the ground that they are an exhibition of justice is the wrong approach, because the purpose of that justice is precisely to show that it is taking place. Justice must not only be done, but must be seen to be done, as the saying goes..... There are the societies most directly concerned, those for which this theatre of truth and punishment is primarily intended and which, in theory, are the target group, such as the populations of the former Yugoslavia, Rwanda, Sierra Leone, Sudan, Uganda, and so on."

(Hazan: 32)

Maybe Hazan is exaggerating – to deliver justice for crimes committed should always be in the focus of a tribunal, and trials are not *only* important because of their educational aspect. However for their impact on reconciliation it was very important for the tribunals to communicate their strategy *and* their progress to the people in an appropriate way. Omitting to do so means that people are left uninformed and implies the risk that an actor in opposition of a tribunal may use deliberate disinformation against it. This was the case in former Yugoslavia where the conflict parties used the media they controlled to discredit the *ICTY*. It is therefore extremely important to conduct appropriate outreach activities among the people that were affected by the crimes to be judged by the tribunal – especially, if the tribunal's seat is located in another country.

8.2.3. Other Aspects

Another salient issue crystallized during the case study: Tribunals should make use of as many local human resources as possible. This contributes to capacity building as the case of the *SCSL* has shown whereas the process in East Timor has proved that even a tribunal integrated within the domestic system may not have a similar effect if mainly international staff is used. Tribunals can also contribute to physical capacity building particularly if they are located within a country where reconciliation is ought to take place. But there is another, equally important aspect of using local resources: It makes the local people feel that the tribunal at hand is *their* institution and not some distinct international institution. Reconciliation has to take place in the heads of the people and if they are actively participating in the tribunals, if it is *their* police force arresting perpetrators, *their* construction workers building the necessary infrastructure, *their* lawyers participating in the trials and *their* people communicating the courts mandate, strategy and progress to the people this makes an important difference to them. People want *"to be directly involved in an internationally sanctioned judicial process delivering justice to its own people, rather than doing nothing, doing it alone or sitting on the sidelines watching what an ad hoc international tribunal does somewhere removed from the locus of the crimes"* (Linton: 245). Using local human resources is even more important, but also more difficult, if the seat of the tribunal or court is located outside of the society affected.

There are a number of other issues that could be named that may enable tribunals to contribute to reconciliation. Further, it is possible that some of those laid out above may be conflicting and that sometimes trade-offs have to be made, it may for example be hard to put up an appropriate strategy and establish good relations with the incumbent government at the same time. In addition, reconciliation may not be the only purpose of a tribunal or special court. However, in the light of the case studies in part I, the above generalizations are most decisive, important and generally valid in regard to their impact on reconciliation and this is why they shall now be used to assess the likeliness that the *ICC* will contribute to reconciliation.

Part II: The International Criminal Court

9. The ICC – An Adequate Successor for Tribunals?

The aim of this chapter is to evaluate the likeliness that the *ICC* is going to contribute to reconciliation. For that purpose, the generalizations put up in chapter 8 shall be used. To use these criteria only makes sense if the *ICC* addresses similar crimes committed in similar contexts as those of the cases studies in part I. As we will see in this chapter, the *ICC* is in fact addressing such crimes. Leiß has written that with its mandate and the crimes under its jurisdiction, the Court is likely to address crimes that are part of a bigger piece and not isolated offences (Leiß: 62/63). Further, a review of the *ICC*'s work so far reinforces that statement as the Court has so far exclusively addressed cases involving large-scale and systematic violations of human rights and international law – and all of the situations under investigation are in societies that had or still have an internal armed conflict. As laid out in the beginning, the methodology will be different to the one of the case studies conducted before. In this chapter, official documents of the *ICC*, particularly the *Rome Statute* and also secondary literature will be analyzed to assess the potential impact of the *ICC* in regard to reconciliation. This will be complemented by a compact review of the work conducted by the court so far.

9.1. External Parameters

9.1.1. Mandate

According to Article 1 of the *Rome Statute*, the *ICC* has "*the power to exercise its jurisdiction over persons for the most serious crimes of international concern*". Article 5 defines those crimes as genocide, crimes against humanity, war crimes and the crime of aggression.⁶⁵ The court may only prosecute crimes committed after its establishment in 2002 (Article 11). If a new state becomes a treaty member of the *Rome Statute*, the *ICC* may exercise its jurisdiction only for crimes committed after the entry date unless the joining party explicitly accepts the jurisdiction of the court for certain crimes in question before that date (Article 12). The *ICC* may only exercise its jurisdiction if the crime was conducted on the territory of a member state (including vessels or aircrafts) or if the accused person is a national of a member state (Article 12). An exception to this rule exists if the *SC* acts under chapter VII of the *UN Charter* and refers a matter to the *ICC*. In such cases, the court has jurisdiction regardless of the territory where the crime was committed or the nationality of the accused.⁶⁶ Besides a referral by the *SC*, the *ICC* can exercise its jurisdiction only if a state party refers a situation to the *ICC* or if the (chief)

⁶⁵ So far there is no commonly accepted definition of "aggression", therefore the court does not prosecute crimes of aggression at the moment.

⁶⁶ Compare website of the *Coalition for the International Criminal Court*:
<http://iccnw.org/?mod=casessituations>

prosecutor has initiated an investigation.⁶⁷ Article 17 lays down that the court may not investigate a case if a state that has jurisdiction already investigates or prosecutes the case or decided not to prosecute the person in question, if the person has already been tried for the crime in question, or if the case doesn't have *sufficient gravity* to justify further actions by the ICC. Those limitations, except the last one, do not apply, if the state authority ought to prosecute the crime is unwilling or unable to so.⁶⁸ Article 26 excludes the ICC's jurisdiction over persons who were under the age of 18 at the time the crime was committed.

Considering the above, it gets clear that the mandate of the court is clearly defined and rather narrow. The crimes that fall under its jurisdiction already pose a limit to the potential number of accused and Article 17 lays down that there must be *sufficient gravity* of a case that the court to take action. Further, under Article 53, the prosecutor can refrain from initiating an investigation, for example if he has "*reasons to believe that an investigation would not serve the interests of justice*" (Article 53/1/c and Article 53/2/c). Such limited mandates have proved to be very significant in the tribunals studied in part I. For the ICC, they may be even more important as it is a globally operating institution with a much higher potential number of crimes and suspects than an institution active only in a single country. That is also the reason why the ICC is not meant to substitute domestic courts but only acts if those are unable or unwilling to prosecute perpetrators.

9.1.2. Framework

The **location** of the court is The Hague – that implies that the ICC's potential contribution to capacity building is limited. Unlike in Sierra Leone, no infrastructure such as courtroom facilities will be built – a process which brought employment for many people and will contribute to the domestic judicial system once the SCSL has finished its work. Since only the prosecutor and his team of investigators are ought to work in the country affected by the crimes, also capacity building in regard to human resources will be limited. On the other hand, the ICC wants to employ staff members who are nationals of the countries targeted by the investigations (compare ICC 2003: 9), which would be a positive contrast to the case of East Timor where virtually the whole team was composed of international staff. Article 62 states that trials shall be held at the seat of the court unless decided otherwise. As seen in the case of Sierra Leone, it makes a big difference to the people where the trial is held. According to information by the NGO *Trialwatch*,⁶⁹ the ICC is considering to hold at least the case of Thomas Lubanga, in the Democratic Republic of Congo where he allegedly has committed crimes. This implies that the court is, in

⁶⁷ The prosecutor can only do so if there is a 'reasonable basis' for an investigation and if a pre-trial chamber authorizes him to do so.

⁶⁸ When a state is 'unwilling' or 'unable' is defined in Article 17 of the *Rome Statute*.

⁶⁹ Compare website of *Trialwatch*: www.trial-ch.org/en/trial-watch.html

spite of his location, trying to do everything possible to prevent the perception that it is a distant institution, ruled by foreign powers and their interests. This aspect will be addressed more in detail later in this paper.

According to Article 115, the **funds** of the ICC are provided by two sources: "*Assessed contributions made by state parties*" and "*Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.*" The court may, under certain circumstances, also receive and utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities (Article 116). These funding mechanisms provide several advantages. First, the court does not have to rely only on UN funds, the largest amount of money comes from the court's *Assembly of States*⁷⁰. Further, the court can acquire additional voluntary contributions so there is a variety of potential income sources for the court. On the other hand is the *Assembly of States* that decides over the budget granted so the ICC is in a way dependent on it. This is, however not necessarily a problem. The member states are geographically diversified, have different political and ideological priorities and each member has one vote. It is therefore difficult and rather unlikely, that any member state will use the funding mechanism to put pressure on the Court in order to influence its work in any way. Since all member states ratified the ICC on a voluntary basis, it is possible that the contributions are paid more timely and consistently than it was the case with the two ad-hoc tribunals – so far there were no problems for the ICC connected to funding. Between 2002 and 2005 the annual budget grew from about 31 to 67 million Euro.⁷¹ Human rights organizations have estimated that the court may in the future have an annual need of 100 million US\$ and more (compare Stempel: 22). In August 2006, the bureau of the *Assembly of States* issued a report on the arrears of States Parties (ICC-ASP/5/27). According to the report, the arrears for the 2002/2003 period amount to 0,04%, those for the 2004 period to 2,8% and those of the 2005 period to 6,7% of the respective annual budget (ibid.: paragraph 6). The *Registry* of the ICC highlighted that "*the current outstanding contributions have so far not caused any constraints to the work of the Court*" but also that this may change in the future (ibid.: paragraph 7). Further, the report recommended a couple of measures to give incentives for states to pay their contributions on time. In November 2005, the *Coalition for the International Criminal Court* has, referring to the report cited above, issued an assessment on developments in the ICC's budget process. The report describes a generally positive development but again

⁷⁰ The *Assembly of State Parties* is the management oversight and legislative body of the ICC (compare website of the ICC: <http://www.icc-cpi.int/asp.html>). The amount a member of the *Assembly of States* has to cover is relative to the rate the state pays within the UN system.

⁷¹ Compare website of the *Coalition for the International Criminal Court*: <http://www.iccnw.org/?mod=budgetbackground>

highlights that any strategy may only succeed if they are supported by the commitment of the *ICC*'s member states (compare CICC 2006: 11/12). In short, the funding mechanisms of the *ICC* are not perfect but still considerably better than those of the examined tribunals. The *ICC* is an independent international body that is supposed to deliver justice. As such, it can of course not engage in income generating activities and will thus always be dependent on external funding, in this case by its member states and the *UN* – with all risks connected to such a situation. It is thus important that members financially support the court and to convince other state parties to do the same.

The last two factors regarding the framework of the court are the **timeframe** the court is given to fulfil its mandate and the question if there is a clear **ownership** of the whole process. The court is a permanent institution so there is no timeframe in which it has to finish its work. In fact that is the underlying idea of the *ICC*, its unlimited temporal jurisdiction shall deter crimes in the first place. It also prevents that suspected perpetrators can hope to evade prosecution until the prosecuting institution finishes its work as *"trying to outlast a permanent court may prove a challenge even to someone of Bashir's or Mugabe's staying power"* (Grono: 4). The *ICC* has a very clear ownership, it is an independent institution with explicitly stated international legal personality and also legal capacity (Article 4). It has the capacity to enter into relations with other states and organizations and to conclude treaties with them and has already done so in various cases. It has for example concluded agreements with the *EU*, the *UN* and the *International Committee of the Red Cross*.

9.1.3. Cooperation and Support

According to the *Rome Statute* all state parties⁷² have a general obligation to cooperate fully with the court in its investigation and prosecution of crimes (Article 86). Article 87/7 states that if a state party fails to comply with a request to cooperate by the Court contrary to the provisions of the statute, the court may refer the matter back to the assembly of states or the *SC* – depending on who originally referred the matter to the Court. Forms of cooperation include but are not limited to arresting and surrendering suspects (Articles 89 – 92), the identification and whereabouts of persons and object, the taking of evidence, the execution of searches and seizures, or the protection of victims and witnesses (Article 93). Under certain conditions namely if the operations of the *ICC* touch the national security of a state that state may deny cooperation (Article 93/4). According to Article 87/5 and 87/6 the court may also ask non-state parties or intergovernmental organizations for assistance or cooperation.

Are these rules sufficient to provide that the court receives the cooperation and support it needs from the authorities of the countries in which investigations take

⁷² "State party" here refers to those nation states that have ratified the *Rome Statute*.

place, from neighbouring countries and from the international community? First of all, it makes a difference if the country ought to provide support is a member state of the *ICC* regime. If this is the case the country is legally obliged to fully cooperate with the court. On the other hand, if a country decides not to do so, the consequences it has to face are not very severe. In case the assembly of states is concerned with a matter of non-compliance, it has two possibilities. First, it can decide "*counter measures*". These will however, given the lack of binding sanction mechanisms, mainly be limited to naming and shaming of members who refuse to cooperate. Alternatively the *Assembly of States* can *recommend* diplomatic or economic sanctions (compare Stempel: 44). Again, the problem is that none of its member states are bound to comply with these recommendations. If the *SC* is concerned with a matter of non-compliance it can, when acting under Chapter VII of the *UN Charter*, decide all kind of binding measures. Agreeing upon effective measures would however require that no diplomatic, economic or strategic interests of the permanent members are affected (compare *ibid.*: 46). A state not member to the *ICC* regime only has to cooperate with if the court if the *SC* has acted under Chapter VII of the *UN charter* and referred the case to the *ICC* (compare Leiß: 69). Those legal regulations are not the only reason why the court is highly dependent on external support – there are also more practical aspects.

"The ICC does not have its own police force. It relies on the governments in those countries in which it is investigating to provide it with the assistance it needs. It depends on these governments to provide it with access, to protect its investigators and witnesses, and to arrest suspects. It also requires international support when domestic support is insufficient or lacking."

(Grono: 5)

This implies that if a country in which investigations take place is unwilling to cooperate, the Court needs the active support of the international community. Depending on the case, this could be political, diplomatic or economic pressure put on that state or even a *SC* resolution concerned with the situation at hand. Otherwise the *ICC* won't be able to carry out its work in an appropriate way. Further, even if a state is willing to cooperate with the *ICC* it may be unable to provide adequate means to do so. The security sector and the judicial system may for example be poor or even inexistent. In such a case, there are two possibilities for the *ICC*. The first is to fall back on means of the international community. Structures and capacities of an existing peace-keeping/peace-building mission of the *UN* could be used e.g. by executing arrest warrants with the help of international troops stationed in the country of investigation. The second possibility would be to wait until the domestic structures have developed in way that they can be of help to the Court. But this process also has to be driven by the international community, the *ICC* does neither have the mandate nor the means to do so (compare Stempel: 52). In short to carry out its work, the *ICC* is heavily dependent

on international support and cooperation. Whether the Court receives such support is dependent on the international community's willingness to do so which is in turn influenced by the general perception of the ICC's work.

9.2. Internal Parameters

9.2.1. Initial Strategy

As described above, its mandate limits the number of perpetrators the ICC can potentially prosecute. Nevertheless, it is important to scrutinize how the *Office of the Prosecutor (OTP)* interprets and implements the mandate – how the initial strategy is designed.

"It is clear in the first place that no investigation can be initiated without having careful regard to all circumstances prevailing in the country or region concerned, including the nature and stage of the conflict and any intervention by the international community. Furthermore, the Prosecutor will have to take into account the practical realities, including questions of security on the ground. It will also be necessary to consider whether there are available to the Prosecutor the necessary means of investigation and possibilities for protection of witnesses."

"The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility such as the leaders of a State or organization allegedly responsible for those crimes."

(ICC 2003: 2/7)

The first statement suggest that the *OTP* is aware that it needs external/international support whereas the second one shows that prosecutions shall mainly be limited on the most guilty and senior-level perpetrators. This impression is backed by the actions the ICC, has taken so far. Up to today, the *OTP* has opened investigations in the Democratic Republic of Congo, in Uganda, in the Central African Republic and in Darfur, Sudan (compare <http://www.icc-cpi.int/cases.html>). In Congo, two cases have been opened. The first is against Thomas Lubanga who is charged with enlisting and conscripting children under the age of 15 and using them for conducting hostilities (compare ICC-01/04-01/06). The second case is against Germain Katanga. He is accused of being responsible for a large number of crimes, including murder as a crime against humanity, sexual slavery and using child soldiers (compare ICC-01/04-01/07). Lubanga is *"the alleged founder of the Union des Patriotes Congolais (UPC) and the Forces patriotiques pour la libération du Congo (FPLC), the alleged former Commander-in-Chief of the FPLC and the alleged President of the UPC"* (compare ICC-01/04-01/06). Katanga was the top commander of a group called the *Force de résistance patriotique en Ituri (FRPI)*. In 2003, he assumed the title of *FRPI President* (compare ICC-01/04-01/07). In 11 December 2004, he was appointed to the rank of General in the *DRC Army*. In Uganda, the ICC has opened one case with four

accused persons.⁷³ All of the accused have been high-ranking officials. They were in the positions of Chairman and Commander of the *Lord's Resistance Army (LRA)*, Vice-Chairman and 2nd in command of the *LRA*, Army commander in the *LRA*, Deputy Army Commander in the *LRA*, and Brigade Commander in the *LRA*. They are all charged with a number of crimes against humanity and war crimes. In the Central African Republic, the prosecutor is investigating crimes against humanity (killing looting and in particular sexual abduction) that were committed between 2002 and 2003. So far, *"the investigation is not targeting any particular suspect at this stage and will be guided solely by the evidence that emerges."*⁷⁴ Sudan was the first situation that was referred to the *ICC* by the *SC*⁷⁵ and not by the countries in which the crimes were committed. One case has been opened, involving two accused perpetrators. The first is Ahmad Harun, former state Minister of the interior – he is, among other things, suspected to be responsible for:

"Management of, and personal participation in, the recruitment of the Militia/Janjaweed to supplement the Sudanese Armed Forces. He recruited Militia/Janjaweed with full knowledge that they, often in the course of joint attacks with forces of the Sudanese Army, would commit crimes against humanity and war crimes against the civilian population of Darfur."

(*ICC* 2007: 3)

The second is Ali Kushayb, the so-called "colonel of colonels" in West Darfur with thousands of Militia/Janjaweed under his command. Both of them are alleged to bear criminal responsibility for crimes against humanity and war crimes in 51 counts.

Recapturing, the *ICC* has so far targeted only the highest-ranking officials most responsible for the crimes committed. With eight accused perpetrators in four cases, the numbers are comparable to those of the *SCSL*. Another virtue of the *SCSL* has been that it targeted perpetrators from all conflict parties. The two suspected perpetrators prosecuted by the *ICC* in the *DRC* are also from opposing parties. In Uganda, all suspects were members of the *LRA*. However, it is widely acknowledged that the *LRA* is in fact responsible for the large majority of crimes that fall under the *ICC*'s jurisdiction. Hence the selection of indictments seems to be well justified and no threat to the *ICC*'s impartiality. In Darfur, both alleged perpetrators were on the side of the government and the Militia/Janjaweed during the massive raids in 2003/2004. Most responsibility for the crimes committed during that period is certainly with those parties. More recent developments do however show, that all parties are committing serious crimes and it would be good if the *ICC* considers to

⁷³ Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, Dominic Ogwen (compare *ICC*-02/04-01/05). The Pre-Trial Chamber later decided to terminate the proceedings against Raska Lukwiya (compare: *ICC*-02/04/01/05-248).

⁷⁴ Compare *ICC* website: http://www.icc-cpi.int/pressrelease_details&id=248&l=en.html

⁷⁵ On 31 March 2005, the Security Council adopted Resolution 1593 referring the Situation in Darfur, the Sudan, to the Prosecutor.

investigate these events, too. All in all, it seems as if the ICC's initial strategy was not only focussed on the high-ranking perpetrators but also unaffected by the perpetrator's conflict party, focussing only on the crimes committed. The initial strategy is therefore adequate and likely to contribute to reconciliation.

9.2.2. Outreach

The ICC is located in The Hague and thus, at least geographically very distant to the countries where it prosecutes crimes. According to Article 50 of the *Rome Statute*, the court has six official languages, Arabic, Chinese, English, French, Russian and Spanish, the working languages are English and French. Given its location and its working languages it is especially important for the ICC to have a proper outreach strategy in order to reach the people living in the societies where the crimes have been committed. For that purpose, the court has put up an "Integrated Strategy". It has the aim to coordinate the external relations, public information and outreach activities of its different departments and identifies possible challenges and constraints.

"The distance between The Hague and affected territories; unstable, unsafe environments; lack of access to media, internet, electricity; lack of implementing legislation; polarized populations and media distortion; deliberate manipulation of information; under-resourced local media and civil societies; security and independence concerns of potential partners; lack of education or illiteracy in some affected populations; suspicion of outside intervention; difficulty of providing materials in local languages."

(ICC 2005: 4)

Those are indeed factors that have proven to be problematic in the cases studied before. The question is which conclusions the court has drawn from these experiences. In late 2006, the *Registry*, which is responsible for the outreach activities, issued a *Strategic Plan for Outreach of the ICC* (ICC-ASP/5/12). According to this document, the court has in the first years of outreach activities mainly used resources available in the countries of investigation which have sometimes not been sufficient to "address the vast information-related needs of concerned communities". The new plan therefore aims at enhancing the outreach activities and builds upon the ICC's own experiences and the lessons learnt in Yugoslavia, Rwanda and Sierra Leone (compare ICC-ASP/5/12: 4). The outreach program has the following objectives:

- *To provide accurate and comprehensive information to affected communities regarding the Court's role and activities;*
- *To promote greater understanding of the Court's role during the various stages of proceedings with a view to increasing support among the population for their conduct;*
- *To foster greater participation of local communities in the activities of the Court;*

- *To respond to the concerns and expectations expressed in general by affected communities and by particular groups within these communities;*
- *To counter misinformation;*
- *To promote access to and understanding of judicial proceedings among affected communities*

(ICC-ASP/5/12: 5)

The plan further elaborates on a number of factors that may influence its strategy – target groups, communication tools for the various groups and potential partners for cooperation are identified. Among them are many tools that have proven to be successful in Sierra Leone such as posters, pamphlet campaigns, comic booklets and a number of other measures as well. Regarding the implementation, outreach activities will be triggered at the same time arrest warrants in the country at hand are issued (compare ICC-ASP/5/12: 10). The ICC focuses on establishing and maintaining networks of partners and wants to ensure a steady flow of information between the court and its partners. In order to be able to do so, the court will establish permanent representations in the countries where investigations are conducted. Those field offices *„should be visible to and accessible by the general public and particular groups“* (ibid.: 16). There are also situation-related strategies for each of the three field offices established so far in Uganda, DRC and Darfur. Those strategies take into account individual contextual factors, target groups and phases of the judicial process and the conflict. In Uganda and DRC, the outreach programs seem to be on its way – each field office has four persons responsible for coordinating the outreach activities. In Sudan, the situation is more difficult. The security situation limits the outreach activities possible, and the court mainly relies on *“international media and other available means”* (ibid: 24) – some details of the activities are confidential due to security considerations.

The above is only a very brief outline of the outreach strategy of the ICC. Further, it was emphasized, that the strategic plan may be subject to permanent revisions and improvements if the need to do so arises. For that purpose, performance indicators have been put up for the various countries that shall help to evaluate the outreach efforts. Within this research it is not possible to conduct an in-depth analysis of the outreach strategy and its impact. There are, however, clear signs that the strategy is very adequate and likely to contribute to reconciliation in the countries affected. Particularly important are the separate strategies and field offices for each country in which investigations are conducted, the focus on cooperation with a variety of and particularly local partners, and the use of methods that have proven to be effective in Sierra Leone. The case of Darfur shows, that besides its good strategy, the ICC cannot operate properly in a hostile environment and is thus still dependent on the cooperation of external partners, in particular the international community.

9.2.3. Other Aspects

As laid out in chapter eight, the use of local human resources can contribute to capacity building and give the people the feeling that they participate in the whole process. The ICC has two fields of activities that are carried out in the countries affected by the conflict. These are its investigations and its outreach activities. According to a statement of the OTP, the

"Investigation teams will include staff members who are nationals of the countries targeted by the investigations, taking care not to recruit individuals whose background or political affiliation may compromise the integrity and objectivity of the investigations. This inclusive strategy will help the OTP have a better understanding of the society on which its work has the most direct impact, and will allow the team to interpret social behaviour and cultural norms as the investigation unfolds."

(ICC 2003: 9)

The author could not find any information on the actual composition of the investigation teams – it is likely that they are treated confidential. The local management of the outreach teams in Uganda and the DRC is however completely in the hands of Ugandans respectively Congolese.⁷⁶ Further, the court has repeatedly stated, that it aims at fostering greater participation of local communities and that it will encourage states and civil society to take ownership of the court (compare ICC 2003: 2). So within the bounds of possibility, the ICC does very good at using local human resources. One measure that could be taken to further increase the use of local human resources would be to hold the trials within the countries affected instead of The Hague. This would also bring the Court closer to the local people. However, besides the statement of *Trialwatch* that the court is considering to do so, the author could not find further information on this issue.

There is one aspect that was not relevant in the case studies but may be for the ICC's potential impact on reconciliation. This is that crimes committed in states that have not ratified the *Rome Statute* are excluded from the ICC's jurisdiction unless the perpetrator has the nationality of a state that has ratified the statute or the SC has referred the situation to the ICC acting under Chapter VII of the *UN Charter*. In Africa for example, neither Ethiopia, Eritrea nor the Sudan are members of the statute – regions not unlikely that crimes falling under the jurisdiction of the court may be committed. This is indeed one major shortcoming of the court, however, there is not much one can do about it. States enjoy sovereignty and no international institution can interfere with the internal affairs of a state unless the state accepts the authority of the institution or the SC authorizes the institution to do so. The SC has already used his competences to refer the situation in Sudan to the ICC so there is hope that it will do so again in the future if necessary. And, as explained below, if the international community has no interest that the ICC deals with the

⁷⁶ Compare: http://www.icc-cpi.int/outreach/o_uganda/ou_contact.html and http://www.icc-cpi.int/outreach/o_drc/odrc_contact.html

situation in a certain country, it is unlikely, that the court can have a significant impact there anyway.

9.3. Conclusion

Some critics claim that the mandate of the court is too limited, that the *ICC* will never judge any perpetrator from industrialized countries and name further shortcomings of the court. Those critics may be right but in regard to reconciliation in societies after internal conflicts the **mandate** is very appropriate. The framework provides acceptable **funding mechanisms** although the Court is to a certain extent dependent on its member states – an aspect that will be addressed once more below. **Timeframe and ownership** of the court are absolutely unproblematic as the *ICC* is a permanent institution, with international legal personality. The **location** of the court is not in the countries affected by the crimes but in The Hague. However, the *ICC* tries to make up for that by involving the local society with the court where possible, e.g. by using local staff in the investigation teams or the outreach office. The last of the external parameters that were significant for a tribunal or special court to contribute to reconciliation is the **cooperation and support** the court receives. Roughly, there are two areas in which the court is dependent on the cooperation and support of external entities. The first one is funding. If the court wants to ensure a steady flow of money, it needs to convince its member states and also the *SC* that their money is used wisely. The court must work efficiently and adapt itself quickly to changing situations and changing financial and personnel needs. The *ICC* seems to be aware of that and has developed several tactics to keep costs down. One example is that the court keeps the size of its investigation teams, its administration and other departments in which the workload can vary very strongly, as flexible as possible (ICC 2003: 9). The court's expenses shall also be kept low by limiting the number of prosecutions and trials by encouraging states to use their domestic judicial system if possible.

„The Court is an institution with limited resources. The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.“

(ICC 2003: 3)

The second area in which the *ICC* is de facto not independent is the selection of geographic areas in which it wants to work. Formally, the prosecutor can decide to open investigation anywhere he wants, as long as the crimes fall under its jurisdiction and the pre-trial chamber approves his decision. But, as the prosecutor has stated, *"to put an end to impunity there needs to be consensus between the Court and the international community"* (ibid). First of all, support from the international community is needed if countries in which investigations take place are

not cooperating with the court. But even if the *ICC* would be able to conduct its investigations, arrest perpetrators, put them on trial and punish them for their crimes on its own and even if it would conduct all of this in the best way possible, it is still not said that this would contribute to reconciliation in that country. This is because justice cannot be delivered without a substantial peace-building process, and even if it could, justice can, important as it is, never be more than one part of a reconciliation process. The problem is that most peace processes requires the active participation of the international community and experiences have shown that the international community is only willing to engage itself if there is a solid interest to do so.⁷⁷ This implies that the *ICC* is likely to be successful only in states or societies the international community has an interest and is engaged in.⁷⁸ For the same reason, it is unlikely that the court will even start investigations in countries where it would be unable to do its work due to a lack of support or where its work would be unlikely to have any effect towards Peacebuilding or reconciliation. This is probably the biggest restriction for the *ICC*'s potential to contribute to reconciliation.

Also the internal parameters show, that the *ICC* is potentially suited to foster reconciliation in post-conflict societies. The Court should continue to indict the highest-ranking perpetrators – when appropriate, it would be wise to issue indictments against perpetrators of all major parties of a conflict. This may avoid the impression of being biased that could for example arise if the *ICC* acts on the request of a state and indicts only perpetrators from government-opposing parties. In all cases, the *ICC* needs to use its outreach program to inform the people in the affected society about its mandate, strategy and progress at all stages of the process. It is not unlikely that the court will be able to do so. The outreach strategy and the first phase of its implementation are very promising. There are diverse programs for the different countries that are managed by local experts who try to involve all sectors of society as well as international NGO's in the implementation. The outcome of these actions is still uncertain, some more time has to pass and trials completed before one can tell if people have understood about mandate, limits, and work of the *ICC* and how they assess it. So far, two things can be captured. First, the situation in Sudan shows that a proper outreach program can hardly be conducted during an ongoing conflict in an insecure environment. The experiences from Uganda and DRC show that many people initially tend to expect too much from the court and do for example believe that it should also prosecute certain crimes committed in their area (compare ICC-ASP/5/12: Paragraph 88). This implies on the one hand, that the *ICC* must make clear its limits to the people. On

⁷⁷ This interest can have different causes such economic, political or security considerations or public pressure.

⁷⁸ There are also problems if the international community's engagement is unsuccessful. In Darfur for example the work of the *ICC* is not making substantial progress due to the difficult situation of the overall peace process.

the other hand, the grave crimes committed in those countries have to be addressed by another institution and that means that the international community has to foster the peace-building processes in the societies affected.

As a conclusion shall be captured that the *ICC* has considerable potential to contribute to reconciliation after internal armed conflicts. But this is only possible in countries where the international community, and particularly the permanent members of the *SC*, want him to do so. The *ICC* is therefore also a suitable successor for international or hybrid tribunals as any obstacles to its success, such as a possible lack of international support would most likely also apply to any future tribunal. This positive assessment shall however not imply, that there is nothing one can do to enhance the effectiveness and the efficiency of the court. In the last part of the paper will be analyzed, how European actors can help the *ICC* to contribute to reconciliation.

Part III: Europe's Contribution to Reconciliation

10. The Role of European Actors

The purpose of this chapter is to determine appropriate measures for European actors to foster the contribution of the *ICC* to reconciliation. The first step will be to review the last two chapters and derive suggestions for concrete actions that could be taken to overcome the weaknesses of and to create positive preconditions for the *ICC*. Thereafter, the most suitable actors to implement those actions will be specified.

10.1. Measures to Support the ICC

As discussed above, the **mandate** of the *ICC* is for the most part appropriate and does not have to be changed. There are certain measures that could improve the **framework** of the Court. One could be to make sanctions decided upon in *Assembly of States* binding to its members instead of issuing only recommendations. Similarly, one could impose penalties on member states that fail to pay their contributions to the *ICC* in full and on time. It is, however, unrealistic to expect corresponding changes on the legal framework of the *ICC* at least in the medium-term as for example shown in discussions in regard to ensuring appropriate **funding** of Court. The members have fundamentally different views on measures such as explicitly publishing arrears of the state parties (compare ICC-ASP/5/27: Paragraphs 15 - 17). Therefore other (e.g. non-governmental) actors should try to create a public interest for the *ICC* which may encourage states to ensure a steady flow of money for the court – this may also include measures as “naming and shaming” of those who are in arrears with their payments.

Generally, the main contribution of European actors can be expected in the area of **cooperation and support**. Particularly governmental actors may support the *ICC* in various phases. Both the *EU* and nation states, should encourage as many state parties as possible to ratify the *Rome Statute*, thus accepting the jurisdiction of the *ICC*. Especially countries in which an internal armed conflict does not seem unlikely in the mid-term should join as this may in the case of a conflict not only ease the prosecution of serious crimes, but prevent them in the first place. Nevertheless, also countries in which reasons for future investigations by the *ICC* seem very unlikely should ratify the statute. The more countries ratify the *Rome Statute*, the greater the international acceptance and thus the support for the Court will be. Further, any measures (including sanctions) decided upon in the *Assembly of states* are likely to be more effective if more countries back them. In the investigation phase, possibilities for support are even greater. The *ICC* must be supported with the information it needs, e.g. regarding the crimes under investigation or the whereabouts of suspects. The court may also require logistical assistance e.g. when

implementing witness protection measures.⁷⁹ Most important, the *ICC* must be able to rely on the international community and particularly Europe if its work is impeded by countries that are supposed to cooperate with the court. If investigations are hampered, suspects are not rendered to the court or evidence is held back, political, economic and diplomatic pressure must be put on the relevant authorities. This pressure can be exercised through different channels, including the *UN*. The *UNO* is also the forum to address situations in countries that are not member to the *Rome Statute*. The *General Assembly* should discuss relevant situations whereas it is up to the *SC* to decide upon suitable measures, acting under chapter VII of the *UN Charter* where appropriate. After the *ICC* has completed its investigations regarding a certain situation, it is still possible that it will need external support. If the *ICC* would decide to hold one or more trials in the country where the crimes have been committed and not in The Hague, problems may arise in regard to security and logistical capacities in that country. Provided that the host country agrees, it may be desirable that foreign military and civil personnel support the *ICC*'s work on-the-spot. One aim of the *ICC* is to closely cooperate with the official authorities in the countries affected. If those authorities are in principle willing but not able to do so due to a lack of capacities, European actors could help in two ways. The first would be to help building up those capacities, what may include measures as training programs for police officers or personnel in the judicial sector. In case this is impossible (e.g. due to time restraints) direct assistance, e.g. by European police forces could be an option in case there are no objections by the domestic authorities.

As laid out above, the **internal parameters** refer to issues that are located within the responsibility of the tribunals respectively the *ICC*. This does not imply that the Court may not decide to involve external actors in these processes. In fact, the Court has repeatedly stated that, also given its limited resources, cooperation with all kind of different actors is the key to success. Among the three identified internal parameters relevant to reconciliation, there is, however only one where European actors could significantly support the *ICC*. The **initial strategy** should be and was decided upon solely by the Courts organs and the decision in how far it is possible to **use local human resources** is also up to the court. The one area in which the *ICC* can and should be supported is the **outreach activities**. In any country where it runs investigations, the Court undertakes efforts to inform the population of those countries about its activities, structure and mandate. These measures are important and well-designed, still, their effectiveness can be enhanced further. Any actor that has access to groups of the societies in the countries affected can and should help communicating the *ICC*'s aims. Particularly NGOs that are running projects or have been working otherwise in the respective countries can play an important role here.

⁷⁹ Witnesses could for example temporarily stay in third countries until their time to testify has come.

Finally, there is another aspect in which the Court needs the help of external actors. As discussed above, the *ICC* is only likely to get active and to be successful in situations (territories) the international community has an interest in. It is therefore necessary that (post-) conflict situations are put on the international agenda and peace-building processes are fostered.

10.2. Recommendations for European Actors

10.2.1. The European Union

As laid out above, it may be essential that diplomatic or economic sanctions are imposed on a country not cooperating with the *ICC*. There is a variety of sanctions the *EU* can impose, that have different legal bases and thus require actions of different actors. In general one can say that the *Commission* is rather in charge of long-term measures. It is for example responsible to manage the EU's external aid programmes including aid and trade agreements (Stewart: 100). The *Council* has more competencies in decisions on operational mechanisms such as the training of (third country's) civilian personnel, police missions, monitoring and other assistance tasks (ibid.: 120). However, in many cases competences are fragmented across the *Commission* and the *Council* (ibid: 115). Therefore, those two institutions, as well as all other institutions of the *EU*, must cooperate and coordinate their actions to support the *ICC* in an appropriate way. If for example economic and financial sanctions against a third state are required Articles 60 and 301 of the *Treaty establishing the European Union* provide that the *Commission* makes a proposal for a regulation which the *Council* has to adopt by a qualified majority. If such measures concern entities not directly connected to the regime of a country, Article 308 further requires an unanimous decision by the *Council* and prior consultation of the *European Parliament*.⁸⁰ *EU* regulations can have a very strong effect as they are directly binding for the member states. Therefore, such regulations can considerably help to foster the cooperation of third countries with the *ICC*. If a regime is willing but unable to support the work of the Court in an appropriate way, the *EU* should consider to provide support with measures such as the training of police officers and other staff or the dispatchment of forces to ensure security for trials or investigation teams.⁸¹ Further, the *EU* can use aid and trade agreements to give other states incentives to join the *ICC* regime e.g. by connecting aid to relevant conditions. This may prevent crimes in the first place and is thus particularly important in countries where human rights violations do not seem unlikely in the future.

Besides these measures, that the *EU* can implement independently, there is another forum that can be used to support the *ICC*: The *UNO*. The 27 *EU* member states have considerable influence within the *UNO* and have two permanent members in

⁸⁰ Compare also: http://ec.europa.eu/external_relations/cfsp/sanctions/index.htm

⁸¹ In most cases, those measures require the permission of the countries affected. In some situations, an appropriate mandate may also be provided by a *UN SC* resolution.

the SC. Depending on the situation, the *EU* member states should take different measures to support the *ICC*. If there is a situation where the involvement of the Court seems to be necessary, or where it is already involved, this situation should be put on the agenda of the *General Assembly*. During the caucuses, the *EU* member states should speak with one voice, try to convince other countries of the necessity of an *ICC* involvement and try to foster measures appropriate to the particular phase of the court's involvement.⁸² The *General Assembly* should encourage the court to start, respectively to continue, its work and ensure the support of the international community e.g. by passing a resolution concerning the situation. The content of such a resolution obviously depends on the situation at hand. If the *ICC* had not started to investigate a situation yet, the resolution could contain a general statement for support. In case the Court is already investigating a situation but encounters resistance from the authorities there, the resolution could condemn such behaviour and recommend appropriate measures (sanctions) to its member states. Sometimes, those steps are insufficient and in such cases, the situation should be referred to the SC, acting under article 11 of the *UN Charter*. Particularly if there is a situation in which the involvement of the Court would be desirable but the affected country is not a member to the *ICC* regime, and is reluctant to cooperate with the court, the SC must discuss the situation at hand. During the discussion the European members of the SC should foster a solution, respectively a resolution that takes into account the preconditions for the *ICC* to work efficiently.

Irrespective of the forum, the *EU* must also be ready to ensure the financing of measures supporting the *ICC*. If actions decided by the *UN* are not covered by the regular *UN* budget, the *EU* must be ready to cover an appropriate part of the costs and to convince third countries, particularly the wealthy ones, to do so as well. Naturally, the *EU* must also be ready to cover expenses arising from their own decisions and actions to support the *ICC*. Depending on the measures taken, costs may be covered by the general budget, by the budget for the *Common Foreign and Security Policy*, or have to be covered by the member states (compare Stewart: 126). As in many other situations, the financial aspect may turn out to be a problem. Both the general budget and the one for the *Common Foreign and Security Policy* is limited, and contributions to civil crisis management are of voluntary nature (ibid.: 127). However civil crisis management may be of greatest importance regarding the work of the *ICC* and it is not only governmental but also the non-governmental actors that may have an impact in this field. NGOs may play an important role as their work is perceived as less connected to the interests of certain political fractions. They are often able to work better on the grassroots level and generally more flexible. In short, NGOs can considerably support the work of

⁸² Of course, the same is true for working groups, bilateral meetings and other occasions.

governmental actors. As NGOs are often dependent on public funding voluntary contributions are not only required for direct *EU* actions. In many cases it makes sense that governmental actors support NGOs both financially and politically (compare Truger: 92).⁸³ In some situations it may be wise to entrust NGOs with the implementation of certain measures and provide them with the financial means to do so. Besides the importance of the *EU*, the potential impact of the *ICC* still depends on the willingness of the European nation states to substantially support the Court.

10.2.2. Nation States

Although the *EU* is more than the sum of its member states, many recommendations made for the *EU* are also valid for single European countries. In fact, whereas the *EU* has often the competence to decide on measures that support the *ICC*, it is usually the nation states that have to implement them⁸⁴ and even if there are binding *EU* decisions, much depends on the states financial and political support for the *ICC*. A positive aspect is that most countries in Europe are members to the *ICC* regime, within the *EU*, only the Czech Republic has not ratified the *Rome Statute*. Among the 21 European non-*EU* countries there are eight that have not done so: Russia, Belarus, Ukraine, Moldova, Turkey, Vatican City, Monaco and Liechtenstein. This is a good starting point, as the decision to become a party to the *ICC* was made on a voluntary basis and one may hope that these countries will also support the court. However, from a legal point of view, few concrete obligations result from the *ICC* membership – mainly to pay the contributions and to accept the jurisdiction of the Court. So far, there have not been big problems regarding the financial contributions but only the future will show if this situation changes – particularly if the financial needs of the *ICC* grow. Article 112b of the *Rome Statute* states that a state party may lose its right to vote in the *Assembly* or the *Bureau* if the "amount of its arrears equals or exceeds the amount of the contributions due from it for the preceeding two full years." There is a similar rule in the *UNO*, which had the consequence that many members pay just enough contributions not to lose their right to vote. Hence, it may be desirable for the *ICC* to have more effective instruments such as fines to sanction members reluctant to pay their fees. This would require a change of the *Rome Statute*, which must be decided upon by the members. On the other hand, it is very unlikely, that the State Parties would agree on such a change, also as it does not seem to be very urgent at the moment. Further it may deter other countries to join the *ICC* regime. Therefore, the recommendation to European states is to always pay their contributions to the *ICC* in full and on time.

⁸³ The possible contribution of non-governmental actors is examined more in detail in chapter 10.2.3.

⁸⁴ For example if the "*EU*" shall speak with one voice in the *UNO* it is in fact the member states that have to do so. And if the *EU* decides to implement a monitoring mission the member states have to provide the personnel and in many cases also the financial means to implement the mission.

Further, and that may prove to be more complicated, they should support measures that contribute to the success of the *ICC*.⁸⁵ Such measures may be very diverse, and so is the required support. In the investigation phase, countries should provide the Court with intelligence that may contribute to the solving of crimes under investigation. Also logistical and material support, such as providing vehicles for investigations or free international transportation for *ICC* officials may be of great value. Both before and during the trials, witness protection programs should be supported, e.g. by temporarily providing shelter for victims in Europe. If the *ICC* ever decides to hold trials outside of The Hague, in the countries where the crimes were committed, the possibilities for support are even greater. In order to guarantee the security of the trials, the Court may require the assistance of European police or military forces. Although such missions will usually be coordinated within the *EU* or even the *UNO*, staff has to be provided by individual countries and European states are predestined for this purpose. This is because they have the necessary capacities and have repeatedly stated their commitment to uphold human rights. Further, they are often perceived less biased than for example neighbours of the countries affected by conflict or the USA.⁸⁶ Irrespective of the phase of activities, European countries should always use political and diplomatic means to support the *ICC*. This may but does not necessarily imply the use of sanctions, or pressure against countries not cooperating with the Court. Some European countries historically have close contacts to certain countries in other geographic regions, such as France to Libya. Such contacts may be an opportunity to encourage countries to become a State Party to the *ICC* and/or to support its work. To convince third countries to join the *ICC*, should be a major goal of European countries and persuaded through all channels available. In countries with open or subliminal conflicts, this may prevent serious crimes in the first place or at least make it easier to bring to account those responsible for them. But so far, many of these countries, for example Ethiopia and Eritrea, Côte d'Ivoire, Myanmar, Sri Lanka or Haiti did not accept the jurisdiction of the court. Any additional *ICC* member implies more possibilities, more legitimacy, and thus a greater deterrent effect of the court that may lead to less serious crimes committed. The fact that three global powers, the USA, Russia and China refuse to become State Parties poses a problem and it should be a long term objective to persuade those countries to join the *ICC*. Their influence, particularly their votes in the *UN SC*, could greatly enhance the effectiveness of the court.

⁸⁵ Also the *OTP* acknowledged that *"Agreements with States will be necessary, supporting the Court's efforts"* (ICC 2003: 2)

⁸⁶ Since the USA object the *ICC* and the especially the war in Iraq limits their willingness and capacities, for further military engagements, any US-lead mission to support the *ICC* seems, at least in the medium term, unlikely anyway.

10.2.3. The OSCE

Before we come to the role of non-governmental actors, some aspects on the *Organization for Security and Cooperation in Europe (OSCE)* and its possible contribution to the success of the *ICC* shall be captured. On first glance, it seems that the *OSCE* could be an important actor to enhance the effectiveness of the *ICC*. The *OSCE* describes itself as “a primary instrument for early warning, conflict prevention, crisis management and post-conflict rehabilitation”.⁸⁷ It has 56 members, including most European states, Russia, the USA and Canada. Decisions are not legally binding but taken on political consensus. The *OSCE* has a considerable annual budget, for 2007 it was almost 170 million Euro. The drawback of the organization is that its objective is to promote peace and security *among their members* that are (with the exception of the USA and Canada) located in Europe and its periphery. Hence, also the activities of the *OSCE* take place in and are limited to South-Eastern Europe, Eastern Europe, the Caucasus and Central Asia. So far, the *ICC* has only investigated situations in regions outside of the *OSCE* sphere, namely in Africa. However, given the tense situation in countries as Bosnia and Herzegovina, Serbia, Croatia, or The Former Republic of Macedonia, one cannot rule out the possibility that violent conflicts re-erupt and crimes falling under the jurisdiction of the *ICC* may be committed there in the future. In this case, the *OSCE* may play an important role for the support of the *ICC*, particularly as it is already active in this region.⁸⁸ The *OSCE* has in-depth knowledge of their member states, including areas as the freedom of media or the situation regarding rule of law and human rights. This information may be very important for the *ICC* when investigating a situation in those countries. If required, the *OSCE* could use both their good contacts and their financial and professional capacities to support the *ICC*. Moreover, the *OSCE* seems to be a very good forum to deliberate fast on urgent matters at hand, as it has a permanent council meeting every week and periodic meetings of heads of states and governments. Further, through the *OSCE*, even countries as the USA and Russia, that are not State Parties to the *ICC* could support the work of the court. On the other hand, those countries could also hamper any kind of support of the *OSCE* for the *ICC* to affirm their general opposition to the court. It cannot be analyzed here, if it is likely that they will do so. But it is clear that the *ICC* could in the future contribute to post-conflict rehabilitation in *OSCE* countries and thus also foster the aims of the *OSCE*. Hence, if the *ICC* starts investigations in an *OSCE* country, the organization should support its work where possible. For that purpose, the *OSCE* should make the *ICC* an external partner as it has done with the *UN*, the *EU* and many international organizations and non-governmental actors.

⁸⁷ Compare *OSCE* website: <http://www.osce.org/about/19298.html>

⁸⁸ The *OSCE* is for example engaged in police-related activities and is conducting and coordinating activities in Croatia, Serbia, Kosovo and Montenegro (compare: <http://www.osce.org/about/13046.html>).

10.2.4. Non-Governmental Actors

As the causes for violent conflicts are usually located within the affected society, the solution cannot take place solely on a political level (Truger: 89). NGOs have gained importance in the field of conflict prevention as well as in other fields. The reasons therefore are diverse and cannot be examined here, instead, some basics regarding existing NGO structures and their capacities shall be captured. Very roughly, NGOs active in the field of conflict prevention can be put in three categories (compare Fahrenhorst: 72-84). First there are NGOs that focus on lobbying, thereby influencing the international agenda. Second there are international NGOs that are involved in the solution of crises or violent conflicts. This involvement can be direct, namely if an international NGO is active in the field, implementing projects, programs, or other measures itself. It can further be indirect, if the NGO is what Fahrenhorst calls a "*Mittler-NGO*". Those NGOs are mostly located in industrialized countries where they also acquire their funds. In the focus of attention are usually developing countries in the south, where they usually implement projects or other measures in cooperation with local NGOs or even completely entrust local NGOs to carry out their work. Those local organizations that operate only within the society affected by a conflict or crisis are the third category of NGOs. Truger identified areas in which crisis-management-related NGOs are usually active (Truger: 92-95). Two of those areas are interesting in the context of this paper. The first is *Evaluation and Research*. NGOs often evaluate their own activities and thus have experience, which measures have been effective under which circumstances. This country- and/or activity-specific knowledge should be made available to the ICC. Relevant NGOs could for example draw up reports or analyses concerning a certain area or an activity, the ICC is concerned with. Those should include specific recommendations for the Court that may help to plan and implement its actions in a more appropriate and effective way. Also, closer forms of cooperation are thinkable, e.g. members of NGOs introducing ICC staff to local leaders or victims of crimes under investigation. However, there are also limits to external cooperation as the ICC must always make sure to keep its impartiality. *Mittler-NGOs* should concentrate on acquiring as many funds as possible for measures in societies the ICC is active in. Particularly the local NGOs need this financial support to foster a positive impact of the ICC – e.g. in the second area of interest.

This area includes *outreach activities and lobbying*. NGOs can improve the impact of the ICC's outreach efforts by spreading information on the court. They are suitable for that task because they can build up connections between governmental actors or international institutions as the ICC and the local people (Truger: 96). NGOs active in societies affected by conflict may be closer to the people and more trusted than for example the domestic media institutions that are often biased. NGOs should spread information on the structure and work of the ICC, either as direct partners of the Court's outreach programs or with independent measures. Thereby, they can

help to shape the perception of the *ICC* among various groups in society in a positive way and thus contribute to the overall process of reconciliation. Besides outreach activities in the affected countries, there is another facet of publicity that can serve the interests of the Court: International lobbying. As discussed before, it needs political and diplomatic pressure of the international community to promote cooperation with the *ICC*. However, before the international community deals with a topic in any way, it must first be put on the international agenda. Sometimes, governmental actors do that themselves but sometimes, particularly if they do not have an economic, strategic or whatsoever interest in a situation, it is possible that they don't. In such cases, it is up to non-governmental actors to step in and fill the gap, they must continuously address the topic in all forums and forms available thereby creating a public interest. Such lobbying activities may be diverse. Examples are to raise awareness on situations in countries so far ignored by the international community or to name and shame those who are supposed to but do not support the court. The latter may also include State Parties of the *ICC* that do not implement measures decided upon by the *Assembly of State Parties* or do not pay their contributions to the court. Another possibility is to address countries that oppose to become a state party of the *ICC* and try to build up public pressure. However, as accepting the *ICC's* jurisdiction must always happen on a voluntary base and touches the issue of national sovereignty, those measures are unlikely to have an impact in the short-run. Summarized, NGOs should take any opportunity to directly or indirectly support the *ICC* and to oppose, respectively publicly name and shame those actors working against it. In the run-up to the establishment of the *ICC*, non-governmental actors have proved how significant and successful lobbying activities can be (compare Van den Herik: 264-282). Thus they should continue to use this instrument to support the work of the *ICC*.

10.3. The Need for Cooperation

This chapter has shown that all kind of European actors can foster a positive impact of the *ICC* on reconciliation in post-conflict societies. Moreover it became clear that there is an enormous need for cooperation between those actors. Many political **competencies** for decision-making in Europe are with the institutions of the *EU*, that have to coordinate their efforts in order to come to good results. However, in many cases, implementing decisions taken by the *EU*, will not be possible without the commitment of the nation states, as it is them who have the necessary personnel and financial **capabilities** to do so. While some actions may and should be directly conducted by the European governmental actors (e.g. police missions or training of staff), other may be more adequately implemented by NGOs with topic- or area-specific **experience**. Also the *OSCE* has considerable experience and could be a very good forum to deliberate on measures supporting the *ICC*. It has, however, the disadvantage that its area of activity is limited and that its

commitment for the *ICC* is unclear as important *OSCE* members are not State Parties to the *ICC*. The Court's mandate and framework is very good and if all actors support the *ICC* and build up a "*network of relationships between the Prosecutor, national authorities, multi-lateral institutions, nongovernmental organisations and other entities and bodies*" (ICC 2003: 2) it is very likely that the *ICC* can make a significant contribution to reconciliation in post-conflict societies.

11. Conclusion

The case study conducted in part I on the work turned up a number of interesting aspects. Some could have been expected beforehand whereas others were rather surprising. For example, it emerged that none of the tribunals was able to individualize guilt. Yet, by addressing the highest perpetrators of all conflict parties, it was still possible to overcome polarization and to contribute to reconciliation – irrespective of the comparatively small number of cases conducted. Generally, the biggest impact of tribunals could be observed on stage 3 – managing contradiction. Particularly the *ICTR* and *SCSL* could prevent return to power of perpetrators and, to a certain extent, also increase awareness of human rights and humanitarian law. However, only the later could transform this into a significant contribution to reconciliation in the respective society. The most salient aspect of the tribunals that was not directly related to reconciliation in the examined societies was that particularly the negative experiences of the two ad-hoc tribunals but also the positive ones of the *SCSL* considerably contributed to the development and evolvement of international humanitarian law in general. The need for more appropriate mechanisms of Retributive Justice was acknowledged and became, strongly promoted by a variety of NGOs, a decisive factor for the establishment of the *ICC*.

The direct connection between the experiences made in international and hybrid tribunals and the establishment of the *ICC* is also reflected in its mandate, its framework, its initial strategy and its outreach activities which are all suited for the task at hand. This is not to say that all of these issues are perfect but together they build a system in which the *ICC* can potentially have a great impact on reconciliation. To what extent this potential can be utilized largely depends on the support the Court receives of the international community. *"Prosecution by the ICC is one of the few credible threats faced by leaders of warring parties"* (Grono: 3) – but only if the *ICC* will be given the financial means and the political backup to do so. This need for external support and cooperation implies that the *ICC* can hardly be successful and will most likely not even engage in situations, the international community does not have a strong interest in and is actively involved with. In short, without a substantial peace process, involving all aspects of post-conflict state building the *ICC* will not be able to foster reconciliation, either.

Even in the field of justice, the Court won't be able to act on its own. The *ICC* will in most societies after an internal armed conflict be the only, or at least the best, instrument to punish high-ranking perpetrators with greatest responsibilities for systematic violations of human rights and other serious crimes committed during that conflicts. Nevertheless, other mechanisms have to be used to create justice for the mass of crimes that have been committed by other perpetrators. Failing to do so will leave an impunity gap that can seriously hamper any reconciliation process.

No justice on the cheap or without international commitment – that is what must always be kept in mind. Non-governmental actors played an important role in the establishment of the *ICC* and will hopefully continue to promote the Court's work in the future. However, neither the *ICC* nor any other international organization can be more powerful and effective than its members want it to be and as three major global powers – Russia, the USA and China – are not State Parties to the *ICC*, support from European governmental actors will be a decisive factor for the success of the Court. Possibilities to do so are plenty and should be seen as a long-term investment that is likely to pay off in the future since today's unresolved conflicts are tomorrow's problems.

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