

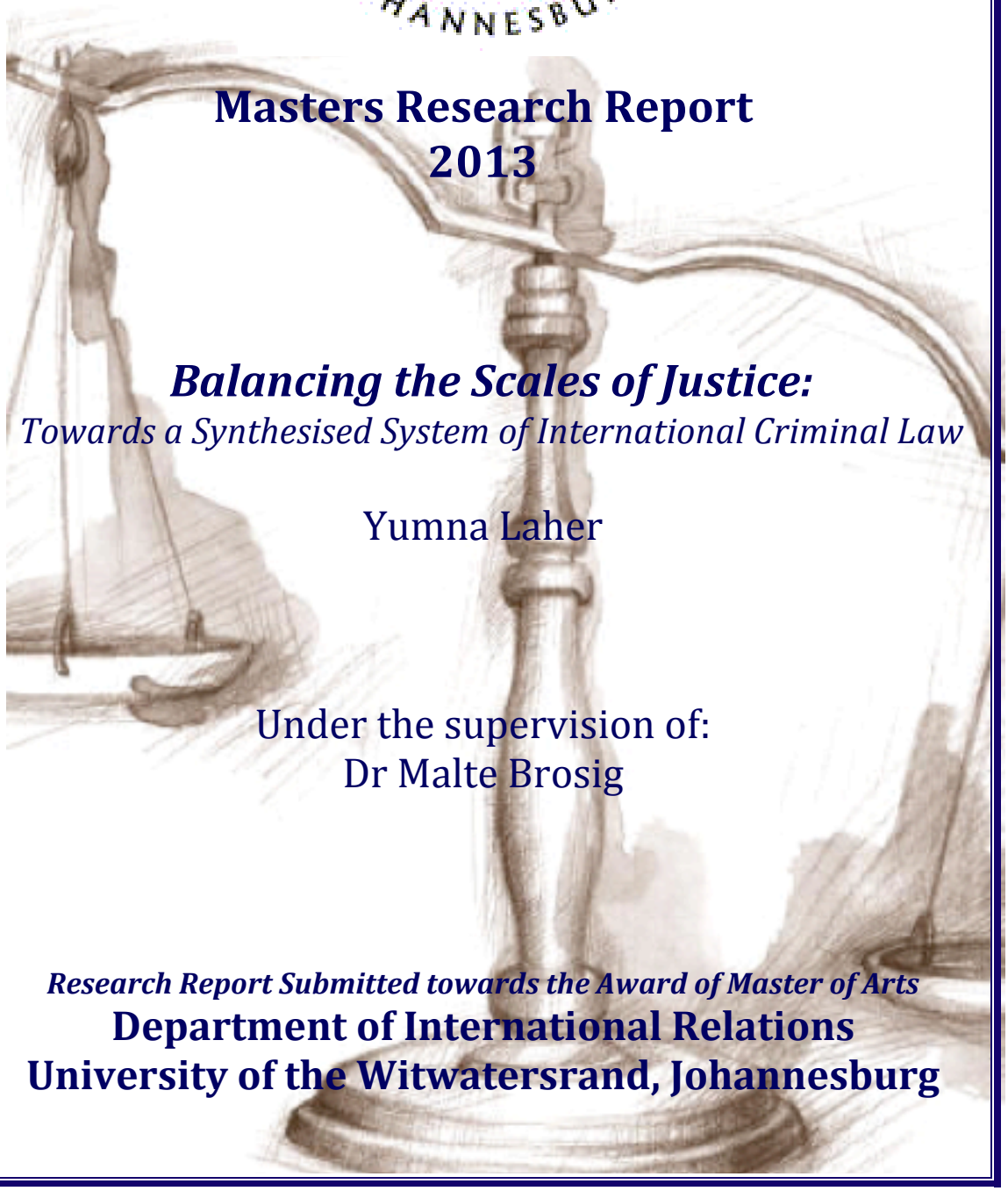
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Balancing the scales of justice: towards a synthesised system of international criminal law

Laher, Yumna

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Masters Research Report
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Balancing the Scales of Justice:

Towards a Synthesised System of International Criminal Law

Yumna Laher

Under the supervision of:
Dr Malte Brosig

Research Report Submitted towards the Award of Master of Arts

Department of International Relations
University of the Witwatersrand, Johannesburg

Declaration



I declare that this research report is my own unaided work except where I have explicitly indicated otherwise. This research report is submitted towards the degree of Master of Arts in International Relations by coursework and research report at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

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Yumna Laher

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Part I
Introduction



Abstract

The history of international relations has been spotted with examples of serious international crimes and the growing need to hold those responsible accountable for their actions has since given rise to a system of international criminal justice. There is, however, no unified theory of prosecution in international criminal law and the field has been plagued by divisions in both theory and practice. At the international level of prosecution, trials conducted under the principle of universal jurisdiction and underpinned by the theoretical tenets of legal positivism are pitted against those conducted under international-sanction and promoted by functionalists. Although the need to develop a common framework of practice has been articulated, the inability of legal theorists and political scientists to stretch the limits of their discipline has, to date, resulted in the pursuit of a limited justice. Utilising comparative case study analysis, this paper aims to assess the extent to which mechanisms of prosecution at the international level contribute to the outcome of justice and to what extent it may be suitable to advance a model of synthesised international criminal prosecution to balance the scales of justice in the future.

Introduction

From the grave human rights violations persecuted in the former Yugoslavia and Rwanda to those in Sierra Leone and Cambodia and from the atrocities afflicted in Pinochet's Chile to those carried out in Chad under Hissène Habré, the history of international relations has been spotted with examples of serious international crimes committed across all four corners of the globe. The growing need to hold those responsible accountable for their actions has since given rise to a system of international criminal justice,[1] however, this field is by no means flawless and has been plagued by dichotomous divisions in both theory and practice.[2]

There is, however, no unified theory of international criminal justice that views mechanisms of justice at both domestic and international levels as compatible. Conflicting theoretical perspectives that determine the domain of law and how justice should be managed have consequently led to the development of two separate spheres

[1] Ratner, S, R, Abrams, J. S. Accountability for Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy. Oxford University Press, Oxford, 2001, p. 151.
[2] Morgenthau, H. J. "Positivism, Functionalism and International Law" in The American Journal of International law. Vol. 34, No. 2, 1940, p. 265.

of practice in international criminal law. On the one hand, the principle of universal jurisdiction grants domestic courts legal authority to try non-citizens whose alleged crimes were committed outside the geographical boundaries of the prosecuting state. On the other hand, international trials have since been established to challenge the domination of domestic courts in trying serious international crimes by developing a set of internationally-sanctioned tribunals under which individuals may be held accountable. The divergence between universal jurisdiction and the international regime of criminal justice has been essentially evident in the competitive discourse between the ideals of positivist legal theory and functionalism. Although these theories do not prescribe the nature of international criminal justice, their tenets do favour certain mechanisms above others. Since functionalism considers international justice to be the domain of an organised physical force, its contemporary prominence in international law could be equated to promote internationally-sanctioned trials.[3] Similarly, positivist legal theories that promote the supremacy of state laws arguably enshrine the significance of such doctrines as universal jurisdiction.[4] Although contemporary literature notes the need to develop a 'unique theory' of international criminal law, the competitive treatment of theory in the literature has undeniably led to divisions in practice and a notably limited outcome of justice.[5] The question, therefore, still remains; how best can prosecutorial mechanisms serve justice in international relations?

Whether the limited justice obtained by the aforementioned mechanisms of prosecution is as a result of their essential theoretical opposition or due to their resultant practical shortcomings is, however, up for debate. By testing these two theories in practice through comparative case study, assessing both their pitfalls and advantages, the extent to which each contributes to achieving justice may be determined. It should be noted from the outset that although the outcome of justice is a difficult one to measure, care will be taken to assess both the procedural and legal elements of the concept as well as its substantive and political implications. The field of international criminal justice is

[3] Soper, P. "Law's Normative Claims" in George, R. P. (ed). The Autonomy of Law. Clarendon Press, Oxford, 1996, p. 216.
[4] Ibid. p. 265.
[5] The practice of international criminal justice is such that competing views of how prosecutorial justice ought to be achieved – whether by mechanisms of international-sanction or by universal jurisdiction – has led to sometimes delayed, sometimes incomplete and sometimes selective levels of prosecution. Across all cases assessed in this paper, it is found that, to varying degrees, limited levels of formal and substantive justice are achieved.

inherently political by nature and even when the conception of justice is limited to the legal element of procedure, the effects of power politics are clearly evident. There is, however, little reason for this comparison to be inherently competitive. By comparing the cases of Slobodan Milošević at the International Criminal Tribunal for the Former Yugoslavia and the case of Charles Taylor at the Special Court for Sierra Leone to the British trial of Augusto Pinochet and the Senegalese and Belgian trials of Hissène Habré of Chad, this paper aims to assess the extent to which mechanisms of prosecution at the international level contribute to the outcome of justice and to what extent it may be suitable to advance a model of synthesised international criminal prosecution to balance the scales of justice in the future.

Part II
Conceptual Frameworks



Introduction

Interrogating the Reality of International Criminal Justice

Research in the social sciences is an undeniably complex project that requires balance to be sought between the apparently competing values of science and human relations all the while ensuring that research remains relevant. As a result, the conceptual frameworks put forward below acknowledge the need to develop a clear, generalisable and falsifiable study while also acknowledging the basic limitations of transposing the rigid requirements of scientific experiment onto the unpredictable nature of social relations. In their consideration of *Research Design in Political Science*, Gschwend and Schimmelfennig note that in order for research to be worthwhile, it needs to be relevant.[6] What is relevant, however, is determined subjectively and it is imperative to take into account aspects of both social and scientific relevance when research is conducted in the sphere of social science.[7]

Socially, the continued persecution of grave human rights violations against populations by leaders and officials entrusted with their care poses a significant challenge to the prospects of human security. The idea that some crimes are so heinous that the international community is obligated to hold those responsible accountable for their actions has since given rise to a system of international criminal justice. From the Nuremburg and Tokyo Trials to the development of International Criminal Tribunals in Rwanda and Yugoslavia and from the construction of hybrid courts in Sierra Leone and Cambodia to the momentous formation of the International Criminal Court (ICC), the system of international criminal justice has been progressing at a promising rate.[8] This having been said, the doctrine of universal jurisdiction that grants foreign courts legal

[6] Gschwend, T. Schimmelfennig, F. (eds). Research Design in Political Science: How to Practice what they Preach. Palgrave Macmillan, London, 2011, p. 3.
[7] Loc cit.
[8] Broomhall, B. International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law. Oxford University Press, New York, 2003, p. 155.

authority to try non-citizens whose alleged crimes were committed outside the geographical boundaries of the prosecuting state has re-emerged as another mechanism of prosecution at the international level. Scientifically, the dual existence of internationally-sanctioned mechanisms and the doctrine of universal jurisdiction at the international level of prosecution poses a unique conundrum as each is underpinned by its own theoretical explanation and, practically, each mechanism is applied relatively independently of the other.

The phenomenon described above points to an interesting coexistence of two mechanisms of prosecution at the international level of criminal justice. This coexistence, however, should not be assumed to be competitive as it may simply reflect two separate domains of application. Asking which, if either, of these mechanisms of prosecution present at the international level of criminal justice is best able to obtain justice in international relations does not exclude the possibility of synthesis if both mechanisms result in sub-optimal outcomes and is, therefore, an essential component of this paper. Although a number of other variables may contribute to justice and there are multiple ways in which the outcome of justice may be achieved, the formulated research question clearly speaks to the social and scientific context of the phenomenon of coexisting mechanisms of prosecution at the international level. It should be noted that this paper by no means attempts to address the entire realm of non-prosecutorial and prosecutorial mechanisms that may lead to justice but instead focuses on the abovementioned variables. It is the way in which these two variables of prosecution and justice are operationalised, contextualised through case studies and explored through inference that will grant this study specificity and validity as well as transform it from one of mere description to one of dynamic explanation.

Theoretical Framework

Tracing Trends: A Brief Review of the Literature

From the early twentieth century the reality of positivist legal theory has been pitted against the ideal of functionalism.[9] In his 1940 submission to the *American Journal of International Law – Positivism, Functionalism and International Law* - Hans Morgenthau developed an *avant garde* and intellectually stimulating argument for the

[9] Morgenthau, H. Op. Cit. p. 265.

replacement of legal positivism with functionalism as the predominant theory of international law.[10] Although Morgenthau's thesis was developed before the Nuremberg Trials even took shape or a shift towards an institutionalised regime of accountability for gross human rights violations was made, his approach was to critique the apparently obsolete application of legal positivism that had left the possibilities of progress in the field of international law in a state of stasis. Favouring an international legal system based on functionalist principles, Morgenthau's approach could be considered nothing less than visionary for a time in which the norms of legal positivism dominated thinking and his writing would serve as a seminal piece of work in the understanding of international law for decades to come.[11] Forty years later, Francis A. Boyle catalogued the tenuous interchange between political scientists and legal theorists in the field of international law in his submission of *International Law in Time of Crisis: From the Entebbe Raid to the Hostages Convention* to the *Northwestern University Law Review*.[12] Boyle's paper draws on the logic of Morgenthau by appraising the apparent severance between theories of politics and those of positivist law while emphasising the need for a shift towards a functionalist approach in international law.[13]

Jurisprudence in international law, however, has since been characterised by a temporal paralysis that has resulted in a disjuncture between theory and practice. By the early 1990's it had become apparent that a mental block existed in the theorising of international law that perpetuated a 'power-law dichotomy' as described by Shirley V. Scott in *International Law as Ideology: Theorising the Relationship between International Law and International Politics*.[14] Although the need 'to aspire to a common vocabulary and framework of analysis that would allow the sharing of insights and information' has been articulated,[15] the legacy of the 'power-law dichotomy' has resulted in a set of legal theorists that perceive little to be gained from the theory of

[10] Morgenthau, H. Op. Cit. p. 265.
[11] Boyle, F. A. World Politics and International Law. Duke University Press, Durham, 1985, p. 18.
[12] Boyle, F. A. "International Law in Time of Crisis: From the Entebbe Raid to the Hostages Convention" in Northwestern University Law Review. Vol. 75, No. 5, 1980.
[13] Ibid. p. 776.
[14] Scott, S. V. "International Law as Ideology: Theorizing the Relationship between International Law and International Politics" in the European Journal of International Law. Vol. 5, 1994, p. 313. This 'power-law' dichotomy refers directly to the schism between legal and socio-political theorising in the field of international law.
[15] Slaughter Burley, A. M. Op. Cit. p. 205.

political scientists and *vice versa*.[16] To date, the inability of legal theorists and political scientists to 'stretch the limits of their field of study by capturing objects which are intrinsically alien to it'[17] has been captured by the writings of prominent academics in the field of international law. The development of theory in international law proves, if anything, that the study of social science is not static as the theories of functionalism and legal positivism continue to be pitted against each other nearly a century later.

Functionalism: Emphasising the Spirit of the Law

The principles of functionalism in international relations are derived from the work of one of the theory's major proponents, David Mitrany, who notes the following about inter-state relations:

> The function of our time is…to develop and co-ordinate the social scope of authority… [that] is no longer a question of defining relations between states but of merging them[18]

Functionalism in international relations aims to emphasise the common interests shared by both state and non-state actors based on the growing guidance of knowledge in policy-making forums. Institutionally speaking, the theory does not promote the need for a world government as federalists do; instead, it recognises the important role that may be played by function-based institutions serving specific international fields in the advancement of international affairs. Such a function-based structure need not be completely formalised as functionalists consider common activities organised on an *ad hoc* basis to be as effective in obtaining their goals as those convened through rules, conventions and bodies of law.[19]

In addition to this, the functionalist approach to international law takes into account that social values - including those of human rights – are not arbitrary rules of state but are norms determined objectively on the consensus of nations through policy-making forums and based on the guidance of knowledge experts.[20] While the origin of law in the domestic sphere arises from the officials of state who hold a monopoly on organised

[16] Scott, S. V. Op. Cit. p. 313.
[17] d'Aspremont, J. "Softness in International Law: A Self-Serving Quest for New Legal Materials" in the European Journal of International Law. Vol. 19, No. 5, 2008, p. 1093.
[18] Mitrany, D. A Working Peace System. Oxford University Press, New York, 1943, p. 10.
[19] Ibid. p. 20.
[20] Loc cit.

physical force, no such sphere of legal enforcement exists in the international arena.[21] It could be argued, however, that such an organised force in international law may be represented by norms that form, amongst other customs, the *jus cogens* of international law. The body of *jus cogens* that relate to the promotion and protection of human rights as well as the seriousness of crimes against humanity, war crimes and genocide give rise to the international regime of criminal justice in which the moral function of our time has been co-ordinated and formalised. Developing law based on a community of interests rather than on those of a few political elites additionally serves to prevent the sometimes-arbitrary application of law and consequence of selective justice for which cases of universal jurisdiction are notorious.

Legal Positivism: Emphasising the Letter of the Law

Although aspects of natural law theory can be traced as far back as the 13th and 17th centuries, the preponderance of seminal texts from the positivist legal perspective, particularly those of the approach's proponents John Austin and Hans Kelsen, date back only a few centuries.[22] Despite its relatively short history in comparison to other legal theories, such as the theory of natural law that has existed and maintained its vibrancy for millennia, legal positivism has arguably waned significantly in its ability to provide a complete and self-sustaining explanation of legal structures. [23]

The principles of legal positivism speak to a rigid exclusivity of jurisprudence that has resulted in a paradox of practical application. Legal positivism is based on the purity of legal analysis focusing solely on state laws and statute books to the exclusion of any social or inherently moral standards of human behaviour.[24] Such a theory of law intrinsically overlooks the practical relationships between law and society and law and morality in a way that enforces a deep schism between the theory of law and its practice as a tool of social development. From slavery in Europe to racial segregation in America and from Apartheid South Africa to Nazi Germany, unjust laws have been used to perpetrate some of history's most heinous human rights violations. These unjust regimes, however, no longer exist as society's values are not static and often develop beyond those enshrined in statute books.

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[21] Morgenthau, H. J. Op. Cit. p. 275.
[22] Bix, B.H. "Legal Positivism" in Golding, M. P, Edmundson, W. A. Philosophy of Law and Legal Theory. Blackwell Publishing, Oxford, 2005, pp. 29-30.
[23] Ibid. p. 29.
[24] Morgenthau, H. J. Op. Cit. p. 261.

Legal positivism is based on the assumption that law is a self-sufficient set of rules with obligations applicable to all people in all places and at all times. The operation of law is deemed to be self-sustaining and completely separate to a moral theory of rights.[25] It could, therefore, be contested that the theory's applicability to standards of international law, particularly those of international human rights law, is limited. Although human rights remained a matter of domestic legal jurisdiction up until the mid 20th century, the field has since been codified through the Universal Declaration of Human Rights and the body of international human rights conventions that soon followed.[26] As a result of these developments, the legal rules of state which legal positivists hold supreme are able to be influenced by written laws between nations including both bilateral and multilateral treaties and conventions on human rights. This having been said, legal positivists have been forced to stray from their strict theoretical principles of self-sufficiency by 'reading in' pseudo-legal value judgements that promote a spirit of development into the otherwise unyielding letter of law.[27] Cushioned in domestic law, the doctrine of universal jurisdiction similarly draws on international norms of human rights protection positioning it well within this hybrid-development of positivist legal theory.

Synthesising Outcomes: Understanding the Interplay between Theory and Practice

For the purposes of this paper, it is particularly important to note the relationships between theory and practice. Although the theories of legal positivism and functionalism do not prescribe the nature of international criminal justice, their tenets do favour certain mechanisms above others. Since functionalism considers international justice to be the domain of an organised physical force, its contemporary prominence in international law could be equated to promote internationally-sanctioned trials.[28] Similarly, positivist legal theories that promote the supremacy of state laws arguably enshrine the significance of such doctrines as universal jurisdiction.[29] It is, therefore, arguable that the practical divergence between universal jurisdiction and trials of

[25] Nino, C. S. "Dworkin and Legal Positivism" in Mind. Vol. 89, No. 358, 1980, p. 519.
[26] Forsythe, D. P. Human Rights in International Relations. Cambridge University Press, Cambridge, 2006, p. 3.
[27] Soper, P. Op. Cit. p. 216.
[28] Loc cit.
[29] Ibid. p. 265.

international-sanction is exemplified in theory through the competition between the ideals of legal positivism and functionalism.

Although there is no unified theory of international criminal justice, theoretical perspectives from the fields of social science and law – the theories of functionalism and legal positivism respectively - that determine the domain of law and how justice should be managed have led to the development of two separate spheres of practice in reality and provide strong argument for a deductive method of inquiry to be utilised in this research project. This having been said, the competitive nature of theory testing often does little to address the nuances and complexities of reality making the approach somewhat limited. While this paper attempts to test independent variables deduced from social phenomena and buttressed by theoretical underpinnings in a way that assesses whether or not their outcomes conform to or deviate from theoretical assumptions and is, therefore, forward-looking, it should not be described as solely deductive. Deductive theory testing presumes the superiority of one theory over another and the inherent competitiveness of such an approach may not do justice to the possibility of synthesis in the theory and practice of international criminal law. Instead, this paper should be described as an impact assessment that serves to assess the impact of selected mechanisms of prosecution on the outcome of justice.

Additionally, it should be noted that arguments for synthesising theories that have for centuries been pitted against each other is a project of questionable merit as the number of theoretical perspectives in International Relations is not reducing but multiplying. Andrew Moravcik, however, notes the following with regards to theory synthesis:

> Theory synthesis is not only possible and desirable but is constitutive of any coherent understanding of international relations as a progressive and empirical social science.[30]

If the project of theory synthesis is to be effective, it should not be viewed as a title match between two competing theories. There are, indeed, a number of ways in which theories may relate to each other and the levels of synthesis described by Jupille, Caporaso and Checkel are essential to understanding these potential relationships. Jupille, Caporaso and Checkel note at least four ways in which theories may relate to

[30] Moravcsik, A. "Theory Synthesis in International Relations: Real not Metaphysical" in International Studies Review. Vol. 5, No. 1, 2003, p. 131.

each other.[31] The first model of theoretical dialogue uses competitive testing to test theories not only against evidence but also against other theories in a way that allows for only one theory to be considered a complete explanation of the outcome.[32] The second model strives for a minimal synthesis in that it acknowledges the separate 'home turfs' on which each theory is applied but further notes that the combination of these theories may result in better theoretical and practical explanations.[33] The third model suggests that one theory depends temporarily on the other to explain a given outcome[34] and the final model of incorporation attempts to show that one theory can logically be derived from the other.[35] Assessing which of these four models of theoretical dialogue applies to the relationship between functionalism and legal positivism will depend on the practical evidence produced by case studies and will essentially contribute to the better understanding and practice of pursuing justice through prosecutorial mechanisms. It should, however, be noted that the purpose of this paper is to assess the possibility for synthesis with the aim of moving towards a synthesised system in international criminal justice in the future. While understanding and explaining why such a system may be viable and while providing general conditionalities for the advancement of such a system, this paper does not aim to set out explicitly the precise features of such a system here.

Structural Framework

Formalising Observations: Defining Causal Relationships

Since the phenomenon, research question and theoretical framework associated with this study are all interested in the explanatory power of specified causal factors, this study can be defined as factor-centric.[36] The goal of such a study is to assess the direction and extent to which the specified independent variables are responsible for the particular outcome in question. Such a relationship may broadly be denoted as the assessment of causality between factor/s X and the outcome Y. It is important to note at this point that although a multitude of causal factors and alternative explanations exist for the outcome Y, the causal factors selected for this research paper are deduced from

[31] Jupille, J. Caporaso, J. A. Checkel, J. T. "Interrogating Institutions: Rationalism, Constructivism and the Study of the European Union" in Comparative Political Studies. 2003, p. 19.
[32] Jupille, J. Caporaso, J. A. Checkel, J. T. Op. Cit. p. 20.
[33] Ibid. p. 21.
[34] Ibid. p. 22.
[35] Jupille, J. Caporaso, J. A. Checkel, J. T. Op. Cit. p. 23.
[36] Morgenthau, H. J. Op. Cit. p. 8.

and limited to the specific context of the phenomenon and theoretical framework at hand to maintain the clarity and academic relevance of the paper.

The independent variables or testable causes in this paper may be defined broadly as the mechanisms of individual criminal prosecution at the international level that are underpinned by competing theoretical frameworks in the social sciences and law. The dependent variable may be defined as the extent to which these mechanisms lead to the outcome of justice. Graphically, this relationship is depicted as follows:

X		**Y**
Mechanism of Prosecution	→	**Level of Justice Obtained**
IV		*DV*

It should be noted that the above representation is a general one and that it is the comparative credentials of this causal relationship that are central to the issue on which the study is based. If, for example, internationally-sanctioned trials provide a higher level of justice than those conducted under the doctrine of universal jurisdiction or *vice versa*, then it could be deduced that the pursuit of synthesis in international criminal justice is unnecessary as one mechanism is more efficient in obtaining the outcome than the other. Alternatively, if the levels of justice obtained by both types of prosecution are similar, sub-optimal or complimentary then the argument for synthesis may be far stronger.

Codifying Observations: The Operationalisation of Variables

Since the validity of empirical and causal inference depends on how variables have been specified, it is important not to define concepts too narrowly or too broadly as this may limit the scope and relevance of the study.[37] The broadly stated independent variable - mechanisms of individual criminal prosecution under international law - involves a number of possible variants. Mechanisms could include national and international criminal tribunals, trials initiated under universal jurisdiction and those considered by domestic courts to deal with crimes committed in their own countries or involving their own citizens.[38] Despite this, the broad independent variable of prosecutorial mechanism can be specified by just two causes for both practical and theoretical reasons.

[37] Gschwend, T. Schimmelfennig, F. (eds). Op. Cit. p. 41.
[38] Ratner, S, R, Abrams, J. S. Op. Cit. p. 14.

Practically, domestic courts, either ravaged by war or limited by the interests of peaceful reconciliation, often choose not to prosecute serious international crimes thus leaving these crimes to the jurisdiction of international mechanisms.[39] In addition to practical limitations, the independent variable can also be delineated by the theoretical framework of this study that aims to evaluate the mechanisms of prosecution promoted by legal positivism and functionalism. The research question can, therefore, sufficiently be addressed by comparing the levels of justice obtained in international prosecutions covered by universal jurisdiction with those of international-sanction.

While cases of universal jurisdiction can easily be observed through the prosecution of criminals in domestic courts for serious international crimes not committed in their geographical jurisdiction or by or against their citizens, mechanisms of international-sanction need to be defined further. These latter types of cases involve sanction by such international organisations as the United Nations (UN) and can include international tribunals as well as trials conducted under hybrid courts that procure UN involvement. It is also important to define the term 'serious international crimes' as it is a key concept in this research paper. This category of crimes is limited to war crimes, crimes against humanity and genocide and is a common definition to both variants of the independent variable. [40]

The dependent variable – levels of justice obtained – is a far more difficult variable to operationalise as what justice is and how it should be measured are contested ideas. The traditional difference between formal and substantive justice remains an enormous source of debate in the legal fraternity and is continually complicated by the tenuous relationship between law and politics in international relations.[41] Formal justice is simply indicated by taking into account whether or not trials have occurred and individuals have been held accountable for their crimes. Despite this, aspects of procedural justice that relate to legal protocol and - in the case of international law - the relevance of the law under which persons are tried, complicate the issue. Exploring whether or not a trial and its preceding legal formalities were fair may be supplemented

[39] Akhavan, P. "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" in The American Journal of International Law, Vol. 95, No. 1, 2001, p. 25.
[40] Van Evera, S. Guide to Methods for Students of Political Science. Cornell University Press, London, 1997, p. 42.
[41] Biersteker, T, Spiro, L, Sriram, C. L. (et al.). International law and International Relations: Bridging Theory and Practice. Routledge, London, 2007, p. 223.

by the study of court records, heads of argument, judgements as well as political and legal critiques of court processes, enabling the aspects of formal justice to be determined with relative and falsifiable certainty. Given that a vast array of politicised procedural issues could arise, however, it would have to be considered on a case-by-case basis if such an indicator was present.

Formal justice is arguably an easy variable to measure relative to its substantive counterpart, however, this should not mean that measuring the level of justice obtained should be limited to this aspect. Aspects of substantive justice, although not as tangible as formal justice, may be measured by considering the themes of deterrence and restoration in the assessment of international criminal trials. Deterrence, in a legal sense, may be defined as the principle or objective of sentencing a person guilty of a crime in order to ensure that the punishment is sufficient to deter the guilty person, and others, from committing the same crime. Deterrence may, therefore, be split into the individual deterrence of the offender and the group deterrence of others from perpetrating similar crimes in the future. Although the issue of individual deterrence is relatively easy to measure by tracking an offender, determining to which group we are referring complicates the issue of group deterrence. What both mechanisms of international criminal prosecution being examined in this paper share, however, is their common interest in pursuing justice for the international community. As a result, it could be argued that to obtain some sort of relevance, group deterrence should be internationally rather than domestically based and that it could be measured simply by determining whether internationally prosecuted crimes occur again by any person in the international context.

Adding aspects of restoration to a definition of substantive justice takes into account that international crimes are a violation of people and relationships and that justice should involve 'the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance'.[42] Central to this discussion on substantive justice is the 'justice versus peace' dilemma in transitional societies.[43] Although the importance of mechanisms of prosecution in promoting justice for serious international crimes cannot be ignored, neither can their potential for destabilising

[42] Dussich, J. P. J, Schellenberg, J. The Promise of Restorative Justice: New Approaches for Criminal Justice and Beyond. Lynne Rienner Publishers, London, 2010, p. 1.
[43] Biersteker, T, Spiro, L, Sriram, C. L. (et al.). Op. Cit. p. 222.

fragile states of peace in post-conflict societies.[44] Although justice for victims and post-conflict societies is not necessarily achieved with prosecutions alone, this paper will need to look at the relationship between trials and post-conflict repair, reconciliation and reassurance and move beyond a purely dichotomous view of peace and justice.

Since the World Bank's Post Conflict Performance Indicators (PCPIs) develop a rating system to measure the progress of post-conflict societies, the system provides a promising starting point from which to develop a somewhat more objective understanding of restoration.[45] It is necessary, however, to limit the understanding of reconciliation to that which promotes justice and the PCPI developed to deal with this issue requires 'agreements on transitional justice processes that will deal with grievances' to be formed in order for restoration to take place.[46] Whether or not mere agreements on transitional justice processes reflect a commitment to substantive justice, however, is up for debate and it would need to be considered to what extent these processes actually reflect the interests of political and social stakeholders. Secondary data, particularly social and political commentary collected *ex post facto*, may provide a compelling set of interpretations from which to assess the role played by mechanisms of prosecution in promoting grassroots justice. Although the issue of repair may not come with its own set of global indicators, it may be associated with the implementation of financial or political reparations that serve to promote post-conflict restoration. Again, it is important to assess the extent to which reparations contribute to a sense of post-conflict reconciliation in the public sphere by assessing social responses to reparations for serious international crimes. Whether or not a sense of reassurance is created in a post-conflict society based on the promotion of reconciliation and repair may be also be deduced from the assessment of social and political commentaries. Despite attempts to create a somewhat more nuanced understanding of its indicators, it should be remembered that measuring substantive justice is, without a doubt, a subjective affair that requires a cautious case-by-case assessment of the whole range of restorative and reconciliatory aspects of international criminal prosecution.

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[44] Loc cit.
[45] World Bank. Post Conflict Performance Indicators (PCPIs) 2004. http://siteresources.worldbank.org/INTCPR/1090479-1115613025365/20482305/Post-Conflict+Performance+Indicators,+2004-05.pdf, 2004, p. 1.
[46] Ibid. p. 2.

Given the above discussion, the limitations of positivist empiricism become clear as dichotomising variables does not always account for the labyrinth of possibilities that lie between those two options.[47] Furthermore, the refinement of variables beyond a dichotomous explanation of 'trial' or 'no trial' and 'justice' or 'no justice' opens the door to greater possibilities of variance and a more subtle understanding of causality. Since the complexities and nuances within the dependent variable are particularly intricate, it seems inadequate to define the outcome on base levels and a case-by-case consideration of what types of justice were (or were not) achieved could result in a more discriminating and policy-relevant finding.[48] Negating research purely on the basis that variables are difficult to measure seems unnecessary and shortsighted and, instead, there is argument for an empirical hierarchy of outcomes to be developed that acknowledges the complexity and nuances associated with measuring the outcome of justice. This hierarchy may include, but is not necessarily limited to, the points of 'no justice', 'limited justice' and 'absolute justice'. Such a system of measuring the outcome is indicated graphically below:

Levels of justice Obtained			
	No Justice	**Limited Justice**	**Absolute Justice**
Formal	• No trial	• Trial with procedural problems or political interference	• Trial with no procedural or political compromise
Substantive and Restorative	• No individual or group deterrence • No recourse for victims • No commitment to transitional justice and reconciliatory processes • No financial or political reparations for crimes • No sense of post-conflict reassurance	• Either individual or group deterrence only • Limited recourse for victims • Commitment to transitional justice and reconciliatory processes but with limited legitimacy • Presence but lack of legitimacy of financial and/or political reparations • Limited sense of post-conflict reassurance	• Both individual and group deterrence • Absolute recourse for victims • Complete and legitimate transitional justice and reconciliatory processes • Presence and legitimacy of financial and political reparations for crimes • Good sense of post-conflict reassurance

When dealing with an intrinsically subjective variable such as justice it is essential to ensure that the variable remains measurable for the integrity of the research paper to be maintained. The most significant purpose of creating an empirical hierarchy of outcomes is, therefore, to provide a basis for comparison. Although the above table indicates a compromise between strictly positivist and somewhat post-positivist

[47] George, A. L, Bennett, A. Case Studies and Theory Development in the Social Sciences. MIT Press, Cambridge, 2005, p. 85.
[48] Ibid. p. 85.

research considerations it may, nonetheless, be limited as it is only able to acknowledge and not fully assess the range of nuances within the dependent variable. The depicted hierarchy of outcomes is by no means all-inclusive and the possibility that many cases may fall between rather than within these categories cannot be excluded. The indicators for each outcome are, similarly, not exhaustive but should be considered as vantage points from which to assess the outcome of each case.

Clarifying Methodology and Case Selection: The Credentials of Comparison

Borrowed from the natural sciences, the traditional understanding of causation is the observance that a certain effect or a certain trigger that must precede the outcome causes outcome.[49] Variance on the dependent variable is, therefore, traditionally viewed as an essential tool for showing causality but the situation of equifinality, described by George and Bennett as a circumstance in which different causal patterns may lead to similar outcomes, [50] challenges this simple definition of causality and allows for a more nuanced description of reality to be formulated.[51]

Although the logic of Mill's Methods seems glaringly obvious for a variable-orientated study such as this, the opportunity for controlled comparisons are limited as the social sciences rarely produce cases that are similar in every aspect but one and there tends to be a number of possible independent and intervening variables that could result in a given outcome.[52] In addition to this, more than one variable may result in a similar outcome making the deterministic and rigid causality to which Mill's Methods subscribes all the more challenging to apply.[53] To acknowledge the equifinality of cases in the social sciences and to examine causality to the fullest extent possible, it is essential to combine the assumptions and inherent logic of controlled comparison with the flexibility of within-case research methods.[54] These methods include congruence and process tracing as a means to compensate for a number of limitations associated with controlled comparison and are stressed as essential to the validity of small-n analysis.[55]

[49] Burnham, P, Lutz, K. Grant, W. (et al.). Op. Cit. p. 173.
[50] George, A. L, Bennett, A. Op. Cit. p. 161.
[51] Ibid. p. 79.
[52] Ibid. p. 152.
[53] Ibid. p. 81.
[54] Loc cit.
[55] Ibid. p. 178.

In this study, the theoretical framework provides sound basis for potential relationships between variables to be predicted. It is then the purpose of case studies to confirm or reject these predictions. Findings of case study analysis in the social sciences, however, are inherently falsifiable and cannot ever be stated with absolute authority. As a result, mere consistency of predictions and case study findings does not automatically result in causality and relationships can often be spurious and over-generalised.[56] There are, however, a number of ways in which to strengthen the argument of causality for merely congruent relationships, most significantly, by means of process tracing. This method aims to identify the intervening causal process, the causal chain and causal mechanism between variables and is suitable for producing the full range of results in research.[57] It is a method essential to eliminating the causal bearing of variables other than the one of interest and is, therefore, also essential to the validity of a study.[58]

By emphasising the causal paths within cases as opposed to the variables across them, within-case methods are able to strengthen arguments of causality.[59] Used alone, however, these methods run the risks synonymous with single case studies and can be prone to selection bias, the exclusion of important causal variables and the over-generalisation of results.[60] Combining within-case methods such as the congruence test and process tracing with cross-case comparison can lead to more generalisable results and increase the validity of a study. In the paper at hand, it would be important to assess the predictions of both the theories of legal positivism and functionalism in relation to the outcome of justice through not just one but multiple case studies and to further trace the causal process of each case in order to provide the subtlety of results suitable for assessing variance and yet the generalisability suitable for a policy-relevant finding.

Although it is argued that the broadest range of independent variables possible should be assessed for causal inferences to be genuine, limitations of practicality and manageability associated with case study research restrict the application of this logic in reality.[61] Theory specification and methods of inquiry can delineate the most important

[56] George, A. L, Bennett, A. Op. Cit. p. 181.
[57] Ibid. p. 6.
[58] Ibid. p. 81.
[59] Ibid. p. 179.
[60] Ibid. p. 22.
[61] Ibid. p. 156.

variables of interest and make a study both manageable and more likely to contribute meaningfully to a specific field.[62] The theoretical framework of this study puts forward a sound argument for only the two independent variables associated with mechanisms of international prosecution at the international level to be tested against each other. The decision to limit the variables of interest is, indeed, a conscious one and it does not aim to ignore that variables other than those of formal prosecution can lead to justice. Rather, the selection of just two comparable variables speaks to the need to fulfil the purposes, answer the research questions and explain the phenomenon at hand in the most comprehensive yet most straightforward manner.

In addition to the decisions made while defining and delineating variables, it is necessary for theories to be tested on their 'home turfs' if a fair and equitable set of results is to be formulated.[63] For these reasons, a single case study simply cannot do justice to the phenomenon of a complex network of international criminal jurisdiction and the argument for a comparative case study approach based on theoretical tenets is strengthened. To consider the theories of legal positivism and functionalism on their own turf, it is important to assess the levels of justice obtained in both cases prosecuted under the doctrine of universal jurisdiction as well as those under the auspices of international-sanction. It would further be advisable to assess multiple cases from each of these two categories in order to ensure that the outcomes are generalisable but, in the interests of providing a reliable comparative study, it would be necessary to consider an equal or at least relatively equal set of cases from each category.

It is arguable that limiting cases to the most relevant international crimes prosecuted to date will not result in selection bias but will, instead, ensure greater generalisability of outcomes. In addition to this, choosing high profile cases - prominent in the media and academic circles - over ones less broadcasted may seem to enforce selection bias, however, it is again in the interests of reliability and relevance that such a choice should be made as the amount of available sources increase the likelihood of veracity when tested against each other. [64] Although it may be contended that the selected set of cases is far too extensive for each to be considered adequately, it should be noted that the form of process tracing being undertaken is such that theoretical hypotheses are already

[62] Van Evera, S. Op. Cit. p. 145.
[63] Jupille, J. Caporaso, J. A. Checkel, J. T. Op. Cit. p. 21.
[64]George, A. L, Bennett, A. Op. Cit. p. 83.

in place and the focus on specific aspects of justice ensures a concise yet comprehensive retelling of the relevant facts.

To keep the study manageable, a small set of comparable cases has been selected from each mechanism of prosecution. One historic and one contemporary case has been selected for each mechanism respectively to provide as broad a temporal understanding of their contribution to justice as possible. In terms of internationally-sanctioned trials the following cases have been selected: from the International Criminal Tribunal for Yugoslavia (ICTY) the case of Slobodan Milošević will be considered[65] and from the Special Court for Sierra Leone (SCSL) the case of Charles Taylor.[66] With respect to cases in the category of universal jurisdiction, the most significant trial to be considered is arguably that of Augusto Pinochet particularly because it is considered a deciding factor in the creation of the ICC as a permanent and internationally-sanctioned tribunal for serious international crimes.[67] In addition to this, focus will also be spent on the Senegalese and Belgian trials of Hissène Habré of Chad.[68]

Conclusion

With the clarification of theory and formalisation of methodologies undertaken in this section, it is apparent that the concepts under consideration in this paper are by no means typical chemical compounds that act in predictable and uniform ways making the rigid application of pseudo-scientific methods to their explanation misplaced. Indeed, applying historically descriptive methods that fail to analyse patterns of phenomena are equally futile for policy considerations. Moving onto the assessment and analysis of case studies in the following sections, it should be noted that the most characteristic feature of this paper is not the cautious clarity with which it attempts to define and measure variables of interest nor is it necessarily its attempt to combine traditional with *avant garde* research methods in an attempt to enhanced reliability. Instead, this paper should be represented for the fine balance of flexibility it allows in understanding the complexity of concepts in the field of international criminal

[65] Lutz, E. Z, Reiger, C. Prosecuting Heads of State. Cambridge University Press, Cambridge, 2009, p. 176.
[66] Ibid. p. 205.
[67] Ibid. p. 77.
[68] Macedo, S. Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law. University of Pennsylvania Press, Philadelphia, 2006, p. 131.

justice. Determining the value of data obtained through this comparative case study analysis should not be measured solely against a tick-list of requirements and should rather be considered holistically with emphasis on case-by-case analysis.

Part III
The International Criminal Justice Regime



Introduction

Development of the International Criminal Justice Regime

In addition to the duty on states to hold individuals accountable for the core crimes of international criminal law, developments in international relations have led to this duty being extended to the international community as a whole. This new consensus emerged amongst governments, non-governmental organisations, international organisations and scholars in the field of international law at a time when the United Nations had embarked on an ambitious project of developing *ad hoc* tribunals to deal with the increasing global occurrences of gross human rights violations.[69] The emerging international human rights regime would grow to encompass these *ad hoc* tribunals as well as hybrid courts and prosecutions under the auspices of the International Criminal Court (ICC).[70]

Despite these impressive developments of function-based institutions at an international level, the international criminal justice regime has been designed in such a way that it serves to protect the sovereignty of states.[71] States are allowed the primary right to try cases of genocide, war crimes and crimes against humanity that have been committed by or against their citizens or national interests or that have occurred on their territories. It is only if states are unwilling or unable to try such cases that the onus then falls on the international community to prosecute these crimes. Although the Rome Statute of the International Criminal Court (the Rome Statute) does not explicitly recognise it, it is generally understood that the court serves as one of last instance and will only try those crimes that have not been investigated by domestic legal structures or where such trials have occurred but have not been genuine.[72]

[69] Ratner, S. R, Abrams, J. S. Op. Cit. p. 151.
[70] Loc cit.
[71] Broomhall, B. Op. Cit. p. 155.
[72] Loc cit.

The ICC is the first permanent court of its kind and its jurisdiction is broad. The court may exercise jurisdiction in one of three ways: by referral of a state party to the Statute, by referral of the United Nations Security Council acting under Chapter VII of the United Nations Charter or by referral of the Prosecutor.[73] It would appear that, in theory, the establishment of the ICC has served to strengthen an international community of common interests in a way that promotes the attainment of justice for the victims of human rights atrocities and for the international community generally. Established in 2002 when the Rome Statute came into force, the ICC has only recently begun to gain momentum and cases before the court are either on trial, pre-trial or at stages of preliminary assessment with only one judgements having been passed to date.[74] As a result, it is difficult to assess the true value of trials at the court and it is the mechanisms preceding the court's establishment – represented in this paper by the *ad hoc* international tribunal Yugoslavia and the hybrid court in Sierra Leone - that will, therefore, be considered below.[75]

Case Studies

The International Criminal Tribunal for the Former Yugoslavia: The Case of Slobodan Milošević

In the tale of the rapid rise to power and equally dramatic fall of Slobodan Milošević, the mobilising forces of ethnicity and history were used to activate levels of human barbarity in the former Yugoslavia unseen in Europe since World War II.[76] After his dramatic rise to power, Milošević declared the Republic of Yugoslavia – derived from Serbia and Montenegro – to be the only true successor of the Former Socialist Federative Republic of Yugoslavia to the exclusion of the newly independent states of Croatia, Bosnia-Herzegovina and Slovenia. In an attempt to salvage Yugoslavia after its break-up, troops under the command of Milošević invaded Slovenia and then Croatia and Bosnia-Herzegovina, progressively losing the rationale of national preservation and lapsing into a project of genocide and ethnic cleansing spurred by historical motivations. Although the true breadth of devastation for which the Croatian and

[73] United Nations. Rome Statute of the International Criminal Court. http://untreaty.un.org/cod/icc/STATUTE/99_corr/cstatute.htm.
[74] International Criminal Court. Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo. http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf, 2012.
[75] Broomhall, B. Op. Cit. p. 10.
[76] Meernik, J. "Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia" in The Journal of Conflict Resolution. Vol. 47, No. 2, 2003, p. 140.

Bosnian Wars were responsible cannot be calculated fully, it is estimated that well over 100 000 deaths occurred and at least two and a half million people were displaced.[77]

Despite the extent of the damage, destruction and human cost of the wars in Croatia and Bosnia, the response of the international community lay quiescent until 1993 when the United Nations Security Council gave provision for the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY/the Yugoslav Tribunal). Despite the existence of the ICTY, little justice was obtained by way of deterrence in the region as the Milošević regime not only continued to commit genocide in Croatia and Bosnia-Herzegovina but also went on to follow a similar policy of ethnic cleansing in Kosovo in 1999.[78] In this latter case, Serbian forces systematically attacked Kosovar Albanians displacing at least 850 000 people. It was at the peak of this conflict that the ICTY put out an arrest warrant for Milošević.[79] Despite this move, the consequences of the Yugoslav Tribunal's relative failure to promote formal justice were seen in the Kosovo crisis and would have ramifications for the estimated worth of the tribunal.

As the first international criminal tribunal established since the Nuremburg and Tokyo Trials at the end of World War II, critics questioned whether the ICTY could effectively pursue justice for those who had experienced grave human rights violations in the Former Yugoslavia and enforce it against those who committed such crimes.[80] Following claims of victors' justice that had plagued the Nuremburg and Tokyo Trials, opinions towards the ICTY were undeniably sceptical. In retrospect, the ICTY has generally been viewed as a public relations tactic used by the UN to mask its inefficiency in preventing the mass killings, ethnic cleansing and other human rights atrocities that occurred in the former Yugoslavia during the Milošević regime.[81]

In considering the limitations of the ICTY, it is particularly important to note the competing elements of politics and justice in international criminal law. The tension between the two is particularly evident in the realist critique of international criminal tribunals that regards them to be superfluous reflections of underlying power balances

[77] Synopsis of Milošević case obtained from: Lutz, E. L, Regier, C. (eds). Op. Cit. pp. 177-9.
[78] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 179.
[79] Loc cit.
[80] Meernik, J. Op. Cit. p. 142.
[81] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 179.

and completely lacking in aspects of independence and morality.[82] Practically, it should be noted that although the UN Security Council (UNSC) was empowered to develop *ad hoc* international criminal tribunals since its formation, it has only chosen to do so in two cases.[83] In the case of the ICTY, it is self-evident from the questionable involvement of the North Atlantic Treaty Organisation (NATO) in Bosnia-Herzegovina and Kosovo that international powers were concerned with legitimising their presence there by forming an international tribunal to try the crimes committed in the region thereby justifying their otherwise unlawful invasion in the name of humanitarian intervention.[84] If tribunals are only developed when the stakes of international power are high then the institutions and decisions of international justice are compromised and the claims of victors' justice ring true.

Indeed, the individual case of Slobodan Milošević brought before the Yugoslav Tribunal in 2002 speaks to the dynamic between politics and justice as well as to some serious procedural limitations that bear consequence on the development of international criminal law.[85] Given that the trial was the first of its kind to make significant strides in prosecuting a sitting head of state by an internationally-sanctioned tribunal, it comes as no surprise that the precedent set by the Milošević case from strategy to execution would be applied to other criminal trials in the future.[86] In his 2004 analysis of the ICTY ten years after its creation, Mirko Klarin points to *The Tribunal's Four Battles* as they were seen from his vantage points in media posts and public galleries:

> The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been forced to fight four great battles in the first 10 years of its existence: for Survival, for Respect, for Hearts and Minds and for Time. To a substantial extent, these battles corresponded to the periodic evolutionary leaps in the international community's attitude towards the Tribunal.

[82] Meernik, J. Op. Cit. p. 145.
[83] Loc cit.
[84] Petras, J. "NATO: Saving Kosovo by Destroying It" in Economic and Political Weekly. Vol. 34, No. 23, 1999, p. 1414. Essential to the controversy around NATO intervention in Kosovo was the basis upon which it was justified. Traditionally, only two grounds for intervention exist in international law and are codified in the UN Charter. Firstly, Chapter VII allows for UN Security Council approved intervention where conflict is a threat to international peace and security. Secondly, article 51 enshrines the right to self-defence if a state faces armed attack. The right to humanitarian intervention that justified NATO intervention in Kosovo, however, is not legally codified and has posed controversy in legal, academic and political circles as it is often a subjective claim that can be used to conceal ulterior motives for intervention.
[85] Boas, G. McCormack, T. L. H. "Learning the Lessons of the Milošević Trail" in Yearbook of International Humanitarian Law. Vol. 9, 2006, p. 66.
[86] Loc cit.

> This attitude has evolved from Neglect, through Irritation and Revelation, to Tribunal Fatigue.[87]

Attempting to manage the seemingly competing values of politics and law as well as efficiency and comprehensive inclusivity, the 'unbearable lightness of creation' with which the ICTY was founded in 1993 seemingly did little to acknowledge the ramifications that decisions on the Yugoslav Tribunal's structure would have for future endeavours in the field of international criminal justice.[88] Caught between apparently competing values, these internal battles of mandate and mission have arguably caused the ICTY to balance unsteadily on the brink of credibility.

The Yugoslav Tribunal's battle for respect stems from the clashing ideals that the international community aimed to achieve in the Former Yugoslavia; peace and justice.[89] Proponents of peace before justice 'grew more and more irritated by the Tribunal's "irresponsible" *pursuit of justice* [sic] which did not take into account the political consequences of such acts'.[90] In the interests of impartial justice and in an attempt to quell mounting criticism, the ICTY attempted to depoliticise the issues before it despite the inherently political nature of the trial as a result of the strong correlation between the offences committed and the pursuit of political power.[91] Such an artificial construction speaks to the divergence between law and politics in the field of international relations as well as to the theoretical debates present in the sphere of international criminal justice. Perhaps most concerning about such a depoliticised approach to transitional justice is the way in which it excludes a large proportion of the intended beneficiaries of justice; the victims of crimes committed in Croatia, Bosnia-Herzegovina and Kosovo.[92]

In addition to this strategic limitation, the Yugoslav Tribunal's strict deadlines placed on prosecution to manage the case in a reasonable timeframe led to their exclusion of at least seventy percent of the counts of genocide against Milošević. In Bosnia-Herzegovina, for example, only seven out of twenty-three counts of genocide against

[87] Klarin, M. "The Tribunal's Four Battles" in Journal of International Criminal Justice. Vol. 2, No. 2, 2004, p. 546.
[88] Ibid. p. 546.
[89] Ibid. p. 549.
[90] Loc cit.
[91] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 176.
[92] Loc cit.

Milošević were tried by the ICTY significantly limiting the sense of national reassurance for victims and citizens.[93] Subject to the limitations of 'Tribunal Fatigue', the Judges and Prosecutors of the ICTY began compiling a completion strategy as early as 2000. Placing deadlines on the completion of investigations, trials and appeals by 2010, the battle against time significantly limited the scope of the Tribunal and forced trials to be expedited potentially reducing their overall efficiency.[94] As of July 2012, however, the ICTY is still in session with seventeen trials in process and another seventeen in appeal proceedings.[95] Despite this, the most iconic trial of the Yugoslav Tribunal was terminated when its accused, Slobodan Milošević, was found dead in his prison cell in March 2006.[96] Having been the mastermind and political leader behind the crimes persecuted across the Former Yugoslavia, enormous weight had been attached to the Milošević case in attaining justice for victims and allowing nations to reconstruct and reconcile their post-conflict identities.[97] Despite this, an incomplete six year long trial did little to dispel the feelings of neglect that spread across the Former Yugoslavia and, instead, has been changed with leaving the levels of justice somewhat hanging in the balance.

Despite the temporal constraints faced by the ICTY, of the 161 indictments issued by the Yugoslav Tribunal until 2012, 126 have been concluded.[98] However comprehensive such a statistic may seem, it cannot equate to near absolute levels of formal justice having been achieved. Battling for survival as well as the hearts and minds of the international community, the ICTY faced a number of political and procedural constraints that affected the final outcome of justice produced by these trials. Concerned with winning over the hearts and minds of those on whom the financial survival of the Yugoslav Tribunal rested, the ICTY almost completely neglected its 'constituency' of citizens in the Former Yugoslavia in favour of the UN Budgetary Committee, independent as well as state-based donors and NATO.[99]

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[93] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 184.
[94] Klarin, M. "The Tribunal's Four Battles". Op. Cit. p. 556.
[95] Meron, T. "Completion Strategy Report" International Criminal Tribunal for the Former Yugoslavia. http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23may2012_en.pdf, 2012, p. 3.
[96] International Criminal Tribunal for the Former Yugoslavia. Prosecutor v Slobodan Milošević: Order Terminating the Proceedings. http://www.icty.org/x/cases/slobodan_milosevic/tord/en/060314.htm, 2006.
[97] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 178.
[98] Meron, T. Op. Cit. p. 3.
[99] Klarin, M. "The Tribunal's Four Battles". Op. Cit. p. 552.

Central to this battle was the Western legal discourse in which the Yugoslav Tribunal's trials were situated. Familiar to Western legal jurisdictions, tools of criminal procedure such as the right to self-representation and the cross-examination of evidence used in the case of Slobodan Milošević were unknown to victims and the Yugoslav Tribunal's 'constituency' as legitimate sources of procedural justice.[100] Transposing a mechanism of formal justice familiar to advanced Western jurisdictions may have made their work more appealing to donor entities, however, such a commercialised approach limited the legitimacy and credibility of trials for those whom the ICTY was chiefly intended to benefit.[101] More familiar to both the direct and indirect victims of crimes committed in the Former Yugoslavia was the use of repetitive oral evidence to hold Milošević accountable for his actions.[102] Such a mechanism, however, simply could not be accommodated by the ICTY as a result of its financial and temporal limitations.[103] It was to the detriment of the ICTY that its battle for survival caused it to situate itself within a discourse and framework that favoured the hearts and minds of its donors over the 'constituency' of victims and citizens in Croatia, Bosnia-Herzegovina and Kosovo for whom the Yugoslav Tribunal was created.

As a result of these limitations on the form and structure of the ICTY, growing levels of fatigue and disinterest with the Yugoslav Tribunal's work existed amongst citizens and victims in the Former Yugoslavia. Legal mechanisms used by the ICTY were unfamiliar, discourses were inappropriately adopted, trials were excessively long and victims were left waiting and wanting for a more substantive justice that would provide levels of post-conflict reconciliation necessary to better their futures.[104] Recognising these limitations, then President of the ICTY Judge Gabrielle Kirk McDonald noted the following about the relationship between formal trials, substantive justice and post-conflict peace:

> Misrepresentations about the Tribunal creates mistrust. Mistrust within communities ensures distrust of the Tribunal. If our work is not relevant to those affected by the conflict, the Tribunal's important substantive jurisprudence will have little practical effect on the peace process. Our decisions and findings must be known and understood

[100] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 176.
[101] Klarin, M. "The Tribunal's Four Battles". Op. Cit. p. 552.
[102] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 176.
[103] Kirk McDonald, G. "Problems, Obstacles and Achievements of the ICTY" in Journal of International Criminal Justice. Vol. 2, No. 2, 2004, p. 569.
[104] McMahon, P. C. Forsythe, D. P. "The ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics" in Human Rights Quarterly. Vol. 30, 2008, p. 412.

by the peoples of the region, not just by international legal academia.[105]

On the recommendation of Judge Kirk McDonald, the ICTY developed in 1999 the Yugoslav Tribunal's Outreach Programme in an attempt to make justice more tangible for the citizens of the Former Yugoslavia. Based on the understanding that justice is an essential component of national reconciliation as it 'provides a sense of redress for wrongs committed…and by doing so breaks the cycle of violence and vengeance',[106] the Outreach Programme consists of a number of activities that bring thousands of people into direct contact with the court every year. From building capacity in national judiciaries to working with the region's youth and from harnessing the power of regional media circles to engaging with communities, the Outreach Programme is broad-based and justice-orientated.[107]

Perhaps most contentious of the activities undertaken by the Outreach Programme, however, was the broadcasting and coverage of trials by regional media platforms that often failed to shed the dogma of partisan politics that characterised their output during the Milošević era.[108] Despite this, the majority of citizens in the Former Yugoslavia relied heavily on the reports of local media to keep in touch with developments at the ICTY.[109] In an attempt to make the work of the Yugoslav Tribunal known, the trial of Milošević that took place in The Hague, for example, was both broadcast on radio and televised to Bosnia and Kosovo.[110] This mechanism of engagement, however, had compromising effects for the perceived legitimacy of the ICTY as it assumed that exposure to the trial would invariably equate to understanding of it.[111] Instead, versions of history proposed by the examination of evidence and testimony of witnesses at the ICTY that conflicted with communal understandings of the truth were considered illegitimate and contributed to the Yugoslav Tribunal's overall loss of credibility. Pitted

[105] International Criminal for the Former Yugoslavia. Remarks by Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia, to the Peace Implementation Council Plenary Meeting in Madrid. http://www.icty.org/sid/7603/en, 1998.
[106] International Criminal Tribunal for the Former Yugoslavia. Peace and Justice go Hand-in-Hand. http://www.icty.org/sid/11127, 2012.
[107] International Criminal Tribunal for the Former Yugoslavia. Annual Outreach Report. http://www.icty.org/x/file/Outreach/annual_reports/annual_report_2011_en.pdf, 2011, p. 2.
[108] International Criminal Tribunal for the Former Yugoslavia. Annual Outreach Report. Op. Cit. p. 13.
[109] Loc cit.
[110] Arzt, D. E. "Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone" in Annals of the American Academy of Political and Social Science. Vol. 603, 2006, p. 230.
[111] Meernik, J. Op. Cit. p. 145.

against reports from the ICTY in print media were the rejections of truth, shifting of blame and concealment of crimes in the name of 'national interest'.[112] Far from reconstructing unified national identities and a collective recollection of the past, media coverage of trials arguably contributed more to resentment than reassurance.

Notably missing from the Yugoslav Tribunal's Outreach Programme, however, is the provision for victims' compensation. A debate that has only begun to take place within the executive functionaries of the ICTY, the current President of the ICTY – Patrick Robinson - claims financial reparation to be a mechanism of restorative justice. Calling for the institution of a victims' trust fund at the United Nations in 2010, Robinson notes that such a mechanism would 'compliment the Tribunal's criminal trials, by providing victims with the necessary resources to rebuild their lives'.[113] These comments have, however, been cursory and no sustained effort has yet been made to initiate an institution that deals in financial reparations for victims.

Despite attempts to broaden the boundaries of justice beyond a merely legal understanding, the ICTY suffered a self-inflicted defeat that arose from its own political and procedural limitations as well as those of the socio-political context in which it was situated. Constrained by a consistent need to focus on a framework that appealed to Western donors as a matter of financial survival, the ICTY was essentially limited in its ability to reassure the citizens of a region plagued by ethnic divisions and competing histories that a reconciled future could be restored. Mirko Klarin notes that:

> It is illusory to expect the Outreach Programme - as it was set up and equipped – to fight Effectively the powerful propaganda machines at the disposal of the political elites dictating the public attitude towards the ICTY[114]

It cannot be ignored that a significant proportion of the message of the ICTY was distorted by political elites for use in their individual campaigns. Even if, in the case of Slobodan Milošević for example, the accused's ill-health had not led to his death before

[112] Klarin, M. "The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia" in Journal of International Criminal Justice. Vol. 7, No. 1, 2009, p. 90.
[113] International Criminal Tribunal for the Former Yugoslavia. Statement by Judge Patrick Robinson. President of the International Criminal Tribunal for the Former Yugoslavia, to the Security Council on 18th June 2010. http://www.internationallawbureau.com/blog/wp-content/uploads/2010/06/100618_pdt_robinson _un_sc_en1.pdf, 2010.
[114] Ibid. p. 96.

a judgement could be made, a guilty verdict would have done little to eliminate the scepticism towards the ICTY of victims who needed justice most.

The Special Court for Sierra Leone: The Case of Charles Taylor

Reminiscent of pre-medieval warlordism in Europe, Charles Taylor's Greater Liberia functioned on the principles of patrimonialism and incessant violence.[115] Taylor's election to office in 1997 did little to condition his militant attitude into that of a democratic statesman and the only institutions developed were those that formalised terror, including the Special Operations Division and the Special Security Unit.[116] In Liberia during both civil wars and Taylor's short presidency, widespread internal and external displacement, murders, rapes, tortures, abductions and the use of child soldiers took place as if they were the norm.[117]

Perhaps one of the most dominant characteristics of the conflict during the period was its transnational nature. It was Taylor's unyielding support for the Revolutionary United Front (RUF) in Sierra Leone that would result in his eventual indictment and trial under the Special Court for Sierra Leone (SCSL/Special Court). The RUF had embarked on a decade-long civil war against the government of Sierra Leone in 1991 that resulted in around 50 000 deaths, 500 000 refugees and numerous incidences of war crimes including sexual violence, destruction of entire villages, abduction, arbitrary killings and random mutilations.[118] Taylor's logistic and financial assistance allowed the RUF to continue its pillage and violence beyond reasonable expectations and, equally, added to Taylor's network of regional patronage that kept him in power for far longer than anticipated.[119]

Despite the agreement to peace, blanket amnesty and formation of a national Truth and Reconciliation Commission (TRC) made in the 1999 Lomé Peace Accords, the civil conflict in Sierra Leone continued to rage and justice, particularly the formal sort,

[115] Reno, W. "Reinvention of an African Patrimonial State: Charles Taylor's Liberia" in Third World Quarterly. Vol. 16, No. 1, 1995, p. 109.
[116] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 207.
[117] Cain, K. L. "The Rape of Dinah: Human Rights, Civil Wars in Liberia and Evil Triumphant" in Human Rights Quarterly. Vol. 21, No. 2, 1999, p. 268.
[118] Sriram, C. L. Globalising Justice for Mass Atrocities: A revolution in Accountability. Routledge, London, 2005, p. 94.
[119] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 208.

continued to be elusive.[120] Critically, the UN signatory to the Lomé Peace Accords qualified his assent to the effect that war crimes, crimes against humanity and genocide perpetrated in Sierra Leone would not be subject to the blanket amnesty.[121] This loophole in the Lomé Agreement would allow Sierra Leone to call on the UN to assist it in forming a special court to bring RUF leaders to justice. With a concurrent mandate to the TRC, the SCSL served as part of the government's post-conflict peace-building agenda in dealing with the aftermath of the Sierra Leone Civil War. The SCSL would be charged with prosecuting those most responsible for committing war crimes, crimes against humanity and other serious violations of international humanitarian law.[122] Although the SCSL held concurrent jurisdiction with domestic courts, it would also be granted superior legal status and could take precedence in cases of conflicting jurisdiction resulting in a more focused and seamless application of international criminal justice.[123]

When the SCSL issued its first arrest warrant, not surprisingly for Charles Taylor, he was still president of a Liberia dwindling into utter anarchy.[124] Given his position of vulnerability, considerable effort had been made by the regional and international community to bring Taylor into peace talks as a means to end the civil war in Liberia. It was at these peace talks held in Ghana in 2003 that the prosecutor of the SCSL made his arrest warrant for Taylor public; a move that was highly criticised for its insensitivity to the balance of peace and justice.[125] True to the response characteristic of African states to arrest warrants issued within the ambit of the international criminal justice regime, Ghana chose not to enforce it and instead sent Taylor back to Liberia on a private jet. In addition to Ghana's impunity, an 'amnesty-for-peace' deal was concluded with Nigeria in which Taylor was granted safe haven there subject to a minor limitations clause that he should no longer take part in political activities of any kind.[126]

Despite this apparent miscarriage of justice in West Africa, Taylor, by this time comfortably tucked away in exile in Nigeria, was arrested in 2006 and transferred to the

[120] Evenson, E. M. "Truth and Justice in Sierra Leone: Coordination between Commission and Court" in Columbia Law Review. Vol. 104, No. 3, 2004, p. 737.
[121] Ibid. p. 738.
[122] Loc cit.
[123] Evenson, E. M. Op. Cit. p. 738.
[124] Lutz, E. L, Regier, C. (eds). Op. Cit. p. 210.
[125] Ibid. p. 213.
[126] Ibid. p. 215.

SCSL in Freetown to face charges of five counts of crimes against humanity, five counts of war crimes and one count of seriously violating international humanitarian law through his active enslavement and conscription of child soldiers under the age of fifteen.[127] This phase of the Taylor case, however, was not without political complication as Nigeria's particular involvement with Charles Taylor and its relations with Liberia exemplified a fickle and inconstant political disposition. When Nigeria's Obasanjo government extended an asylum offer to Taylor in 2003, the foreign policy objectives of peace and regional stability were cited.[128] Despite these promising aspirations, the offer was met with considerable outcry from a Nigerian civil society exposed to the horrific collective memory of Charles Taylor.[129] Nigeria was one of the earliest signatories to the Rome Statue and former foreign ministers in addition to the government-appointed National Human Rights Commission expressly condemned the move as one that would go against the country's national interest and an international movement to hold those responsible for serious human rights violations accountable for their crimes.[130] Given a combination of continued domestic pressure and mounting international interest in the case, Nigeria's own police force would eventually surrender Taylor to the SCSL within days of a UN request to do so.[131]

Let alone the trial itself, pre-trial issues in the Taylor case were fraught with controversy. Question marks surrounded the lawfulness of Taylor's arrest as it was not clear whether he had violated his terms of exile in Nigeria or whether Nigeria was simply ceding to international pressure.[132] In a similar fashion to his Serbian counterpart at the ICTY, Slobodan Milošević, Taylor aimed to de-legitimise the functions of the SCSL by using stalling tactics that included his boycotting of proceedings and firing of defence counsel.[133] In addition to this, the trial's change of venue from Freetown in Sierra Leone to The Hague in the Netherlands was argued to be a matter of security but was equally criticised as a mechanism to artificially heighten the

[127] Special Court for Sierra Leone. Prosecution's Second Amended Indictment of Charles Taylor. http://www. sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107, 2007.
[128] Ojione, O. C. "Public Opinion and Foreign Policy: Analysing Nigerian Reactions to the Asylum Offered tu Former President Charles Taylor of Liberia" in African Journal of International Affairs. Vol. 11, No, 1, 2008, p. 74.
[129] Ojione, O. C. Op. Cit. p. 74.
[130] Loc cit.
[131] BBC News. Charles Taylor Caught in Nigeria. http://news.bbc.co.uk/2/hi/africa/4856120.stm, 2006.
[132] Bhoke, C. The Trial of Charles Taylor: Conflict Prevention, International Law and an Impunity-Free Africa. Institute for Security Studies - paper 127, 2006, p. 4.
[133] Special Court for Sierra Leone. The Prosecutor vs. Charles Ghankay Taylor. http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx.

significance of the trial.[134] Regardless, the change of venue would result in a dislocation of justice from those victims who needed it most in a way that would hark back to the limited restorative justice brought about by the ICTY and International Criminal Tribunal for Rwanda.[135]

With the failure of three other high-profile cases before it, including those of Foday Sankoh (leader of the RUF) who died in custody in 2003,[136] Sam Bockarie (Battlefield Commander of the RUF) who was killed in Liberia in 2003 speculatively by Charles Taylor who wished to prevent his appearance before the SCSL[137] and Johnny Paul Koroma whose fate is unknown and who remains at large, it is no surprise that the Taylor trial has come to represent the depth and breadth of the Special Court's work. Framing Taylor as a poster-child for retribution may have relieved the international community of its formal responsibility to react to serious human rights violations in Sierra Leone but there still remains a tight tension between the prosecution of individuals and mass exoneration.[138] In addition to this, the capacity of the Taylor trial to represent the depth and breadth of crimes committed by the RUF in Sierra Leone is inherently limited leaving a deep schism between the reality of the prosecution and the reality lived by the victims of serious human rights violations.

Foremost amongst the three main obstacles to legitimacy recorded by Marlies Glasius and Tim Meijers in their assessment of the Taylor trial is the limitation posed by the utilisation of a Western legal discourse that cannot appeal to a broad audience.[139] To whose justice we are referring when we try individual criminals on an international platform has been the subject of serious debate in the discipline with postcolonial discourses challenging the formality of retributive justice often displaced from victims if not by geography then by privileged legal discourse.[140] The oversimplification of Sierra Leone's post-conflict peace project as one that concerns criminal justice only and

[134] Arzt, D. E. Op. Cit. p. 228.
[135] Loc cit.
[136] Special Court for Sierra Leone. Withdrawal of Indictment of Foday Sankoh. http://www.sc-sl.org/LinkClick.aspx?fileticket=HzFiuoeHSCQ%3d&tabid=187, 2003.
[137] Special Court for Sierra Leone. Withdrawal of Indictment of Sam Bockarie. http://www.sc-sl.org/LinkClick.aspx?fileticket=w8Ic%2bZX4wAI%3d&tabid=189, 2003.
[138] Glasius, M. Meijers, T. "Construction of Legitimacy: The Charles Taylor Trial" in The International Journal of Transitional Justice. Vol. 6, 2002, p. 229.
[139] Loc cit.
[140] Ibid. p. 230.

that is fully addressed by the mandate of the SCSL seriously restricts the level of post-conflict justice achieved.

What exists on the ground in Sierra Leone is a collective memory of the structural violence, the corruption amongst government elites and the marginalisation of rural youth that existed long before Charles Taylor entered the fray.[141] Addressing issues of social and political injustice as well as broadening the scope of criminal justice to include more local and accessible examples of prosecution will produce a form of justice more conducive to the project of post-conflict peace-building. Gill Wigglesworth notes that:

> …in a country such as Sierra Leone there is … clearly a need to incorporate traditional justice systems into the national judicial system, as only then will the full truth of what happened come to light and longterm peaceful coexistence, rather than the mere outward façade of reconciliation, become a real possibility.[142]

Given the complex situations in which nations faced with the project of post-conflict peace-building find themselves, deciphering the 'full truth' of what happened in the past ought to take heed of socio-political as well as outright criminal causes of injustice. Promoting the outward façade of reconciliation by the sentencing of a single mastermind and a few commanders has done little to promote repair and proper reintegration on the ground. The truth about war crimes stated by a court in a language and at a place displaced from the victims of serious human rights violations is arguably an insufficient means by which to contain the fear and promote the levels of individual and personal reconciliation required to prevent cycles of violence from reoccurring.

In a country where the post-conflict reconstruction policies have resulted in over 60 000 ex-combatants being disarmed – not prosecuted – and reintegrated into communities,[143] it is no surprise that Sierra Leoneans have welcomed Charles Taylor's sentence but seem to have drawn little solace from it.[144] Rebuilding a society in which victims of rape and violent assault as well as the families of murdered and abducted citizens are

[141] Anderson, J. Beyond Taylor, "Where is our justice?". http://www.rnw.nl/international-justice/article/beyond-taylor-"where-our-justice", 2012.
[142] Wigglesworth, G. "The End of Impunity? Lessons from Sierra Leone" in International Affairs. Vol. 84, No. 4, 2008, p. 827.
[143] Malan, M. "The Challenge of Justice and Reconciliation" in Malan, M. Meek, S. & Thusi, T. (et al). Sierra Leone: Building the Road to Recovery. Institute of Security Studies, 2003, p. 139.
[144] Anderson, J. Op. Cit.

forced to live alongside the perpetrators of such crimes requires a longer-term commitment to interaction and the active restoration of interpersonal relations.[145] Based on the same principles of public engagement as those underpinning it at the ICTY, the SCSL developed its Outreach Programme in 2003 and consolidated its function in 2008 when the division merged with Press and Public Affairs in order to work actively in the restoration and reconciliation projects of post-conflict Sierra Leone.[146]

The Special Court's Outreach Programme significantly resembles the public engagement mechanisms of international tribunals that came before it with focus spent on a number of activities from town-hall meetings to radio programmes and from video-recordings of trial proceedings to seminars on how the court functions.[147] In addition to these mechanisms, the Special Court's Outreach Programme is complimented by a Legacy Programme that further aims to strengthen domestic justice systems and national institutions by transferring skills, knowledge and resources to national partners.[148] It should be noted, however, that this legacy is not supplemented by the provision of victims' reparations as the statute of the SCSL does not explicitly provide for these.[149] Although similar to the civil engagement projects pursued by the ICTY in principle, it has been argued that 'the Special Court for Sierra Leone boasts the strongest Outreach Programme of any [international criminal] tribunal to date'.[150] Central to this strength is the speed and efficacy with which the Special Court's mechanisms were implemented. Unlike the ICTY that was operational while conflict was still raging in its focus region significantly limiting its scope for outreach activities, the SCSL was founded and Outreach Programme was ready to begin its work as soon as six months after the court had commenced its work.[151] In addition to this, the Special Court's strategic location in Freetown was arguably more able to transfer tangible outcomes to the citizens of Sierra Leone than the Yugoslav Tribunal that was situated in The Hague, however, this did not prevent justice from being displaced.[152]

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[145] Wigglesworth, G. Op. Cit. p. 827.
[146] Special Court for Sierra Leone. Outreach and Public Affairs. http://www.sc-sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx.
[147] Loc cit.
[148] Special Court for Sierra Leone. Legacy. http://www.sc-sl.org/LEGACY/tabid/224/Default.aspx.
[149] The Hague Justice Portal. No Sign of Victim Compensation in Sierra Leone. http://www.haguejusticeportal.net/index.php?id=12284, 2010.
[150] Clark, J. N. "International War Crimes Tribunals and the Challenge of Outreach" in International Criminal Law Review. Vol. 9, No. 1, 2009, p. 106.
[151] Ibid. p. 107.
[152] Arzt, D. E. Op. Cit. p. 228.

It is, therefore, no surprise that a number of non-governmental organisations were developed to fill the gaps left by the Special Court's Outreach Programme. Projects such as *Fambul Tok* (Family Talk) have gone a long way in mending the gap between the retributive theory of trials under the SCSL and the reality of restorative justice required by citizens to rebuild their lives. Founded on the realisation that 'peace can't be imposed from the outside, or the top down',[153] *Fambul Tok* has engaged in consultations on reconciliation at the community level but also goes beyond these to implement changes assisted by a formal training and education initiative. In addition to this, *Fambul Tok* has been instrumental in putting institutions in place to deal with the poor governance, corruption and patrimonialism characteristic of Sierra Leone's wartime economy and is able to assist in promoting practical post-conflict repair for citizens.[154]

After a long and arduous trial, Taylor was convicted in April 2012 of all eleven counts against him and was sentenced to a single term of fifty years imprisonment.[155] Despite this closing, the Taylor trial had been plagued by a number of procedural and substantive issues that greatly limited the justice effected on victims as well as the peaceful future of a region destructed by Taylor's greed. While the SCSL was manoeuvring the difficult path of pursuing post-conflict justice and holding war criminals accountable for their crimes, 'all that people saw [was] that these people were getting what they didn't have; namely food, shelter and security' – a visual that epitomised a limited sense of reassurance amongst the Sierra Leonean population.[156] Attitudes towards the trial of Charles Taylor and the SCSL were no exception to this despondency and reflected the achievement of a limited justice.

Earning a reputation as a show trial rather than a legitimate source of justice, the Taylor trial brought Hollywood to The Hague with Naomi Campbell's infamous hairpiece gaining as much publicity as the atrocious crimes committed by Taylor.[157] The trial's

[153] Fambul Tok International. The Healing Power of Community. http://www.fambultok.org.
[154] Fambul Tok International. The Nuts and Bolts of the Fambul Tok Process. http://www.fambultok.org/what-is-fambul-tok/our-process.
[155] Special Court for Sierra Leone. Sentencing Judgement. http://www.sc-sl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3d&tabid=107, 2012, p. 40.
[156] Kerr, R. Licoln, J. "The Special Court for Sierra Leone: Outreach, Legacy, Impact". War Crimes Research Group, Department of War Studies, Kings College London. 2008, p. 23.
[157] Simons, M, Cowell, A. Model Testifies at War Crimes Trial. http://www.nytimes.com/2010/08/07/world/ europe/07hague.html, 2010.

sensationalism and oversimplification of issues seem to have commercialised and made more of a mockery of elements of formal and substantive justice rather than making the trial more accessible to victims and the global public. While non-prosecutorial reintegration initiatives in conjunction with the engagement of *Fambul Tok* may be able to translate justice into a tangible task of transformation, the role played by the Taylor trial and the SCSL in recognising the harm done to victims of serious human rights violations and the place this has in post-conflict peace-building cannot be ignored.

Conclusion

From the political motivations and limited mandate synonymous with the ICTY to the show trial quality of Charles Taylor's case before the SCSL, it could be argued that the regime of international criminal justice is plagued as much by the predicaments of politics as it is by the limitations of legal procedure in international trials. Both of these international mechanisms of prosecution suffer similar financial constraints and limitations in mandate that have ultimately led to selective justice and compromised standards of retribution. Whether the permanency of the ICC is able to deal adequately with the limitations to justice elucidated in the above case studies is up for debate and will be considered in Part V.

Levels of justice Obtained in the Case of Slobodan Milošević at the ICTY			
	No Justice	**Limited Justice**	**Absolute Justice**
Formal	• ***No trial***	• ***Trial with procedural problems or political interference***	• Trial with no procedural or political compromise
	Notes: Formal justice is borderline in this case as although a trial occurred, it was incomplete as a result of Milošević's death.		
Substantive and Restorative	• ***No individual or group deterrence*** • No recourse for victims • ***No commitment to transitional justice and reconciliatory processes*** • ***No financial or political reparations for crimes*** • No sense of post-conflict reassurance	• Either individual or group deterrence only • ***Limited recourse for victims*** • ***Commitment to transitional justice and reconciliatory processes but with limited legitimacy*** • Presence but lack of legitimacy of financial and/or political reparations • ***Limited sense of post-conflict reassurance***	• Both individual and group deterrence • Absolute recourse for victims • Complete and legitimate transitional justice and reconciliatory processes • Presence and legitimacy of financial and political reparations for crimes • Good sense of post-conflict reassurance
	Notes: The commitment to transitional justice is borderline in this case as the ICTY's Outreach Programme was developed well after the Tribunal's founding.		
Overall Outcome	✓		

Placing these two cases within the matrix of justice obtained by international mechanisms of prosecution, it would seem that each results, to varying degrees, in sub-optimal levels of formal and substantive justice. Formally, both cases faced procedural limitations arising from non-compliance, financial and temporal constraints as well as questionable applicability of a Western legal discourse to regions where such law was often misunderstood. The political interference with due legal process that played out in the case of Charles Taylor further exacerbated traditions of non-compliance characteristic of the African continent and contributed to levels of limited formal justice in this case. Perhaps one of the most complicating aspects of trials under the regime of international criminal justice is the way in which formal limitations impact on the efficacy of restorative justice. Although commitments were made to pursuing transitional justice mechanisms, these were often disconnected from the 'constituency' of affected populations and to their needs of restoration and post-conflict reconciliation. While Outreach Programmes have become a hallmark of international criminal tribunals, the same cannot be said for reparations and little attention is paid to the true relationship between post-conflict reconstruction, justice and peace which has led to gaps of application and understanding to be filled by local non-governmental organisation and independent institutions.

Levels of justice Obtained in the Case of Charles Taylor at the SCSL			
	No Justice	**Limited Justice**	**Absolute Justice**
Formal	• No trial	• ***Trial with procedural problems or political interference***	• Trial with no procedural or political compromise
Substantive and Restorative	• No individual or group deterrence • No recourse for victims • ***No commitment to transitional justice and reconciliatory processes*** • ***No financial or political reparations for crimes*** • No sense of post-conflict reassurance	• ***Either individual or group deterrence only*** • ***Limited recourse for victims*** • ***Commitment to transitional justice and reconciliatory processes but with limited legitimacy*** • Presence but lack of legitimacy of financial and/or political reparations • ***Limited sense of post-conflict reassurance***	• Both individual and group deterrence • Absolute recourse for victims • Complete and legitimate transitional justice and reconciliatory processes • Presence and legitimacy of financial and political reparations for crimes • Good sense of post-conflict reassurance
	Notes: The commitment to transitional justice is borderline in this case as the SCSL's Outreach Programme was consolidated only after the Court's founding.		
Overall Outcome	✓		

Slobodan Milošević and Charles Taylor were poster children for their respective region's post-conflict transition. Dangerous not only to the extent that such an approach excluded the responsibility of other criminals but also to the extent that it sensationalised the suffering of victims for global press initiatives; the nature of these trials was such that they often did little to promote the outcome of formal or post-conflict justice. Access to direct recourse for victims was limited as it fell within the top-down ambit of international criminal trials and they again became victims this time to the clutches of their history. In addition to this, the types of crimes prosecuted by the ICTY and SCSL continued to occur globally well after prosecutions took place. The twenty-first century has not seen an end to war crimes and from the targeted killings of Tamils by the Sri Lankan government during the final stages of the Sri Lankan Civil War[158] to the continued persecution of war crimes and crimes against humanity in the Democratic Republic of Congo,[159] contemporary history proves that the overall regional and international deterrence of international mechanisms of criminal prosecution has been weak. Local deterrence in states where tribunals have been arranged to deal with serous human rights violations, however, lacks any obvious trend and seems to be dependent on temporal factors such as when tribunals are initiated. The Yugoslav Tribunal, for example, effected little deterrence on the Milošević regime that not only continued to commit genocide in Croatia and Bosnia-Herzegovina but went on to follow a similar policy of ethnic cleansing in Kosovo. Set up as part of a transitional peace-building agenda and once war had ceased, the SCSL, on the other hand, provides a more complete sense of local deterrence with no future human rights violations having been committed since its initiation in 2002. Whether or not trials conducted under the doctrine of universal jurisdiction are better able to fulfil the outcome of justice will be the focus of the next section.

[158] United Nations Expert Panel on Sri Lanka. "Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka". United Nations. 2011, p. 111.
[159] Human Rights Watch. DR Congo: M23 Rebels Committing War Crimes. http://www.hrw.org/news/2012/ 09/11/dr-congo-m23-rebels-committing-war-crimes, 2012.

Part IV
Universal Jurisdiction



Introduction

Background to Universal Jurisdiction

The doctrine of universal jurisdiction is a unique legal principle developed to root-out impunity towards gross human rights violations. Unlike most traditional crimes, the prosecution of individuals under the doctrine may occur regardless of the persecutor's nationality, the victim's nationality or, indeed, any other connection to the prosecuting state.[160] As a result, prosecution may occur despite the crime having been committed outside the jurisdictional boundaries of a state or it being unrelated to state security.[161] Additionally, it is not necessary for crimes to have been committed by a national of the prosecuting state or for the crime to have been committed against one of her citizens.[162] Given the seemingly vague and broad scope of universal jurisdiction, it is essential to ask what holds the doctrine together if it is to remain a significant landmark on the international legal landscape.

In contrast to the traditional elements of criminal procedure, it is not the technical aspects of a crime but rather its nature that is essential to the application of the doctrine. Universal jurisdiction applies only to 'serious crimes' – that is, those crimes considered so heinous that they are able to affect the peace and security of the entire international community.[163] Included in this definition, for historical reasons, are the crimes of slavery and piracy; however, it is the contemporary application of the doctrine to crimes against humanity, war crimes, genocide and torture upon which this paper is centred.[164] This latter group of international crimes tend to occur in conflict situations, the aftermath of which leaves domestic legal structures ravaged and unable to fulfil basic responsibilities associated with retributive justice.[165] In addition to this, internationally-

[160] Macedo, S. (ed). Op. Cit. p. 21.
[161] Loc cit.
[162] Broomhall, B. Op. Cit. p. 106.
[163] Ibid. p. 107.
[164] Sriram, C. L. Op. Cit. p. 4.
[165] Akhavan, Op. Cit. p. 25.

sanctioned mechanisms of prosecution may sometimes perform selectively due to the limitations of diplomatic immunity or legal technicality, thus making the argument for universal jurisdiction all the more potent.

With respect to the formal legal aspects of universal jurisdiction, it should be noted that war crimes, crimes against humanity, genocide and torture have all been codified in one form or another. Crimes against humanity are principally defined in the 1998 Rome Statute that also gave rise to the International Criminal Court.[166] War crimes have been developed in a number of ways but have only been legally codified in the Geneva Conventions[167] and both the crimes of genocide[168] and torture[169] have been granted their own specific United Nations human rights conventions. Despite this, domestic ratification of international conventions is insufficient grounds to apply the doctrine of universal jurisdiction as it would only allow for the prosecution of individuals whose crimes were committed within the prosecuting state's geographical jurisdiction, by or against one of its citizens or if it involved issues of the state's national security.[170] As a result, states with an interest in applying the doctrine of universal jurisdiction have taken it upon themselves to institute domestic legislation to that effect. Theoretically, it is this domestic legislation upon which legal positivists place enormous weight. In addition to assessing the nature of the cases in which universal jurisdiction has been used as grounds for prosecution, the following case studies will also consider the development of applicable domestic legislation in the field of universal jurisdiction.

Case Studies

A Chilean in Britain: The Case of Augusto Pinochet

The case of Augusto Pinochet did not result in exorbitantly high rates of fatality or disappearance, indeed, Argentina's state-sponsored Dirty War was responsible for far worse. Despite this, the Pinochet case is perhaps the most well known and most often cited application of universal jurisdiction to date, thus granting Pinochet status of

[166] United Nations. Rome Statute of the International Criminal Court. Op. Cit.
[167] International Committee of the Red Cross. Geneva Conventions of 1949 and Additional Protocols. http:// www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp.
[168] United Nations. Convention for the Prevention and Punishment of the Crime of Genocide. http://untreaty. un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf.
[169] United Nations. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. http://untreaty.un.org/cod/avl/pdf/ha/catcidtp/catcidtp_e.pdf.
[170] Macedo, S. (ed). Op. Cit. p. 21.

morbid notoriety in the field of international criminal law. Crimes committed by Pinochet during his seventeen-year dictatorship of Chile from 1973 up until a civilian government was installed in 1990 deserve recognition as some of history's most heartless and most gruesome acts of human rights violation.[171] In 1976, a special working group to the United Nations General Assembly produced a report on the Protection of Human Rights in Chile in which it catalogued some of the methods of torture used by the Chilean National Intelligence Agency (DINA) that ought only to be reserved for the fiction of horror stories. These methods included, amongst others, *submarino* where prisoners were bound into a drum of nauseating chemicals such as sewage water or petroleum to cause temporary asphyxiation, driving vehicles over bound prisoner's hands and feet, extraction of teeth and burning sensitive organs with cigarettes, fire or acid.[172] By the time Pinochet was removed from power around 4 000 people had been killed or had disappeared, a further 50 000 had been imprisoned and tortured for suspected treason and around 500 000 people were living in exile fearing for their lives.[173]

Despite the serious nature of the crimes committed, Pinochet was exempt from any domestic prosecutions for two reasons. Firstly, he had embarked on a cunning constitutional plan to ensure his own protection against prosecution by instituting a system of 'senators for life'. Since parliamentarians already enjoyed complete diplomatic immunity under Chilean law, Pinochet's system - enshrined in the 1980 Constitution - would render this privilege life-long for presidents who spent more than six years in office.[174] In addition to this, Pinochet also decreed a blanket amnesty for all officials who had engaged in murder, torture or other internationally reprehensible crimes when dealing with suspected adversaries to his regime.[175] Secondly, Pinochet remained Commander-in-Chief of the now constitutionally-unrestrained Armed Forces which caused the new Aylwin-led government to fear military backlash if Pinochet and his aides were ever tried in Chile.[176]

[171] Lutz, E. L, Reiger, C. (eds) Op. Cit. pp. 77-8.
[172] Webber, F. "The Pinochet Case: The Struggle for the Realisation of Human Rights" in Journal of Law and Society, Vol. 26, No. 4, 1999, p. 526.
[173] Lutz, E. L, Reiger, C. (eds) Op. Cit. pp. 77-8.
[174] Loc cit.
[175] Webber, F. Op. Cit. p. 529.
[176] Lutz, E. L, Reiger, C. (eds). Op. Cit. p. 78.

In addition to this, and as a result of the sensitive political conditions in which the Aylwin government found itself, compromised domestic justice ensued largely in the interests of post-conflict peace despite commitments made to pursuing mechanisms of transitional justice. Central to the leading party's philosophy were the principles of truth, justice and reparations as means to promote post-conflict peace.[177] Directed at the nation, the military and victims of serious crimes committed by the Pinochet regime respectively, the policy seemed all-inclusive.[178] Despite this, justice prescribed by such a limited scope of understanding led to ambiguities in understanding and application. Transposed onto policies of reconciliation – a fundamentally nationalist agenda – the justice project defined by the Aylwin government to encompass military reformation was more a matter of rhetoric than reality.

Post-conflict policies of reconciliation were prominent in the Latin America of the 1980s and 1990s, with truth commissions and symbolic atonements from memorial plaques to financial reparations characterising political transitions to democracy.[179] The 1991 government-appointed Rettig Report in Chile produced by the country's National Truth and Reconciliation Commission, however, was no exception to the outcome of limited justice.[180] Based on the mandate 'To establish as complete a picture as possible of those grave events, as well as their antecedents and circumstances…',[181] the Rettig Commission was primarily concerned with the project of establishing a national truth. Although the report detailed a list of victims, little emphasis was placed on who committed the crimes, why such crimes were committed and what was the nature of these crimes.[182] Additionally, the report only considered cases of fatal torture and disregarded the experiences of the thousands of victims whose torture did not result in death.[183] Although a fundamental component of post-conflict reconciliation for Chile, the pursuit of truth, in this case, was selective and justice was consequently limited.

[177] Garreton, M. A. "Human Rights in Processes of Democratisation' in Journal of Latin American Studies. Vol. 26, No. 1, 2007, p. 226.
[178] Loc cit.
[179] Loveman, B. Lira, E. "Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814-2006" in Radical History Review. No. 97, 2007, p. 43.
[180] Roht-Arriaza, N. The Pinochet Effect. University of Pennsylvania Press, Philadelphia, 2006, p. 72.
[181] Loveman, B. Lira. E. Op. Cit. p. 61.
[182] Roht-Arriaza, N. Op. Cit. p. 72.
[183] Webber, F. Op. Cit. p. 529.

Perhaps the most ironic tenet of the pursuit of truth by domestic mechanisms was the impact it actually had on the activities of victims seeking retribution for past crimes. President Aylwin transferred a copy of the 1991 Rettig Commission Report to Chile's Supreme Court.[184] The courts, however, restrained by amnesty laws embedded in the country's constitution, were unable to prosecute crimes documented in the report. In addition to this, the report provided little information of when and by whom said crimes were committed resulting in the courts undertaking investigations into the perimeters of truth rather than the judgement of it.[185] Furthermore, a large proportion of the crimes committed by the Pinochet regime related to disappearance for which there is no formal body of law to form the basis of prosecution. In what Naomi Roht-Arriaza terms 'A cruel irony for the families!',[186] a dichotomous duel between truth and justice unfolded in Chile in a way that left post-conflict reconciliation hanging in the balance. Victims' reassurance was dealt another blow with the government's approach to reparations as a key component of the country's restoration agenda.[187] Through the payment of reparations to victims and their families, the government's opinion was that justice had been effectively served without resorting to punitive measures.

Despite this broad consensus of justice obtained by the Rettig Commission, a group of families, human rights activists and surviving victims rallied for the enforcement of greater accountability and the application of more punitive measures to serious crimes committed under the Pinochet regime.[188] The Mothers of the Disappeared in Chile - much akin to the Mothers of the Plaza de Mayo in neighbouring Argentina – embarked on a relentless form of social protest that continues to this day.[189] From survival to social protest, the production of brightly coloured *Arpillera* tapestries by the Mothers of the Disappeared has since become a symbol of hope and unity against the denial of Pinochet's crimes.[190] The Aylwin government's belief that time would heal the wounds of the past is essentially misguided and does not consider the true relationship between truth and justice:

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[184] Roht-Arriaza, N. Op. Cit. p. 72.
[185] Loc cit.
[186] Loc cit.
[187] Garreton, M. A. Op. Cit. p. 226.
[188] Lutz, E. L, Reiger, C. (eds). Op. Cit. p. 78.
[189] Rosenberg, T. Editorial Observer; Searching for Justice in Chile and Argentina. http://www.nytimes.com/ 2000/03/21/opinion/editorial-observer-searching-for-justice-in-chile-and-argentina.html, 2000.
[190] Adams, J. "Movement Socialization in Art Workshops: A Case from Pinochet's Chile" in The Sociological Quarterly. Vol. 41, No. 4, 2000, p. 623.

> The other reason that time has not brought silence is that many of those who were killed simply disappeared. Their bodies were never found, and every family still lives, even after 25 years, with a flicker of hope that the missing son will someday walk through the front door. They cannot move on. As the past year has shown, nor can a society truly bury the past while the bones are missing, the killers free and the dead unmourned.[191]

Yet to be reassured of the context of their past and unwilling to give up hope for the possibility of a peaceful future, the Mothers of the Disappeared prove that Chile has yet to come to terms with its past and provide the levels of substantive justice for which its citizens are still yearning.

Aside from the democratic government's denial of Pinochet's crimes, his actions were considered so serious that, even during his reign, recommendations were made by the United Nations for the international community to prosecute those responsible for crimes against humanity occurring in Chile.[192] Despite this, the restraints of sovereignty and inherent problems associated with prosecuting a sitting head of state rendered Pinochet immune to these calls. In 1996, Spanish courts called for the prosecution of Argentine military junta members responsible for genocide as well as crimes of detention and disappearance during the 1970s of Spanish citizens in Argentina and Argentine citizens of Spanish decent.[193] It was the momentum gained by these cases that led to a similar complaint filed against Augusto Pinochet by Spanish lawyer and former aide to Salvador Allende - Joan Garcés – in July 1996.[194] Despite this call to hold Pinochet to account, it was only in October 1998 that he was arrested in London after an international warrant of arrest was hastily put in place by Spanish courts.[195] A protracted legal battle ensued in Britain's House of Lords regarding Pinochet's diplomatic immunity to prosecution. As the first case tried in Europe under the doctrine of universal jurisdiction, these limitations of politics and procedure would reverberate into future analyses of universal jurisdiction.

The power of political influence and fear of military-led mutiny was so intense that it would not only limit the possibility of domestic prosecution but would challenge foreign prosecution as well. Both Chile and the United States of America (United

[191] Rosenberg, T. Op. Cit.
[192] Webber, F. Op. Cit. p. 528.
[193] Lutz, E. L, Reiger, C. (eds). Op. Cit. p. 79.
[194] Ibid. pp. 79-82.
[195] Ibid. p. 82.

States), one fearing domestic security and the other concerned about her international image, put pressure on the courts of Britain to prevent the extradition hearings of Pinochet from going ahead.[196] Particularly detectable within the official legal and advisory ranks of the United States bureaucracy, concern was voiced with the precedent that Pinochet's extradition to Spain would have for foreign leaders seemingly protected by their own domestic law.[197] Indeed, the United States' government holds particular political weight in the international arena and did not want its involvement in the Allende-coup interrogated nor were they keen on having their alliances with Pinochet questioned.[198] Although political interests may not have been enough to prevent either Britain or Spain from going ahead with their hearings, the potential limitations to justice posed by political meddling cannot be underestimated.

In the first of two threshold House of Lords judgements examining the issue of whether Pinochet was exempt from extradition on the grounds of political immunity, the Lords were split almost equally in their opinions save for the legal opinion of Lord Hoffman whose judgement allowed for the extradition of Pinochet to go ahead.[199] It was, however, this determining vote of Lord Hoffman in the first hearing that took place in November 1998 against the defence of immunity that would ultimately cause the ruling to be overthrown and place the case afresh before another panel of Lords. Pinochet's defence appealed against the judgment arguing that Lord Hoffman should have recused himself from judgement based on a conflict of interests owing to his association with Amnesty International, one of a number of *amicus curiae* in the case.[200] Much to the dismay of the Pinochet defence, however, the second House of Lords hearing concluded in March 1999 and produced an even more overwhelming vote against the defence of immunity for an ex-head of state.[201] Common to most of the opinions made in this

[196] Hawthorn, G. "Pinochet: The Politics" in International Affairs. Vol. 75, No. 2, 1999, p. 253.
[197] BBC News. Pinochet: The US Connection. http://news.bbc.co.uk/2/hi/225533.stm, 1998.
[198] Lutz, E. L, Reiger, C. (eds). Op. Cit. p. 82.
[199] House of Lords. R v. Bartle and the Commissioner of Police for the Metropolis and Others (Appelants) Ex Parte Pinochet (Respondent) (on appeal from the a divisional court of the Queen's Bench Division) / R v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) (on appeal from a divisional court of the Queen's Bench Division). http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm, 1998.
[200] Roht-Arriaza, N. Op. Cit. p. 50.
[201] House of Lords. R v. Bartle and the Commissioner of Police for the Metropolis and Others (Appelants) Ex Parte Pinochet (Respondent) (on appeal from the a divisional court of the Queen's Bench Division) / R v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) (on appeal from a divisional court of the Queen's Bench Division). http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm, 1999.

second judgement was the Lords' reliance on the intricacies of British and not international law strengthening their positivist legal approach.[202]

Of concern to the House of Lords was not only the legal issue pertaining to Pinochet's diplomatic immunity but also the issue regarding the scope of his liability. Arrested in London in October 1998 on a warrant issued by Spain, Pinochet faced counts of genocide, hostage-taking, conspiracy to murder, torture and conspiracy to torture.[203] By the end of protracted legal battles at magistrates courts and the House of Lords, however, these counts had been reduced to just two extraditable crimes of torture and conspiracy to torture. Excluded by a House of Lords' Judgement were the crimes of hostage-taking and conspiracy to murder[204] while the crime of genocide was effectively excluded by its complex legal nature and political ramifications.[205] In addition to this, the Lords reduced the number of individual counts of torture in favour of pursuing an overall conspiracy to torture, the implications of which for victims' reassurance cannot be underestimated. With the limiting contextualisation of Pinochet's case in Europe, it comes as no surprise that the value of trying Pinochet for selected crimes was up for debate.

Since Pinochet's deteriorating health rendered him unfit to stand trial in Europe and since no such trial was contemplated in Chile, strictly speaking, the attainment of retributive justice was limited. Despite this, the consensus amongst human rights advocates was that if the Pinochet case was truly about justice and not vengeance, the importance of focusing on the gains the case had made for international law rather than on its failure would be paramount.[206] Although 'General Augusto Pinochet died without standing trial…justice caught up with him in every other sense';[207] bringing Pinochet to justice at all given the failure of domestic mechanisms to do so despite the call of thousands of Chileans cannot be ignored for the impact it has had on universal jurisdiction laws in Europe as well as the prosecution of war criminals around the

[202] Roht-Arriaza, N. Op. Cit. p. 57.
[203] Human Rights Watch. The Extradition of General Augusto Pinochet. http://www.hrw.org/news/1999/09/ 20/extradition-general-augusto-pinochet, 1999.
[204] Human Rights Watch. The Extradition of General Augusto Pinochet. Op. Cit.
[205] Roht-Arriaza, N. Op. Cit. p. 46.
[206] Ibid. p. 64.
[207] Brody, R. Pinochet: Justice and the General – Opinion – International Herald Tribune. http://www.nytimes.com/2006/12/11/opinion/11iht-edbrody.3855909.html?_r=0, 2006.

globe.[208] Indeed, the Pinochet case was the first of its kind in Europe and served to entrench universal jurisdiction as a mechanism of domestic law in a way that ensured legitimacy through the discourse of legal positivism.

A Chadian in Senegal and Belgium: The Case of Hissène Habré

Dubbed 'Africa's Pinochet', the despotic regime of Hissène Habré, akin in many ways to his Chilean counterpart, wreaked havoc across Chad during his eight-year reign from 1982 to 1990.[209] As Pinochet relied on domestic security forces to suppress dissidents to his regime and to control Chile's population with a horrifically harsh hand, Habré relied on the Documentation and Security Directorate (DDS) to silence dissenting voices.[210] Amongst the arms of this supposedly legitimate state-structure was the Special Rapid Action Brigade that undertook the tasks of arrests, tortures and large-scale massacres in Chad as well as the Terrorism Mission Branch that took charge of the 'physical liquidation' of dissenters located abroad or in exile.[211] In addition to the estimated 40 000 murder and torture victims, the horrors of the Habré regime further left 80 000 children orphaned, 30 000 women widowed and left at least 200 000 people destitute.[212] While Habré's successor Idriss Deby continued the practices of his predecessor, Habré settled comfortably in Dakar, Senegal, as a welcome 'guest of the government'.[213]

The Chadian Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories (Commission), was charged in 1990 with investigating crimes ranging from 'kidnappings, detention, murder, disappearances, torture, acts of barbarity, mistreatment, other attacks on physical or moral integrity, and all acts in violation of human rights' committed under the Habré regime.[214] From late and limited allocations of funding to the haphazard distribution of urban transport vehicles for all-terrain travel to the outskirts of the country's capital Ndjamena, the work of the Commission was severely hampered by

[208] Brody, R. Op. Cit.
[209] Macedo, S. (ed). Op. Cit. p. 133.
[210] Loc cit.
[211] Loc cit.
[212] Ibid. p. 135.
[213] Loc cit.
[214] Ibid. p. 134.

logistical and financial constraints.[215] Besides these logistical issues, the Commission also faced opposition from witnesses fearful or simply unwilling to share their experiences that further reduced the overall integrity of investigations.[216] As a result of these extensive restraints on time and resources, the Commission was eventually only able to assess an estimated ten percent of all the crimes committed by the Habré regime; a proportion far short of complete justice.[217] In addition to this, its recommendations to create a National Human Rights Commission and the development of judicial mechanisms committed to holding persecutors of serious crimes to account were not heeded by the Chadian government thus leaving any prospects of restorative, let alone retributive, justice abandoned. [218]

Given that Chad was unwilling to prosecute Habré on his home-turf, it was agreed that Senegal with its independent judiciary, burgeoning democracy and promotion of human rights would be the ideal place to bring forth a case based on universal jurisdiction.[219] Prosecutors in Senegal relied on provisions of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), particularly Articles 4 through 7, as well as provisions of customary international law to prosecute Habré in Senegal.[220] Article 7 (1) of the Torture Convention reads as follows:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4…shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purposes of prosecution[221]

Although Senegal had been party to the Torture Convention since 1986, no attempt had been made to integrate its provisions into domestic law.[222] This would be the oversight that tipped the scales of justice in favour of Habré and would set them on an unsteady path of motion for the next decade.

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[215] Chad Commission of Inquiry. Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by the Ex-President Habré, his Accomplices and/or Accessories. http://www.usip.org/files/file/resources/collections/commissions/Chad-Report.pdf, 1992, p. 54.
[216] Loc cit.
[217] Macedo, S. (ed). Op. Cit. p. 134.
[218] Ibid. pp. 134-5.
[219] African Union. Report of the Commission of Eminent African Jurists on the case of Hissène Habré. http://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf, 2006, p. 4.
[220] Macedo, S. (ed). Ibid. p. 141.
[221] United Nations. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Op. Cit.
[222] Macedo, S. (ed.). Op. Cit. p. 142.

Simultaneously, a small cohort of victims living in Belgium filed charges under Belgian laws of universal jurisdiction.[223] In 1993, Belgium enacted the *Loi du 16 Juin* that codified the use of universal jurisdiction to prosecute international crimes in Belgian courts.[224] Although Belgium's law of universal jurisdiction has been heralded as one of the world's most comprehensive, it would be amended twice, both times resulting in its extensive scope being limited, and would eventually be repealed in 2003 under intense international pressure.[225] The Habré case fell within this period of flux in Belgian law that would allow the case to be tried only if it could not be tried elsewhere. Despite these legal modifications and since both Chad and Senegal were unwilling or unable to prosecute Habré, his case would still fall within the ambit of Belgian jurisdiction.[226] Even once Belgium's universal jurisdiction laws were repealed, the Habré case could still go ahead,[227] however, the consensus in Senegal was shaking.

Initially adamant that their courts had no jurisdiction over the Habré case, Senegal faced enormous pressure from Belgium and the African Union (AU) to fulfil its commitments under the Torture Convention. The AU's stance on the Habré Case was influenced by the commissioned Report of the Committee of Eminent African Jurists on the Case of Hissène Habré (Report) in 2006.[228] Amongst other findings, this Report held unequivocally that Senegal was bound by its commitments under the Torture Convention to try Habré and if it was unable to provide judicial recourse for the victims of the Habré regime then Chad or another able African state should do so.[229] Heeding this call as well as that of the UN Committee against Torture,[230] Senegal amended its Criminal Code in 2008 to include prosecution of crimes against humanity, war crimes and genocide whilst also refuting the non-retroactivity principle in law to allow for the prosecution of Habré under its domestic law.[231]

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[223] Human Rights Watch. Chronology of the Habré Case. http://www.hrw.org/legacy/english/docs/2004/10/29/chad9579_txt.htm, 2009.
[224] Baker, R. B. "Universal Jurisdiction and the Case of Belgium: A Critical Assessment" in the ISLA Journal of International and Comparative Law. Vol. 16, No. 1, 2009, p. 143.
[225] Loc cit.
[226] Human Rights Watch. Chronology of the Habré Case. Op. Cit.
[227] Human Rights Watch. Chronology of the Habré Case. Op. Cit.
[228] African Union. Op. Cit. 2006.
[229] Ibid. pp. 3-4.
[230] The Committee held that by not prosecuting Habré in its courts, Senegal was in breach of its commitments under the Torture Convention.
[231] Human Rights Watch. Chronology of the Habré Case. Op. Cit.

Four years on, however, attempts to prosecute Habré in Senegal 'in the name of Africa' have failed leading both Chad and Belgium to try him *in absentia*.[232] In Chad Habré had been sentenced to death in 2008 for attempting to overthrow the government while in Belgium he has been found guilty of crimes against humanity and torture.[233] In 2011, Senegal informed Chad of its decision to repatriate Habré, however, this decision was withdrawn within days of being made due to its condemnation by the United Nations High Commissioner on Human Rights, Navi Pillay, who feared that Habré would be tortured and face inevitable death in his home country.[234] While attempts to hold Habré to account have seemingly lost clout weighing the scales in favour of impunity, nonchalance and scarce justice, a decision made by the International Court of Justice (ICJ) in July 2012 has brought hope to a number of victims seeking the satisfaction of accountability. In a case brought forward to the ICJ by Belgium, the international court held that Senegal should finally and immediately fulfil its legal responsibility to try Habré for serious human rights violations failing which, Senegal should comply with the extradition request of Belgium.[235] Viewed as a victory for victims stuck in political purgatory and who have been awaiting justice for over a decade, the ICJ decision brings hope to many in their pursuit of truth.[236]

Four months later, Senegal has only just begun to show an interest in complying with the order of the ICJ by signing an agreement with the African Union (AU) to set up a special court in which Habré may be tried. The agreement calls for an Extraordinary African Chamber (EAC) to be developed within the existing domestic legal structures of Senegal to prosecute those most responsible for international crimes committed in Chad between 1982 and 1990.[237] Based somewhat on the Extraordinary Chambers in the Courts of Cambodia (ECCC), the EAC will utilise the expertise of Senegalese judges as well as that of judges from foreign jurisdictions emphasising the functionalist approach to justice.[238] In addition to this, it is expected that individuals will have the capacity to

[232] BBC News. Senegal Suspends Hissene Habre's Repatriation to Chad. http://www.bbc.co.uk/news/world-africa-14101258, 2011.
[233] Loc cit.
[234] Loc cit.
[235] International Court of Justice. Questions Relating to the Obligation to Prosecute or Extradite: Belgium v Senegal. http://www.icj-cij.org/docket/files/144/17064.pdf, 2012, p. 37.
[236] Amnesty International. ICJ: Ex-Chad Leader Habré's Victims' Long Wait for Justice. http://www.amnesty.org/en/news/icj-ex-chad-leader-habr-s-victims-long-wait-justice-2012-07-20, 2012.
[237] Human Rights Watch. Senegal: New Court to try Chad Ex-Dictator in Senegal. http://www.hrw.org/news/ 2012/08/22/senegal-new-court-try-chad-ex-dictator-senegal, 2012.
[238] Loc cit.

participate in legal proceedings as civil parties and will further be able to seek financial reparations whether or not they participate in the Habré trial.[239] Nonetheless, it is presumed that the EAC will try Habré only for his most serious crimes arguably limiting the overall level of formal justice to be achieved by the special court.

While no longer conducted in accordance with the doctrine of universal jurisdiction as a result of its collaboration with the AU, such a trial would now be considered a feature of international-sanction. Regardless, the Habré trial to date has brought to light what is perhaps one of the most pressing factors in holding those responsible for serious human rights violations to account: the inherent inability of international criminal law to be enforced. With compliance based considerably on the self-imposed morality of state actors, the will of states in pursuing justice as a mechanism of post-conflict peace-building is relative. Resulting in prolonged trials, the issue of non-compliance and state passivity contributes to the reduced value of international criminal law in promoting the levels of truth and justice necessary for post-conflict reconciliation.

With justice for victims still an elusive fantasy despite international intervention and the role of the international community meandering into redundance, the possibility of Chad coming to terms with its past and navigating a more peaceful future seem to be an impossible dream. Chad's contemporary country profile is such that is has largely been unable to adequately remedy the ravages and consequences of conflict over the twenty years since Habré's removal from power.[240] Poor infrastructure, a lack of social welfare provisions including poor provision of healthcare and education facilities continue to place Chad in the bottom five of the Human Development Index Rankings.[241] In addition to social services, Chad has struggled to reinvent its political and institutional image with very little positive development in the field of law leaving the legal burden of prosecuting Habré to external actors whose internal political drivers have to date stalled the project of justice.

[239] Human Rights Watch. Senegal: New Court to try Chad Ex-Dictator in Senegal. Op. Cit.
[240] BBC News. Chad Profile. http://www.bbc.co.uk/news/world-africa-13164686, 2012.
[241] United Nations Development Programme. Chad Country Profile: Human Development Indicators. http://hdrstats.undp.org/en/countries/profiles/TCD.html.

Chad still finds itself, today, in a phase of post-conflict peace-building where projects of nation and institution building are essential to its prospects for sustainable peace.[242] Opinions on pursuing a project of post-conflict justice this long after Habré was ousted from office in 1990 are, however, varying. Polarities are often voiced along the lines of age with the older generation of Chadians craving formal justice for the collective memory of atrocities their minds have been forced to harbour while the youth of the country see little value in pursuing the memory of a 'Chad from the history books'.[243] With justice displaced from the Chadian population by both time and space, it is no surprise that an entire generation of youth unconcerned with Habré's prosecution has been born.[244]

It is, indeed, probable that the temporal placing of mechanisms of justice as soon after crimes were committed as possible is likely to have more bearing on post-conflict nation building and thus in producing sustainable peace but whether or not such a relationship is definitive, however, is up for debate. What is notable in the case of Chad is that a generation of youth faced with the failures of state building and a national reconstruction dialogue displaced from their immediate interests serves as a volatile breeding ground of potential unrest and possible future conflict in an environment still ravaged by the aftermath of war.[245]

Conclusion

Although the case of Habré indicates quite clearly that obligations exist for signatories to international treaties even where no domestic legislation has been enacted to that effect, domestic courts have doggedly stuck to the tenants of legal positivism that require domestic legislation for legal recourse to take place. In addition to this, courts throughout Europe and Canada have over time added the requirement of a 'legitimising link' between the accused and prosecuting state in order for universal

[242] Rocha Menocal, A. "State Building for Peace: A New Paradigm for International Engagement in Post-Conflict Fragile States" in Third World Quarterly. Vol. 32, No. 10, 2011, p. 1717.
[243] Hicks, C. Chad Divided over Former Dictator who Could Finally Face Justice. http://www.guardian.co.uk/global-development/2012/aug/06/chad-divided-over-dictator, 2012.
[244] Loc cit.
[245] Hanlon, J. "Is the International Community Helping to Recreate the Preconditions for War in Sierra Leone" in The Round Table. Vol. 94, No. 381, 2005, p. 469.

jurisdiction cases to take place somewhat reducing the scope of traditional laws of universal jurisdiction that could otherwise be utilised regardless of such a link.

Levels of justice Obtained in the Case of Augusto Pinochet of Chile			
	No Justice	**Limited Justice**	**Absolute Justice**
Formal	• ***No trial***	• ***Trial with procedural problems or political interference***	• Trial with no procedural or political compromise
	Notes: Formal justice is borderline in this case as although a trial was underway in England, Pinochet was deemed medically unfit to stand trial in Europe		
Substantive and Restorative	• No individual or group deterrence • No recourse for victims • No commitment to transitional justice and reconciliatory processes • No financial or political reparations for crimes • No sense of post-conflict reassurance	• ***Either individual or group deterrence only*** • ***Limited recourse for victims*** • ***Commitment to transitional justice and reconciliatory processes but with limited legitimacy*** • ***Presence but lack of legitimacy of financial and/or political reparations*** • ***Limited sense of post-conflict reassurance***	• Both individual and group deterrence • Absolute recourse for victims • Complete and legitimate transitional justice and reconciliatory processes • Presence and legitimacy of financial and political reparations for crimes • Good sense of post-conflict reassurance
Overall Outcome	✓		

Placing these cases within the matrix of justice obtained, each undoubtedly results in sub-optimal outcomes. In the case of Pinochet, political power-play played a significant role in reducing the overall number and scope of counts against him during pre-trial proceedings. In addition to this and as a result of his ill-health, formal justice was further limited as Pinochet never actually faced trial. The effects of such a limited formal justice on the outcomes of substantive justice, deterrence, victims' reassurance and post-conflict reconciliation cannot be underestimated. This having been said, the Pinochet case was a watershed event for international criminal justice; while its failures cautioned applications of the doctrine soon after the Pinochet case concluded, its successes have provided impetus for a renewed academic and practical interest in the unique doctrine that may fashion its more candid future. The case of Habré, on the other hand, indicates an overall reluctance to pursue justice at the domestic and even regional level as a result of political preference. Procedural limiting relating to the scope of domestic law further complicated the case before Senegalese and Belgian courts leading to reduced accessibility to justice in Chad.

Levels of justice Obtained in the Case of Hissène Habré of Chad			
	No Justice	**Limited Justice**	**Absolute Justice**
Formal	• No trial	• ***Trial with procedural problems or political interference***	• Trial with no procedural or political compromise
Substantive and Restorative	• No individual or group deterrence • No recourse for victims • ***No commitment to transitional justice and reconciliatory process*** • ***No financial or political reparations for crimes*** • ***No sense of post-conflict reassurance***	• ***Either individual or group deterrence only*** • ***Limited recourse for victims*** • Commitment to transitional justice and reconciliatory processes but with limited legitimacy • Presence but lack of legitimacy of financial and/or political reparations • ***Limited sense of post-conflict reassurance***	• Both individual and group deterrence • Absolute recourse for victims • Complete and legitimate transitional justice and reconciliatory processes • Presence and legitimacy of financial and political reparations for crimes • Good sense of post-conflict reassurance
	Note: The sense of post-conflict reassurance is borderline in this case as a result of the divergent opinions of Chad's citizens towards the prosecution of Habré and the effect this would have on post-conflict peace.		
Overall Outcome	✓		

While the Pinochet case was influenced by both domestic and international power concerns and the case of Habré indicates the potential effects of a lack of formality and bending of the law that can occur at a domestic level, both show promise in pursuing the application of universal jurisdiction as a means to fill in the gaps of retributive justice left by international mechanisms of prosecution and domestic courts. This having been said, the requirements of justice in these cases have often proven to fluctuate depending on the nature of the post-conflict society, the nature of the crimes committed as well as the needs of victims. Although the case of Chile shows that the pursuit of both substantive and formal justice by citizens and victims has been relentless regardless of domestic nonchalance, the case of Habré has shown that pursuing formal justice where their immediate concerns relate to survival causes a somewhat more mixed reaction. To assume that all cases of international crimes will respond well to the pursuit of retributive justice is shortsighted, indeed, to presume that all cases require formal justice in the legal sense is equally problematic as the next section will illustrate.

Part V
Comparative Analysis



Justice f(or) Peace: Critical Conceptions for Comparative Analysis

The emergent trend in Chapter III of including outreach programmes in the approach to international criminal justice is not without cause and clearly indicates an understanding that solely formal mechanisms of justice are lacking. Justice for serious human rights violations does not exist in isolation from the socio-political environment in which mechanisms of prosecution operate; often post-conflict situations. Understanding the relationships between peace and justice as well as the role played by justice in reconstructing societies emerging from conflict are, therefore, both essential to developing a more nuanced and efficient approach to international criminal law.

To date, the definition of peace-building has been redefined as multifaceted and has been argued to include, amongst other aspects, 'building democratic institutions, protecting human rights, strengthening the rule of law and promoting sustainable development'.[246] In addition to this, peace-building has found complementarity with projects of state building as more practically sustainable solutions have been sought to bring post-conflict states out of their pasts and into their futures.[247] Without a doubt, aspects that are essential to nation building are relative and dependent on the needs and social evolution of a post-conflict population. While justice may contribute to a consolidated national memory and the truth-telling necessary for post-conflict reconciliation,[248] to assume that the formal justice of tribunals and trials will always contribute positively to post-conflict nation building is not only a wild generalisation but also a costly one.

The financial and institutional costs of a narrow agenda for justice onto the peace-building trajectories of states emerging from conflict cannot be ignored. The running costs of the ICTY, for example, have increased 500-fold since the Tribunal's inception

[246] Rocha Menocal, A. Op. Cit. p. 1717.
[247] Ibid. p. 1718.
[248] Hohn, S. "International Justice and Reconciliation in Namibia: The ICC Submission and Collective Memory" in African Affairs. Vol. 109, No. 436, 2010, p. 472.

in 1993 from a modest annual budget of $276 000 to one in excess of $301 million.[249] Although the full cost of the Habré trial to date is yet to be calculated, the Charles Taylor trial alone has been estimated to cost in excess of $50 million – a cost that defence counsel Courtenay Griffiths QC describes as 'a complete waste of time and money'.[250] Although Griffiths has often been criticised throughout the Taylor trial for his raw cynicism of the process he is expected to defend,[251] his outbursts ought not to be taken as the politico-legal antics of legal failure but rather as an indication of the difference between value and money.

As a result of the incredible financial costs involved in the logistic, technical and legal support required to create tribunals and mechanisms of prosecution on an *ad hoc* basis, the business of prosecuting serious human rights violations has been forced to make itself more marketable to donors; notably taxpayers in developed countries.[252] Less focus is spent on the aspects of reconciliation and reconstruction necessary for nation building and more on the short-term measurability of success by case numbers and the status of those prosecuted in order to 'sell' issues of transitional justice to the international public.[253] Focusing on the visible industry of high-profile prosecutions with little concern for its bearing on the victims that these trials are supposed to benefit contributes little to the formation of a sound socio-legal foundation for future interactions between the state and its population.[254] Proven by the cases of Milosevic, Taylor and Habré, the development of international criminal prosecution into less accessible yet more marketable mechanisms is simply not enough to obtain the whole range of variables necessary for justice to be complete and peace to be initiated.

Costs of pursuing justice in post-conflict societies are, however, not merely financial and the socio-political costs of international criminal justice processes cannot be ignored. The nature of international criminal justice is such that it is often viewed as a

[249] Silverman, J. Ten Years, $900m, one verdict: Does the ICC Cost too much? http://www.bbc.co.uk/news/ magazine-17351946, 2012.
[250] Hirsch, A. Charles Taylor is Guilty – but what's the verdict on international justice? http://www.guardian.co.uk/commentisfree/libertycentral/2012/apr/26/charles-taylor-guilty-abetting-war-crimes, 2012.
[251] Loc cit.
[252] Hirsch, A. Op. Cit.
[253] Price, M. E. Stemlau, N. "Media and Transitional Justice: Toward a Systematic Approach" in International Journal of Communication. Vol. 6, 2012, p. 1078.
[254] Madlingozi, T. "On Transitional Justice Entrepreneurs and the Production of Victims" in Journal of Human Rights Practice. Vol. 2, No. 2, 2010, p. 208.

mandatory feature of transitional politics,[255] however, the implicated costs of imposing a blueprint for the peace-building process in all transitional states are high. From both the cases of Slobodan Milošević and Charles Taylor as well as those of Augusto Pinochet and Hissène Habré, it is apparent that the temporal constraints placed on a nation's coming to terms with its past lock it into a period of political purgatory that hinders rather than promotes prospects for peace. Although trials conducted in the interests of victims can play an important role in restoring their dignity,[256] promoting such an approach beyond a reasonable timeframe and against the will of a country's citizens may create social division amongst the population or utter indifference to the peace-building project of post-conflict justice.

The commercialisation of justice and peace similarly contributes to creating a blueprint for post-conflict peace-building that oversimplifies the challenges with which the process encounters. An entire industry of global mechanisms and frameworks has grown around the phenomenon of a transitional society in which mechanisms of prosecutorial justice have become a normative feature.[257] Kimberley Theidon, medical anthropologist and academic specialist in the social consequences of transitional justice, argues that however commonsensical such norms of formal justice may seem, they may also lack foundation as they speak to valueless assumptions on what is and is not necessary for post-conflict justice and peace to be achieved.[258] An essential assumption in transitional societies is that there is an inherent 'duty to remember and to narrate those memories' so that the wounds of the past may be healed.[259] While truth-telling may, indeed, be necessary in cases where the past was shrouded in mystery such as Pinochet's Chile to assume that this is the case in all situations of political transition is to assume that all post-conflict states are cut of the same cloth; a serious and imposing generalisation.

To date, the relationship between peace and prosecutorial justice continues to be described in dichotomous terms with arguments either that justice is absolutely

[255] Kersten, M. Revisiting the Peace-Justice Debate in Northern Uganda. http://opiniojuris.org/ 2011/10/09/revisiting-the-peace-justice-debate-in-northern-uganda/, 2011.
[256] International Centre for Transitional Justice. Criminal justice. http://www.ictj.org/our-work/transitional-justice-issues/criminal-justice.
[257] Theidon, K. "Editorial Note" in The International Journal of Transitional Justice. Vol. 3, 2009, p. 294.
[258] Ibid. p. 295.
[259] Loc cit.

necessary for peace or that it absolutely hinders the prospects for peace in post-conflict societies.[260] Despite this, justice for peace is not such an elusive dream or such a relational fantasy when it is viewed as the catalyst for building a sound legal foundation upon which post-conflict states may ground their relations with citizens. Based on what is essentially a social contract between the state and its population, a sound legal foundation is essential to a strong state structure.[261] Working in partnership with domestic lawyers, legal experts at the international level of international prosecution may transfer legal knowledge and information to local authorities in a way that will better allow them to rebuild their own legal framework. In addition to this, rebuilding courts in domestic locations and working in conjunction with domestic structures will also go a long way in proving the legitimacy of these institutions if trials are conducted well and in accordance with victims' needs.

It is perhaps this latter point that sets apart examples of success from those of failure in the field of international criminal law. Akin to the SCSL in mandate and formation, the ECCC was formed in 2001 based on a joint agreement between the home government and the UN to prosecute serious crimes committed during the Khmer Rouge regime.[262] What sets the relative success of the ECCC apart from the serious limitations of the SCSL, however, is the Court's consistent commitment to keeping the trials relevant and accessible to the Cambodian population. As much as the crimes committed by Charles Taylor were crimes against humanity they were fundamentally crimes against the people of Sierra Leone. Shifting the trial to The Hague based on supposed security concerns was the first of many concessions that allowed the trial to digress into a political showpiece and arguably did a serious disservice to the plight of victims left behind in Sierra Leone.

From the commercialisation of justice to the internationalisation of trials, the fundamental link between the perpetrator and victim has been lost in a global web of politics. The tangibility of recourse necessary for truth and individual reconciliation to result in peace seems to have been lost in the rhetoric of international responsibility. As a result, many authors argue that the 'local is the realm of solution, the global the realm

[260] Kersten, M. Op. Cit.
[261] Rocha Menocal, A. Op, Cit. p. 1721.
[262] Extraordinary Chambers in the Courts of Cambodia. Introduction to the ECCC. http://www.eccc.gov.kh/en/about-eccc/introduction.

of imposition and domination' when it comes to issues of building states and building peace in post-conflict societies.[263] With prosecutorial justice a strongly Western legal phenomenon and with its direct transference onto transitional situation in less developed constituencies around the globe with little regard for pre-existing socio-political and cultural complexities, it comes as no surprise that the populations of Sierra Leone, Chad and countries in the Former Yugoslavia have rejected flashy public prosecutions with, at most, indifference.

The Multiple Strains of International Criminal Prosecution: Comparative Implications for Justice

Despite limitations in understanding the complexities and requirements of transitional societies pursuing post-conflict justice, the value of holding individuals responsible for serious human rights violations as well as the legal framework that underpins such prosecutions cannot be underestimated. Transforming an obsolete prosecutorial prototype into a dynamic solution for post-conflict justice, however, rests on the ability of the field of international criminal justice to combine the formality of law with the nuances of social development.

	Overall Levels of justice Obtained		
	No Justice	**Limited Justice**	**Absolute Justice**
Formal	• No trial	• Trial with procedural problems or political interference	• Trial with no procedural or political compromise
Substantive and Restorative	• No individual or group deterrence • No recourse for victims • No commitment to transitional justice and reconciliatory processes • No financial or political reparations for crimes • No sense of post-conflict reassurance	• Either individual or group deterrence only • Limited recourse for victims • Commitment to transitional justice and reconciliatory processes but with limited legitimacy • Presence but lack of legitimacy of financial and/or political reparations • Limited sense of post-conflict reassurance	• Both individual and group deterrence • Absolute recourse for victims • Complete and legitimate transitional justice and reconciliatory processes • Presence and legitimacy of financial and political reparations for crimes • Good sense of post-conflict reassurance
Overall outcome by Case*	***Slobodan Milošević***	***Charles Taylor*** ***Augusto Pinochet*** ***Hissène Habré***	

[263] Theidon, K. Op. Cit. p. 296.

**Note: the placement of cases in this table is for the purpose of general comparison and is based solely on the overall outcome of each case's placement in its individual matrix.*

From their placements within the matrix of levels of justice obtained, it would seem that alone each mechanism of prosecution assessed has resulted in overall limited levels of justice taking into account both their formal and substantive strains. Lying somewhere within or around the category of 'limited justice', the cases show neither an argument for an absolutely non-existent approach to justice nor a complete one. Although cases conducted under international sanction show more promise in their approach to obtaining 'recourse for victims' and pursuing 'transitional justice processes', cases conducted under the doctrine of universal jurisdiction often present fewer procedural problems and a greater sense of 'formal justice' where domestic forces are unable or unwilling to deal adequately with prosecuting serious crimes. Although neither mechanism of justice assessed in this paper provides an argument starkly in favour of 'absolute justice', the extent to which each fits into the category of 'limited justice' differs as each straddles the border between 'no justice' and 'limited justice' to varying degrees. The argument for pursuing synthesis over a process of elimination, however, is strengthened by the complementarities between mechanisms of justice that may lead to its more sound pursuit in practice.

The mechanisms of justice assessed, however, are certainly not without individual fault. In his 2001 submission to *Foreign Affairs*, Henry Kissinger launches a particularly scathing attack on the virtues of universal jurisdiction. With specific reference to the politicisation of justice, he deems such a mechanism of prosecution to substitute the 'tyranny of judges for that of governments'.[264] More broadly, limitations of universal jurisdiction often stem from its uneven development in both form and substance. Procedurally, universal jurisdiction in its pure norm-based form is rarely exercised as legal positivism echoes through its application. Substantively, only a handful of countries have chosen to exercise universal jurisdiction as a means to hold persecutors of serious human rights violations to account while most avoid the responsibility completely.[265] Even where laws of universal jurisdiction exist, they have often been limited by international pressure and power concerns. Because universal jurisdiction relies on national authorities to prosecute international crimes, it can reflect domestic

[264] Kissinger, H. A. "The Pitfalls of Universal Jurisdiction" in Foreign Affairs. Vol. 80, No. 4, 2001, p. 86.
[265] Sriram, C. L. Op. Cit. p. 35.

interests pursued through justice.[266] The cases of Belgium and Spain where laws of universal jurisdiction have been repealed and amended to suit political interests is evidence of these limitations. Similarly, in the case of Senegal, laws were enacted against traditional legal principles and as a direct result of international pressure to allow Habré to be tried there.

The limitations of mechanisms of universal jurisdiction stated, *ad hoc* and hybrid mechanisms of international criminal prosecution are not without their faults and suffer the same problems of selective justice and politicisation for which universal jurisdiction is so heavily criticised. The involvement of NATO in the former Yugoslavia and the international community's lack of involvement in the Rwandan genocide both led to international pressure to develop judicial mechanisms to hold persecutors of human rights atrocities to account. The mandate of these mechanisms are also generally limited to a specific time-period in which the most heinous human rights violations occurred as a result of financial and resource constraints. Although aimed at promoting efficiency, such a limitation in mandate neglects the very nature of systematic and conflict-based violence that is inherently progressive and ongoing. As in the case of the Former Yugoslavia, conflict continued well after the ICTY was formed and, indeed, preparatory acts of ethnic-violence occurred before the Yugoslav Tribunal's mandated jurisdiction applied.[267]

In addition to this, financial and resource limitations have impeded the prosecution of all those responsible for crimes committed in these already limited timeframes. The mandates of both *ad hoc* and hybrid courts are generally limited to those persons who bear greatest responsibility for the crimes committed.[268] Those who bear greatest responsibility tend to be those in command; the presidents, prime ministers and army generals on whose ideology civilians leech. Although it is true that the prosecution of government officials is a relatively new phenomenon that deals admirably with cases of diplomatic immunity and corresponding impunity, their sole prosecution to the exclusion of other responsible individuals results in seriously limited levels of retributive justice. Procedurally, the limitations are obvious as prosecution of those most responsible can lead to the promotion of selective justice. Substantively, civilian

[266] Broomhall, B. Op. Cit. p.105.
[267] Akhavan, P. Op. Cit. p. 23.
[268] Kirk McDonald, G. Op. Cit. p. 569.

survivors may be expected to live side-by-side with their attackers reintegrated into society and left unprosecuted thus indicating the close relationship between compromised retributive justice and the restrained prospects for post-conflict reconciliation.[269]

Aside from their practical limitations, theoretical issues of legality and legitimacy also challenge the overall efficacy of internationally-sanctioned mechanisms of justice. The legality of international tribunals and hybrid courts has been challenged from their outset and, similarly, their legitimacy has been questioned particularly where there are political consequences.[270] Vesselin Popovski notes that challenges of legality against internationally-sanctioned mechanisms are based on at least four grounds.[271] Firstly, the UNSC was developed to be a political body empowered with the protection and promotion of international peace and was not intended to possess legislating or judicial powers. Secondly, 'the logic of peace' with which the UNSC is charged may be different from the 'logic of justice' necessary for a sound system of international criminal law to be developed. Thirdly, the UNSC is empowered to take action against states that do not comply with the organ's mandate, however, criminal tribunals serve as measures against individuals. Finally, the UNSC suffers a serious 'legitimacy deficit' as its internal structure is not fully representative of the global condition. In addition to and as a result of these issues of legality, the legitimacy of trials conducted under the auspices of international-sanction has been brought into question.

With current developments in the field of universal jurisdiction, its space in the international criminal justice regime has been recasted to one promising progress in the discipline. Recent cases of universal jurisdiction, in Canada and Germany in particular,[272] have shown what strong laws and independent, morally-conscious judiciaries can do for the promotion of global justice. The application of universal

[269] Malan, M. Op. Cit. p. 139.
[270] Popovski, V. "Legality and Legitimacy of International Criminal Tribunals" in Falk, R. Juergensmeyer, M. Popovski, V. (eds). Legality and Legitimacy in Global Affairs. Oxford University Press, Oxford, 2012, p. 388.
[271] Ibid. p. 397.
[272] Canada's Crimes against Humanity and War Crimes Act (the Act) adopted by the Canadian parliament in 2000 making it the first state to incorporate obligations of the Rome statute into national legislation. Similarly, German laws of universal jurisdiction have been applied through the *Strafgesetzbuch* (Criminal Code) since 1954. In 2002, the *Völkerstrafgesetzbuch* (International Criminal Code) was passed to give effect to the doctrine of universal jurisdiction with specific respect to war crimes, crimes against humanity and genocide.

jurisdiction, however, is not without fault and it seems in the interest of justice that mechanisms serving broader mandates and geographical jurisdictions, such as that of universal jurisdiction, ought to be formalised if we are to secure against an incoherent system susceptible to double jeopardy. The 2001 Princeton Project sponsored by Princeton University's Law and Public Affairs Programme in conjunction with the Woodrow Wilson School of Public and International Affairs is one such example of formalisation.[273] The Princeton Principles contain fourteen core features of universal jurisdiction that strengthen its practice and guard against common limitations such as double jeopardy, amnesties and diplomatic immunity.[274]

Although a formalised system of universal jurisdiction could easily iron-out the imperfections of one twisted to enhance political gain, domestic courts also need to function in their traditional capacity as arbiters of domestic issues. In addition to this, codifying the system of universal jurisdiction does not compel all domestic courts to abide by these rules. Discarding the role of the international community in favour of that of domestic jurisdiction is, therefore, also a limited solution to the problems faced by global justice. From the cases studied in this paper, the role of universal jurisdiction has generally been to pursue justice where other mechanisms of international criminal prosecution have failed or have left projects of justice incomplete. The capacity of the international criminal justice regime can only be enhanced if individual states and the international community as a whole develop a co-operative framework to deal with the legal aftermath of serious human rights violations. Such a framework should be multi-levelled and multilateral and ought to contain elements of both internationally-sanctioned mechanisms of prosecution as well as those of universal jurisdiction to ensure that the limitations of a unilateral approach to justice are resolved.

Similarly, placing the onus of justice on an international community inexperienced in the application of international criminal law is a challenging undertaking. Although the functionalist stance is admirable, the dangers of political interference that lead to selective and ineffective justice is a common one across cases studied in this paper. Functionalist approaches to international criminal justice simply cannot achieve the levels of prosecution necessary for formal justice to be achieved. The rigid formality of

[273] Macedo, S. (ed.). Op. Cit. p. 19.
[274] Ibid. pp. 21-5.

positivist legal theory, on the other hand, and its mechanism of universal jurisdiction cannot deal adequately with the requirements of substantive justice that are so essential to the meaningful outcomes of post-conflict reconstruction. In terms of internationally-sanctioned trials, David M. Crane notes that:

> It must be understood that an international war crimes tribunal is for and about the victims, their families, their towns, and their districts. A busy tribunal tends to lose sight of this important fact.[275]

While a conservative tribunal may be better able to spend limited resources on a few high-profile cases in close geographical proximity to affected areas, these types of tribunals inherently promote a limited formal justice in their selective approach. Foreign courts practicing at a domestic level, however, have the inherent stability and means to prosecute those untried by international tribunals and consequently raise the bar of overall formal justice achieved in cases of serious human rights violation. Despite these apparent differences and limitations, the possibility for synthesis between the often more localised and somewhat more considerate trials of international-sanction and the legal formality of cases considered under doctrines of universal jurisdiction is not without merit.

Whether justice on the ground is more purposively obtained by universal jurisdiction or internationally-sanctioned mechanisms of criminal justice is debatable. Whether international crimes ought to be prosecuted by domestic judiciaries or foreign courtrooms seems a non-question as the argument for home-based mechanisms is the strongest.[276] Domestic prosecutions are undoubtedly best able to provide justice to the societies and victims who need it most given their geographical proximity to the scene of crimes. Despite this, domestic courts are rarely able or willing to prosecute persecutors of human rights violations because of the devastating consequences conflict may have had on the proper functioning of a judiciary and because trials may compromise the prospects of post-conflict peace and reconciliation.[277] As a result, international and foreign interests become intermingled with the pursuit of retributive justice, in one way or another, for all the trials studied. Indeed, even in the case of hybrid courts, international assistance was required to keep judiciaries that had not fully

[275] Crane, D. M. "Terrorists, Warlords and Thugs" in American University International Law Review. Vol. 21, 2005, p. 504.
[276] Ratner, S. R, Abrams, J. S. Op. Cit. p. 157.
[277] Ibid. p. 156.

recovered from their pasts on par with international legal standards. Cases of universal jurisdiction and those of *ad hoc* mechanisms, and sometimes even the trials of hybrid courts displaced from the home country for security reasons, dislocate justice from the societies, victims and survivors that these mechanisms are intended to benefit. Restorative qualities of retributive justice become limited as a result and prosecutions attain value as nothing more than sensationalist show trials.

The issues surrounding international criminal justice are complex and mechanisms of prosecution should not be over-simplified and made ineffective in an attempt to "right-size" them. There is also a presumption that only one mechanism of prosecution can serve to promote justice fully and that the corresponding discourse ought to relate to which mechanism should be given preference is one that has resulted in stagnating academic debate as well as uncoordinated application in practice.[278] The debate about which mechanism fairs better is, however, an essentially moot one as the theoretical foundations of universal jurisdiction and internationally-sanctioned trials function on their own turfs - one based on the formality and perpetual nature of legal instruments and the other on common norm-based incentives of the international community – while both work towards the common goal of justice. Instead of pitting these mechanisms against each other, avenues for co-operation between the two should be sought as using legal recourse to place the past in perspective while also instilling an institutional framework for the future gives justice a foothold and peace a backbone in transitional societies.

Drawing on Compatibility over Conflict: Towards a Synthesised System of International Criminal Law

Central to the project of co-operation in the field of international criminal law is a formalised regime of international justice in which the relationships between mechanism of universal jurisdiction and international-sanction as well as their compatible theories of legal positivism and functionalism are codified. Although theorists such as Morgenthau would argue for the replacement of obsolete theories of legal-positivism with functionalist approaches, it would seem that, in practice, mechanisms underpinned by both these theories result in suboptimal outcomes

[278] Scott, S. V. Op. Cit. p. 313.

rendering an elimination argument somewhat extreme. The argument for synthesis, however, is strengthened by the compatibility of mechanisms of international-sanction and universal jurisdiction in obtaining a more complete sense of overall formal justice if codified and combined. Although these mechanisms do not always act together either simultaneously or necessarily consecutively and although the integrity of their application is based on the legal foundation of their separate 'home turfs', there is arguably space for at least a minimal synthesis based on the criteria set out by Jupille, Caporaso and Checkel.

The second model of synthesis developed by Jupille, Caporaso and Checkel strives for a minimal synthesis in that it acknowledges the separate 'home turfs' on which each theory is applied but further notes that the combination of these theories may result in better theoretical and practical explanations.[279] Indeed the 'home turf' of universal jurisdiction that functions at the domestic level of foreign courts is set somewhat apart from the more localised 'home turf' of internationally-sanctioned trials that often functions in or near effected constituencies. In addition to this, the doctrine of universal jurisdiction is essentially grounded in the domestic legal structures of foreign states while that of international-sanction is more flexible and based on a common global initiative. While the purview of internationally-sanctioned trials often extend only so far as the most extreme cases of culpability, the doctrine of universal jurisdiction is able to fill in the gaps of selective justice left behind by its over-extended and under-resourced counterpart. Despite this, each mechanism appears to practice independently of the other. Although neither relies on the other to exist, their combined applications tend not to overlap and could lead to a more complete sense of justice making the argument for a minimal synthesis all the more valid.

Despite this, prospects for substantive justice remain limited even with a more synthesised approach to prosecutions in the field of international criminal law. There is no certainty on whether mechanisms of prosecutorial justice are at all able to contribute to national healing. There is little evidence in contemporary literature to suggest a direct link between prosecutions of war criminals and the outcomes of substantive post-conflict reconstruction, however, it is apparent from the continued inclusion of outreach programmes in the format of internationally-sanctioned trials that purely formal

[279]Jupille, J. Caporaso, J. A. Checkel, J. T. Op. Cit. p. 21.

mechanisms of justice are essentially lacking. Purely restorative measures, on the other hand, do not have a flawless track record either as compensation and symbolic gestures cannot mute misgivings where citizens crave information and formal recourse. Whether the pursuit of justice can ever be complete, however, is speculative as quantifying its outcome has proven to pose many challenges that oversimplify the project of post-conflict peace.

Part VI
Conclusion



Conclusion

Utilising comparative case study analysis, this paper has considered the extent to which various mechanisms of prosecution have contributed to procedural and substantive aspects of post-conflict justice. Answering the fundamental question of how best prosecutorial mechanisms may serve justice in international relations has thus taken into account a broad array of independent factors as well as their relational consequences. Considering both the pitfalls and advantages of various forms of prosecution, it has been found that mechanisms of prosecution have resulted in overall sub-optimal outcomes for justice, however, a closer consideration of these outcomes speaks to the discourse of compatibility over conflict and the possibility of theoretical and practical synthesis in the future.

The obstacles associated with pursuing post-conflict justice are manifold. How do we ensure that the rank-and-file combatants persecuting human rights violations are prosecuted alongside their commanders and chiefs? How do we ensure that victims are not forced to live side-by-side with their attackers in post-conflict situations and that government officials are not protected by their diplomatic status? How do we ensure that the triumphs of retributive justice are not displaced by time from the period in which crimes occurred while also ensuring that justice is not compromised by domestic judicial organs destructed by conflict? Alone, each of these questions may be answered with ease but together they pose a more challenging conundrum, the complexity of which cannot be underestimated. Indeed, the outcome of justice when mechanisms of prosecution are assessed separately is, to varying degrees, limited and alone each mechanism is insufficient to promote a more complete sense of justice posited in the matrix of assessment. The system of international criminal justice that aims to provide a solution for all these issues simultaneously ought to acknowledge this complexity by pursuing a prosecutorial framework that is not superficial in its mechanisms, unilateral in its development or selective in its approach.

Ultimately, it may be argued that although lengthy, costly, fragmented and fundamentally ineffectual trials have become the norm in international affairs,[280] this need not be the case if a clear vision of the purpose and aims of justice is consolidated. Such a vision ought to encompass more than just the international community's exoneration of its responsibility to hold those responsible for human rights violations accountable for their crimes and should include a more sustainable approach to legal development in war-torn countries. Essentially, a more considerate approach to post-conflict justice that also takes into account the necessity to rebuild courts and domestic legal structures destroyed by war as well as to hold persecutors of serious crimes to account is required if justice is to have any long-term effect on state development.[281]

Although the discourse around mechanisms of prosecution has generally been a competitive one between cases of internationally-sanctioned trials and those conducted under the doctrine of universal jurisdiction, this paper finds space for both in the international system. From a comparative case study of the implications these mechanisms have for justice, it would seem that neither is necessarily better than the other and that each adds its own value to the system of international law. Cases based on universal jurisdiction as well as those sanctioned by the international community through *ad hoc* or hybrid mechanisms sometimes suffer the same limitations of political interference but where international courts lack in resources, domestic courts make up in will and where international courts lack in mandate, domestic courts make up in efficiency.

Indeed, prosecutorial mechanism may best serve justice by broadening the conception of justice to one that includes substantive as well as formal strains and also by uniting procedural strengths to create a legally sound and equally legitimate source of international criminal law. Balancing the scales of justice in a way that develops a system that promotes justice equally across all states and for all accused ought to be pursued. Such a balance of justice is, indeed, a fine one but if a co-operative framework supports various avenues of prosecution, those who commit serious international crimes may run from the consequences of their actions but it will become increasingly more difficult for them to hide.

[280] Kersten, M. Op. Cit.
[281] Rocha Menocal, A. Op. Cit. p. 1722.

Part VII
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