Achieving Justice and Seeking Truth: The Evolution of International Criminal Tribunals

By Kitty Anya Rosemary Radojev

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Abstract

This thesis examines the way in which international criminal tribunals have changed and evolved over time, using the International Military Tribunal at Nuremberg and the International Criminal Tribunal for the former Yugoslavia as specific examples. By examining two central societal responses to collective violence – justice and truth – this thesis engages with ideas regarding post-conflict resolution in the hope of creating a positive peace. The following chapters will analyse the IMT and ICTY to determine the manner in which developing ideas regarding state sovereignty and international intervention have impacted the way in which societies deal with mass atrocity. Furthermore, this thesis seeks to expound the correlation between law and history in the joint pursuit of retribution and historicization.
Introduction

After mass atrocity, what can and should be faced about the past?¹

This thesis examines shifting responses to atrocity, rather than merely atrocity itself. I argue that it was not until the 1990s that international criminal tribunals reflected a wider attempt to protect and promote individual human rights, and that prior to this revolution international criminal tribunals focused on maintaining state sovereignty and limiting international intervention. In analyzing the International Military Tribunal and the International Criminal Tribunal for the former Yugoslavia, this thesis illustrates how wider trends regarding concepts of state sovereignty, intervention, human rights and international law impact the choices made in the pursuit of justice and truth in post-conflict societies.

In the wake of mass atrocity, Martha Minow sees “two purposes animating societal responses to collective violence: justice and truth”². This thesis will follow this line of thought, arguing that international criminal tribunals are the oft chosen mechanism for post-conflict societies and represent an attempt to reconcile the needs for retribution and fact-finding in the hopes of creating a positive peace. I will argue that the International Military Tribunal at Nuremberg focused on punishment through the implementation of justice and that any truth and fact-finding achievements

² Minow, M. Between Vengeance and Forgiveness, p.9
were in service of the greater pursuit of retribution. In contrast, the
International Criminal Tribunal for the former Yugoslavia represents a true
duality of responses.

There has never been a time during the past century when our planet
was free from mass murder. Between 60 million and 150 million people have
perished in episodes of mass killings during the 20th century alone. In the
wake of tragedy, what should be faced about the past? Achieving justice and
discovering the truth are both crucial for the facilitation and reconstruction of
post-conflict societies.

International criminal tribunals as mechanisms of post-conflict
resolution are reflective of evolutions in academic and political thinking. In
the wake of mass atrocity, methods of post-conflict resolution are
implemented as a means of addressing the past, allowing victim’s stories to
be heard and facilitating reconciliation. The methods of post-conflict
resolution have changed and evolved over time, and this thesis will chart the
progression of the specific contrivance of the international criminal tribunal.

Chapter One analyses the International Military Tribunal and argues
that the central aim motivating this tribunal was the pursuit of justice and the
allocation of individual criminal responsibility for specific crimes, with a
focus on the crime of aggressive war. While the establishment of a credible
historical record was considered a worthy byproduct of the proceedings, it
was by no means the central focus of the Allied Powers. Though truth was

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3 The large variation in estimated numbers is a result of inaccurate sources and limited
fieldwork/excavation, often as a result of uncooperative states; Valentino, B.A. Final
Solutions: Mass Killing and Genocide in the 20th Century (New York: Cornell University Press,
2004), p.1
sought in the IMT, it was truth in the pursuit of justice rather than reconciliation. I analyse the International Military Tribunal for its contribution to the foundations of international law and the framework that would later be adopted and adapted by international criminal tribunals.

In contrast, Chapters Two and Three study the International Criminal Tribunal for the former Yugoslavia and the two-pronged approach adopted by the tribunal since its inception. Chapter Two reflects on the changes in academic and political thinking that impacted the ICTY in its mandate as a mechanism to pursue justice for war crimes, with a particular focus on crimes against humanity and genocide. This chapter highlights the ways in which the very idea of justice itself changed as a result of new concepts of state sovereignty and legal intervention: justice for the individual began to take precedence.

While Chapter Two explores the ICTY in terms of its pursuit of justice as a societal response to collective violence, the third chapter of this thesis analyses this tribunal in terms of its pursuit of truth. The establishment of a credible historical record was a validated aim of the ICTY since its creation. This chapter looks historiographically at the place of history within the courtroom and analyses specific elements of the ICTY’s procedure and process to argue that the fact-finding mission of the tribunal is limited and flawed.

It is my intention to look not only at the historical evolution of international criminal tribunals, nor merely the role of historical context in the workings of criminal tribunals. Instead, I also attempt to investigate the ways
in which the legal framework of an international criminal tribunal places
limitations and qualifications on the historical record that is created as a result
of the process. It is therefore both the ‘input’ and the ‘output’ of history that is
my concern.

This thesis engages with the evolution of ideas regarding human rights
and state sovereignty, from the doctrine of responsibility toward the state to
respect for the individual. The International Military Tribunal (herein referred
to as the IMT) is commonly viewed as a stalwart of human rights. In this
thesis I revisit this myth and highlight the ways in which the Tribunal at
Nuremberg and subsequent development of the United Nations (herein
referred to as the UN) actually served to maintain the status quo that saw
state sovereignty as an inherent right.

The International Tribunal for the Prosecution of Persons Responsible
for Serious Violations of International Humanitarian Law Committed in the
Territory of the Former Yugoslavia since 1991 (herein known as the
International Criminal Tribunal for the Former Yugoslavia or ICTY) is
representative of the evolution of these ideas throughout the latter half of the
20th century. Established as a means of prosecuting the war criminals of the
Balkan conflicts of the 1990’s, the ICTY was the first international criminal
tribunal that represented the concepts of sovereignty as responsibility and the
true indivisibility of human rights.

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4 The Balkan conflict refers to the conflicts in the geographical locale of the former
Yugoslavia, with focus on the events between 1991 and 1995 in Croatia and Bosnia and
Herzegovina, and between 1998 and 1999 in Kosovo. The collective term ‘Balkan Conflict’ is
used interchangeably throughout the essay with the terms Yugoslav Wars and Wars of
Yugoslav Succession, for the events over which the ICTY has jurisdiction.
It is through the implementation of international criminal tribunals to prosecute war criminals that the twin agendas of justice and truth have become intertwined and collectively served. International criminal tribunals self-consciously contribute to the collective memory of the time period over which its jurisdiction presides. This thesis seeks to critically analyse the legal mechanisms of the IMT and the ICTY. This work is an exploration of the limitations and challenges of international law, and its application in the criminal tribunal framework, in its attempts to contribute to the historical record of a given event.

The succeeding chapters will chart the historical evolution of international criminal tribunals from the IMT to the ICTY; the international law that underlies their jurisdictions; and the changing ideas regarding international rights and responsibilities of intervention through political means.

This thesis attempts to explore the intricate interconnectedness of human rights, international law and history in the 20th century. Through the examples of the International Military Tribunal at Nuremberg and the International Criminal Tribunal for the Former Yugoslavia at the Hague, the reader will be invited to re-evaluate ideas regarding the evolution of individual rights, the transformation of sovereignty and the challenges of adopting legal mechanisms as a means of establishing an accurate historical record. This thesis traces the process of international criminal tribunals as a means of achieving justice and truth, a pursuit inherently impacted by the changing political and academic thinking.
Chapter One

A Recollection of Nuremberg

In the wake of the mass atrocity that wreaked havoc across Europe at the hands of the Nazis, the international community was forced to react. As a product of legalist thinking and as a means of reinstating the pre-existing balance of power, the Allied victors implemented an international criminal tribunal whose mandate it was to prove individual criminal responsibility for specific war crimes. If we are to look at the two societal responses posed by Martha Minow, the IMT is representative of a mechanism largely animated by a call for justice through retribution.

This Chapter seeks to situate the IMT within the historical evolution of international and humanitarian law; illustrating how the IMT made use of existing legal mechanisms and analyzing the way in which the framework of international criminal tribunals was altered for application in the future, most notably in the ICTY. In analyzing the legislative advances made as a result of the IMT, this thesis argues that the Nuremberg Charter and the UN in their earliest forms represent a maintenance of state sovereignty to the detriment of genuine mechanisms for the protection of individual rights. This Chapter will argue conclusively that while crimes against humanity were a significant element of the Indictment at Nuremberg, they were not considered to be of the utmost consequence. The Allied victors were more concerned with punishing rogue actions against the state than actions against the individual as a means of maintaining world peace and security.
While mass murder is as old as the human race, it had become an issue of world-wide importance in the 20th century, and it was World War Two in particular that prompted a widespread reassessment of the current balance of power: respect for human dignity was recognised as a prerequisite for a peaceful world. As the world’s power players strove to right the wrongs of the past, it was legal mechanisms they turned to in their pursuit of a future peace. The IMT was the first modern international criminal tribunal established in the wake of the devastation of war. The IMT was established by the victors of World War Two, as an international tribunal committed to finding individual criminal responsibility on four counts and was the first tribunal established as a result of newly ratified international laws.

The Nuremberg Trials were a series of military trials, the most famous of which was the Trial of the Major War Criminals, which convened between November 20th 1945 and October 1st 1946 at the International Military Tribunal. In studying the evolution of the human rights movement, international law and history writing, the IMT represents the beginning of a broad spectrum of time and change. The IMT “proved to be the foundation of what has now become a permanent feature of modern international justice” and the framework established for its successful implementation would go on to form the basis of its most infamous successor: the ICTY.

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6 Unless otherwise explicitly stated, where mention is made of the Nuremberg Trials or the IMT, the reference applies to the Trial of the Major War Criminals.
The IMT and its national counterparts are representative of a universal declaration to end impunity for and punish authors of mass atrocity. Yet it is important to note that while this aim is honorable, any form of retribution has fundamental shortcomings. There is no such thing as an appropriate punishment for the indescribable cruelty and wanton destruction that these tribunals are mandated to judge. “For these crimes, no punishment is severe enough”, stated Hannah Arendt in the wake of the trials of the Nazi leadership. “This guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems”.

As a means of capitalizing on the successes of the legal mechanisms imposed at Nuremberg, the Tribunal was followed by a series of international gestures aimed at outlawing the newly defined crimes, as well as the promotion and protection of more broadly recognised human rights. The United Nations Declaration of Human Rights (UDHR) of 1946 codified 30 basic rights which signatory nations adopted to illustrate “their faith in fundamental human rights, in the dignity and worth of the human person and the equal rights of men and women”. On December 11th 1946, the UN General Assembly adopted Resolution 96(I) entitled “The Crime of Genocide”, affirming that genocide would henceforth be known as a crime under international law. In addition, the UN adopted General Assembly

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Furthermore, the International Law Commission, a branch of the UN, adopted seven principles of international law in 1950 that were “principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal”\(^{11}\). Richard Goldstone, the first Prosecutor of the ICTY, sees the recognition of crimes against humanity as “the most important legacy of Nuremberg”\(^{12}\), thus drawing a direct link between the IMT and the promotion of individual rights and humanitarian law.

**An Appropriate Punishment?**

As the final sounds of war rang out across Europe, the leaders of the victorious Allies found themselves with yet more work to be done. The defeated Nazi party leaders needed to be brought to account for the crimes perpetrated against their own peoples and those in other aggrieved countries. The Allies themselves saw their nations as the victims of German criminality and were “thus resolute in their desire for some sort of justice”\(^{13}\).

The Moscow Declaration of November 1943 represents the Allied nations determination to punish Nazi war criminals even before the successful conclusion of the war. The Declaration, signed on the 1\(^{st}\) of the month by President Roosevelt, Prime Minister Churchill and Marshall Stalin, states that “those responsible for, or [those who] have taken a consenting part


\(^{12}\) Bass, G.J. *Stay The Hand of Vengeance*, p.204

\(^{13}\) Bass, G.J. *Stay The Hand of Vengeance*, p.148
in the above atrocities… will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be created therein”\textsuperscript{14}. The gauntlet had been thrown, and the political will for justice would only increase as the war raged on.

The four Allies formalised their commitment to prosecute war crimes by signing the London Agreement on the 8\textsuperscript{th} of August 1945, which encapsulated the mandate undertaken in the adoption of “an International Military Tribunal for the trials of war criminals”\textsuperscript{15}. The IMT constituted the first time in history that a group of political leaders were brought before the international bar to answer for the actions of their state\textsuperscript{16}. Yet in the early days, in this post-war situation where actions were “governed by political as much as legal considerations”\textsuperscript{17}, an international tribunal was by no means a foregone conclusion.

In the initial aftermath of the war, the British delegates promoted the concept of summary execution of war criminals who were found and properly identified. In a war that had seen devastation wrought on British territory and a high number of British deaths, the general public demanded firm action. While some form of legal mechanism was considered as an option, doubts were voiced surrounding the ability of a prosecution team to

\textsuperscript{14} ______., “Declaration of the Four Nations on General Security” or “The Moscow Declaration” (1 November 1943)
\textsuperscript{15} United Nations, “Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis” or “London Agreement”, (8 August 1945)
\textsuperscript{16} Sellars, K. The Rise and Rise of Human Rights, p.30
\textsuperscript{17} Overy, R. “The Nuremberg Trials: International Law in the Making”, p.24
provide solid forensic evidence of identifiable war crimes\textsuperscript{18}. In addition, the British legal consultants remained skeptical that a proper legal foundation for the trials could be found in existing international law, and were therefore doubtful as to the success of any proposed tribunal\textsuperscript{19}. In a tense situation that was as much about politics as it was about justice, the British were wary of committing to a mode of punishment that showed such an obvious point of weakness.

There were those in the American elite who agreed with the principle of mass execution, evident particularly in the ideas of the US Treasury Department’s Henry Morgenthau. The Morgenthau Plan, with its austere aims of land division, de-militarization, re-education and leadership punishment, has become “synonymous with a devastatingly punitive peace”\textsuperscript{20}.

Morgenthau’s proposal was sent to President Roosevelt on September 5, 1944 and is most notable for its method concerning the treatment of “arch criminals” of the war. Working from a list drawn up based on “obvious guilt” recognised by the UN, military authorities would be instructed “with respect to all persons who are on such a list” to apprehend and identify the suspect, before putting him or her to death by firing squad\textsuperscript{21}. For the “lower-level perpetrators of crimes against humanity”, a trial before the Allied military commission and swift execution upon conviction was suggested\textsuperscript{22}. However,

\textsuperscript{18} Overy, R. “The Nuremberg Trials: International Law in the Making”, p.7
\textsuperscript{19} Overy, R. “The Nuremberg Trials: International Law in the Making”, p.7
\textsuperscript{20} Bass, G.J. Stay The Hand of Vengeance, p.157
\textsuperscript{21} Morgenthau, H. “The Morgenthau Plan”, Germany is Our Problem (New York: Harper & Brothers, 1945)
\textsuperscript{22} Bass, G.J. Stay The Hand of Vengeance, p.158
a general unease was ever-present over the use of violent force to condemn the actions of the Nazi leadership, a government that had become synonymous worldwide for atrocity and bloodshed. Such action was in direct conflict with the democratic liberal norms upon which the Allied nations (with the exception of the Soviet Union) were founded.

It was the US Secretary of War, Henry Stimson, who first suggested that the Americans instigate an international tribunal to examine the crimes of the top Nazi’s. In his view, a criminal trial would enable the world to see the true nature of Hitler’s regime, while simultaneously emphasizing the virtues of the Allies who had put a stop to it23. To Stimson, a criminal tribunal would succeed in the dual aim of punishment and prevention. “We should always have in mind the necessity of punishing effectively enough to bring home to the German people the wrongdoing done in their name, and thus prevent similar conduct in the future”, he stated. “Remember, this punishment is for the purpose of prevention and not for vengeance”24.

In the eyes of Lieutenant Colonel Murray Bernays, the American legal specialist in charge of investigating Nazi war crimes, to proceed with any other form of recourse would be a mistake. To react against violence with violence, as some had suggested, would “furnish apparent justification for what the Nazis themselves had taught and done”25. In the end, it was this reasonable blend of pragmatism and ingrained legalism that saw the IMT

23 Sellars, K. The Rise and Rise of Human Rights, p.26
25 Sellars, K. The Rise and Rise of Human Rights, p.27
come to fruition\textsuperscript{26}. Yet, to adopt this method would involve a heavy reliance on the provisions of international law and the necessity of international cooperation, both of which showed signs of fallibility.

**Constitution of the Court**

It was in the Constitution of the court set up in Nuremberg that both the political and legal questions surrounding the validity of the trial needed to be addressed. It was essential to establish a strong and resilient mandate that could withstand the numerous legal issues that the Tribunal would face. The war crimes defined at the end of the First World War and subject to common agreement included crimes that had evidently been perpetrated by the Nazi system, including systematic terrorism, torture of civilians and the usurpation of sovereignty\textsuperscript{27}. Yet the difficulty in this case was to define the crimes in specific language that could be applied to the men in the dock, both in terms of the acts they had been directly involved in and in terms of their individual responsibility for those acts. The final list of twenty-two defendants were widely accepted as being representative of important aspects of the dictatorship and difficulties lay in proving their direct involvement in the criminal regime\textsuperscript{28}.

It was in the framing of the Indictment, formally issued on 19\textsuperscript{th} October 1945, that the IMT began to impact and change the face of international law. The four charges that the defendants faced, in various combinations, were “a

\textsuperscript{26} Bass, G.J. *Stay The Hand of Vengeance*, p.157
\textsuperscript{27} Overy, R. “The Nuremberg Trials: International Law in the Making”, p.14
\textsuperscript{28} Overy, R. “The Nuremberg Trials: International Law in the Making”, p.13
common conspiracy to wage aggressive war”, “crimes against peace”, “war crimes” and “crimes against humanity”\textsuperscript{29}. It was the charges of “conspiracy to wage aggressive war” and “crimes against humanity” that required the most legal ingenuity on behalf of the Prosecution team and would thus most heavily impact the international law that was written as a result of the trial process at Nuremberg.

It was the IMT that propounded the concept of individual responsibility in an international legal framework, thereby instilling the notion that individuals have irrebutable duties and obligations under both national and international law\textsuperscript{30}: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”\textsuperscript{31}.

With these words, the Nuremberg Judgement of October 1\textsuperscript{st} 1946 effectively disputed the long-standing argument that international law applied only to states. The adoption of the concept of individual responsibility signalled a paradigm shift. The principle of individual responsibility for criminal violations of international law is now applied daily around the world, particularly in legal settings such as the ICTY\textsuperscript{32}. It has

\textsuperscript{29} “Charter and Judgement of the International Military Tribunal at Nuremberg: History and Analysis”, Memorandum by the Secretary-General of the United Nations General Assembly (1949)


\textsuperscript{31} “Charter and Judgement of the International Military Tribunal at Nuremberg: History and Analysis”, Memorandum by the Secretary-General of the United Nations General Assembly (1949)

provided the foundation for human rights law that has come to create the rights and duties of the individual in relation to the state.\(^{33}\)

The IMT Charter and Judgement instilled two other key principles in terms of individual responsibility for violations of international law. Firstly, Article 7 of the Nuremberg Charter rejected the ‘sovereign immunity’ principle in declaring that “the official position of [a] defendant shall not be considered as freeing them from responsibility or mitigating punishment”\(^{34}\). The Nuremberg Judgement highlighted that the “very essence of the Charter” lay in the idea that “individuals have international duties which transcend the national obligations of obedience imposed by the individual state”. By enabling the IMT to declare ultra vires\(^{35}\) and criminal, actions which were state directed and sanctioned, those who conceived of and brought into being the IMT effectively overturned hundreds of years of law, history and philosophy. The IMT succeeded in limiting the states authority over its citizens and imposing instead duties and obligations upon the state.

Secondly, the defence of command responsibility was diminished in the eyes of the Tribunal. Article 8 of the Charter specifically provided that: “The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility”\(^{36}\). However, in conformity with the law of all nations “the order may be urged in mitigation of the

\(^{33}\) Clapham, A. “Issues of complexity, complicity and complementarity: from the Nuremberg Trials to the dawn of the new International Criminal Court”, p.33

\(^{34}\) “Charter and Judgement of the International Military Tribunal at Nuremberg: History and Analysis”, Memorandum by the Secretary-General of the United Nations General Assembly (1949)

\(^{35}\) Translation: “Beyond Power”

\(^{36}\) “Charter and Judgement of the International Military Tribunal at Nuremberg: History and Analysis”, Memorandum by the Secretary-General of the United Nations General Assembly (1949)
punishment”\textsuperscript{37}. As the Judgement declared in respect to the defence of command responsibility, “the true test is not the existence of the order, but whether moral choice was in fact possible”\textsuperscript{38}. Thus, the IMT’s Charter and Judgements provided a framework in regards to the bounds and limitations of the concept of individual responsibility.

**Crimes of Aggressive War**

The IMT was plagued from the outset by issues of legality and validity. It was the criminalization of aggressive war that was especially contentious in terms of legality. Waging a war had never previously been a supreme crime and responsibility for war making had always rested with the state rather than the individual. In this way, “Nazi leaders were being charged with actions which, although morally reprehensible, were not illegal when they were committed”\textsuperscript{39}. It was through the Indictment of the conspiracy to wage aggressive war that arguments of retroactivity were leveled at the Tribunal. In the eyes of historian Richard Overy: “To define the war-making acts of the Nazi government as crimes required international law to be written backwards”\textsuperscript{40}. Justice Robert Jackson, the lead American prosecutor, was forced to confront this contentious issue from the outset, using his Opening Statement on November 21\textsuperscript{st} 1945 to illustrate the existing legal foundation for the charge of conspiring to wage aggressive war.

\begin{itemize}
\item \textsuperscript{37} “Charter and Judgement of the International Military Tribunal at Nuremberg: History and Analysis”, Memorandum by the Secretary-General of the United Nations General Assembly (1949)
\item \textsuperscript{38} “Charter and Judgement of the International Military Tribunal at Nuremberg: History and Analysis”, Memorandum by the Secretary-General of the United Nations General Assembly (1949)
\item \textsuperscript{39} Sellars, K. The Rise and Rise of Human Rights, p.27
\item \textsuperscript{40} Overy, R. “The Nuremberg Trials: International Law in the Making”, p.15
\end{itemize}
In particular, Jackson pointed to the Kellogg-Briand Pact, signed by World War Two aggressors including Germany and Japan in 1928. Article One committed the signatory nations to renouncing war as an instrument of dispute resolution in foreign policy: “They condemn resolution to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another”\(^\text{41}\). Despite the fact that the Pact was a statement of intent rather than a binding international convention, Jackson and the Prosecution Team in their Opening Statement declared that signature of the Kellogg-Briand Pact heralded the signatory states intended outlawing of war and the condemnation of aggressive war as an illegal and criminal action\(^\text{42}\). In the eyes of Justice Jackson, “this pact altered the legal status of war” and formed the judicial cornerstone of the charges of committing war in violation of treaties\(^\text{43}\).

Both the American and British Prosecution teams were “compelled to reinterpret the meaning, intent and legal status of the interwar resolutions dealing with the problem of war”\(^\text{44}\). British Prosecutor Hartley Shawcross further developed Jackson’s foundational argument, reinterpreting the longstanding legal principle of *nullum crimen, nulla poena sine lege*\(^\text{45}\). Shawcross agreed with the principle that it was invalid to punish a person for an act that was not designated a crime at the time it was committed. However, he argued that it was valid to retrospectively add a punishment to an act that had

\(^{41}\) _______, “Kellogg-Briand Pact”, (1928), Article One
\(^{42}\) Overy, R. “The Nuremberg Trials: International Law in the Making”, p.18
\(^{43}\) Jackson, R.H. “Opening Statement at Nuremberg”, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1971), Vol II
\(^{45}\) Translation: “There exists no crime and no punishment without existing penal law”
already been designated to be against the law. In this way, Shawcross and
the British Prosecution argued that even though the Kellogg-Briand Pact did
not specify punishment for the conspiracy to wage aggressive war, “its
renunciation of war implied the need for punishment”. It was therefore the
due responsibility of the IMT, under existing international legal parameters,
to conceive of and enforce that punishment.

The Nuremberg Indictment’s criminalization of aggressive war
attracted further uncertainty with the question of selective justice and the
overarching validity of the Tribunal. Specific elements of the mandate
further suggest that truth and the establishment of an accurate historical
record were not of the utmost priority to the creators of the IMT.

The selective nature of the IMT’s system of indictments served to
“distort the truth about the Second World War... that all sides fought a
savage war, unbound by either morality or the Geneva Convention”. The
trial itself was meant to be an exercise in didactic legality, a form for
education as well as retribution. General Telford Taylor, who served in the
IMT as an assistant to Chief Counsel Jackson, recalled the documentary and
didactic function of the Tribunal when he spoke of the importance that
“incredible events be established by clear and public proof, so that no one can

46 Sellars, K. ‘Crimes Against Peace’ and International Law, p.123
47 Sellars, K. ‘Crimes Against Peace’ and International Law, p.123
48 Sellars, K. The Rise and Rise of Human Rights, p.32
49 Sellars, K. The Rise and Rise of Human Rights, p.36
50 Borgwardt, E. “A New Deal for the Nuremberg Trial: The Limits of Law in Generating
Human Rights Norms”, Law and History Review: Part IV Law, War and Human Rights (Vol. 26
No.3: Fall 2008), p.703
ever doubt that they were fact and not fable”51. Yet by rejecting evidence of Allied war crimes, and eliminating the legal validity of the *tu quoque* defence, the historical record produced by the Tribunal is distinctly one-sided.

In the IMT the defence of *tu quoque*52 was ruled irrelevant “with such predetermined speed and emphasis that it was obvious that the judges were bent on silencing any allegations about Allied war crimes”53. It was with the immediate dismissal of any evidence of Allied misconduct that a fatal legal flaw would come to characterize the IMT in posterity. *Tu quoque* evidence and defence is crucial within the vocabulary of any fair trial, and is highly relevant in any assessment of whether a particular mode of warfare is “justified by military necessity or counts as a war crime”54. By not taking into consideration, or even entering on to court record, evidence of alleged Allied war crimes the judgement of alleged Axis war crimes is impacted and the historical record remains incomplete. In existing international law, *jus in bello*55 denoted the limits of acceptable wartime conduct and incorporated a concept of comparability of action. Yet, the IMT was the first to embellish and then apply these limitations to only one aggressor within a broader conflict.

The Nuremberg Charter “was notable for the amnesty that the Allies had granted themselves”56. The IMT was established to punish the crimes of the defeated enemy and there was never any suggestion that aggression or

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52 Translation: “I did it, but you did it too; you also”
54 Robertson, G. *Crimes Against Humanity*, p.201
55 Translation: “The Laws in War”
56 Sellars, K. *The Rise and Rise of Human Rights*, p.31
war crimes in a more general sense would be targeted. In many ways, the Tribunal “retrospectively validated the Allied cause”\textsuperscript{57} and deemed all actions of warfare necessary in the fight for triumph over the Axis forces. The legacy of the ‘Good War’ created at the Tribunal would permeate the historical record.

It was not only the historical record of the events of World War Two that were impacted by the IMT, as the negative connotation of ‘victor’s justice’ would plague opinions of the trial process specifically at Nuremberg and more generally. Although a success in its aim to prosecute Axis war criminals and perpetrators of crimes of aggressive war and crimes against humanity, the IMT was inherently flawed in terms of legality within the trial process. While victor’s justice was not a new concept, its application at Nuremberg was particularly extensive. It would be left to future tribunals, with the ICTY as the first to adopt and embellish these precedents, to right the wrongs of Nuremberg. Most notably, the count of crimes of aggressive war was eventually excluded from the constitution of the ICTY, as the concept was deemed inherently tainted with the stench of injustice.

\textbf{Crimes Against Humanity}

The idea of prosecuting those acts that would fall under the category of crimes against humanity in the IMT “did not cause nearly as much surprise… because it was not such a new idea after all”\textsuperscript{58}. The notion that rulers could

\textsuperscript{57} Sellars, K. \textit{The Rise and Rise of Human Rights}, p.46
\textsuperscript{58} Best, G. \textit{Nuremberg and After: the continuing history of war crimes and crimes against humanity}, The Stenton Lecture 1983 (University of Reading, 1984), p.13
fall below a bearable standard in the handling of their subjects was an ancient notion. As Jackson maintained in his Opening Statement, the acts committed by the Axis enemy “have been regarded as criminal since the time of Cain”\textsuperscript{59}. It was in this way that the Prosecution framed the concept of crimes against humanity, arguing that “many of the acts covered by the indictment were in fact known to be criminal at the time they were committed”\textsuperscript{60}.

Crimes such as mass murder, torture, forced transportation and enslavement were not novel concepts by the mid-20\textsuperscript{th} century. However, never before in history had the international community witnessed these crimes being perpetrated on such a widespread scale or in such a ruthlessly all-encompassing manner. The future jurisdiction for crimes against humanity, as first defined in Article 6(c) of the Nuremberg Charter was that “state agents who authorized torture or genocide against their own populations were criminally responsible, in international law, and might be punished by any court capable of catching them”\textsuperscript{61}. This statement is summative of the wider legal legacy of crimes against humanity at Nuremberg: that individuals had the right to have their basic human rights protected by their government, and that all other governments had a correlative duty to ensure that those rights were upheld.

In this commitment to the protection of the rights of the individual, a change in perspective in regards to the concept of state sovereignty was noticeably emerging. Yet while it is important to recognise that crimes against

\textsuperscript{59} Overy, R. “The Nuremberg Trials: International Law in the Making”, pp.22-23

\textsuperscript{60} Overy, R. “The Nuremberg Trials: International Law in the Making”, pp.22-23

\textsuperscript{61} Robertson, G. \textit{Crimes Against Humanity}, p.xiv
humanity were a significant element of the Indictment at Nuremberg, this thesis argues that they were not the most consequential. The prosecution of the violation of individual rights was overshadowed by the Great Powers’ intent to secure justice for crimes against the state, and the implementation of a balance of power that would ensure world peace.

The Allied nations were confronted with the issue of trying to establish a Tribunal with the mandate to prosecute all of the crimes that the Nazi leadership had perpetrated throughout World War Two. Despite the historical antecedents of crimes against humanity, the concept became legally problematic when applied to crimes perpetrated against German people by their own government. The criminalization of these acts “violated the principle of international law that the internal affairs of a sovereign state were its own business”62. While none of the crimes perpetrated by the Axis nations were unfamiliar, the prosecution of these crimes by “non-nationals asserting an unprecedented universality of jurisdiction” was a new phenomenon63. It was only by the linking of Nazi atrocities against their own people with a more general conspiracy to wage aggressive war that Jackson and the Prosecution team were able to bring crimes against humanity perpetrated by a sovereign state outside of war under the bounds of international law. As head of the American delegation at the London Conference, Jackson was aware of the limitations that existed in terms of contemporary international law and foreign policy:

62 Overy, R. “The Nuremberg Trials: International Law in the Making”, p.16
63 Best, G. Nuremberg and After, p.15
“It has been a general principle of foreign policy of our Government… that the internal affairs of another government are not ordinary our business. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war”\(^64\).

Lieutenant Bernays concluded that “conspiracy to wage aggressive war could rightfully include everything the regime had done since coming to power on 30 January 1933… deliberate repression of the German people”\(^65\). This proclamation stands in direct contrast to the sentiment of the victors following World War One. After the massacre of the Armenian population in 1915, the American and Japanese representatives of the commission formulated to investigate the deaths argued that these were not international crimes because they were atrocities perpetrated by the Ottoman Empire against its own citizens\(^66\). This distinct change in legal parameters highlights a fundamental shift in human rights ideology, where by 1945 crimes against Germany’s own population were included in the Nuremberg Indictment as crimes against humanity. This is illustrative of the constantly changing and evolving nature of international law and approaches to international crime.

\(^{64}\) United Nations, “Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis” or “London Agreement”, (8 August 1945)
\(^{65}\) Overy, R. “The Nuremberg Trials: International Law in the Making”, p.16
\(^{66}\) Kelly, M. and McCormack, T. “Contributions of the Nuremberg Trial to the Subsequent Development of International Law”, p.107
The crimes against humanity count “reached behind the iron curtain of Westphalian state sovereignty”\textsuperscript{67} and held that individuals have international human rights which states cannot jeopardize”\textsuperscript{68}. It was from this starting point that further ideas regarding the evolution of state sovereignty, international responsibilities and individual rights came to fruition, culminating in the Responsibility to Protect which will be analysed and discussed in Chapter Two.

International law was historically binding on states, not on persons, yet to this classic doctrine “an exception has now been made in the case of individuals who commit crimes which are of such an ideologically motivated heinousness as to permit classification as crimes against humanity”\textsuperscript{69}. The case of United States vs Ohlendorf was one of the twelve trials held in U.S Military Courts at the end of World War Two. The judgement in this case set a precedent that would be stand as a watershed moment in the development of international human rights law and the tribunals that would be created to enforce it.

“Crimes against humanity can only come within the purview of this basic code of humanity because the State involved”, the judgement read, “owing to indifference, impotency or complicity, has been unable or has

\textsuperscript{67} The fundamental norm of Westphalian sovereignty, as established by the Peace of Westphalia which was signed in 1648, is that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behaviour; Krasner, S.D. Sovereignty: Organised Hypocrisy (New Jersey: Princeton University Press, 1999), p.20
\textsuperscript{69} Robertson, G. Crimes Against Humanity, p.195
refused to halt the crimes and punish the individuals”\textsuperscript{70}. This definition made crimes against humanity applicable to “tyrannous behavior within a state as much as to wartime conflict between states” and facilitated the ability of the international community to intercede despite the longstanding political tradition of non-intervention in the activities of sovereign states. It was this definition of crimes against humanity that would be drawn upon as the foundation of the ICTY indictments.

\textbf{The International Military Tribunal and Genocide}

Prohibition of the persecution of ethnic groups “runs like a golden thread through the defining moments of the human rights movement”\textsuperscript{71}. The IMT and its aftermath presented the term ‘genocide’ to the world community as an international crime which urgently demanded specific repression; “not indeed new in human experience but now newly described and defined, with a view to preventing its recurrence”\textsuperscript{72}. Although the Judgement of Nuremberg never used the term, it went on to describe in great detail what was in the process of being formulated as the crime of genocide.

The term ‘genocide’ emerged in the early 1940’s while the Nazis continued to carry out their crimes\textsuperscript{73}. The Polish Jewish jurist Raphael Lemkin was the first to coin the term and publish it in the work, \textit{Axis Rule in Occupied Europe} published in November 1944. Lemkin went on to become a major force

\textsuperscript{70} The United States of America vs. Otto Ohlendorf et al. or “The Einsatzgruppen Trial”, (Case No. 9, September 1947 – April 1948) (Washington: National Archives and Records Service, 1973)
\textsuperscript{71} Schabas, W.A. \textit{Genocide in International Law} (Cambridge: Cambridge University Press, 2000), p.15
\textsuperscript{72} Best, G. \textit{Nuremberg and After}, p.16
\textsuperscript{73} Kiernan, B. \textit{Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur} (Victoria: Melbourne University Press, 2008), p.10
in the drafting and implementation of the UN Convention on the Prevention and Punishment of Genocide in 1948, which gave his new term a legal meaning “narrower than he had intended yet still much broader than the colloquial sense of total, state-organized physical extermination”\textsuperscript{74}. It is important to note that the IMT did not prosecute the specific crime of genocide, as Lemkin’s definition “could not apply to the Jews, who were not a nation”, but that under the terms of the more general ‘crimes against humanity’ category could be included for the deliberate persecution and murder of Jews, gypsies and other minority groups\textsuperscript{75}.

With the adoption of the Convention by the UN General Assembly on the 1\textsuperscript{st} of December 1948, genocide became “whether committed in a time of peace or a time of war… a crime under international law”\textsuperscript{76}. The Convention broadened the term ‘genocide’ to encompass “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”\textsuperscript{77}. In addition, Lemkin had hoped for the inclusion of the systematic elimination of political and social groups. Thus a new legal discipline of international criminal law emerged from the Convention with a direct link to the Nuremberg Trials and the criminalization of government actions towards their own people. This legal process has expanded significantly on the

\textsuperscript{74} Kiernan, B. Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur, p.10

\textsuperscript{75} Overy, R. “The Nuremberg Trials: International Law in the Making”, p.21

\textsuperscript{76} United Nations General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide.” Approved and proposed for signature and ratification by General Assembly Resolution 260 A (III) (9 December 1948), Article One

\textsuperscript{77} United Nations General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide.” Approved and proposed for signature and ratification by General Assembly Resolution 260 A (III) (9 December 1948), Article Two
narrower understanding of genocide as based on the Holocaust yet limitations still exist\textsuperscript{78}. 

A glaring deficiency of the Convention lies in “its retreat from universal jurisdiction” whereby perpetrators could be brought to trial in any country where they may be apprehended regardless of the location of the crime\textsuperscript{79}. While initial ideas for “an unchallengeable court established by the UN to enforce this newly defined international law” were debated for a short time, the Genocide Convention was eventually adopted with no more enforcement than the national jurisdictions of States in whose territories the criminal acts had occurred\textsuperscript{80}. Being a signatory to the Convention required states to punish, either domestically or “by such international criminal tribunal as may have jurisdiction”, acts which were intended to destroy in whole or part a national, ethnic or racial group, committed by anyone “whether they be constitutionally responsible rulers, public officials or private individuals”\textsuperscript{81}. In this way we see how the Convention “provided the legal mechanism which would later be triggered to challenge the sovereignty of the internally oppressive state”, in instances such as the former Yugoslavia in the conflict of the 1990s\textsuperscript{82}. 

While the Convention succeeded in making genocidal acts illegal, there were severe limitations on the ability of the international community to

\textsuperscript{78} Kiernan, B. Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur, p.11
\textsuperscript{79} Best, G. Nuremberg and After, p.16
\textsuperscript{80} Best, G. Nuremberg and After, p.16
\textsuperscript{81} United Nations General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide.” Approved and proposed for signature and ratification by General Assembly Resolution 260 A (III) (9 December 1948), Article Four
\textsuperscript{82} Robertson, G. Crimes Against Humanity, p.29
demand justice and accountability for violations in other states. The onus remained on the state in the absence of any universal mechanism. The refusal of the international community to act upon the powers granted by the Genocide Convention in the years immediately following its adoption are illustrative of the pervasive desire to retain the largely unimpeded rights of the state. It would take a revision of ideas regarding state sovereignty and the legality of international intervention, such as that prompted by the New World Order delegates to the UN, to encourage the international community to act upon their enshrined rights and responsibilities.

The United Nations and Human Rights: An Inauspicious Beginning

While the Nuremberg Charter and the Universal Declaration of Human Rights (UDHR) asserted that atrocities within sovereign states were indeed a matter for international law, the emphasis remained on the issue of maintaining world peace and security rather than the need to protect the human rights of the individual. In the wake of the League of Nation’s failed attempts to protect minority rights, and the devastating destruction caused by the Nazi’s disrespect for humanity as a whole, the rights of the individual within the nation were at the forefront of the world’s attention in the form of minority rights.

Yet in the UDHR, it was the peaceful relations between nations rather than governments and their people that were of central concern. The US Secretary of State in 1948 claimed that “governments that systematically

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disregard the rights of their own people are not likely to respect the rights of other nations and other people, and are likely to seek their objectives by coercion and force”\textsuperscript{84}. The Preamble for the UDHR itself highlights this key emphasis: “Equal and inalienable rights of all members of the human family is the foundation of peace in the world”\textsuperscript{85}.

While there are few who deny that the UN Charter was the first treaty to make human rights a matter for global concern, the Charter pledges were “circumscribed by other factors”. It became the duty of signatory nations to “promote” human rights rather than to guarantee them as a matter of law for all citizens\textsuperscript{86}. At this point in time when political tensions were high and competition between the historical great powers of Great Britain and France, and the rising powers of the United States and the Soviet Union, for dominance and influence was ever-increasing, no nation “was prepared to be bound by international law in respect of the treatment of its own subjects”\textsuperscript{87}.

Mark Mazower’s essay \textit{The Strange Triumph of Human Rights} illustrates how human rights played a critical role in the academic and political thinking of the early 40s. The Nazi persecution came to represent the idea that rights could only be defended internationally and that the protection of minority rights as had been campaigned for by the League of Nations, would no longer offer sufficient protection to those in danger. While recognising the importance of human rights on a public and academic platform, Mazower argues that it was the issue of domestic jurisdiction that continued to

\begin{flushright}
84 Robertson, G. \textit{Crimes Against Humanity}, p.28
86 Robertson, G. \textit{Crimes Against Humanity}, p.25
87 Robertson, G. \textit{Crimes Against Humanity}, p.25
\end{flushright}
dominate political thinking at that time. The new Charter of the UN “would have to make some reference to rights”\(^88\) as a result of wartime promises and public opinion, yet the Great Power’s were wary of making a wholehearted commitment. As summed up by Charles Webster, Foreign Office adviser and historian, “Our policy is to avoid guarantee of human rights though we might not object to a declaration”\(^89\). There was a need amongst the Great Powers to ensure that “the human rights provisions of the UN Charter would not be automatically applicable at home”\(^90\).

There was a call, most notably from the British and American delegates at Dumbarton Oaks, to ensure that the new organisation had a limited ability to intervene in the domestic affairs of member states. In conclusion, the UN Charter that emerged from the San Francisco conference in 1945 bore the “unmistakable traces of competing interests”\(^91\). While it served to highlight human rights in the Preamble and main body of the Charter itself, the founding document of the UN should not be misconstrued as a conclusive agreement in regards to human rights and the role of international organisations in the actions of sovereign states. Article 2 of the Charter contained the most stringent of domestic jurisdiction clauses that severely confined the possible enforcement mechanisms of the newly born UN:

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any

\(^{90}\) Mazower, M. “The Strange Triumph of Human Rights 1933-1950”, p.393
\(^{91}\) Mazower, M. “The Strange Triumph of Human Rights 1933-1950”, p.393
state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”92.

As will be shown in the following chapter, the UN was created with the power to intervene in the affairs of the nation for the protection of the rights of the individual. Yet in its earliest days this power and the mechanisms that would eventually enforce it were curtailed by the dominant and widely accepted views regarding Westphalian state sovereignty, sovereign immunity and the contested validity of international intervention.

Conclusion

The Nuremberg Judgement and Principles “made it clear that it was legitimate under international law to take up questions relating to the human rights of nationals mistreated by their governments”93. The antecedents of international humanitarian law lie in the Nuremberg Principles and the foundation of international interest in the protection of individual rights is evident in the establishment of the UN and its adoption of the aforementioned resolutions. Yet, there has been cause for further expansion and redefinition as crimes against humanity have continually been perpetrated upon groups.

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93 Clapham, A. “Issues of complexity, complicity and complementarity: from the Nuremberg Trials to the dawn of the new International Criminal Court”, p.60
In the eyes of legal historian Geoffrey Robertson, “it was the internecine bloodbaths in the former Yugoslavia and Rwanda that caused the Security Council to exercise a power to punish crimes against humanity that it has actually possessed from the outset”\textsuperscript{94}. It is to the events in the former Yugoslavia that this thesis will now turn attention. While the Nuremberg Tribunals are illustrative of many of the foundational elements of international criminal tribunals and international law, it is the ICTY that called for further elaboration and improvement of these mechanisms.

\textsuperscript{94} Robertson, G. \textit{Crimes Against Humanity}, p.25
Chapter Two

Continuity and Change: The Foundation of the ICTY

The previous chapter elaborated on the precedents established at Nuremberg in the realm of international law and the human rights movement were elaborated on in the previous chapter. Yet, this framework was “largely ignored until the ethnic cleansing policy of the Bosnian Serbs”\(^95\). Throughout the period of the Cold War, the attention of the world was no longer focused on the pursuit of human rights but on the maintenance of the balance of power to prevent the outbreak of nuclear war. The prevalence of human rights groups and campaigners for minority groups largely diminished during this time period and academic thought and debate in this sphere dwindled.

It was not until the outbreak of the War of Yugoslav Succession, characterised by the Serbian-led mass killing and deportation of ethnic minorities from territorially important regions of the former Yugoslavia, that international humanitarian law was drawn upon once again. While the mechanism of an international criminal tribunal was adopted once more as the chosen mechanism of post-conflict resolution, there are crucial differences that reflect broader changes in academic and political thinking. While the IMT was instigated as a means of criminalizing aggressive war and punishing the crime of disrupting peace between nations, the ICTY was the first international tribunal to focus on the criminalization of the mistreatment of

\(^{95}\) Robertson, G. *Crimes Against Humanity*, p.193
the individual and the violation of human rights. The ICTY is reflective of evolutionary thinking that to address the wrongs of the past, to ensure future reconciliation and the maintenance of peace, the status quo had to change. Respect for human dignity was brought to the forefront of political and academic thinking, and this trend is reflected in the implementation of an international criminal tribunal with an irrefutable focus on human rights. In this way, we see a continuation of the adoption of a legalist mechanism in the pursuit of justice. Yet the essence of the justice pursued had irrevocably changed: it was justice for the people rather than justice for the state that was of the utmost importance.

The international response to the War of Yugoslav Succession, or the Balkan conflict as it is most commonly known, represent the culmination of evolutionary thought in the field of international intervention, state sovereignty and individual and minority group rights. While distinct progress was made in the wake of World War Two, as previously discussed, it was the period of the 1990s which saw a reclassification of state sovereignty as a responsibility rather than a right conferred on any territorially and politically independent nation. The transformation of sovereignty was “in keeping with the transformation of the international system and state-society relations by events of the twentieth century”96. The exercise of complete control in a world that had become so interconnected was becoming a relative impossibility.

It is the creation of the ICTY that stands at the forefront of this revolution. Representative of a universal declaration to end impunity and challenge the status quo of non-intervention, the ICTY effectively adopted and adapted the precedents established by the Nuremberg Tribunal in keeping with current manifestations of international humanitarian law. The ICTY has in many ways established the new norms of international intervention and the implementation of the legal mechanism of international criminal tribunals in the face of state-sponsored mass violence.

**A New Concept of Sovereignty**

The instigation of international criminal tribunals is the “most visible sign of the transition from the classical Westphalian system of state sovereignty to an international system based on the credo of ‘common interest’”\(^97\). While the Nuremberg Trials are seen as instilling the fundamental principles of international law, as discussed in Chapter One, the ICTY was the first ad hoc international tribunal whose statute was a product of the accumulation of thinking in the sphere of humanitarian law since then.

The principles of state sovereignty and international responsibility can be seen as coming into conflict in three main instances throughout the conflict in the former Yugoslavia. The instance of most importance to this thesis is the United Nation’s decision to create an international criminal tribunal to prosecute those who broke international laws. It is also important to note that such issues could be applied and debated in regards to the NATO bombing of

Kosovo and the decision to engage UN peacekeeping troops in Srebrenica. However, both of these events remain largely outside the scope of this essay.

Historian Damien Hirsch sees the post-Second World War period as one of “cross-pollination between humanitarian law and human rights”98. Historically, humanitarian law aimed to set limitations on what was legitimate in the act of war. Most humanitarian laws were concerned with the treatment of individuals in the event of war, most specifically civilians and prisoners of war. In contrast, human rights were concerned with defending human beings against the arbitrary acts of their own states.

In the post-WWII period, there has been a rapid increase in the convergence of these two fields due to the changing nature of warfare. Professor Mary Kaldor sees the Yugoslavian wars of the 1990s as typifying this metamorphosis. “War is no longer controlled by sovereign states wielding legitimate monopolies of violence”, Kaldor argues. Instead there is a prevalence of fighting between ethnically defined social formations that mix the characteristics of nationalist struggles with intra-national violence99. It is these intra-national conflicts that have brought questions of state sovereignty, human rights and international responsibilities into conjunction.

Classically, international law is the system that “protects the rights of sovereign states to be free from external aggression”100. However, following the devastation of World War Two and the extent of human suffering, “a need was felt to extend the scope of international law so that it could protect

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99 Mary Kaldor quoted in Hirsch, D. *Law against Genocide: Cosmopolitan Trials*, p.6
100 Hirsch, D. *Law against Genocide: Cosmopolitan Trials*, p.1
the rights not only of states but of individuals”\textsuperscript{101}. According to lead international relations scholar Stephen Krasner, there are “two clusters of values at play in the contemporary environment – state autonomy and human rights – which can come into conflict”\textsuperscript{102}. Though the international community has consistently recognised sovereignty as a fundamental right, “complete autonomy of the sovereign state from outside interference and unsolicited intervention has changed over time”\textsuperscript{103}. With the growing recognition of the importance of human rights comes the realization that state sovereignty must be limited: there are certain things that independent states do not have the right to do\textsuperscript{104}. The ‘absolutes’ of the Westphalian system are dissolving, and a “competing notion of ‘human security’ is creeping around the edges of official thinking”\textsuperscript{105}.

Historian Mark Mazower charts the progression of the relatively recent idea that “rulers of the world make up a kind of international society”\textsuperscript{106}. Legalists of the post-World War Two era were quick to point out the flaws of the internationalist trend pursued by the League of Nations. What produced stability in the eyes of realists such as Carl Schmitt were “legal regimes based on power over a clearly delineated territory”: the very premise of the Peace of Westphalia\textsuperscript{107}. The UN itself reaffirmed the centrality of the nation state in

\textsuperscript{101} Hirsch, D. \textit{Law against Genocide: Cosmopolitan Trials}, p.1
\textsuperscript{103} Maogoto, J.N. “Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept”, p.212
\textsuperscript{104} Hirsch, D. \textit{Law against Genocide: Cosmopolitan Trials}, p.3
\textsuperscript{105} Mathews, J. “Power Shift”, \textit{Foreign Affairs} (Vol.75 No.1: 1997), p.51
\textsuperscript{107} Mazower, M. \textit{Governing the World: The History of an Idea}, p.183
modern life, working more fully through the mechanism of sovereign states than the League had done\textsuperscript{108}.

The concept of Westphalian sovereignty is embedded in the UN Charter itself, with Article 2(7) stating that “nothing… shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any State”\textsuperscript{109}. While the UDHR as codified in 1948 is widely interpreted as enshrining a commitment to the rights of the individual, “the powers fought strongly to make sure it was not binding”\textsuperscript{110}. As a means of subordinating the universality of the declaration, the General Assembly insisted that the right of national self-determination remain at the forefront of any agreement to further the enforcement of the UDHR. Thus, the two Covenants that were ratified by member states saw self-determination appear as a “lead right”\textsuperscript{111}.

It was the emergence within the UN of a powerful bloc of states with a different conception of global justice that prompted tacit opposition to this status quo. The ‘New World Order’ that emerged after the Cold War was “characterised initially… by an unprecedented expansion of the UN’s responsibilities and powers in the humanitarian realm” whereby sovereignty was no longer regarded as absolute\textsuperscript{112}. Mazower looks to the emergence of human rights groups in Eastern Europe and the USSR, and their counterparts in Western Europe and the US, as the source of pressure on Western governments to speak against human rights violations and internal

\textsuperscript{108} Mazower, M. \textit{Governing the World: The History of an Idea}, p.188
\textsuperscript{110} Mazower, M. \textit{Governing the World: The History of an Idea}, p.318
\textsuperscript{111} Mazower, M. \textit{Governing the World: The History of an Idea}, p.319
\textsuperscript{112} Mazower, M. \textit{Governing the World: The History of an Idea}, p.379
repression. Political decisions such as the cutting of financial aid to dictatorships in Central and Latin America, as well as in Africa, signified a change in policy direction. This “reconfiguring of rights, not as part of a larger political project led by the state but as an ethical alternative to the tyranny of the state” saw human rights emerge at the forefront of political considerations\textsuperscript{113}. It was in the midst of this radical shift in thinking that the ICTY emerged.

It became evident on a global scale during the latter half of the 20\textsuperscript{th} century that the Westphalian principles of sovereignty are inherently flawed; they allowed states to tyrannize their own peoples and create human rights catastrophes that not only harmed their own populations, but threatened international peace\textsuperscript{114}. The 1990s were characterised by the dominance of “state-sponsored massive crimes” as opposed to conventional warfare\textsuperscript{115}. As a result, there was a call for “new and much more conditional attitudes towards sovereignty” that saw an unprecedented expansion of the UN’s responsibilities and powers in the humanitarian realm in concert with the strengthening of international legal mechanisms to enforce it’s decisions\textsuperscript{116}.

The Security Council took an unprecedented step in authorizing the use of force “on behalf of civilian populations” in Somalia in 1991, illustrating the way in which the interests of the citizens were beginning to compete with, and occasionally override, the “formerly unquestioned primacy of purely

\textsuperscript{113} Mazower, M. Governing the World: The History of an Idea, p.321
\textsuperscript{114} Mazower, M. Governing the World: The History of an Idea, p.379
\textsuperscript{116} Mazower, M. Governing the World: The History of an Idea, p.379
state interests” and the principle of non-interference\textsuperscript{117}. This new paradigm, marked by decisive international intervention on legal grounds, “weds traditional humanitarianism with the law of human rights”\textsuperscript{118}. Thus, we see a shift away from states as the dominant subjects of international law and an inclusion of the individual as a rival focus\textsuperscript{119}.

The limitations now placed on the powers, immunities and privileges of sovereignty are the result of the need to balance the rights of sovereign states with the greater need for universal peace. The development of international humanitarian law “accelerated the reconceptualization of sovereignty to transcend the responsibility of the territorial nation-state” and placed the rights of the individual on the international plane\textsuperscript{120}. International humanitarian law has marked “the point at which sovereignty gives way to the prerogatives of the international community” and the prosecution of crimes in violation of such norms serves as an affirmation of the supremacy of a higher positive law\textsuperscript{121}. According to international human rights theorist Nigel Rodley, this higher positive law has served as the basis for the recognition and identification of duties for those who exercise power: the necessity of respecting, at least to a minimal extent, the dignity of those subject to that power\textsuperscript{122}.

\textsuperscript{117} Mathews, J. “Power Shift”, p.59
\textsuperscript{119} Levy, D. and Sznaider, N. “Sovereignty Transformed: a sociology of human rights”, p.662
\textsuperscript{120} Maogoto, J.N. “Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept”, p.213
\textsuperscript{121} Broomhall, B. “From National to International Responsibility”, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford Scholarship Online, 2004), p.15
\textsuperscript{122} Nigel Rodley as quoted in Broomhall, B. “From National to International Responsibility”, p.15
The reconfiguration of the concept of state sovereignty and humanitarian intervention reached its culmination in the Responsibility to Protect Doctrine. The idea emerged as part of the international legal lexicon on the cusp of the 21st century, when Francis Deng’s analysis of conflict management in Africa argued for a redefinition of sovereignty as “the responsibility to protect the people in a given territory”\textsuperscript{123}. This duty to protect formulation of sovereignty was elaborated on in a report by the International Commission on Intervention and State Sovereignty of August 2001. “There is no transfer or dilution of state sovereignty”, the report insists. “But there is a necessary recharacterization involved: from sovereignty as control to sovereignty as responsibility”\textsuperscript{124}. In this way, sovereignty is not eroded but instead becomes a necessary condition for maintaining the legitimacy of the state\textsuperscript{125}.

The debate about sovereignty in respect to the R2P principle has been directly linked to the events of the Balkan conflict and the international community’s response to the worsening humanitarian crisis. Kofi Annan drew a direct link between the recharacterization of humanitarian intervention and the events at Srebrenica in 1995 when he posed the question “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Srebrenica?”\textsuperscript{126}. Additionally, the “legitimate but illegal”\textsuperscript{127} NATO bombing and subsequent intervention in Kosovo has caused a shift in commentary and political concern, away from a

\begin{footnotesize}
\textsuperscript{123} Etzioni, A. “Sovereignty as Responsibility”, \textit{Orbis} (Winter 2006), p.71
\textsuperscript{124} ICISS Report quoted in Etzioni, A. “Sovereignty as Responsibility”, p.73
\textsuperscript{125} Levy, D. and Sznaider, N. “Sovereignty Transformed: a sociology of human rights”, p.671
\textsuperscript{126} Kofi Annan quoted in Etzioni, A. “Sovereignty as Responsibility”, p.73
\textsuperscript{127} Etzioni, A. “Sovereignty as Responsibility”, p.82
\end{footnotesize}
more general prevention of state breakdown to a specific debate over establishing legitimate grounds for military intervention\textsuperscript{128}. The question moving forward is where to set the threshold for intervention, to prevent unnecessary military action yet encourage the international community to uphold its responsibilities.

Historian Donald Bloxham sees the existence of institutions such as the ICTY as “testament to the fact that an organised international value community of some sort does exist beyond the international power system constituted by the world’s most powerful states”\textsuperscript{129}. Yet, he warns against seeing the eventual decisive action of the UN in regards to the conflict in the former Yugoslavia as heralding the existence of a new norm of humanitarian action. Bloxham particularly questions the potential efficacy of the international community’s response to conflicts “where their interests are antipathetic”\textsuperscript{130}. Despite the evolution of thinking in regards to traditional notions of state sovereignty, “events simultaneously illustrated that intervention [in the Balkan conflict] was the exception rather than the rule”\textsuperscript{131}.

In academic thinking today, state sovereignty is a double-edged sword. Along with the rights that the traditional concept of Westphalian sovereignty instills, there are responsibilities of the state to their subjects. Respect for sovereignty is thus “contingent upon a state fulfilling its responsibilities to its

\textsuperscript{128} Mazower, M. \textit{Governing the World: The History of an Idea}, p.391
\textsuperscript{129} Bloxham, D. “Beyond ‘Realism’ and Legalism: A Historical Perspective on the Limits of International Humanitarian Law”, \textit{European Review} (Vol.14 No.4: October 2006), p.467
\textsuperscript{130} Bloxham, D. “Beyond ‘Realism’ and Legalism: A Historical Perspective on the Limits of International Humanitarian Law”, p.467
\textsuperscript{131} Bloxham, D. “Beyond ‘Realism’ and Legalism: A Historical Perspective on the Limits of International Humanitarian Law”, p.466
citizens”¹³². Once a right conferred *de jure*, sovereignty is now conditional, and control of territory is seen as “less meaningful than care for life-sustaining standards for a nation’s inhabitants”¹³³. The focus has shifted from the traditional concepts of land and territory to the more modern concepts of citizenry and the individual. Respect for state sovereignty is still a vital concern, yet it is no longer infallible: the protections provided by state sovereignty can be superseded, but only in “the most exceptional and extraordinary circumstances”¹³⁴.

When blatant disregard for the rights of citizens can be proven, as in the Balkan conflict of the 1990s, the international community is forced to act decisively. In the case of the former Yugoslavia, the international community chose to act in three distinct ways: through the positioning of UN peacekeeping troops, through military intervention, and through the creation of an international criminal tribunal to prosecute violators of international law. It is to this third mode of operation that we will now turn.

The International Criminal Tribunal for the Former Yugoslavia

The decision to invoke the norm of justice as a means of resolving the Yugoslav conflict was “in large part a response to the initial failure of other approaches” such as appeasement, economic and diplomatic inducements,

¹³³ Mazower, M. *Governing the World: The History of an Idea*, p.388
and the use of UN peacekeepers\textsuperscript{135}. The concept of invoking an international criminal tribunal as an alternative to the comprehensive use of force has been criticized by some. The UN Ambassador for Bosnia and Herzegovina, Mohamed Sacirbey believes that “justice was held out, in reality, as an alternative to real immediate measures to confront the crime or the criminals”\textsuperscript{136}. For various reasons, that are beyond the scope of this thesis, there was a lack of international political momentum to commit troops to a conflict in the region in the early 1990s. Yet, as further information leaked to the international public about the unfolding humanitarian crisis in the Balkan region there was growing pressure on governments to respond.

As an initial gesture of intent, the Security Council adopted Resolution 764 on July 13\textsuperscript{th} 1992, which stated that persons who commit violations of “international humanitarian law” in the former Yugoslavia would be held individually responsible for their actions. This was the first step in adding the norm of justice to the tools of the peace builders in the Balkan region. Additionally, this Resolution served to build upon the lessons of Nuremberg and the dangers of action without the requisite legal backing. There could be no question that this application of justice would be retroactive.

With no noticeable heed paid to Security Council warnings, in October of 1992 the Council unanimously adopted Resolution 780, which established an impartial commission of experts to assess the information submitted pursuant to Resolution 771, which had called on participatory nations for the

\textsuperscript{135} Williams, P.R and Scharf, M.P. Peace with Justice? War Crimes and Accountability in the Former Yugoslavia (Maryland: Rowman & Littlefield, 2002), p.91

\textsuperscript{136} Mohamed Sacirbey quoted in Williams, P.R and Scharf, M.P. Peace with Justice? War Crimes and Accountability in the Former Yugoslavia, p.93
submission of “substantiated information” concerning war crimes in the former Yugoslavia\textsuperscript{137}. The War Crimes Commission found and reported on evidence of “900 prison camps, about 90 paramilitary groups, 1,600 reports of rape and 150 mass graves” in its relatively small-scale investigation\textsuperscript{138}.

The War Crimes Commission’s interim report, released on 26 January 1993, determined that ‘ethnic cleansing’ had been carried out\textsuperscript{139}. The Commission thus concluded that the policy and practices of ethnic cleansing constituted “crimes against humanity, grave breaches of the Geneva conventions and the crime of genocide”\textsuperscript{140}. It is from this characterization of the conflict that some historians, including Williams and Scharf, see that the obligation of members of the Security Council to intervene was triggered. As parties to the Geneva Conventions and the Genocide Convention, members were under a legal obligation to prosecute those who defied the terms of these Conventions: “The obligation to prosecute is absolute,” argue historians Williams and Scharf, “meaning that state parties can under no circumstances grant perpetrators immunity or amnesty from prosecution”\textsuperscript{141}.

While some members of the UN favoured “less invasive accountability measures” to achieve reparation, documentation and punishment without jeopardizing the waning peace process, the legal obligation for criminal

\textsuperscript{137} Resolutions 780 and 771 as quoted in Williams, P.R and Scharf, M.P. Peace with Justice? War Crimes and Accountability in the Former Yugoslavia, p.94

\textsuperscript{138} Bass, G.J. Stay The Hand of Vengeance, p.212


\textsuperscript{140} Williams, P.R and Scharf, M.P. Peace with Justice? War Crimes and Accountability in the Former Yugoslavia, p.95

\textsuperscript{141} Williams, P.R and Scharf, M.P. Peace with Justice? War Crimes and Accountability in the Former Yugoslavia, p.97
justice was absolute. In addition, the historical burden of a shockingly similar event weighed heavy on the hearts and minds of both politician and civilian alike. Lawrence Eagleburger, US Secretary of State, drew upon this historical parallel at the Geneva Peace Talks in 1992. He invoked “a moral and historical obligation not to stand back a second time in this century while a people faces obliteration” and called specifically for charges to be made against certain individuals for crimes against humanity\textsuperscript{142}.

On February 22\textsuperscript{nd} 1993, the Security Council unanimously adopted Resolution 808 which established an international tribunal “for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”\textsuperscript{143}.

In drafting the statute of the ICTY, preexisting international law concerning the commission of war crimes and acts of genocide played a crucial role\textsuperscript{144}. “Modeled loosely on the Nuremberg Charter”, according to Williams and Scharf, “the proposed statute provided for criminal liability of persons who planned, instigated, ordered, committed or otherwise aided and abetted in violations of international humanitarian law”\textsuperscript{145}. The UN Legal Office’s statute provided for jurisdiction over four different international crimes, drawn from the widely ratified treaties that established what constituted an impermissible act during times of war:

\textsuperscript{142} Lawrence Eagleburger quoted in Bass, G.J. \textit{Stay The Hand of Vengeance}, p.213
\textsuperscript{143} Resolution 808 as quoted in Williams, P.R and Scharf, M.P. \textit{Peace with Justice? War Crimes and Accountability in the Former Yugoslavia}, p.98
\textsuperscript{144} Williams, P.R and Scharf, M.P. \textit{Peace with Justice? War Crimes and Accountability in the Former Yugoslavia}, p.101
\textsuperscript{145} Williams, P.R and Scharf, M.P. \textit{Peace with Justice? War Crimes and Accountability in the Former Yugoslavia}, p.101
1. Grave breaches of the Geneva Conventions of 12 August 1949
2. Violations of the laws or customs of war
3. Genocide
4. Crimes against humanity

The creation of the ICTY with the jurisdiction to prosecute individual criminal responsibility for the above four counts was the result of a decision to invoke existing legal power and authority of the Security Council in an unprecedented manner. Article 41 of the UN Charter directly empowers the Security Council to use “measures not involving the use of armed force.” Despite the listed nonmilitary measures not including judicial measures, there is nothing within the Charter that prevents this method from being legally implemented. The ICTY symbolizes the unique creation of a judicial institution with a political mandate, the restoration and maintenance of international peace and security.

For the first time, parties not directly involved in the conflict in question were the architects of the trial. The international community stood “as neither victor nor victim” and presented a vehicle for the achievement of justice that was unaffected by direct involvement in the conflict. With criticisms of the Nuremberg Tribunal as being nothing more than ‘victor’s

148 Scheffer, D. All The Missing Souls: A Personal History of the War Crimes Tribunals, p.21
justice’ lodged firmly in the back of their minds, the architects of the ICTY were determined that this time fair and due process would prevail. As US Secretary of State Madeline Albright maintained, the Tribunal was unique in its creation; “This will be no victor’s tribunal,” Albright stated at the Security Council passing of Resolution 808. “The only victor that will prevail in this endeavour is the truth”\textsuperscript{150}.

The legal framework for the Security Council decision had existed since the inception of the UN Charter agreed at the San Francisco Conference in 1945. The change that facilitated the creation of the ICTY was in the reinterpretation of existing powers and responsibilities of the Security Council made possible by the existence of sufficient political will\textsuperscript{151}. Chapter VII of the UN Charter allows for “action with respect to threats to the peace, breaches of the peace and acts of aggression”\textsuperscript{152}, but never before had the Security Council deemed a conflict occurring within the borders of a single sovereign state as a threat that required international intervention in the form of a criminal tribunal. In addition, this was the first historical instance where a war crimes tribunal had been established in the middle of the armed conflict it was tasked to investigate\textsuperscript{153}. In this way the international community was forced to walk the tightrope of justice and warfare simultaneously.

\textsuperscript{150} Madeline Albright quoted in Scheffer, D. All The Missing Souls: A Personal History of the War Crimes Tribunals, p.21
\textsuperscript{151} Kerr, R. The International Criminal Tribunal for the Former Yugoslavia, p.13
\textsuperscript{152} United Nations, “Charter of the United Nations”, (San Francisco: 1945), Chapter VII
\textsuperscript{153} Scheffer, D. All The Missing Souls: A Personal History of the War Crimes Tribunals, p.19
Precedents set by the ICTY

International criminal tribunals are one of the mechanisms through which sovereign conduct is held accountable to international norms, norms that find their basis in the conventions and agreements which nations consent to upon signing (many of which were discussed in Chapter One). According to Antonio Cassese, the first President of the ICTY, one of the main roles of the tribunal has been in clarifying some of the major elements of international substantive criminal law and the validity of international criminal tribunals more generally.\textsuperscript{154}

As the first ad hoc international tribunal and the first criminal tribunal to prosecute war crimes since Nuremberg, the ICTY has played a definitive role. Commentators view the ICTY statute as defining the “features of armed conflict” in the modern age, as well as the “conditions on which one may hold that an international armed conflict has broken out”.\textsuperscript{155} Fundamentally, the successful completion of prosecutorial processes against war criminals has reinforced the efficacy of international criminal law and the methodology of the international tribunal as a means of bringing about accountability and justice.

While the ICTY has been productive in further grounding a number of the core principles that emerged as a result of the Nuremberg Tribunal, that is by no means the limitations of its effectiveness. Through the prosecutorial process and case law that has emerged as a result of the ICTY, there is a


\textsuperscript{155} Cassese, A. “The ICTY: A Living and Vital Reality”, p.592
greater clarification of the notion of war crimes as contained in the ICTY statute. In particular, the notion of grave breaches of the Geneva Convention, subjective elements of crimes against humanity, the notion of joint criminal enterprise and the important aspects of genocide have all been clarified and codified within international law as a result of ICTY proceedings.

a) The Validity of the ICTY Statute

It was fundamentally important that the legal basis of the ICTY was clear and defined, to avoid charges of retroactive justice as had been leveled at the Nuremberg Tribunal. The validity of the ICTY statute was challenged and dismissed at both the Trial Chamber and Appeals Chamber levels by the legal team of Duško Tadić, the first successfully detained indictee of the Tribunal.

Duško Tadić had lived in Kozarac, a predominately Muslim area that was of strategic importance to the Serbs since it straddled the corridor between Serb-occupied areas of Bosnia and Croatia. When a majority of Kozarac’s Muslim residents were executed and the rest were sent to concentration camps, Tadić became a frequent camp ‘visitor’ whose brutality made him well known throughout the area. After emigrating to Germany Tadić was arrested by German authorities on suspicion of “murder, aiding and abetting genocide, and causing grievous bodily harm”. Lead prosecutor Richard Goldstone requested his transferal back to the Hague and the deference of his prosecution to the ICTY, where Tadić was formally

indicted on February 13 1995 for 34 counts of breaches of the Geneva
Conventions, violations of the laws and customs of war, and crimes against
humanity.\textsuperscript{157}

Legal historian Geoffrey Robertson identifies and analyses the main
elements of the arguments in the pre-trial motions put forward by Tadić’s
legal team. The motion was formed on the grounds that Article III of the ICTY
Statute was based on war crimes committed during international armed
conflict, and that the Balkan situation was purely internal.\textsuperscript{158} The Appeals
Chamber of the ICTY dismissed this definition, finding that “an armed
conflict exists whenever there is resort to armed force between States or
protracted armed violence between governmental authorities and organised
armed groups.”\textsuperscript{159} Of most vital importance was the Appeals Chamber
confirmation that an appeal grounded in the language of state sovereignty
was no longer of relevance, as “a state-sovereignty oriented approach has
been gradually supplanted by a human-being oriented approach.”\textsuperscript{160}

The concern of the international community was to protect civilians
from belligerent violence, whether caused by interstate or civil wars. The
Tadić Precedent has thus “rid the law of the anachronistic distinction between
acts of internal oppression and international conflicts”, allowing for

\textsuperscript{157} Scharf, M.P. \textit{Balkan Justice}, p.100
\textsuperscript{158} Robertson, G. \textit{Crimes Against Humanity}, p.272
\textsuperscript{159} \textit{Prosecutor vs Duško Tadić} (13 February 1995) (IT-94-1); ICTY Appeals Chamber Judgement
of Duško Tadić (15 July 1999)
\textsuperscript{160} \textit{Prosecutor vs Duško Tadić} (13 February 1995) (IT-94-1); ICTY Appeals Chamber Judgement
of Duško Tadić (15 July 1999)
international intervention in instances where the State acts as an internal oppressor as well as an external aggressor\textsuperscript{161}.

Michail Wladimiroff and Alfons Orie, Dusko Tadić s legal counsel, made history as the first to openly question the legality of the Tribunal on the grounds of a violation of state sovereignty. The legal team argued that the transferal of Tadić and the deference of the prosecution for his crimes from his place of arrest in Germany to the Hague was essentially unlawful “because among the sovereign powers retained by UN members is the right to prosecute in their own courts”\textsuperscript{162}. While not denying that the principles of sovereignty did support such a claim, the Trials Chamber dismissed the argument on the grounds that Tadić had no standing to bring such as issue forward: he was neither a German national nor a representative of the German state in any way.

When the same argument was brought to bear in the Appeals Chamber, the conclusion was reached that although state sovereignty had a role to play, it was not definitive. “State sovereignty must give way,” the judgement stated, “in cases where the nature of the offenses alleged does not affect the interests of one state alone but shocks the very conscience of mankind”\textsuperscript{163}. The creation of the ICTY amounted to abdication of sovereignty in the area of criminal jurisdiction, as illustrated in the case of Duško Tadić, where international peace and security was threatened\textsuperscript{164}.

\textsuperscript{161} Robertson, G. Crimes Against Humanity, p.274
\textsuperscript{162} Scharf, M.P. Balkan Justice, p.106
\textsuperscript{163} Prosecutor vs Tadic as quoted in Scharf, M.P. Balkan Justice, p.106
\textsuperscript{164} Kerr, R. The International Criminal Tribunal for the Former Yugoslavia, p.63
b) Ending Impunity

The echoes of Nuremberg are evident in many of the foundational elements of the ICTY, not least the Tribunal’s efforts to ground itself in existing international law and custom. Despite the fact that traditional international law recognises degrees of immunity from criminal prosecution for heads of State and other officials, such immunity was denied at Nuremberg and codified in Article IV of the Geneva Convention: “Persons committing genocide or any of the other acts enumerated shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”\(^{165}\). This practice has continued in the ICTY, despite early criticisms that it would hinder the dwindling peace process.

Furthermore, the ICTY Statute excludes entirely the defence of following superior orders, a challenge that was frequently brought about and dismissed at the Nuremberg Tribunal. “The fact that an accused person acted pursuant to an order of a Government or of a superior”, Article VII of the Statute denotes, “shall not relieve him or her of criminal responsibility”\(^{166}\). Additionally, the defence of *tu quoque*, which proved so controversial at the Nuremberg Tribunals, has since been deemed “inapplicable to international humanitarian law which creates obligations *erga omnes*\(^{167}\). The ICTY specifically holds that evidence that another party to a conflict may also have committed atrocities “is, as such irrelevant, because it does not tend to prove


\(^{167}\)Translation: “Towards All”; Schabas, W.A. *Genocide in International Law*, p.342
or disprove any of the allegations made in the indictment against the accused”\textsuperscript{168}.

c) **Clarification of War Crimes**

Geoffrey Robertson sees one of the most notable achievements of the ICTY as being the identification and stigmatization of rape as a war crime\textsuperscript{169}. Since its inception, the ICTY has charged more than seventy individuals with crimes of sexual violence and has strengthened the realm of gender crimes in international humanitarian law.

The first case at the ICTY that was focused solely on charges of sexual violence was against Anto Furundžija, commander of the Jokers, a special unit of the Croatian Defence unit based in Bosnia and Herzegovina. Charged with aiding and abetting the rape of Bosnian women in front of a “laughing audience” of other soldiers, the Trial Chamber made important remarks on the qualification of rape in the context of international crimes\textsuperscript{170}. While the Tribunal’s Statute only makes explicit reference to rape as constituting a crime against humanity, the Furundžija case broadened this scope to ensure that rape could be prosecuted as a grave breach of the Geneva Conventions, as a violation of the laws and customs of war, and as a tool of genocide “if the requisite elements are met”.

The Trial Chamber of the ICTY has set precedents that allow for the future prosecution of sexual violence as a form of torture and as a precursor

\textsuperscript{168} Schabas, W.A. *Genocide in International Law*, p.342  
\textsuperscript{169} Robertson, G. *Crimes Against Humanity*, p.284  
to ethnic-cleansing and genocide. In the trial of Hazim Delić, deputy camp commander at the Čelebići prison camp in central Bosnia and Herzegovina, rape was qualified as a form of torture for the first time in an international criminal tribunal\textsuperscript{171}. In the judgement of 1998 the judges noted that the purpose of the rapes was to obtain information, to intimidate and to coerce: “There can be no question that acts of rape may constitute torture under customary international law”\textsuperscript{172}. The Trial Chamber roundly condemned the use of rape as a method of warfare, highlighting its use as a punishment and discriminatory act against women “which strikes at the very core of human dignity and physical integrity”\textsuperscript{173}.

d) The Crime of Genocide

Until as late as 1995 when the ICTY issued its first indictments, no international forum had ever prosecuted an individual or group for breach of the Genocide Convention, despite genocide having illegal status in international criminal law\textsuperscript{174}. The crime of genocide has a significantly higher threshold of proof than other violations of international criminal law such as crimes against humanity or war crimes. The ICTY holds that genocide “must be consciously desired, not simply negligently caused or recklessly risked”\textsuperscript{175}.

\begin{footnotesize}
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\item[\textsuperscript{172}] Prosecutor vs Zdravko Mucić, Hazim Delić, Esad Landžo & Zejnil Delalić (21 March 1996) (IT-96-21); Trial Chamber Judgement of Hazim Delić (16 November 1998)
\item[\textsuperscript{173}] Prosecutor vs Zdravko Mucić, Hazim Delić, Esad Landžo & Zejnil Delalić (21 March 1996) (IT-96-21); Trial Chamber Judgement of Hazim Delić (16 November 1998)
\item[\textsuperscript{174}] Kiernan, B. \textit{Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur}, p.11
\item[\textsuperscript{175}] Kiernan, B. \textit{Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur}, p.18
\end{itemize}
\end{footnotesize}
To successfully charge an indictee with the crime of genocide, the ICTY must successfully prove that the genocidal acts were the direct and planned consequence of conscious policy decisions, rather than merely a by-product of war.

The first trial of a genocide charge for actions at the Luka concentration camp led to an acquittal in December 1999. The judges were “unsatisfied with evidence that there had been any organised genocide” although they did not definitively state that genocide, by its strictest definition, had not occurred. In August 2001, the Trial Chamber of the ICTY handed down its first genocide conviction in the landmark case against Radislav Krstić for his role in the mass murder at Srebrenica.

Given this extensive burden of proof, only 8 indictments of genocide have reached the trial stage. Commentators have viewed this as a limitation on the efficacy of the Tribunal, as cases where genocidal activity occurred but the intent could not be sufficiently proven have been dismissed. The crime of genocide was conspicuous in its absence from the indictment of Duško Tadić. Despite it being proven that his actions contributed to “the removal of the majority of the Muslim population of Prijedor and effectively the destruction of that community” and were therefore genocidal in their outcome, the

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176 Scharf, M.P and Schabas, W.A. *Slobodan Milosevic on Trial*, p.67
177 *Prosecutor vs Radislav Krstić* (27 October 1999) (IT-98-33); Trial Chamber Judgement of Radislav Krstić (2 August 2001); Southwick, K.G. “Srebrenica as Genocide? The Krstic Decision and the Language of the Unspeakable”, *Yale Human Rights and Development Law* (Vol.8: 2000), pp.188 – 227
178 Schabas, W.A. *Genocide in International Law*, p.378
179 *Prosecutor vs Tadić* as quoted in Scharf, M.P. *Balkan Justice*, p.98
Tribunal were “not at all clear that his actions were intended to further the Serb policy of ethnic cleansing or were merely a by-product of it”\textsuperscript{180}.

e) **Ethnic Cleansing**

The campaign of ethnic cleansing in parts of the former Yugoslavia quickly became infamous throughout the world, and is now widely agreed as the “involuntary and forced transfer of an ethnically distinct component of a population outside their area of former residence by an invading or occupying power”\textsuperscript{181}. The term ethnic cleansing first appeared in 1981 in Yugoslav media accounts of the establishment of ‘ethnically-clean territories’ in Kosovo\textsuperscript{182}. The term then entered international legal vocabulary in 1992 when it was used to describe the policies openly pursued by the various parties to the Yugoslav conflict that aimed to create ethnically homogenous territories\textsuperscript{183}. It is important to note that the phrase does not appear in the Statute of the ICTY and has “never been authoritatively defined in international law”, despite being used as a descriptive term in later hearings\textsuperscript{184}.

One notable feature of the inclusion of the term ethnic cleansing in the Judgements of the ICTY is that until the 1970s, “legally constituted mass population transfers seemed... in no way criminal or genocidal”\textsuperscript{185}. The transfer of ethnic minorities out of territories was seen as a means of reducing

\textsuperscript{180} Scharf, M.P. *Balkan Justice*, p.101
\textsuperscript{182} Schabas, W.A. Genocide in International Law, p.189-190
\textsuperscript{183} Schabas, W.A. Genocide in International Law, p.190
\textsuperscript{184} Scharf, M.P and Schabas, W.A. Slobodan Milosevic on Trial: A Companion (London: Continuum Ltd, 2002), p.126
\textsuperscript{185} Rubinstein, W.D. Genocide: A History, p.258
the potential source of conflict and providing “long-term humanitarian solutions” in ethnically defined nation-states. It was not until the War of the Yugoslav Succession that ethnic cleansing was widely “attacked and demonized by international humanitarian bodies”.

The Commission of Experts appointed by the Security Council adopted the phrase, determining that a policy of ‘ethnic cleansing’ constituted a crime against humanity, a war crime, and could be seen as a breach of the Genocide Convention. The official definition of ethnic cleansing as adopted by the ICTY was first put on the record in the Rule 61 hearing of Karadžić and Mladić: “Ethnic cleansing is a practice which means that you act in such a way that in a given territory the members of a given ethnic group are eliminated.” The response of the international community in regards to the ethnic-cleansing policies in the former Yugoslavia are demonstrative of a dramatic shift in attitudes in regards to the large-scale transferal of minority populations.

Case Study: Slobodan Milošević

The three indictments against Slobodan Milošević, the President of Serbia from 1987 to 1999 and President of the Federal Republic of Yugoslavia from 1997 to 2000, charge him with all four categories of offenses as listed in the ICTY statute. The trial of Milošević thus makes an effective case study for the purpose of examining the precedents set by the Tribunal. Yet it is

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186 Rubinstein, W.D. Genocide: A History, p.259
188 Schabas, W.A. Genocide in International Law, p.197
189 Prosecutor vs Karadžić and Mladić, quoted in Schabas, W.A. Genocide in International Law, p.190
important to note that due to his death before the proceedings concluded, no official verdict was ever returned\(^{190}\).

The information drawn from these proceedings is thus based on the indictments, witness testimony and cross-examination. Drawing on the historical background of the Yugoslav Conflict, lead prosecutor Louise Arbour used the indictments to summarise Milošević’s “campaign of terror and violence” with the alleged purpose to facilitate the “consolidation of Serb control over Kosovo and parts of Croatia and Bosnia and Herzegovina, eventually to be incorporated into a ‘Greater Serbia’”\(^{191}\). Milošević was transferred to the custody of the ICTY on June 29 2001 but died before the trial had concluded on March 11 2006.

Milošević was charged with Grave Breaches of the Geneva Convention (Article II of the ICTY Statute) for actions in both Croatia and Bosnia and Herzegovina. The eight specific acts that are categorised as Grave Breaches are drawn from four international treaties, the 1949 Geneva Conventions, which deal with the laws of armed conflict\(^{192}\). The Charter of the Nuremberg Tribunal set the precedent for the codification of war crimes, focusing on crimes committed by or against combatants. The Geneva Conventions, and thus the charge of Grave Breaches by the ICTY, focuses on non-combatants, specifically civilians and _hors de combat\(^{193}\) who were those affected in greatest numbers in the Balkan conflict\(^{194}\).

\(^{190}\) Scharf, M.P and Schabas, W.A. _Slobodan Milosevic on Trial_, p.58  
\(^{191}\) Scharf, M.P and Schabas, W.A. _Slobodan Milosevic on Trial_, p.57  
\(^{192}\) Scharf, M.P and Schabas, W.A. _Slobodan Milosevic on Trial_, p.58  
\(^{193}\) Translation: “No longer combatants”  
\(^{194}\) An agreed estimate is given that over 260,000 civilians were killed in the ‘Yugoslav Wars’ between 1992 and 1996 (conflicts between Serbia, Croatia and Bosnia and Herzegovina); and
Milošević was notably not charged with Grave Breaches in regards to his actions in Kosovo. The charge was “deemed inappropriate with respect to actions by Yugoslav forces against the Kosovo Albanian minority within the borders of the sovereign state of Yugoslavia”\textsuperscript{195}. Thus the charge for Grave Breaches is only applicable in international, not internal, armed conflicts. Milošević was brought to account for his actions in Kosovo until Article III of the ICTY Statute, the charge of Violations of Laws or Customs of War. The five acts specified in the Statute are drawn largely from the Nuremberg Precedents, and encompass a range of acts that may be committed during armed conflict. Since this article applies to both non-international armed conflict and international armed conflict, the Kosovo crisis falls under this category.

The definition and applicability of the crimes listed in the ICTY Statute were in many ways confined by the constraints of existing international law. The Tribunal had to adapt and reconfigure the contemporary framework of humanitarian and criminal law to form indictments that could be applied and proven beyond reasonable doubt in regards to those brought into its custody. It was in this redefinition and reinterpretation that the ICTY set new precedents in the realm of international humanitarian and criminal law.

The initial indictments issued against Milošević in 1999 did not charge him with the crime of genocide. However, the Bosnia and Herzegovina indictment was adapted in 2001 to include a specific reference to Srebrenica, a further 2,000 were killed in the Kosovo Liberation War (conflict between NATO and Serbia).\textsuperscript{195} Scharf, M.P and Schabas, W.A. \textit{Slobodan Milosevic on Trial}, p.60
for which there was now an important precedent in the form of the guilty verdict found in the Krstić case. In the Milošević case, he would be tried on the grounds of command responsibility and de jure authority over a range of military and civilian institutions that played a role in the Srebrenica massacre. This was the first command responsibility trial since the US military commission of the Japanese commander General Yamashita following World War Two. Under this principle, even if the crime had been physically committed by a subordinate, the prosecution only had to prove that Milošević, as the superior commander, had reason to know that the crime would be committed or had failed to take the necessary and reasonable measures to prevent it.

While not being held physically responsible for the war crimes committed in the territory of the former Yugoslavia, Milošević was highlighted by the lead prosecutor Carla Del Ponte as the integral link in a joint criminal enterprise that had ordered and perpetrated those crimes.

The idea of joint criminal enterprise is relatively new in international criminal law and the phrasing was adopted for the first time in the 2001 indictment against him: “Slobodan Milošević participated in the joint criminal enterprise... The purpose of this joint criminal enterprise was the forcible removal of the majority of non-Serbs... from large areas of the Republic of Bosnia and Herzegovina”.

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196 Translation: “By Law”

197 Scharf, M.P and Schabas, W.A. Slobodan Milosevic on Trial, p.72

198 Scharf, M.P and Schabas, W.A. Slobodan Milosevic on Trial, p.120

199 Prosecutor vs Slobodan Milošević (B and H) (22 November 2002) (IT-02-54)
These charges are conditional on proving the existence of a common enterprise to create ethnically homogenous territories\(^\text{200}\). Any individual who participates physically in a crime; is present when a crime is committed; encouraged another to commit the crime; or commits an act in furtherance of this particular system or policy can be found guilty of participation in a joint criminal enterprise. By virtue of the dominant position held by Milošević throughout the political and military structures of what remained of Yugoslavia, the joint criminal enterprise element provides a means by which all criminal acts carried out by official or quasi-official forces can be linked back to him\(^\text{201}\).

In the case of Srebrenica, Milošević’s role as President of Serbia and the Supreme Defence Council saw him exercise direct authority over Krstić, Mladić and Karadžić, and the forces who took over the UN safe zone in July 1995 and allegedly killed up to 8,000 Bosniaks\(^\text{202}\). The Prosecutor made it clear that Milošević did not physically commit the murders with which he was charged, but that his actions evidenced the necessary intent which coupled with the outcome constituted genocide.

General’s Krstić and Mladić have been identified as the massacre’s architects and no reference to any alleged complicity of Milošević was raised in the Krstić case. However, through the application of the concepts of command responsibility and joint criminal enterprise, Milošević as the commanding head of a joint criminal enterprise, of which Krstić and Mladić

\[^{200}\text{Scharf, M.P and Schabas, W.A. Slobodan Milosevic on Trial, p.121}\]
\[^{201}\text{Scharf, M.P and Schabas, W.A. Slobodan Milosevic on Trial, p.121}\]
\[^{202}\text{A South Slavic ethnic group living predominately in Bosnia and Herzegovina}\]
were central members, could be said to be complicit in the Srebrenica atrocity\(^\text{203}\).

**Conclusion**

The convening of the ICTY evidences the way in which the international community has applied the precedents of the IMT at Nuremberg, as well as attempting to improve, modernize and adapt the existing framework.

International criminal tribunals have become a crucial and prevalent legal mechanism of international intervention in instances of state-sponsored violence. As a result of evolutionary thinking in the field of state sovereignty and the universal responsibility to protect individual rights, international criminal tribunals have become a pivotal apparatus in modern day international relations. The fact that the International Criminal Tribunal for Rwanda, the Special Courts in Sierra Leone, Cambodia, Lebanon and East Timor, and the International Criminal Court are all in existence is testament to this growing importance.

These mechanisms are, however, not without their inherent flaws. While some of the issues of their legal validity have already been addressed, their very existence is not the only contentious issue. Recently, attention has turned to the interplay and growing interconnectedness of the fields of law and history.

As we have established, as well as being a means of achieving justice, international criminal tribunals have from time to time chosen to adopt a fact

\(^{203}\) Scharf, M.P and Schabas, W.A. *Slobodan Milosevic on Trial*, p.130
or truth-finding operation. In addition to this truth finding obligation, the facts established in a criminal trial will inevitably impact the public record of the event. It is the issue regarding the transposition of information obtained for the purpose of a legal mechanism to use in the forum of history writing that will be explored and analysed in the following chapter.
Chapter Three

History and the ICTY: A Controversial Legacy

In nations riven by the devastation of mass atrocity, the mechanism of an international criminal tribunal is often adopted as the chosen method of post-conflict resolution. This thesis has engaged with the implementation of an international criminal tribunal in the wake of World War Two and in the midst of the Balkan conflict, illustrating the ways in which the framework of a criminal tribunal has been adapted to and reflective of greater trends in academic and political thinking in regards to the pursuit of justice.

In continued exploration, this chapter analyses the ICTY as a means of establishing a historical record as a mode of post-conflict resolution. The pursuit of truth and fact finding as a societal response to collective violence is therefore the focus of this chapter, in an effort to expand upon the ideas put forward by Martha Minow.

Using specific examples from the mandate and procedures of the ICTY, this chapter argues that despite a conscious attempt to establish an accurate historical record as a means of facilitating reconciliation between victims and society more broadly, the history written as a result of the ICTY is inherently flawed. While the international criminal tribunal at Nuremberg focused on the maintenance of the balance of power and the early years of the ICTY in particular saw an engagement with evolutionary thinking in terms of human rights, it is also important to acknowledge the ICTY in its attempts to use truth as a mode of reconciliation. Reflective not only of the evolvement of
post-conflict resolution and it’s focus on fact-finding, this change is also exemplary of the evolving field of legal history which seeks to examine and critique the growing interconnectedness of history in the legal sphere.

As the proceedings at the ICTY begin to wind down as result of the implemented completion strategy, we are drawn to look at the legacy it will leave behind. As established in Chapter Two, the ICTY represents the evolution of individual rights as a cause for a significant compromise over the power of state sovereignty and the use of criminal tribunals as a mechanism for achieving justice for the individual and reconciliation for post-conflict societies. In addition, the Tribunal at The Hague has provided the framework for national and localized criminal tribunals and legal mechanisms to continue the process of achieving justice for the victims of the Balkan conflicts. The processes of prosecution in domestic courts are another critical element of the ICTY’s legacy that will be remembered in posterity.

However, to limit the impact of the ICTY to the field of law would do it a great disservice. It is of the utmost importance to analyse the impression that the ICTY has had on the historical record of the events over which it holds criminal jurisdiction. The burgeoning field of history which engages with the interconnection of the fields of legal and historical thinking, highlights the methodological differences between the two; and yet, there is an acknowledgement that they are inescapably intertwined and becoming ever more so as the mechanisms of international criminal tribunals continue to be drawn upon more frequently.
While some legal mechanisms merely impact the historical record of the events with which they engage in a minor or limited way, the ICTY in particular has made a conscious decision to contribute to the field of history surrounding the events in the former Yugoslavia. It is therefore a matter of acute consequence that the validity and fairness of court testimony is upheld. It is this testimony which impacts not only the findings of the court, but the findings of history. This chapter attempts to explore this contentious issue historiographically, from Hannah Arendt’s vocal warnings as a result of the Eichmann Trial to the more modern interpretations of Richard Ashby Wilson.

Historian Martha Minow has witnessed the growing interconnectedness of the fields of law and history and questions the future of the two methodologies in concert. As legal mechanisms are increasingly called upon to solve the pertinent issues of international relations, the assumption is made that it is this material which will progressively form the basis of our understanding of the events discussed. This assumption begs the question asked by Minow of international criminal tribunals and legal mechanisms of this kind: should justice or truth take precedence?

It is the view of this thesis that without justice there can be no truth (or, at the very least, an incomplete and therefore inadequate truth) revealed in a courtroom. While the Nuremberg Tribunals were highly criticized for a lack of due process, as highlighted in Chapter One, there was hope that improvements would be made on the established framework, as analysed in Chapter Two. However, the ICTY is exemplary of the dangers that come to fruition when respect for just process is diminished through a combination of
political factors and institutional failures. The historical record produced as a result of the testimony recorded at the ICTY is therefore limited and incomplete.

I have interviewed two former members of the ICTY legal counsel as a means of achieving a more in-depth understanding of how law and history are increasingly interconnected within the courtroom setting. The questions asked of them were intended to provoke the interviewees into discussing the role that historical context more generally played within the trials they were involved in, as well as specific questions about institutional factors. The answers given played a critical role in developing the ideas addressed in the following pages, yet specific accreditation is only given in footnotes for quotes and paraphrasing. Mark Ierace SC served as a Senior Trial Attorney for the Office of the Prosecutor at the Tribunal, working most specifically on the case of Stanislav Galić which lasted between December of 2001 and May of 2003. Chrissa Loukas SC served on the Defence Counsel at the ICTY in the case of Momčilo Krajišnik and as Vice President of the Association of the Defence Counsel. It is important to note that the ideas put forward were equally represented between the Prosecution and Defence as a result of having one interviewee from each ‘side of the bar table’.

It is widely accepted that the ICTY will “be judged by the standards of fairness it is able to demonstrate”\(^\text{204}\). If this is the case, then the legacy of the ICTY, like that of the IMT, will be forever tainted and it’s attempt to establish

\(^{204}\) Robertson, G. Crimes Against Humanity, p.279
an accurate historical record as a means of post-conflict reconciliation will never come to fruition.

Law and History: An Uneasy Marriage?

There are few who contend with the idea that legal mechanisms are effective in their ability to establish facts that have been tested under cross-examination and the other rigorous processes of the courtroom. As Christine van den Wyngaert points out, “through the process of judicial fact finding, international criminal courts help to sort out competing accounts”\(^\text{205}\). As a result of this fact-finding use, judges in an international criminal tribunal are “acutely aware that their judgement will inevitably be viewed as making history”\(^\text{206}\). While the symbiosis between the fields of law and history in terms of legal mechanisms such as international criminal tribunals established as a result of major conflicts is widely recognised, there is a similar understanding that the relationship between “criminal judgement and historical interpretation is problematic in myriad ways”\(^\text{207}\).

There are two broad schools of historical thought that maintain the argument that courts are “inappropriate venues to delineate the origins and causes of mass crimes”\(^\text{208}\).

\(^{207}\) Osiel, M. Mass Atrocity, Collective Memory and the Law, p.79
\(^{208}\) Wilson, R.A. Writing History in International Criminal Trials (Cambridge: Cambridge University Press, 2011), p.2
Liberal legalism claims that the sole function of a criminal trial is to determine whether the alleged crimes occurred and, if so, whether the defendant can be held criminally responsible for them. One of the most influential historical scholars to adopt this position was Hannah Arendt, who strongly argued that the main and only function of a court should be to determine the guilt or innocence of an individual: “The purpose of the trial is to render justice and nothing else.” Attempting to pass judgement on competing historical interpretations serves to undermine fair procedure and due process and place an undue qualification on the universality of the legal outcome. In her study of the Eichmann trial, Arendt criticizes the labeling of Eichmann’s crimes as specifically crimes against the Jewish people: in her eyes the legal process should have construed them as crimes against humanity as a whole and not contributed to the debate about the historicization of Jewish persecution.

Scholars of law-and-society pursue this vein of argument, claiming that even when courts attempt historical inquiry, they are bound to fail as a result of the inherent limitations of the legal process. Historian Richard Evans is one of the proponents of the ‘Incompatibility Theory’, identifying “profound incompatibilities between legal and historical approaches to evidence” that render legal testimony inappropriate for the articulation of historical fact. Law and history involve different modes of reasoning altogether and while

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209 Wilson, R.A. Writing History in International Criminal Trials, p.3
211 Wilson, R.A. Writing History in International Criminal Trials, p.4
212 Wilson, R.A. Writing History in International Criminal Trials, p.6
courts seek the certitude which allows them to convict or acquit, historians are released from such imperatives\textsuperscript{213}. Donald Bloxham is an innovative thinker within this field, looking at the explicit aims of modern legal mechanisms to contribute to the historical field. Bloxham points out the successes of the ICTY in establishing “an invaluable documentary database about the crimes of that era”\textsuperscript{214}. It is his belief that the courtroom is a place for establishing the facts, facts tested under the rigorous constraints of criminal legal methodology. Yet he remains critical of the aims of the ICTY to consciously establish its own historical record of the events. He maintains that the primary function of the court is to establish a substantiated verdict and mete out punishment where appropriate. While the facts established in a courtroom may be of value, the “only matter over which the courts have complete control and for which they are properly qualified” is to establish criminal responsibility for a specific act.

As an illustration of these incompatibilities and the modern historian’s attempts to overcome them, Mark Osiel tracks the emergence of ‘perpetrator history’, a branch focused almost exclusively on the intentions and ideologies of top leaders, an emphasis understandable when reflecting on the record of legal proceedings. The Nuremberg Tribunal assigned the highest import to members of the political and military elite and as a means of achieving success in the legal sphere, this methodology had its benefits. However, Osiel points to the notable disadvantages of this strategy for the historical record of

\textsuperscript{213}Wilson, R.A. “Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia”, \textit{Human Rights Quarterly} (Vol.27, No.3: August 2005), p.912

\textsuperscript{214}Bloxham, D. “Beyond ‘Realism’ and Legalism: A Historical Perspective on the Limits of International Humanitarian Law”, p.458
these events. By focusing so intently on the actions of the individual, the
courts missed not only the “macro picture, the story of mass collaboration and
institutional support for administrative brutality” but also the “micro-picture,
the story of the victims, the human experience of uncomprehending
suffering”215.

In contrast, there are a growing number of modern historians who
have called for a reevaluation of the interrelationship between the fields of
law and history. Bob de Graaff views the two disciplines as “condemned to
cooperation” due to the evolution of the legal field and it’s growing reliance
on historical evidence216. In addition, de Graaff points to the growing field of
historical study which seeks to do more than merely “explain, interpret and
evaluate such inhuman events” by invoking questions of justice.

Modern legal historian Richard Ashby Wilson sees an evolution in the
interrelation between law and history, arguing that their relationship “cannot
be characterised by either harmonious accord or inherent contradiction”217.
Wilson describes an inescapable connection between the two, in that courts
provide a body of evidence that is invaluable to historians. Therefore legal
counsel in their arguments and judges in their final judgements have an
impact as producers of history long after the culmination of the trial. As the
methodologies of law and history continue to evolve, Wilson sees a

215 Osiel, M. Mass Atrocity, Collective Memory and the Law, p.103
216 De Graaff, B. “The Difference Between Legal Proof and Historical Evidence: The Trial of
Slobodan Milosevic and the Case of Srebrenica”, European Review (Vol.14 No.4: October 2006),
p.500
217 Wilson, R.A. Writing History in International Criminal Trials, p.13
compelling case for rethinking the long-standing view that “the pursuit of justice and the writing of history are inherently irreconcilable”\textsuperscript{218}. In particular, Wilson points to the ICTY as a point of departure from previous courtroom accounts of mass atrocities. As an international tribunal, the ICTY has been less influenced by distorted narratives of national identity and therefore the historical account it creates has a lessened ethnic bias. In addition, the new legal categories such as genocide have compelled the court to situate individual acts within long-term systematic policies rather than view them as isolated events\textsuperscript{219}. In this way, the very nature of the history that can be written as a result of court testimony has been changed and expanded beyond the scope of the bare facts of an individual act.

The ICTY and its pyramidal Prosecutorial structure runs the risk of reiterating these same mistakes, and creating a historical record that is fundamentally limited by its selectivity. French historian Pierre Nora maintained that “history should not concern itself with ascribing praise or blame to individuals, but rather with tracking long-term social and institutional change”\textsuperscript{220}. It is therefore the role of the historian to take the evidence proffered by the court, and dig deeper and look beyond the individual or the event in question. In an attempt to engage with and build upon the foundations established by the Nuremberg Tribunal, historians of the Balkan conflict and the ICTY are seeking to recapture this broader perspective. While at Nuremberg there was little testimony by surviving

\textsuperscript{218} Wilson, R.A. \textit{Writing History in International Criminal Trials}, p.19
\textsuperscript{219} Wilson, R.A. “Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia”, p.908
\textsuperscript{220} Pierre Nora quoted in Osiel, M. \textit{Mass Atrocity, Collective Memory and the Law}, p.101
victims, the ICTY has placed a unique focus on oral testimony and “direct evidence, people giving evidence of what happened to them”\textsuperscript{221}. As both Richard Wilson and Mark Osiel point to in their work, there has been an increase in the number of oral histories and the use of this forum to explore the “subjective experience” of witnesses and victims, illustrating the newfound versatility of direct evidence when transposed to the field of history\textsuperscript{222}.

**The ICTY and its aim to write history**

Despite widespread debate about the suitability of the courtroom as a forum for history writing, it is now broadly accepted that the chain of events established in a courtroom, and the evidence used to establish it, will have an impact on the historical record of that event. From the time of the Nuremberg Trials, the development of an historical record has been a conscious aim of the instigators of criminal tribunals, despite the differing epistemological methodology of the two fields, and the ICTY is no exception.

It is therefore of crucial importance to create an awareness of the limitations of the legal system in regards to the establishment of a well-rounded, unbiased and complete history of the events which it seeks to judge. It is only through a thorough analysis of the system as it stands that effective and meaningful changes can be made.

As noted by Robert Jackson following the Nuremberg Trials, one of the most notable achievements of the IMT was the documentation of Nazi

\textsuperscript{221} Loukas SC, C. 13 September 2013, Public Defenders Chambers, Sydney
\textsuperscript{222} Osiel, M. *Mass Atrocity, Collective Memory and the Law*, p.104
atrocities “with such authenticity and in such detail that there [could] be no
responsible denial of these crimes”\textsuperscript{223}. It is the furtherance of this credible
historical account of international crimes that is found at the heart of the aims
of the ICTY.

At the time of it’s creation, the permanent members of the Security
Council articulated six distinct goals, or justifications, for the ICTY: to provide
justice for the victims, to establish accountability for individual perpetrators,
to deter continued atrocities in the Balkans, to facilitate the restoration of
peace, to serve as a deterrent elsewhere around the globe, and to develop an
historical record of the conflict\textsuperscript{224}. In this way we see a preoccupation not only
with addressing the crimes themselves, but also with influencing the way
these crimes and their alleged perpetrators would be remembered.

At the ICTY, the concepts of law and history are inextricably linked
and purposefully so. While administering justice through the application of
legal processes, the Tribunal is conscious that the record it establishes and
makes public will form the basis for the future understanding of this conflict
and the actions of the world in it’s aftermath. “This publicly presented
evidence”, stated Justice Richard Goldstone in \textit{Prosecutor v. Nikolić}, will
constitute a permanent public record for all time of the horrendous war
crimes that have been committed in the former Yugoslavia”\textsuperscript{225}.

\textsuperscript{223} Williams, P.R and Scharf, M.P. \textit{Peace with Justice? War Crimes and Accountability in the
Former Yugoslavia}, p.121
\textsuperscript{224} Scharf, M.P and Schabas, W.A. \textit{Slobodan Milosevic on Trial}, p.52
\textsuperscript{225} Thieroff, M. and Amley, E.A. “Proceeding to Justice and Accountability in the Balkans: The
International Criminal Tribunal for the Former Yugoslavia and Rule 61”, \textit{Yale Journal of
The development of an accurate historical record is of particular importance in the aftermath of the Balkan conflict, a confrontation in which distortion of the truth had been an essential ingredient in the ethnic violence perpetrated\textsuperscript{226}. It was through an inflammation of historical tensions and dormant rivalries that the nationalist governments of the newly independent states of the Former Yugoslavia had fostered active support bases. As noted by Mark Ierace, “there were resentments from injustices that were never addressed from World War Two that worked actively beneath the surface to lead to an eruption of violence this time around”\textsuperscript{227}. In this same vein, it is the historical record of this conflict that will have a direct impact on the prospects of reconciliation and nation-building for the states of the Former Yugoslavia.

In post-conflict societies, different versions of the traumatic events often compete with one another\textsuperscript{228}. The function of truth finding that is associated with legal proceedings helps to create an official narrative of the conflict more broadly as well as reconstruct the events of the specific crime being investigated, a “properly tested historical record of those horrors”\textsuperscript{229}.

It is the ICTY’s position as an ad hoc tribunal established by the UN rather than the victors of the conflict that enhances its credibility as an unprejudiced source of information; although it must be noted that the narrative produced by the ICTY is by no means one unquestionably accepted by all ethnic groups. Different ethno-national communities are more likely to

\textsuperscript{226} Williams, P.R and Scharf, M.P. Peace with Justice? War Crimes and Accountability in the Former Yugoslavia, p.100
\textsuperscript{227} Ierace SC, M. 12 August 2013, Public Defenders Chambers, Sydney
\textsuperscript{228} Van den Wyngaert, C. “International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Courts Be Avoided?”, p.64
\textsuperscript{229} Ierace SC, M. 12 August 2013
view the truths found by the international tribunal “selectively and on the basis of their particular definition of war, defenders and perpetrators.”\textsuperscript{230}

However, it is hoped that there will be an establishment of largely uncontestable facts about the conflict, facts that will be solidified in the court of law and therefore unable to be manipulated or twisted in times to come. In this way, the historical record as produced by the ICTY has hopes for the maintenance of peace in the future. As Antonio Cassese has noted, “justice is an indispensable ingredient of the process of national reconciliation.”\textsuperscript{231} It is through learning and understanding the mistakes of the past that society has the best chance of preventing their repetition.

**History and the ICTY: An Imperfect Relationship**

The fields of law and history have an increasingly symbiotic yet imperfect relationship. A thorough examination of the institutional failures embedded within the international criminal tribunal system is essential, as the historical record written as a result of any legal proceedings will be inherently impacted by the context and limitations of the courtroom. While it must be noted that the ICTY’s contribution to historical inquiry into the Balkan conflict will be “one of many, the interpretation of events found through evidentiary proof will be of particular weight and importance.”\textsuperscript{232} It is thus of

\textsuperscript{230} Wardak, A.W., Corin, A. and Wilson, R.A. “Surveying History at the International Criminal Tribunal for the Former Yugoslavia”, Human Rights Institute of the University of Connecticut (Research Paper: January 2010), p.47

\textsuperscript{231} Caine, P. “The International Criminal Tribunal for the former Yugoslavia: planners and instigators or foot soldiers?” International Journal of Police Science and Management (Vol.11 No.3: September 2008), p.346

\textsuperscript{232} Wardak, A.W., Corin, A. and Wilson, R.A. “Surveying History at the International Criminal Tribunal for the Former Yugoslavia”, p.23
the utmost importance to study the shortcomings of the ICTY system in terms of procedural fairness, not only for its legacy but the accuracy of the historical record it is contributing to. Without due process, there is doubt cast on the authority and integrity of the legal proceedings and by extension on the record that these proceedings create\textsuperscript{233}.

The ICTY serves as an effective example of the limitations of the courtroom process as the Tribunal consciously seeks to contribute to the historical record of the Balkan conflict. The mechanisms adopted by the ICTY are adequately representative of the framework more broadly applied to international criminal tribunals and thus provide useful examples to be studied. While some examples engaged with apply with specificity to the ICTY, for example the controversial implementation of Rule 61, there are others that can be applied more broadly to international criminal tribunals in general.

International criminal tribunals are increasingly called upon as the legal mechanism of choice to end conflicts and rehabilitate post-conflict societies. For this reason, the facts established through the trial process are relied upon to solidify the differing opinions regarding the traumatic events. Particularly as civil unrest and ethnic conflict within sovereign borders becomes more prevalent, the fact-finding mission of the tribunal framework plays an increasingly important role in regards to clarification of the truth.

As the ICTY enters its final phases of work and begins the legal proceedings against those last accused perpetrators, attention will turn to the

\textsuperscript{233} Wardak, A.W., Corin, A. and Wilson, R.A. “Surveying History at the International Criminal Tribunal for the Former Yugoslavia”, p.23
legacy this Institution will leave, in terms of the crimes it has examined and the historical record it has helped produce. Trial Chamber judgements have provided modern day academia with what might be called “forensic history”, an account derived from witness testimony and documentary evidence submitted in each case\textsuperscript{234}. Yet, the failures of a variety of institutional mechanisms decrease the validity and reliability of this forensic history.

In January-February 1994, the ICTY Judges institutionalised a set of Rules and Procedures of Evidence (RPE) that aimed to regulate court proceedings\textsuperscript{235}. Judges have continuously adapted the Rules and Procedures to meet the specific requirements of international trials and it is this body of procedural and evidentiary rules that will be one of the main contributions of the ICTY to international criminal law; while simultaneously attracting the harshest criticism\textsuperscript{236}.

There are elements of the RPE that negatively impact the validity of the historical record created as a result of the ICTY’s prosecutorial proceedings. As noted by interviewee Chrissa Loukas, the legacy of the ICTY will be judged on the basis of fairness: “The tribunal will not be judged on the number of convictions which it enters but the fairness of the trials”\textsuperscript{237}. In the absence of procedural fairness, the validity of the evidence found at trial can

\begin{footnotesize}
\begin{itemize}
  \item Donia, R. “Encountering the Past: History at the Yugoslav War Crimes Tribunal”, \textit{The Journal of the International Institute} (Vol.11 No.2-3: Winter 2004), p.4
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  \item Loukas, C. and Robb, L. “Cross examination and international criminal law”, \textit{Bar News: The Journal of the NSW Bar Association} (Summer 2004/2005), p.39
\end{itemize}
\end{footnotesize}
still be questioned and thus the historical record created as a result of it may be discredited.

a) Genocide and *dolus specialis*

The role of historical context in the legal domain has changed and evolved over time, and has gradually become of more importance. In the specific setting of an international criminal tribunal, the impact of historical context has drastically increased with the establishment of genocide as a crime. It is apparent that prosecutors are “more likely to turn to historical evidence” in order to illustrate the mental state of the accused.\(^{238}\)

For genocidal intent or *dolus specialis* to be established and therefore for the alleged perpetrator to be found guilty of genocide, premeditation and a conscious desire to commit genocide must be proven. However, proof of intent to commit genocide does not necessarily require a confession of motive, as a court may “infer proof of the intent to destroy a group, in whole or in part, from a pattern of actions to that effect”.\(^{239}\) As delineated by the ICTY Appeals Chamber in the case of *Prosecutor vs Jelisić* proof of specific intent “may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as general context, the perpetration of other culpable acts, the systematic targeting of victims or the repetition of destructive or discriminatory acts”.\(^{240}\)

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\(^{238}\) Wardak, A.W., Corin, A. and Wilson, R.A. “Surveying History at the International Criminal Tribunal for the Former Yugoslavia”, p.23

\(^{239}\) Kiernan, B. *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur*, p.19

\(^{240}\) *Prosecutor vs Jelisić* quoted in Kiernan, B. *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur*, p.19
intent, the Prosecution will evaluate the historical context and attempt to establish the necessary intent through the presentation of contextual evidence.

Historical contextualization has assumed greater prominence in trials to determine individual criminal responsibility because it “responds to the requirements of a new class of legal concepts… that demand proof of discriminatory intent to harm a group”\(^{241}\). Richard Wilson sees historical context as central to the Milošević trial, where the high threshold of proving special intent to commit genocide meant that Prosecutors were forced to draw on historical evidence. Dr Audrey Helfant Budding was called forward as the historical expert for the Prosecution and a majority of her testimony was in furtherance of the argument that the Serbian genocide was “the culmination of a century-old ideological program”\(^{242}\). The Prosecution drew on historical evidence in an attempt to prove the necessary mental elements of the crime of genocide.

While historical evidence can be a useful tool for the Prosecution to effectively prove the crimes put forward in the indictment against an individual perpetrator, the converse lack of necessary evidence can prevent the securing of a guilty verdict. In the case of Duško Tadić, the crimes he was accused of committing were largely supported by eyewitness testimony and positive identification at the scene. However, for those crimes to be considered genocidal, the court had to be convinced that these individual

\(^{241}\) Wilson, R.A. *Writing History in International Criminal Trials*, p.21
\(^{242}\) Wilson, R.A. *Writing History in International Criminal Trials*, p.100
crimes were part of a wider program or policy of persecution\textsuperscript{243}. When the Prosecution failed to satisfy the Judge’s requirements to establish a wider program and the necessary criminal intent, Tadić’s crimes were downgraded from genocide to the lesser charge of grave breaches of the Geneva Conventions and violations of the laws and customs of war\textsuperscript{244}.

To extrapolate further on the idea of the importance of historical context, the very jurisdiction of the Tribunal over a majority of the accused crimes rests on a question of historical interpretation\textsuperscript{245}. The role of historical context was crucial to the indictment and prosecution of Slobodan Milošević. Without establishing that the declaration of independence of the states of Croatia and Bosnia and Herzegovina from Yugoslavia occurred in June of 1991 and February of 1992 respectively, there would have been no international crime for Milošević to answer to.

b) Rule 61

The “Procedure in Case of Failure to Execute a Warrant”, adopted into the Rules of Procedure and Evidence as Rule 61, provides a means by which the judge can confirm the indictment of a defendant and submit it to the Trial Chamber. The existence of Rule 61 allows for information and testimony untested in a court of law to be freely entered on to the public record. Once the indictment is submitted, the Prosecutor may introduce evidence and call

\textsuperscript{243} Wilson, R.A. “Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia”, p.926
\textsuperscript{244} Scharf, M.P. Balkan Justice, p.101
\textsuperscript{245} Wilson, R.A. Writing History in International Criminal Trials, p.73
and examine witnesses\textsuperscript{246}. If the Judges see that there are “reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment” then the Prosecutor will read the indictment aloud in open court\textsuperscript{247}. In addition, the Trial Chamber shall also issue an international arrest warrant for the accused.

Rule 61 was devised in order to ensure that the Tribunal was not rendered ineffective if it was unable to gain custody of the accused, a very real issue in 1994 when the conflict was ongoing and the cooperation of all States was not assured\textsuperscript{248}. The adoption of Rule 61 gave the Tribunal the power to provide a hearing in an open court of the evidence that was submitted to the judge when the indictment was confirmed. This hearing process was conceived as an alternative to the trial \textit{in absentia} and as a means of moving forward with the indictment in the absence of the requisite state cooperation to obtain custody of the accused\textsuperscript{249}. However, despite these positive intentions, the reality of Rule 61 has resulted in “a legal aberration and a substitute that satisfies no one”\textsuperscript{250}. The legal and political imperatives of the Tribunal are not always coincidental and therefore a balance must be reached between the two\textsuperscript{251}: Rule 61 hearings are an example of political imperatives taking precedence over legal due process.


\textsuperscript{248} Kerr, R. \textit{The International Criminal Tribunal for the Former Yugoslavia}, p.100

\textsuperscript{249} Kerr, R. \textit{The International Criminal Tribunal for the Former Yugoslavia}, p.101

\textsuperscript{250} Kerr, R. \textit{The International Criminal Tribunal for the Former Yugoslavia}, p.101

\textsuperscript{251} Kerr, R. \textit{The International Criminal Tribunal for the Former Yugoslavia}, p.94
Rule 61 hearings have been roundly criticized by lawyer Geoffrey Robertson as an outright reversal of the presumption of innocence promised by Article 21(3) of the ICTY Statute and by historian Aleksandra Stankovic as a blatant dismissal of the right of the accused to be present during his trial as affirmed by the International Covenant on Civil and Political Rights\textsuperscript{252}. As the Rule 61 proceedings happen in an open court, the indicted suspect will be “publicly prejudged prior to his trial, by three judges of the court and by the media”\textsuperscript{253}. While the Tribunal maintains that Rule 61 is not a trial \textit{in absentia} because there is “no finding of guilt”, Robertson criticizes the hearings as overlooking the fact that “there is a determination of likely guilt by way of a finding of reasonable grounds for judicial belief that the accused has committed a crime for which he has been indicted”\textsuperscript{254}.

By putting the prosecution’s evidence, unchallenged, in to the public domain, Rule 61 severely impacts the historical record of the Balkan conflict: “The perpetrator’s actions are publicized for eternity”\textsuperscript{255}. The most infamous Rule 61 hearing was that of \textit{Prosecutor v. Karadžić and Mladić} which began on June 27 1996, a case in which the two defendants were accused of crimes against humanity and genocide. In the eyes of Geoffrey Robertson, this hearing “lacked even the appearance of justice”\textsuperscript{256}. No argument from the defence was put forward and the court allowed no cross-examination of victim or witness testimony. The lawyers of the accused were ordered to sit in

\begin{thebibliography}{99}
\bibitem{253} Robertson, G. \textit{Crimes Against Humanity}, p.283
\bibitem{254} Robertson, G. \textit{Crimes Against Humanity}, p.283
\bibitem{255} Quintal, A. “Rule 61: The Voice of the Victims Screams Out for Justice”, p.750
\bibitem{256} Robertson, G. \textit{Crimes Against Humanity}, p.284
\end{thebibliography}
the public gallery while “prejudicial evidence” against their clients was read on to the public record “without challenge” and a ruling of presumptive guilt for crimes against humanity was delivered.

At the conclusion of a Rule 61 hearing, the indictment, and the verdict of presumptive guilt, is broadcast around the world “with the intent of creating greater urgency for the apprehension of the accused.” While being specifically intended to deal with uncooperative States the information swiftly enters the public domain. As Chrissa Loukas notes, the outcome of a Rule 61 hearing is the danger of “placing something on the public record that has not been tested.” And yet, this is not merely an unavoidable by-product of media attention but one of the aims of Rule 61 proceedings.

As noted by Judge Rustam Sidhwa, the ICTY is presenting these hearings as “the next effective procedure to inform the world of the terrible crimes with which the accused is charged and the evidence against the accused that would support his conviction at trial.” In the same vein, Justice Goldstone has praised the adoption of Rule 61. “A Rule 61 hearing will constitute a permanent judicial record for all time,” Goldstone has stated. “That public record will assist in attributing guilt to individuals.” Yet to label the information retained in a Rule 61 hearing as a “record of the crimes” is to give uncontested allegations undue status. This record is created without input from the defence, and thus remains inherently biased.

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257 Stankovic, A. “Guilty until Proven Guilty: Rule 61 of the ICTY”, p.97
258 Loukas SC, C. 13 September 2013
259 Judge Sidhwa quoted in Stankovic, A. “Guilty until Proven Guilty: Rule 61 of the ICTY”, p.113
260 Justice Goldstone quoted in Stankovic, A. “Guilty until Proven Guilty: Rule 61 of the ICTY”, p.113
c) Unreliable Evidence: Hearsay and Hidden Identities

Hearsay evidence is deemed of no value to countries who adopt the common law system, as the demeanor of the originator of a piece of information cannot be tested, nor can the information be taken under oath or subject to cross-examination\(^\text{261}\). In contrast, international criminal tribunals, including the ICTY, operate without an explicit rule against the admissibility of hearsay evidence\(^\text{262}\): Rule 89 of the RPE allows a Trial Chamber to admit “any relevant evidence, including hearsay, which it deems to have probative value”\(^\text{263}\).

A fundamental right or guarantee of the international legal system is that of cross-examination of witness testimony. Loukas maintains that “if you want something to be correct in law and also correct historically, you have to be able to test the allegations”\(^\text{264}\). However, the adaptation of Rule 92bis interferes with this basic safeguard. Its application allows for the Chamber to “admit witness statements and transcripts from previous trials while denying, in certain circumstances, the opposing party’s right to cross-examine”\(^\text{265}\). The opportunity to cross-examine the information will be denied if the court is satisfied that the witness was subject to cross-examination at an earlier stage and that the document was prepared for use in legal proceedings. Yet, the nature of the information portrayed in a legal document does not make it

\(^{262}\) Wardak, A.W., Corin, A. and Wilson, R.A. “Surveying History at the International Criminal Tribunal for the Former Yugoslavia”, p.7
\(^{263}\) Loukas, C. and Robb, L. “Cross examination and international criminal law”, p.39
\(^{264}\) Loukas SC, C. 13 September 2013
\(^{265}\) Loukas, C. and Robb, L. “Cross examination and international criminal law”, p.39
infallible. As Loukas noted when interviewed, “just because something was said in a courtroom doesn’t mean it is the truth”\textsuperscript{266}.

As noted by human rights academic Eric Stover, “witnesses are the lifeblood of the ICTY trials” because the political and military commanders in the former Yugoslavia did not keep meticulous records of their deeds\textsuperscript{267}. Thus, victim and eyewitness testimonies form the ballast of most of the prosecution’s cases and it is this same testimony that has been the basis of much debate surrounding the rules and procedures of the ICTY. While it is the responsibility of the Tribunal to protect the safety and wellbeing of witnesses who testify in the court, these protective measures “must always be balanced against the rights of the accused to a fair and public trial”\textsuperscript{268}. However, certain elements of the RPE strongly compromise these fundamental rights.

Rule 75 of the RPE allows the court to order the expunging of names from the tribunal record; the nondisclosure to the public of any records identifying the witness; testimony via voice or image altering devices or closed circuit television; and/or the assignment of a pseudonym where deemed applicable for the safeguarding of the witness\textsuperscript{269}. In addition, Rule 79 of the RPE allows for the Tribunal to call for a closed session in which the court may part the press and public from the proceedings\textsuperscript{270}. Finally, Rule 96

\textsuperscript{266} Loukas SC, C. 13 September 2013
\textsuperscript{268} Stover, E. The Witnesses, p.47
\textsuperscript{269} United Nations, “International Criminal Tribunal for the former Yugoslavia: Rules of Procedure and Evidence”, adopted on 11 February 1994 (IT/32), Rule 75
\textsuperscript{270} United Nations, “International Criminal Tribunal for the former Yugoslavia: Rules of Procedure and Evidence”, adopted on 11 February 1994 (IT/32), Rule 79
governs the testimony of victims of sexual violence, requiring “no corroboration of the victim’s testimony”; meaning that an accused perpetrator can be convicted on the strength of a single eyewitness or victim account271.

While the need for adequate assurances of safety are obviously required, these protective measures negatively impact the ability of the accused’s counsel to mount an effective counter-argument against the indictment. The basic principle of criminal law is that every person accused of a crime has a right to know who is appearing as a witness and to cross-examine them272. The decision to allow anonymous witnesses has been criticized by Australian jurist Sir Ninian Stephen. “If the defence is unaware of the identity of the person it seeks to question”, Stephen maintains, “it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable”273. In a criminal justice system that relies so heavily on the testimony of witnesses as a basis for prosecutorial proceedings the validity of these recollections must be corroborated; yet the system consistently prevents this from occurring effectively.

The Tadić case represents the first time that the issue of the protection of victims and witnesses was addressed in an international court274. The Decision of August 10 1995, set down guidelines and procedural safeguards to be applied for the future, granting that in “exceptional circumstances” anonymity could be granted for witnesses and victims. It was, however, in this same case that the issues of witness anonymity played a crucial role.

272 Laughland, J. Travesty, p.101
273 Ninan Stephen quoted in Laughland, J. Travesty, p.103
274 Kerr, R. The International Criminal Tribunal for the Former Yugoslavia, p.106
Geoffrey Robertson sees the granting of witness anonymity as an example of the Tribunal allowing “it’s natural sympathy for victims to override its fundamental duty of fairness to the defendant”\textsuperscript{275}. Robertson explores the perjury of Witness L in the Tadić case as an example of the dangers of allowing witnesses to conceal their identities before the Defence, hoping it will “serve as a warning for the future of international courts”\textsuperscript{276}.

Dragan Opacic’s testimony formed the basis of the prosecution’s accusations that Tadić had executed 30 male prisoners, raped 12 female detainees at a prison camp and killed Opacic’s own father. Having been allowed to testify in secret for three days, Opacic was eventually exposed as a fraud when the cross-examiner called a man to the courtroom who turned out to be the ‘murdered’ father of the witness. If it had not been for this turn of events, there is every likelihood that Tadić would have been convicted on the strength of this false testimony. Chrissa Loukas points to the Tadić case as an example of the fallibility of the court system in terms of garnering the truth: “If the defence hadn’t been able to uncover what they had needed to in order to cross-examine, that would have been the historical record. That [the Tadić case] is a prime example of why you can’t necessarily accept all testimony that is proffered before the ICTY as the direct evidence of truth”\textsuperscript{277}.

\textsuperscript{275} Robertson, G. \textit{Crimes Against Humanity}, p.290
\textsuperscript{276} Robertson, G. \textit{Crimes Against Humanity}, p.292
\textsuperscript{277} Loukas SC, C. 13 September 2013
d) Against the Defence?

The allowance of witness anonymity by the Trial Chamber is one of a variety of criticisms leveled at the ICTY in terms of adequately protecting the rights of the accused and maintaining the ability of the Defence Counsel to mount an adequate counter-argument. The main challenge the Tribunal has faced in recent years is to devise mechanisms that expedite its proceedings without limiting the rights of the accused. For a trial to be considered fair, and uphold the standards imposed by the International Covenant on Civil and Political Rights, the rights of the accused must be adhered to. As it stands, there are many who continue to criticize the Tribunal for allowing the rights of the accused to be squandered, and see the RPE as continuing to “systematically put defendants at a distinct disadvantage”.

The Tribunal’s main organisational problem stems from Article 11(c) of the Statute, which provides that its Registry shall serve both the judges and the Prosecutor. Yet, fairness to the defence demands a “complete separation of the prosecutorial from the judicial function”. The only judicial review to which the Prosecutor is subject is provided by Article 19(1) of the ICTY Statute which “demands that a judge reviews every indictment” and will confirm it only if satisfied that “a prima facie case” has been established.

Chrissa Loukas is highly critical of the ICTY for its inherent bias in favour of the Prosecution, so much so that she stood down from her position.

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278 Robinson, P. “The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia”, p.6
279 Laughland, J. Travesty, p.90
280 Robertson, G. Crimes Against Humanity, p.278
281 Robertson, G. Crimes Against Humanity, p.278
282 Caine, P. “The International Criminal Tribunal for the former Yugoslavia: planners and instigators or foot soldiers?”, p.353; ICTY Statute Article 19(1)
at the Tribunal as co-counsel in the case of Momčilo Krajišnik on the grounds of “inadequate time and opportunity afforded by the Trial Chamber” to prepare and present his defence\textsuperscript{283}. When interviewed, Loukas reiterated that “if you are not providing the defence with the resources it needs to properly investigate and test allegations, then that is a real issue for the quality of justice”\textsuperscript{284}. While not being enshrined in the ICTY Statute as a “pillar” of the Tribunal, this external position “limits the Defense’s ability to actively and effectively contribute to the administration of justice”\textsuperscript{285} and directly impacts the ability of the counselors to thoroughly investigate the indictment.

In the “Proposal for an Amendment to the Statute of the ICTY” as put forward by the Association of Defence Counsel Appearing Before the International Tribunal, the authors argue that the tribunal “can only legitimately claim to be promoting international human rights if they also safeguard the rights of the alleged violators of those human rights”\textsuperscript{286}. It is only through a “healthy defence function” that the legitimacy and fairness of all legal proceedings at the ICTY can be guaranteed, as the accused is entitled to ‘equality of arms’ between the Prosecution and Defence\textsuperscript{287}. The Proposal cites inequality with regard to time for preparation, finances, human

\textsuperscript{283} Vine, C. “Due Process?”, \textit{Counsel} (October 2005), p.2
\textsuperscript{284} Loukas SC, C. 13 September 2013
\textsuperscript{285} Association of Defence Counsel Appearing Before the International Tribunal. “Proposal for an amendment to the Statute of the International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”, p.3
\textsuperscript{286} Association of Defence Counsel Appearing Before the International Tribunal. “Proposal for an amendment to the Statute of the International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”, p.2
\textsuperscript{287} Association of Defence Counsel Appearing Before the International Tribunal. “Proposal for an amendment to the Statute of the International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”, p.3
resources, translation services and linguistic support, as well as administrative support^{288}.

**Conclusion**

As a mechanism of post-conflict resolution, the ICTY seeks to voice the stories of the victims, prove individual criminal responsibility for crimes against international law and create an accurate historical record to facilitate reconciliation through a real understanding of the past. In this way, the ICTY is exemplary of attempting to undertake and achieve a combination of the two societal responses to mass violence proposed by Martha Minow. Unfortunately, despite the honorable purported aim of fact-finding, institutional and political failings in the rules and procedures of the ICTY hinder its truth seeking efforts.

The legacy of the ICTY will leave an impression on the international criminal tribunal’s that come to fruition in the future. As one of the first international criminal tribunals to actively combine the responses of justice and truth, the framework established by the ICTY is of the utmost importance for future application. It is thus crucial that the failings of the tribunal are critically analysed to facilitate clarification and correction.

^{288} Association of Defence Counsel Appearing Before the International Tribunal. “Proposal for an amendment to the Statute of the International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”, p.6


**Conclusion**

The human rights movement divides the process of establishing accountability into two phases\(^{289}\). The first is the justice phase, where those with highest responsibility for the most egregious crimes should be prosecuted and punished. The second is the truth phase, in which all that may be established about the crimes is disclosed. In the long shadow of death, mutilation, torture and mass deportation, only a process to secure justice seems appropriate as a means to secure accountability\(^{290}\). The prosecution of war criminals in a tribunal established by the UN, as seen in the ICTY, is particularly significant as it demonstrates a worldwide unity in condemning and punishing those criminals. Through this “universal condemnation” we see a “reaffirmation not only of the laws that prohibit the crimes that were committed but also of the idea of law”\(^{291}\).

In the hopes of building a positive peace, post-conflict societies must find a way to deal with the devastation of the past. While the IMT adopted a retributive mechanism as it’s primary focus, the ICTY can be seen as having adopted a two-prong approach of punishment and reconciliation through truth-seeking. This changing approach reflects not only broader trends in political and academic thinking in regards to intervention, state sovereignty, human rights and international law as have been illustrated, but also a


\(^{290}\) Neier, A. “Rethinking Truth, Justice and Guilt after Bosnia and Rwanda”, p.43

\(^{291}\) Neier, A. “Rethinking Truth, Justice and Guilt after Bosnia and Rwanda”, p.49
definitive change in the nature of peacebuilding. Fact-finding, truth seeking
and historicization of past traumas are now seen as valid elements of building
a positive peace.

The mechanism of an international criminal tribunal converts the
individual or localized impulse for revenge into a state managed process of
justice and fact finding. In addition, beyond the state we see
nongovernmental organisations and collections of nations attempting to
create international institutions as “living memorials to atrocities and vital
vows for change”\textsuperscript{292}. Long gone are the days when mass violence, state
sponsored killing and ethnic cleansing could pass unnoticed on a global scale.
The interconnectedness of today’s world demands knowledge and
accountability.

Throughout this thesis there has been a focus not only on the horrors of
the atrocities in World War Two Europe and late 20\textsuperscript{th} century Balkans but on
the choices made in regards to post-conflict resolution through the adoption
of the mechanism of an international criminal tribunal. With this focus on the
history of responses to atrocity rather than the atrocity alone, this thesis
attempts to draw attention to the continuing pursuit of action that deals with
– and hopes to eventually prevent – mass state-sponsored inhumanity.

While some scholars and academics of the international relations field
see the mechanisms of international criminal tribunals and other
interventionary methods as a means of deterrence, this is not the argument of
this thesis. These chapters encapsulate the idea that out of the ashes of

\textsuperscript{292} Minow, M. \textit{Between Vengeance and Forgiveness}, p.138
genocide and mass violence, life must carry on. Individual communities, states and the international community must respond to mass atrocity. Those who personally experienced the devastation deserve to be acknowledged; bystanders to the injustices must face their own choices about their own action or inaction; perpetrators of the horrendous violence deserve to be brought to account; and an historical record of incontestable facts must be established to prevent denial and hopefully serve as a lesson for the future.

The two purposes that animate societal responses to collective violence are both a product of broader political and academic thinking, as well as reactions to the intimate details of the conflict itself. The IMT and the ICTY have been analysed jointly for their adoption of the modes of justice and truth, for their triumphs and their failures, and serve as frameworks to be adopted and adapted by criminal tribunals for the future.
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