Facultad de Ciencias Humanas y Sociales
Grado en Relaciones Internacionales

Trabajo Fin de Grado

The Legacy of The ICTY:

An Evaluation of its Successes, Failures, and Controversies

Estudiante: Nadja Mijatovic Milicevic

Director: Jacqueline Hellman Moreno

Madrid, junio 2022

The Legacy of the ICTY: An evaluation of its successes, failures and controversies

Summary:

Genocide, ethnic cleansing, rape, and torture. These are only some of the atrocities that were committed during the conflict that led to the dissolution of the country we formerly knew as Yugoslavia. As a response to atrocities committed in Croatia, Bosnia-Herzegovina and Kosovo, the international community agreed on the creation of a court of law, known as the International Criminal Tribunal for the Former Yugoslavia (ICTY) to specifically trial and punish the international crimes that took place in the mentioned countries. During its 24-year mandate, after its creation in 1993, there has been a lot of praise, criticism and controversy regarding the tribunal's purpose and overall success. With this in mind, the objective is to evaluate the extent of the ICTY's success, shine a light on its failures and explore its controversies with special focus on three main areas: its internal competence and practices as an International Criminal Tribunal, its capacity to positively represent and develop international criminal law and how it has contributed to the prosecution of future war crimes and crimes against humanity, and finally its ability to bring justice and reconciliation in the Balkan region.

Keywords: Yugoslavia, crimes against humanity, international law, ICTY, justice, trials

LIST OF ABBREVIATIONS

B&H	Bosnia and Herzegovina
ICC	International Criminal Courts
ICL	International Criminal Law
ICTY	International Criminal Tribunal for the Former Yugoslavia
JCE	Joint Criminal Enterprise
JNA	Yugolsav People's Army
NATO	The North Atlantic Treaty Organization
UN	United Nations
UNSC	United Nations Security Council
WWII	World War II

Tabla de contenido

INTRODUCTION

The history of international criminal tribunals can be highlighted under two main decades. On one hand, the end of the Second World War led to the establishment of the Nuremberg and Tokyo War Crimes Trials -in 1945- to hold Axis leaders and high-ranking officials accountable for the crimes committed during the war. They also established a new precedent for judging war crimes and crimes against humanity and brought justice under international law (Burton, 2020). On the other, the 1990s witnessed further advancements in international criminal and humanitarian law with the creation of the International Criminal Tribunal for Yugoslavia (ICTY), following a series of civil wars that spread throughout the former Yugoslavia (Barria & Roper, 2006). While the origins of tribunals and courts, at an international level, is a short one, they have become fundamental components in codifying and applying international criminal law (ICL) and, also, in ensuring the protection of Human Rights and dignity in times of war. As with every new development in the international sphere, international courts and tribunals, have had their fair share of failures and shortcomings; however, this does not mean they have failed in their overall functions (Carter, 2016). In fact, each tribunal serves as a patent to create a better one in the future. We see this, for instance, with the International Tribunal for Rwanda (ICTR), whose early years, in comparison to the ICTY, were less belligerent (Danner, 2006). The ultimate objective of tribunals such as the ones in Nuremberg, Tokyo, or The Hague, is to dimmish the casualties committed in future wars, bring justice to those who have already been harmed, and aid in the post-war reconciliation process.

A historical overview of the Yugoslav Wars

Before we establish the historical context, it is important to keep in mind that, during the Yugoslav wars, much of the fighting happened simultaneously within each Republic, and some of the conflicts may overlap. For that reason, the overview will focus on each territory individually, rather than following a specific chronological order.

Up until the 1990s, the Socialist Republic of Yugoslavia enjoyed a fair share of success and international recognition. Additionally, it became known for its diversity and geographical prosperity in the Balkan region. It's large mix of ethnic and religious backgrounds was due to the peaceful coexistence of the 6 Republics thar made up the country: Bosnia and Herzegovina

– hereafter referred as B&H-, Croatia, Macedonia, Montenegro, Serbia and Slovenia- (ICTY , n.d.). This peaceful coexistence, however, would soon come to an end following three main events: the death of President Josip Broz Tito in 1980, who, prior to his death, successfully managed and prevented any possible tensions between the different groups in the country; the collapse of the Soviet Union in 1991; and finally, the spread of nationalism across Eastern Europe. Additionally, tensions further intensified after the country entered a serious economic and political crisis that weakened the central government and gave rise to a new wave of militant nationalism across the Republics, calling out for more autonomy within their respective territories (BBC , 2016). The first ones to declare independence were Slovenia, followed by Croatia in the summer of 1991, after accusing Serbia – the capital at the time- of disproportionally controlling the Yugoslavian government, military and economy. In the case of Slovenia, the process of independence was fairly quick following a ten-day war that led to their victory and consequent withdrawal of the Serb-led Yugoslav People's Army (JNA) from their territory. However, Croatia's fight for independence was neither short, nor simple. Perhaps the deepest tensions were experience between the Serbs and the Croats who, apart from sharing the same language, had long-standing religious and political differences dating all the way back to the first World War. Within the self-proclaimed Croatian government under Franjo Tudjman, the Serbs became a minority, and in order to protect such group the JNA and Serbia invaded the territory and seized nearly a third of it, expelling the Croats and other non-Serbs in a brutal ethnic cleansing campaign, followed by the shelling and seizing of Dubrovnik and Vukovar -two very old and important cities for the Croats- (ICTY , n.d.).

Fighting continued until 1992 after a UN-led ceasefire between the Serbs and Croats was negotiated; however, the latter were determined to re-assert themselves and their territory, and continued their offensive until 1995, when they managed to push the Serbs back to their territory or to other Serb-held areas (Barria & Roper, 2006). The conflict also spread to B&H, home to a vast mix of Serbs, Croats and Muslims. Similar to the Slovenian and Croatian wars, Serbia and the JNA backed the Bosnian Serbs who resisted the separatist movement and threatened bloodshed if Bosnian Muslims and other non-Serbs broke away (BBC , 2016). Very soon the Bosnian war would supersede the number of casualties and ethnic violence seen so far. By 1993, the Serbs took control of Bosnia's capital, Sarajevo. Eventually, after mass expulsions of civilians, and killings, the international community finally intervened and deployed a UN protection force (UNPROFOR) in order to establish "safe zones" in Sarajevo and Srebrenica. UN efforts failed when more than 7,500 Muslim men and boys were killed by

Serbs in Srebrenica in one of the biggest massacres seen since WWII at the time. Overall, it was estimated that during the Bosnian War more than 200,000 people died and 2 million became internally displaced (Barria & Roper, 2006).

The province of Kosovo was next, resulting in a civil war between Yugoslavia's central government -controlled by Serbia- and ethnic Albanians. Tensions regarding Kosovo's independence trace all the way back to 1989, when Serbian President Slobodan Milosevic ended Kosovo and Vojvodina's autonomy by establishing Serbian rule over both provinces (Barria & Roper, 2006). In 1998, a new group of Albanian nationalists, known as the Kosovo Liberation Army (KLA) rebelled against Serbia, and began to issue anti-Serb attacks. The conflict soon led to bloodshed with massive war crimes being committed by both the KLA and the JNA. After another attempt by the UN too establish peace in 1999, NATO took matters in its own hands and carried out monthly long air strikes in Kosovo and Serbia. Eventually, President Milosevic gave in and withdrew his army from the province. Finally, in the fall of 1991, a couple of months after Slovenia and Croatia, the republic of Macedonia also declared its independence but unlike other neighboring republics, its separation from Yugoslavia was a peaceful proccess (ICTY , n.d.).

Establishment of the ICTY

In 1992, a year after the dissolution of the Socialist Republic of Yugoslavia began, the UN sent a commission of experts to examine the situation regarding the wars. Reports of civilian massacres, rapes, torture, detention camps and other violations of the Geneva conventions and international humanitarian law left the international community no choice but to intervene. Several ceasefires and attempts for peace were negotiated but with limited success, until finally in 1993, the UN Security Council (UNSC), following the commission's recommendations, recognized the necessity of establishing an *ad hoc* International Tribunal to deal with the mass atrocities committed and prevent future ones from happening (ICTY, n.d.). The ICTY was consolidated after the UNSC passed Resolution 827, Sating that its creation was aimed solemnly at *"prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace".* Additionally, the Tribunal's Statute identified 3 main goals: establish justice, prevent further crimes and maintain peace (UNSCOR, 1993, p. 2).

The Tribunal was made up of 3 organs: the Judiciary Organ, which was made up by 11 judges; the Prosecutor's Office; and the Registry. Additionally, the Tribunal's headquarters would reside in The Hague, mainly because the conflict in former Yugoslavia was still ongoing at the time, but also as a way to exercise and practice universal jurisdiction and impartiality in judgements. On another note, the scope of the ICTY's jurisdiction was different in comparison to the Nuremberg and Tokyo Trials in two ways. On one hand, the tribunal was given jurisdiction over crimes against humanity and war crimes but excluded crimes against peace. On the other, the ICTY, unlike Nuremberg and Tokyo, could judge crimes committed within an inter-state or an international contexts (UNGAOR, 1994) . Finally, under Charter VII of the UN Charter, the UNSC also defined the types of offences the ICTY was allowed to prosecute, which included violations of the 1949 Geneva Conventions, crimes against humanity, genocide, and breaches of the laws and customs of war. The latter, due to its broadness, was specifically invoked if the other 3 offences could not be justified (Barria & Roper, 2006). In any case, the present investigation will provide more details of what these crimes entail in the theoretical framework.

PURPOSE AND MOTIVES BEHIND THIS THESIS

The purpose of this paper is to explore the different aspects that made the ICTY's legacy a success or a failure, or even both. There are three main reasons behind the selection of this specific tribunal and topic of discussion, which consist of both, an academic and personal perspective. The personal motives behind the selection of the topic are, on one hand, related to my family and my own heritage, and on the other, linked to my academic experience and studies in the University of Comillas and the degree that I'm majoring in.

My family in itself is of Serbian, Montenegrin, Croatian and Bosnian descent, and many of them were present not only when the wars started, but many were also living in Belgrade by 1999 when NATO orchestrated the air strikes, including my mom, who was pregnant with me at the time. The events that transcended in the former Yugoslavia did not tore the country apart, but unfortunately also created a division between my family, since there is still much resentment between the Serbian, Croatian and Bosnian side. Additionally, each side has a very different and conflictive view opinion of the conflict, and as someone who has neither experienced nor lived in either country -since I've lived my entire life in Spain-, I don't know which side to believe and what to think in relation to the subject. I've always tried to be as impartial as possible, but it's hard when the members of your family tell you one thing and all

other external sources tell you another. Throughout the thesis I will make reference to Serbia's denial of the massacre in Srebrenica. This revisionism is also very much present among some members of my family and this, of course, tares me apart as -from my perspective- it's like the equivalent of denying the holocaust or the Rwandan genocide. Additionally, throughout my 5 years studying this degree, we never touched in depth the subject of the Yugoslav Wars. The closest thing we've seen was in the course of Public International Law in second year, and again this year in Human Rights Law, but never to a full extent. Therefore, when I was assigned International Public Law as the main subject for my thesis, I saw it as a perfect opportunity to widen my knowledge in relation to the topic and found a perfect link through the ICTY. This thesis was not only an academic assignment for me in order to get my diploma, but also a process of discovery about my culture and what my family went through during the 90s, and for that I am grateful.

On another note, there are also a series of very important academic reasons behind my interest in the Tribunal and its work in the former Yugoslavia. Throughout its mandate, its successes in ending impunity by holding high-ranking military and political leaders accountable was groundbreaking, proving that no one is above the law. Additionally, its contributions to the field of international criminal law have led to the creation and development of *ad hoc* tribunals such as the International Criminal Tribunal for Rwanda (ICTY), The Special Court of Sierra Leone, or the Khmer Rouge Tribunal. Furthermore, its archives are now officially considered sources of history in itself with thousands of recordings and documentations of the ongoings of the conflict that will permanently remain for the public eye; also, for those who, like myself, wanted to know more about the conflict and what really happened. These documents include countless and striking testimonies of surviving witnesses and victims who travelled all the way to The Hague to tell their story (Forum for Living History, 2003). Yet, despite these successes, the Tribunal is also highly criticised and many still remain skeptical of its accomplishments. Perhaps the biggest criticisms the ICTY has received to date, was regarding its lack of impartiality in its court proceedings. Nonetheless, it was interesting to see the extent to which these criticisms stretched and whether it reached beyond its accusations of anti-Serbian bias, which some members of my family also express.

Finally, after its finalization in 2017, there has been very little studies and follow-up information regarding the Tribunal and the current situation in the region, which is also why most of my sources don't go beyond that year either. Additionally, there is still very little academic research and studies surrounding the territories that once made up the Socialist Republic of Yugoslavia, which is why it still remains a very unexplored territory and, in a way,

a challenge. Perhaps I could even make a contribution, no matter how little it is, in strengthening the link between the field of international law and the former Yugoslavia.

OBJECTIVES, RESEARCH QUESTIONS AND HYPOTHESIS

The structure of the thesis is divided as follows: first of all, a series of personal and academic motives behind the selection of the topic will be presented followed by the main objectives and questions that this work is attempted to answer as it develops. The work will then establish the theoretical framework that will exibit the main theoretical bases to guide the analysys. The main body of the analysis will consist of evaluating the performance of the ICTY during its mandate. In order to do so a series of reports, essays, and cases from the tribunal itself will be studied and the most relevant elements will then be extracted and analyzed around the main research question. Finally, based on the analysis, several conclusions will be drawn in order to establish the extent of the ICTY's success or failure, followed by a series of recommendations for future studies and research on the matter.

We now move onto establishing the primary objective presented in this thesis, which will focus on the legacy the ICTY left behind, encompassing its successes, its failures and its main controversies in order to determine the extent through which it can be considered a good judicial model for future International Criminal Courts and Tribunals. Because of the broadness of the research topic, this thesis is divided in threefold in order to narrow the analytical scope: the first part will aim to analyze the ICTY's performance as an international criminal tribunal with a specific focus on its ability to interpret and use specific judicial functions in an international context and understanding. Next, it will explore and examine its developments, if any, in the field of ICL; and, finally, it will consider whether or not it has contributed to bringing justice and reconciliation to the region. It is important to highlight that each section will carry its own analysis of successes and failures and the conclusions drawn for each part will sum up the entirety of the ICTY legacy.

In order to guide the course of the analysis, the following questions will be pondered, and answered:

- What were the main issues the ICTY's encountered while performing common judicial practices? The term "judicial practices" refers to elements such as the ability to provide fair trials, the quality of judges, guilty pleas and plea bargains, acquittals etc.

- What set the ICTY apart from its predecessors as an international criminal tribunal and in what ways was it considered the future of the ICL?
- How was Serbian revisionism an obstacle for the success of the Tribunal?
- Are *ad hoc* tribunals expected and capable of bringing justice and reconciliation to its full extent?

Finally, because the analytical body is divided into 3 parts, each section will have its own hypothesis since the legacy of the ICTY may be positive or negative depending on whats being focused on. Nonetheless, all three hypotheses tie up to the main research topic, which is analyzing the Tribunals legacy.

H_1: The ICTY's legacy was controversial in its judicial practices and court proceedings
H_2: The ICTY's legacy was successful in the field of ICL
H_3: The ICTY failed to effectively bring justice and reconciliation to the former Yugoslavia

METHODOLOGY

As previously said, the bulk of the analysis is divided in 3 sections. The reason behind this structure helps the reader identify the ways in which the ICTY's legacy might've been more positive in certain aspects as opposed to others. Additionally, the nature of the research topic does not follow a linear structure and it will, therefore, involve a more subjective and varied interpretation based on the elements argued. Thus, the methodology in question will follow a very inductive approach whereby specific observations will be made within each of the 3 sections that divide the analysis and general conclusions will be made in accordance to the main findings of each section. The work presented in this paper has used a variety of reports and official documents –resolutions, Statutes, and trial cases- form the Tribunal's archives and official website –icty.org-. On the other hand, it also relied on a variety of academic studies, essays, articles from journals, books and papers, with some of its authors being, either, directly linked to the field of ICL, or somehow involved with the ICTY itself. Finally, specific news from online media articles have also been used and analyzed in order to track new updates regarding how the Tribunal's legacy and work has been perceived in the eyes of journalists and the public over the years.

The theoretical framework consisted of providing the reader with the main definitions and theoretical concepts in order to facilitate his/her understanding of what is being analyzed and how it relates to the topic. For that reason, an overview of the main functions and elements

that encompass ICL was conducted followed by a study on the laws of war and what they entail. The framework will also outline, in more detail, the types of crimes and offences that the ICTY judged and, finally, it will provide a distinction between retributive and restorative justice, which will prove useful in the third section of the analysis when analyzing ICTY's legacy in the former Yugoslavia.

Once the state the theoretical framework is established, the thesis will follow into the analytical phase . Here, several methods were used in order to evaluate the ICTY's legacy. In the first section, we talk about the work and performance of the ICTY as an international judicial body, after going through a variety of different reports, resolutions, case summaries and papers, a compilation of 7 different judicial elements and practices were chosen and analyzed in terms of their successes, shortcomings and controversies. These elements were: the quality of judges, the practice of individual criminal responsibility, due process, cooperation and judicial assistance, guilty pleas and plea bargains, length of trials and finally acquittals. What's interesting was that all elements had a combination of successes and failures alike. The second part, which evaluated the ICTY based on its contributions to the field of ICL, relied greatly on personal experiences and observations made by some of the former judges and prosecutors of the tribunal itself such as, Elizabeth Odio Benito, who highlighted the Tribunal's gender perspectives in war crimes, or Theodor Meron, who talked about the ICTY as a basis for future *ad hoc* tribunals, among others. Finally, the last part- which talks about contributions to the region- is divideded into two main arguments: 1) the extent to which the Tribunal achieved justice for the victims of the wars and, 2) whether it helped reconcile the parties in conflict. In both cases, the information was also straight forward and was also less varied, since most authors managed to agree that despite its efforts the ICTY failed in this aspect. Finally, based on the findings, general conclusions were inducted in order to determine the ICTY's overall legacy, which -once again- is successful in some areas, but came short in others.

METHODOLOGICAL FRAMEWORK:

Internationoal Criminal Law

International criminal law aims to govern the behaviors of states, organizations and individuals who commit international crimes beyond national borders (Cornell Law School, n.d.). Moreover, serious crimes such as crimes against humanity, genocide, war crimes and other violations are also regulated by international criminal law when they occur within the

territory of sovereign states (UNITED NATIONS, n.d.). The purpose of ICL is to be able to bring justice to the world's worst war criminals (Felter, 2022). In addition, international criminal law is relevant to the protection as well as the study of international human rights as it is aimed to punish acts that have a negative effect in human rights, these rights being; liberty, security and life (Mackintosh, 2006).

Furthermore, like in criminal law, international criminal law bans certain actions by individuals and establishes various amounts of sanctions when these prohibited actions are committed. We can therefore say that international criminal law mainly poses responsibility on individuals rather than collective states and organizations (International Justice Resource Center, n.d.). According to the *Rome Statute* international criminal looks at the crimes that; "shock the conscience of humanity" (Blackstone School of Law, 2016). Not only does ICL govern the criminal responsibility of individuals, it also imposes obligations on states. On the other hand, classical international law controls the responsibilities, rights and relationships of states (International Criminal Court, 2020). But why and when was international criminal law established?

It all occurred after World War II in the charter of the international military tribunal where international law was revolutionized. Moreover, prohibitions were started to being imposed in individuals, in this case, defeated Nazi Germany leaders; the creation of "international criminal law" (International Justice Resource Center, n.d.). After being inoperative for quite some decades, international criminal law was brought back to life in the 1990s to treat the war crimes in the former Yugoslav wars (ICTY) as well as the Rwandan genocide (ICTR) (ICTY, n.d.). As a result, this led to the permanent establishment of the International Criminal Court in the year 2001 following the Rome conference in the year 1998. Essentially, international criminal law as we know it today can be understood as expanding and developing in three distinct periods mentioned above. Furthermore, international criminal law has many different types of sources. It exists in many different forms such as; international treaties, in forms of international customary laws and it exists as jurisprudence and general principles of international criminal law (International Criminal Law Services, 2018).

The Laws of War

After having established what international criminal law is we have to be able to state and analyze what "Laws of war" are and what they protect. Laws of war are established as rules of war or/and international humanitarian law as international rules that explain what can

and cannot be done during combat/war/armed conflict (ICTY, n.d.). These rules of war are established globally. Since the beginning of our existence humans have relied and resorted to violence as a solution for disagreements between one another. As decades went on, individuals have tried to decrease brutality of war. It was this exact humanitarian spirit that resulted to the first ever “Geneva convention” in the 1864 (University of London Postgraduate Laws, 2019). This was the initiation of *modern international humanitarian law.* International humanitarian law is often known as the law of war or the law of armed conflict. International humanitarian law is a subset of international law, which is the body of rules that governs state-to-state interactions (ICTY, n.d.). Moreover, the international humanitarian law created the basic limits of how a war should and could be fought. The main aim of IHL is to be able to reduce suffering and maintain humanity withing people in armed conflicts (British Red Cross, n.d.).

In addition, the universal laws were made to protect non-combatants- such as civilians-, and to aid workers and medical personnel. These laws were also created for the ones who are no longer able to fight such as prisoners and soldier that are no longer able to be in battle. Furthermore, one of the most important laws of war is the protection of civilians; it is a "war crime" to target civilians. The prohibition of torture and other ill treatment of detainees, regardless of their past, is another important law of war. They must be provided with food, water, and communication in order to maintain their dignity and survival (International Committee of the Red Cross, 2022). Additionally, advances in weaponry and technology indicates that the laws of war have to adapt accordingly. No matter how sophisticated weapons become, it is crucial they are aligned with the rules of war. There are five main principles of international humanitarian law; military necessity, proportionality, humanity, honor and distinction (ICRC, 2004).

If the rules of war are broken, individuals can be held accountable for war crimes. This is owing to the fact that international courts and states are heavily invested in and focused on war crimes. In other words, infringement of the rules of war, particularly atrocities, may be held individually liable for war crimes after a combat has ended (International Committee of the Red Cross, 2022). Additionally, countries that have signed the Geneva Conventions are compelled to look for and prosecute anyone who has committed or authorized certain "grave breaches" of the laws of war (UNITED NATIONS, 1950).

Crimes judjed under the ICTY

The ICTY's Its mandate, which lasted from 1993 to 2017, irreversibly altered the landscape of international humanitarian law, gave victims a platform to speak out about the horrors they witnessed and experienced, and demonstrated that those suspected of carrying the greatest responsibility for atrocities committed during armed conflicts can be held accountable. The main goal of this tribunal is to bring to justice the individuals held accountable for violations against the humanitarian laws committed in former Yugoslavia. There are four substantial crimes in international criminal law; genocide, crimes against humanity, war crimes and aggression. These are studied in international criminal law as they are able to shock humanity. (ICTY, n.d.)

On one hand, we have crimes against humanity. Crimes against humanity can be defined as a deliberate action in order to cause death or human suffering on a large scale (European Comission, n.d.). Moreover, they are defined in article 5 of the ICTY Statute as *"the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population"* (UN Security Council, 1993, p. 6) . Crimes against humanity can be considered as any of the following; murder, torture, rape, enslavement and other inhumane acts. In differentiation to war crimes, crimes against humanity can also be committed during a time of peace, and on the contrary to genocide are not committed to a specific racial, ethical and religious group. To give historical context, crimes against humanity was first introduced during the end of the second world war in the 1945 Nuremberg Charter. (The Law Academy, 2021).Crimes against humanity has been systemized and codified in both the Statute of the international criminal tribunal for the former Yugoslavia as well as for Rwanda (Trial International , n.d.)

On the other hand, genocide is one of the most horrendous war crimes to exist where the UN defined it as an international crime in the year 1946. Genocide is no natural disaster; it is a deliberately planned out mass murder. This means that genocide is made up of individual planning and individual acts. Genocide is defined as an intention to "destroy a group of people by committing one of the following acts": killing members of the group and causing serious bodily or mental harm to members of the group (UNITED NATIONS, n.d.) Article 4 if the ICTY Statute states and explains these acts which compose and constitute genocide(UN Security Council, 1993, p. 5-6) . Moreover, genocide can sometimes be grouped together with crimes against humanity. One similarity both share is that genocide and crimes against humanity can be performed both during arms conflict as well as peace time. Secondly, what differentiates both of these is that genocide is an act with intention to

destroy a group. There have been effective penalties that have been established for anyone that has committed genocide (UNITED NATIONS, n.d.).

Thirdly, we have the crime of aggression. The crime of aggression is one of the most interesting of the substantive crimes(The Law Academy, 2021). This is due to the fact that there was a lack of agreement on the crime during the 1998 Rome conference. It can be defined as; "*planning, reparation, initiation or waging of a war of aggression, or a war in violation of international treaties*" (International Committee of the Red Cross, n.d.). The crime of aggression was one of the most controversial topics talked about in the Rome conference. As mentioned previously, there were disagreements over what it meant to commit the crime of aggression as well as the extent in which the court could exercise jurisdiction. Moreover, the crime of aggression is a leadership crime, hence, unlike the rest of the crimes analyzed (The Law Academy, 2021).

Retributive vs. Restorative Justice

Restorative justice and retributive justice have similarities and differences. On one hand, restorative justice occurs when an offence occurs and the community including victims and offenders come together to collectively solve the situation (Hermann, 2017). Restorative justice is defined as "a response wherein both the victim and the offender are able to resolve their incident in a non-coercive manner" (Clamp, 2014, p. 67). On the other hand, retributive justice refers to the idea that justice is to be made with punishment. If we ought to compare and contrast, we can see that restorative justices' views crimes as an act against communities and individuals whilst retributive justice sees crimes as an act against the state, the law and the moral code.

Restorative justice focuses on the offender's rehabilitation, the healing of the victim, and the restitution of the harm done. Retributive justice focuses on a just and appropriate penalty for the crime committed (UNDOC, 2019). Moreover, in Restorative Justice, the victim and the community play an important part, but in Retributive Justice, their role is limited or non-existent. Restorative Justice is a type of justice that involves the victim, the offender, and the community and is carried out through discussion or mediation. Retributive Justice, on the other hand, does not involve any of these steps and instead concentrates on brining justice and punishing the offender for the offense. Finally, Restorative Justice focuses on attaining justice by involving the parties listed above. Retributive Justice, on the other hand, argues that justice is served when the perpetrator has been suitably punished. Furthermore, retributive justice puts

an end to impunity. One of the main goals of the European Union's approach to transitional justice is to eliminate impunity. This refers to the responsibility of prosecuting people who have committed crimes and restoring lawful order. Retributive justice is served through the act of holding culprits accountable through punishment. Both retributivists and consequentialists agree that achieving vengeance is critical to serving justice since it gives victims satisfaction and prevents future offenses. This is accomplished through criminal prosecutions conducted by both domestic and foreign tribunals (Braithwaite, 1999).

It is crucial to name examples of both restorative and retributive justice in order to grasp a higher understanding of both concepts. Examples of restorative justice can be community and service work and any other work that can serve as a reparation of the victim. On the other hand, examples of retributive justice are capital punishment and the death penalty; "life for life" (Bube, 2018, p. 3).

ANALYSIS:

Evaluation of the ICTY's legacy as an International Criminal Tribunal:

There is no doubt that upon evaluating and analysing judicial proceedings, in any court or tribunal, there can be positive and negative attributes. The ICTY, considered one of the first modern - and by that, I mean established post WWII - international criminal tribunal of the 20th century, has had its fair share of achievements as well as criticisms regarding its overall performance and efficiency. This section will evaluate the ICTY's ability as a supranational court to operate in accordance with its Statute, focusing on issues such as, quality of judges, individual criminal responsibility, fair trials, international cooperation, guilty pleas and pela bargains, the length of trials and finally the acquittals of key perpetrators.

Quality of Judges

One of the main draw-back for the ICTY's initial debut was its lack of "professional" judges. This lack of professionalism does not target the knowledge of said individuals in terms of international law theory but rather at their practical experience in criminal law as judges, prosecutors or lawyers. In fact, some of the ICTY's judges during the time it came into force, didn't know how to conduct criminal trials, deal with procedural issues nor manage evidence, especially from an international level. Those who were deemed as "professionals" by the ICTY

were in fact individuals who, before being appointed as judges, were law students with minimum qualifications to act as such, diplomats or professors. To further complicate matters, Judges were not provided with a type of rulebook that would guide them during the first years of appointment. In addition, Judges came from different backgrounds and each had their own interpretation of how certain judicial functions worked based on their country's judicial traditions and applications. This in turn affected the ICTY as it not only led to confusions in final judgement decisions but also to inconsistent interpretations of the law, which made a lot of Judges clash and contradict each other. This issue also frustrated the Prosecutors, whom despite their efforts to build meticulous cases, would often find themselves victims of improvised or experimental trials (Karnavas, 2011).

One example was in the *Prlić et al* case, where the Prosecutor, Kenneth Scott, expressed his embarrassment towards the institution and its judges, and was also very articulate in his concerns regarding fair trials for the accused (Prosecutor v. Prlic et al., 2007, p. 15852). It is important, however, to reassure that the arguments on the basis of initial judge qualifications do not, in any way, intent to discredit the Tribunal's work to this day. Despite the initial setbacks, the ICTY proved to be resilient and soon began building experience and establishing legitimacy and procedural quality in its trials, which is what defines its true capabilities as a tribunal, rather than the flawed institutional design upon which it was created at the beginning.

Individual Criminal Responsibility

Another topic of concerns around the ICTY revolves around the issue of individual criminal responsibility. Before starting the evaluation, it is important to establish that ICTY Prosecutors have relied heavily on a specific type of criminal liability, known as the Joint Criminal Enterprise (JCE), pioneered by the ICTY itself, which is applied in the case of collective or group criminal activity. However, this section will not focus explicitly on the JCE because of two main reasons. Firstly, the act of collective crimes falls under Article 7 (1) of the ICTY Statute, which is already what we will focus on, and secondly, the main criticisms regarding the JCE as a form of liability can be summarized by claims that it was judge-made and had no support under international customary law, which consequently led to lack of legitimacy and revisionism surrounding some of the prosecutions, not to mention controversies regarding acquittals of certain individuals who were initially prosecuted under JCE (Karnavas, 2011).

Critics such as Amy J. Sepinwall highlighted the Tribunals inability to effectively and consistently identify and prosecute culpability, more specifically in relation to individual criminal responsibility stated under Article 7 of the tribunal's Statute. There is, however, special focus on two sections: Article 7(1), whereby the Tribunal can consider any individual as criminally liable, as long as it is proven that said individual had something to do with the planning, aiding, command or instigation, of said crime; and Article 7 (3), which establishes that, as a leader/commander, failure to stop or punish subordinates from committing an atrocity if he/she knew about it, is also considered a criminal offense (UN Security Council, 1993, p. 6). That being said, critics have often established that the ICTY had been inconsistent in the way it prosecuted its defendants under Article 7, as there seemed to be a lot of vagueness in the distinction between sections 1 and 3. For instance, does the failure of a commander to punish its subordinates make him liable for the crime committed or does it fall under a different type of offense? In other words, there is a clear form of ambiguity that might arise in court with respect to Article 7 (3): on one hand, a commander´s "failure to punish" can be considered as a dereliction of duty, which is still considered an offence according to the ICTY, but it will also consequently separate him from being prosecuted for the atrocity committed. And, on the other hand, the failure to punish can also place the commander as criminally liable for the crime committed, despite whether or not he ordered or even knew about its occurrence (Sepinwall, 2009).

Overall, there is a recognized complexity when trying to establish the type of relationship a commander has with his/her subordinates, and consequently the link they might have to specific crimes even if he/she did not actively participate in them. It has been speculated that the ICTY failed to recognize the militarily hierarchies and, thus, made it more complicated to identify responsibility where its due. Additionally, it has created ambiguity, as well as inconsistency in identifying which crimes fall under Article 7(1) and which fall under Article 7(3). This, in turn, is a controversy in itself since one conviction leads to a significantly longer sentence than the other (Carter, 2016). For instance, in the case Naser Orić, a former commander of the Army of the Republic of Bosnia, the Trial Chamber sentenceed him to only two years of prison under Article 7(3) as opposed to the actual 18 years he would have gotten- as recommended by the prosecution- after speculations that Orić, not only knew or had reason to know about the mistretment of Bosnian Serb detenees, but alsoo had effective control to prevent it and even participated in some of the mistreating. Yet the Orić Chamber ruled against the prosecution's findings (Sepinwall, 2009, p.270).

The innefective and ambiguous applicabilty and enforcement of comander responsibility porvided a set-back to the legacy of the ICTY and it's reputation as a pioneer of modern International Criminal Tribunlas. It's responsibility is to set a precedented standard for future internatoinal criminal courts and tribunals to follow, and yet it has only created confusion and uncertanty regarding concersn of culpability and comander responsibility (Carter, 2016)

Due Process

The ICTY has always thrived under its claims of impartiality and overall due process. In international law, due process revolves around issuing a fair trial to the defendants, which entails, *inter alia*, the right to confront witnesses. In order to establish an effective due processes, there needs to be an already functional development of the Rules of Procedure and Evidence and a consistent interpretation of such so as to avoid clashes between the prosecution and the interests of the defendants (DeFrancia, 2001). In the case of the ICTY, due process is established in Articles 20, *Commencement and conduct of trial proceedings* and 21, *The rights of the accused*. The Statute expresses, *inter alia*, its opposition to trials *in abstentia*[1], informing the accused of the charges against him, equality before the tribunal, the right to defense counsel and time to prepare his/her case, the presumption of the accused to be innocent until proven guilty, the ability to cross-examine witnesses, and finally conducting the proceedings in a language understood by the accused (UN Security Council, 1993, p. 11-12). However, the main concerns reside under Article 22 which issues the protection of victims and witnesses[2], since many critics say it's a direct contradiction of the rights established under the previous two Articles whereby the accused should be allowed to examine and cross-examine witnesses, which wouldn't be possible if the defendant can't see them or interact with them. This issue was especially relevant in the case of *Prosecutor vs Tadić* and has been used by many skeptics, to point out the ICTY's inability to conduct fair trials for the accused (Scharf, 1997).

By contrast, the *Tadić* Chamber expressed that the decision to withhold witness' identities did not in fact, interfere with the accused's rights expressed under Article 21(4) of the ICTY's Statute, since the defense is allowed and given ample time to question and interview the anonymous witnesses. An important detail that critics always seem to gloss over when

[1] Trails that take place without the accused being present (Coalition for the ICC, 2016)
[2] "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity" (UN Security Council, 1993, p. 12)

criticizing the Tribunal's due process. Furthermore, this proved the ICTY's awareness regarding the clash between Articles 21 and 22 and, thus, established additional measures so as to not disrupt due process. Furthermore, the issue of witness protection starts to make sense if we highlight the context upon which the trial was being conducted under. According to the Chamber, tensions between ethnic regions were still high and the sentiment of revenge and resentment dominated people's minds. The Tribunal was also aware of the limitations of its witness protection program as it did not extend to their relatives, friends and other acquaintances. Therefore, their non-disclosure became even more essential since it acted as a preventive measure against more violence to occur and more victims to appear. To quote the *Tadić* Chamber regarding this issue, "[the ICTY has] no long-term witness protection programme nor the funds to provide for one. [the witness protection program] could not be effective in protecting family members of witnesses in cases in which the family members are missing or held in camps." (Prosecution v. Tadić A/K/A "Dule", 1995).

Another way in which we can criticize the critics regarding fair trials and the ICTY, is the fact that the Trial Chamber did not grant anonymity to whomever. The conditions under Article 22 are only exercised upon a further evaluation of the specific contexts and circumstances presented. In this case, it was the fact that the conflict was still an on-going one, as well as the types of atrocities being committed by the perpetrators. Moreover, it has to be highlighted that the Tribunal lacked an enforcement body to protect and establish order beyond the court that called for urgent witness protection. What is more important, the protective measures were flexible; if there is a less restrictive form of ensuring protection then the former one shall cease to apply and will be replaced by the new one. It is also relevant to establish the fact that judges were aware of the use of anonymous witnesses, and, thus, a different criterion of prosecution was applied in order to ensure the fairest outcome possible during trial. Finally, another argument that reassures the ICTY's protective measures is that it encouraged people to step fourth and testify, which at the end of the day precedes everything else once we realize that witness and victim testimonies were the main source of evidence used in the trials (Swaak-Goldman, 1997).

Cooperation and judicial assistance

The UNSC Resolution 827 -upon which the ICTY was established under-, as well as Article 29 (2) of the Tribunal's Statute, highlights the requirement by all member states to

comply with any possible requests needed by the ICTY in order to carry out its mandate; this includes: the arrests and transfers of the accused to The Hague. Sates are given a timeframe to set out their compliance, such as the adoption of domestic legislation in order to ensure their effectiveness and commitment to cooperate. Additionally, in the case that a suspect is residing or hiding in a State that isn't his own, members of the Geneva Convention are obliged to search, arrest and extradite them (O'Brien, 1993). Furthermore, the Dayton Accords of 1995, established the explicit assistance of the parties to the conflict -Croatia, B&H and the Federal Republic of Yugoslavia- to assist the Tribunal. This obligation and reliance of cooperation may seem very elaborated on paper, but the reality of the ICTY was far more complicated, especially when it came to apprehending and extraditing the accused, which created major setbacks in its goal to prosecute high profile individuals, at least during its first years. Although there are benefits in indicting low-level officials, such as direct links with victims and filling in the blanks of certain events, locations and crimes, the Tribunal's real value has always been linked to its ability to apprehend high-level officials and leaders of the conflict (Barria & Roper, 2005). In fact, in 1999, Judge Gabrielle Kirk McDonald, president of the ICTY at the time, expressed frustrations regarding impunity, stressing that the lack of assistance from States and State Organizations made it impossible to arrest and prosecute those primarily responsible for the conflict and deterioration of Yugoslavia, and that some, making reference to Slobodan Milosević, were still in power and operating at the time. She further added that the Tribunal's efforts to involve the international community to enforce the law upon these individuals and, consequently, help solve the conflict in the region, were undermined (McDonal, 1999). In this sense it seemed that the ICTY was put under a lot of pressure to complete its mandate and bring all perpetrators to justice but was not given the right tools not the assistance it needed in order to do so.

In order to deal with the issue of apprehension and extradition, the ICTY -under Rule 53- established the practice of requesting a sealed indictment- disclosing form the public-. This helped, not only to increase the speed of apprehension but, also, as a way to prevent its evasion by the accused (Barria & Roper, 2005). In fact, this practice was considered more effective than public indictments, as it allowed the Tribunal to prepare arrest warrants and inform them to authorities before the dittanies even realized they were being indicted (ICTY & UNICRI, 2009). Furthermore scholars, such as Akhavan, reassure that the issue of high-profile indictments does not necessarily stain the ICTY's legacy as a powerless institution. In fact, the ICTY has created other forms of justice that don't necessary imply arrests, most commonly known as "interim justice", which involved removal from office, travel restrictions and

deprivation of liberty. However, even though this type of justice is not nearly as impactful as active prosecution and punishment, it does prove the ICTY's determination to complete its mandate against all odds, not to mention its ability to adapt and find innovative ways to overcome the hurdles along the way (Akhavan, 1996).

The issue of cooperation, or lack thereof, has also transcended into the ability to effectively collect evidence and paper trial. On many occasions, governments obligated to comply with the Tribunal would often withdraw important information or share it under certain conditions, one of them being the ability to block its use in trial. This evidentiary issue led to conflicts outside the courtroom with claims and accusations, from both, the citizens of former-Yugoslavia and the defendants, that certain governments would manipulate or withdraw information to purposely incriminate certain defendants belonging to a specific ethnic group while shielding others. This has also contributed to current tensions between different ethnic groups in the region which further hampers the reconciliation processes. In order to counter the evidentiary problem, the Tribunal adopted a rule whereby additional evidence on appeal would be admitted if the circumstances required it. However, even then there were still problems with reaching decisions regarding criminal proceedings which often made the ICTY struggle between fairness -or at least accurate recompilation of evidence- and finality, a balance that all criminal justice systems must guarantee (Meron, 2006).

Guilty Pleas and Plea Bargains

The subject of guilty pleas and plea bargains has also been used amongst skeptics to criticize the ICTY's legacy and overall success. During its first years, the ICTY's Statue did not have a specific article addressing guilty pleas. The closest thing it had was Article 20(3)[3]. And, within this context, the first person to engage in a guilty plea was Drazen Erdemović, a Bosnian-Serb soldier, in 1996. The following year, the ICTY adopted, in its Rules of Evidence and Procedures, Rule 62*bis*[4]; however, this did not guarantee plea agreements since the ICTY's president at the time, Antonio Cassese, was still reluctant to establish them as an official practice. Nevertheless, many defendants were quick to follow Erdemović footsteps, and -in

[3] "The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial" (UN Security Council, 1993, p. 11)

[4] "If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber […] may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing" (United Nations, 2015, p. 53).

2001- the ICTY adopted Rule 62*ter.* At that point, guilty pleas as well as plea agreements were officially considered part of the ICTY's Statute and Rules, and a crucial practice in the Tribunal's Proceedings (Clark, 2009).

Now that we have established the ICTY's considerations of guilty pleas and plea agreements we can move on to the main controversies and issues. The main controversy at hand is the use of plea agreements as shortcuts towards justice (BALKAN, 2003). This speculation arose when the ICTY implemented its completion strategy in 2003, which led to the belief that plea bargains were an easy and faster way for the Tribunal to complete its mandate, despite the judicial or practical challenges that these might provoke. In addition, critics have also highlighted that when a defendant pleads guilty, the prosecutor, in exchange, may drop certain charges- also known as a charge bargain-, which can have several consequences for the Tribunal's work in bringing justice reconciliation to the region. (Clark, 2009).

However, those, that support the practice of guilty pleas and plea bargains in the ICTY, such as Mark Harmon[5], have outlined that one of the main contributions is combating historical revisionism. According to Harmon, having written and quoted confessions of the perpetrators themselves, helps establish the truth behind the scenes of some of the worst crimes known to humanity, and consequently leaves little room for denial (International Criminal Tribunal for the Former Yugoslavia , 2018). By contrast, we can also argue and suggest that guilty pleas and plea agreements may lead to the voluntary omission of crucial facts upon which a conviction was built on, pampering and distorting the historic record of certain acts and crimes committed. (Clark, 2009). This, in turn, also has negative impacts on the ICTY's archives and future documents as they might be considered as "incomplete" or "inaccurate". In fact, according to critics like Scharf, one of the main expectations of the ICTY as an *ad hoc* Tribunal was to generate accurate accounts of the crimes against humanity produced in Yugoslavia during the 90s so as to counter any distortions of the truth as well as narrow down the space for denial. This, however, becomes more difficult when we add plea bargains to the equation. On one hand because defendants can be selective of the crimes, they chose to plead guilty for as an attempt to reduce their accountability. On the other, if the Tribunal agrees to drop certain charges, these will cease to be officially documented, which will further encourage denial

[5] Former Senior Trial Attorney at the ICTY Office of the Prosecutor (International Criminal Tribunal for the Former Yugoslavia , 2018).

amongst ethnic groups that perpetrated the crimes under the premise of "if it's not documented it didn't happen". (Scharf M. , 2004, p. 1079-1081).

Furthermore, it can also have consequences for the victims and their families, who have often expressed dissatisfaction with the ICTY, and feel as if though justice was not fully establishes since their aggressors, through pleading guilty, have received lighter sentences (Carter, 2016). In response to this, those who support the ICTY's work have argued that when a defendant enters a guilty plea, the judges then implement a factual judgment which blocks any form of denial regarding the occurrence of said crimes or the individuals that perpetrated them. Additionally, it relieves witnesses and victims from testifying in court which spares them from having to re-live their suffering and trauma (BALKAN, 2003). That being said, there are arguments that oppose the former statement. There is a significant level of importance in giving a forum through which victims and their families can express the human dimensions of their suffering, in hopes of promoting a larger sentiment for human dignity. Testimonies of survivors can also help establish the truth about some of the worst atrocities known to mankind, just as much as the guilty pleas from the accused. Furthermore, victims deserve to be heard before sentences to the accused are established, yet the ICTY's practice on guilty pleas does not grant this, but rather mutes their voices and prevents them from providing their version of the story, so that a full account by all parties of the conflict -the aggressors and the victims- is given in order to establish more appropriate sentences that would be approved and supported by the victims themselves so as to bring them justice (Harmon & Gaynor, 2007).

Finally, with guilty pleas and plea bargains there is also the issue -or benefit, depending on your stance- of remorse. Those who plead guilty, not only agreed to provide information about their crimes, locations and co-perpetrators, but also issue an official apology and expression of guilt and remorse towards the victims, which may contribute to the process of acceptance and reconciliation in the region (BALKAN, 2003). In fact, sincere expressions of remorse are considered by the ICTY factors that could potentially lessen the sentence of the accused. The challenge however, for both, the prosecutor and the Trial Chamber is to differentiate the recitals of remorse that are meaningful and sincere with those that are faked for the sole purpose of having less jail time (Harmon & Gaynor, 2007). Overall, the ICTY's practice of guilty pleas and plea bargains is a controversial one, since it seems to benefit the accused more than the victims of the conflict.

Length of trials

According to Resolution 837, the suspected criminals found under the jurisdiction of the ICTY have at least the right to a trail without delays. However, the reality was more complex. Unlike its predecessors (Nuremberg and Tokyo trials which experienced not only fast trial completion, but also thorough documentation), the ICTY had issues with trial delays, the passage of time, and collection of evidence (Barria & Roper, 2005). Critics have often linked the saying "Justice delayed is justice denied" when talking about the efficiency of the ICTY's work in holding those accountable for the atrocities committed in former Yugoslavia. This, in turn, not only weakened the Tribunals legacy in the long run, but also provoked frustration and distrust of the Tribunals amongst victims and their families, activists and the region's citizens (Vukušić, 2021). In fact, it has been calculated that the Tribunal took an average of three and a half years to complete trials from arrest to verdict, sometimes even longer (Barria & Roper, 2005).

For instance, Slobodan Milosevic, one of the most prominent figures in the conflict and number one in the ICTY's prosecution list, was actually still president of Serbia after being suspected of crimes against humanity in Kosovo, Croatia and B&H. When he was finally convicted in 2001- a year after he stepped down form office-, he spent 5 years under ICTY jurisdiction before suddenly dying in his cell in 2006, leaving the Tribunal unable to foresee his sentence and establish justice for his victims (Whiting, 2009). Furthermore, in the cases of Stanišić & Simatović, the ICTY's Trial Chamber spent 10 years, since their arrest, only to find them "not guilty" in 2013. When a retrial was ordered, both were finally condemned in June 2021. To this day the cases of both Serbian officials have been considered the longest running trials in the history of the Tribunal and beyond (Prosecutor v. Jovica Stanišić & Franko Simatović, n.d). Finally, the cases of Radovan Karadžić and Ratko Mladić, are also particularly interesting, since both were initially indicted in 1995, but weren't arrested nor stood for trial until the end of the first decade of the 2000s. This meant that their verdicts weren't issued until 2016, in the case of Karadžić, and 2017 in the case of Mladić. Therefore, the ICTY spent a total of 22 years to reach a verdict for these two individuals (Vukušić, 2021).

In addition to the lengthy duration of trials for some of the most prominent figures in the conflict, there was also the issue of collecting evidence that extended beyond lack of international cooperation and assistance. Prosecutors relied heavily on witness accounts and statements from surviving victims, which became more complicated to fact check as time passed. Furthermore, access to specific locations mentioned at the time of the trials were not allowed to be investigated due to the nature of the conflict -as it was still ongoing -, which

further complicated the ability to substantiate the evidence provided, and thus, causing trial delays (Barria & Roper, 2005).

Overall trial delays are known to have negative connotations since they can diminish the value of Tribunals in brining perpetrators to justice, weaken evidence, compromise due process, and most importantly frustrate and endanger victims as their aggressors roam free (Whiting, 2009). However, as unideal as they might be, there are some advantages provided from the passage of time that can help a Tribunal increase their reliance in evidence and reach a more appropriate verdict than it would have if the process had been faster. This of course, assuming that the practice of guilty pleas and plea bargains has not been invoked. The first advantage makes reference to the growing experience of witnesses and their testimonies, as they are not only better prepared for what to expect in trial, but they also seem to be more objective with their information provided since the emotional grip and trauma pinning them down slowly begins to lift with the passage of time. This, in turn, not only makes their testimonies more reliable in the eyes of the prosecutor, but it also makes the course of the trial run smoother. Secondly, the passage of time has also given us what's known as "expert witnesses", a name given to military and intelligence analysts, psychotherapists, historians, anthropologists, demographers etc., who have used the time between trials and verdicts to research as much as possible the contexts -historical, military, political etc.- that could back up their claims and bring forth more trustworthy and complete testimonies (Vukušić, 2021). Finally, time has given the Tribunal its ability to constantly evolve and develop from its mistakes; thus, leaving less margin for error for the next trial. The ICTY has come a long way since its establishment in 1993 and despite its struggles and delays, it will always be considered the pioneer for the structures of future successor courts, as time helps it build a record and a standard for how certain key figures should be judged, apprehended, extradited and how evidence should be handled and evaluated (Meron, 2006).

Acquittals

A decade after its establishment in 1993, the ICTY was finally gaining the recognition it hoped for not only in the international community, but also in the region as many victims and civil actors began to slowly see the Tribunal as an emblem of hope in the form of justice. This recognition was greatly due to the slow but increasing indictments against high-ranking officials and figures that were considered fundamental in the planning and organisation of some of the most atrocious crimes committed Croatia, Kosovo and B&H (Meron, 2006). However,

the praise of the ICTY ran short following the acquittals of 3 Serbian leaders and 2 high-ranking Croat officials between 2012 and 2013 under the pretext that neither of them were directly linked to the order or approval of the crimes committed by their subordinates. This not only puts in question the Tribunals practice of individual criminal responsibility under Article 7(1) and (3), but also further confirms critics' claims regarding the lack of consistency in the Tribunal's judgements, and the clashes between the verdicts of the different judges (Simons, 2013).

A brief overview of the cases regarding the acquitted defendants will now be provided, in order to see whether the Appeals Chamber's judgment was justified or not, and consequently, how it has affected the Tribunal's legacy.

Case 1- Prosecutor V. Gotovina et al: the prosecutor charged three high-ranking Croat officials -Ante Gotovina, Ivan Čermak, and Mladen Markać- with crimes against humanity during the launching of a military offence known as "Oluja" -or "Operation Storm" in English-. According to the Indictment, they were found guilty of charges under Article 5 and 3[6] of the ICTY statute. Čermak was acquitted fairly fast, while the Trial Chamber issued an initial sentence of 24 years for Gotovina and 18 for Markać, under a JCE pretext. The Appeals chamber, however, reversed the Trials Chamber claims that the artillery attacks during "operation storm" were unlawful, and established that a JCE claim could not be sustained, and thus acquitted them both in 2012 (Prosecutor v. Gotovina et al., n.d.)

Case 2- Prosecutor V. Stanišić and Simatović: Jovica Stanišić, Former Head of the Serbian State Security Service -"Državna bezbednost"- and his subordinate Franko Simatović were charged with four counts under Article 5 and one count under Article 3[7]. According to the prosecutor, they were both initially considered eligible for the application of JCE to their crimes, which was targeted specifically towards a large majority of non-Serbs in Croatia and B&H (Prosecutor v. Jovica Stanišić & Franko Simatović, n.d). After a long trial, due to Stanišić's health issues that led to continuous trial postponing, the Trial Chamber finally issued its judgement for both individuals as "not guilty" and Acquitted them from all charges (Pruitt, 2014, p.368).

[6] Under "crimes against humanity", more specifically with "persecution, murder and other inhumane acts" and Under "violations of the laws or customs of war", specifically regarding "plunder of public or private property, wanton destruction, murder and cruel treatment" (Prosecutor v. Gotovina et al, n.d.)

[7] Under "crimes against humanity" for "persecutions, murder, deportation and other inhumane acts" and under "violations of the laws or customs of war" for "murder" (Prosecutor v. Jovica Stanišić & Franko Simatović, n.d)

The acquittals issued by the ICTY's Appeals and Trials Chambers have led to considerable discussions regarding it's its ability to provide justice in the Balkan region. While it is true that wrongful convictions are worse than unprecedented acquittals, the ICTY's reputation regarding the latter bore a heavier weight to its legacy for several reasons. Firstly, the initial indictments recognized and even affirmed that several violations of Articles 5 and 3 of the Tribunal's statute were committed under JCE, which again, was a practice pioneered by the Tribunal itself, and yet we have seen inconsistencies in its interpretation and application. Secondly, it even witnessed in excruciating details, the accounts of victims and witness alike and yet decided to dismiss the defendants of those crimes, indicating a clear set back in what would have been the ICTY's biggest achievements as an International Criminal Tribunal, with 5 high-ranking officials behind bars (Pruitt, 2014). Thirdly, the acquittals indicated, not only an inadequate ability to evaluate evidence, but also a lack of judgment in legal considerations. In addition, it builds up and confirms critic's arguments regarding the quality of judges allowing them to continue undermining their work, under the pretence of legal incompetence. Finally, Human rights organizations, civil activists and, of course, victims have expressed frustrations and dwelled on whether the institution truly provided the quality of documentation and justice that it preached. Therefore, it's safe to say that the acquittals that took place between 2012 and 2013, compromised the ICTY's expectations to fulfil its mandate as an International Criminal Tribunal (Ekeløve-Slydal, 2016).

On another note, it seems appropriate to mention the recent updates regarding the retrial for Stanišić and Simatović. It seems that the Tribunal tried to redirect its wrongs and finally prosecuted both individuals, after the Appeals Chamber, in 2015, revoked the Initial Trial Judgment made in 2013 on the basis that sufficient evidence has re-surfaced that established the conditions for a retrial which led to a final sentence being appointed to both individuals of 12 years each, in June 2021 (Prosecutor v. Jovica Stanišić & Franko Simatović, n.d). The prosecutor relied on newly stated witness accounts, as well as videos, radio and telephone interceptors that helped link both men to the initial crimes they were accused and acquitted of, as well as new records from Serbian Intelligence archives that were not available during the initial trials, that further implicate both men (Santora & Simons, 2021).

That being said, this also caused a lot of controversy and reignited past accusations of the Tribunals alleged anti-Serb bias, since the Appeals Chamber only focused on re-trialing the two Serb officials instead of also revising the trials of the other 3 Croatian officials that were also acquitted of all charges around the same time. However, the controversy also extends to those who support the work of the tribunal -the victims for instance-, as they may feel that the

verdict was too light and does not reflect the amount of time, and resources wasted to finally prosecute these individuals.

The ICTY's legacy in the development of International Criminal Law:

What started out as a preventive institution to deter the ongoing conflict in former Yugoslavia in the 90s and consequently establish justice and reconciliation in the region expanded into what we now consider a breakthrough in developing ICL forward (Simonovic, 1999). This section will anticipate the fact that the ICTY has done more for ICL than it has, unfortunately, for bringing justice to the region. This may be due to the controversies and setbacks it has faced within its internal workings as a Tribunal, but also in the way that different ethnic groups that once made-up Yugoslavia have perceived it throughout is active years and to this day. In relation to the ICTY and ICL, we must keep in mind, that despite the developments achieved, the Tribunal did not have "big shoes to fill" in that area in the first place since its predecessors in Nuremberg and Tokyo, and consequently the circumstances that established these tribunals diverge from the ones that created the ICTY. For one, WWII was over when both tribunals were established, while the ICTY was chartered in the midst of the conflict in 1993. In addition, in contrast to the Nuremberg and Tokyo Tribunals, whereby justice was judged by the victorious nations of the conflict, the ICTY was judged by a potpourri of nations that did not participate in the conflict itself. So, we can see an element of moral duty, so to speak, by the international community to step in and provide justice that wouldn't have been established otherwise. Finally, the establishment of *ad hoc* Tribunals was still a relatively new practice with little accredited experience; therefore, any developments would have been recognized as groundbreaking at the time (Schultz, 2012).

Nonetheless, the Tribunal did not have small accomplishments in the field of International Law as it provided new international offences to be recognized, paved the way for universal jurisdiction to be recognized for future international courts and tribunals and contributed greatly to strengthening the Rule of Law through many different ways.

In order to dwell upon this development or contribution to international criminal law, we must first establish some context. The notion of customary International law existed long before the establishment of the post-WWII tribunal in Nuremberg; however, there were still struggles when it came to its applicability in an international criminal court and, thus, there was a need to create a channel through which the existing law would be compatible within the proceedings of a multinational court, thus creating the London Charter. Said charter was used

to term what we now know and recognise as crimes against humanity, war crimes and crimes against peace and what constitutes and classifies these crimes. The UNSC, using its jurisdiction under Chapter VII of the UN Charter, and using the London Charter as a model, created the statutes upon which the ICTY were built on, though excluding crimes against peace and adding the crime of genocide instead. The Hague further developed the offences recognised by defining war crimes in internal conflicts in addition to international ones and establishing further awareness around the scope of humanitarian law and human rights; however, just because the definitions over the offences were more detailed, they still required judicial interpretations, and its judges according to Theodore Meron still "had to refer to the customary underpinnings of the crimes". Nonetheless, subsequently to the Nuremberg trials, the ICTY contributed greatly in further codify international law to its judicial decisions (Meron, 2006, P.564-567).

On another note, gender crimes, such as rape, violence and aggression towards women, have always been consequential aspects of war, and yet never recognised as actually crimes under the law. However, in relation to this, the ICTY has made ground-breaking progress, as its Statute explicitly recognises sexual and physical violence against women as a form of crime against humanity (Meron, 2006). In fact, the establishment of R*ule 96,* which states that rape does not admit to consent, is also seen as a revolutionary advance considering the fact that prior to this, the Idea of "consent" to sexual violence was used as a form of defence. In fact, according to former ICTY judge Elizabeth Odio Benito, the Tribunal's willingness to address rape and violence against women as not only a crime against humanity, as previously stated, but also as a form of ethnic cleansing, humiliation and degradation, demonstrated the possibility of having international criminal justice with gender perspectives and definitions (International Criminal Tribunal for the Former Yugoslavia, 2018).

The concept of war crime jurisdiction is nothing new, especially in domestic courts: we've seen it after WWII where Nazi generals were prosecuted in French, British, and German courts. Neither is exercising universal jurisdiction for said crimes. What is new however, is the practice of this jurisdiction in domestic courts that have no link to the conflict, victims not the perpetrators being submitted to justice. The innovative thing about the ICTY was that, for the first time, crimes were being judged in courts whose respective countries were independent from the conflict (Kerr, 2006, p. 85). This was not only ground-breaking but also seemed to establish impartial and consequently fairer conditions for judgement proceedings so as to avoid what was pioneered in Nuremberg and Tokyo as "Victor's Justice", a term used to describe

vengeance in the name of justice by the victors of a specific conflict, which in their case was WWII (Schultz, 2012).

Finally, despite the complexity of the ICTY's operational reality, it is considered a pioneer for the pillars of modern international criminal justice, and through its work has inspired the structures and mechanisms of its preceding courts, like The ICTR or the Special Court of Sierra Leone. It additionally inspired the necessity to establish effective and functional "internationalised" courts in Sri Lanka, and Israel and improve the justice intuitions in Cambodia and East Timor (Gupta & Rodkey, 2018) . Apart from its international contribution to criminal law, it has also helped the former nations of Yugoslavia improve their judiciaries in order to create special war crime bodies in order to carry on its quest for justice in the region (ICTY, n.d.). Finally, the ICTY has contributed to strengthening the rule of law by transferring its cases, as well as sharing all evidence, findings, and expertise it has gathered during its operative years, to the region's local war crimes prosecution courts – in Serbia, B&H and Croatia-. Through this, the Tribunal encouraged them to continue seeking justice, reform and reconciliation on their own so as to finally put the past behind them and move together towards the future (Trahan & Vukušić, 2020)

The ICTY's impact in the Balkan region

Has it Brought Justice?

When talking about the ICTY's impact in the Balkan region, there is often the question of whether it achieved justice, especially considering it was one of its main goals under its mandate. This question, however, is very complex and controversial as it involves two different perspectives. On one hand we have the victims' perspective, which argues that the justice provided was "abstract" (Šimić, 2016, p. 9-10), and on the other, we have the Serbian perspective, which argues that justice was "selective" (Clark, 2008, p.337). These conflicting remarks not only reflect the tensions between ethnic groups considered to be victims in the conflict, and those labelled as perpetrators, but also prove that the justice brought by the ICTY was, in fact, imperfect.

ICTY Skeptics have often belittled its success in terms of justice in the region under the premise of ethnic bias, specifically related too anti-Serbian prejudices in its indictments and trials (Millender, 2013). Objectively speaking, if we look at the official ICTY trial figures, out of the 161 indicted individuals, 94 were Serbian, 29 were Croatian and 9 were

Albanians, 9 were Bosnian and no more than 2 were Montenegrin and Macedonian (ICTY, 2021). What's more, ethnic Serbians had a 94% guilty rate, and a total of 957 years – plus 5 life sentences- in prison, as opposed to a total of 150 years given to Croats, 41.5 years to Bosnians, 13 to Albanians, 12 to Macedonians and 7.5 years given to Montenegrins (Carter, 2016, p.20). These figures, although intended to provide an objective compilation of key following the aftermath of the ICTY's trial proceedings, are often used by Serbian nationalist groups and political elites to further accentuate the alleged anti-Serb narrative. This in turn nourishes the self-victimization by the Serbs but also consolidates revisionist attitudes.

In fact, the celebration of victimhood among Serbian society can be reflected in almost all surveys conducted when measuring public satisfaction during the ICTY's mandate. For instance, a survey conducted in 2004 – 11 years after the Tribunal came into force- by the Strategic Marketing and Media Research Institute documented the responses of 1245 Serbs in relation to their perception of the ICTY's overall purpose. Data proceeded to show that 74% of the respondents saw the Tribunal as an anti-Serb conspiracy, with a further 32% firmly believing that the Hague trials were created to target Serbia and Serbians specifically (Clark, 2008). What's more, another study conducted in 2017 – following the conclusion of the Tribunal's mandate -, designed by the Humanitarian Law Center, and conducted by Demostat in Serbia, showed similar perceptions regarding Serbian bias. In this case out of the 1200 respondents more than half believed that the non-Serbian defendants that were acquitted were in fact guilty. An additional 47% also established that the Serbs were the real victims during the conflict, while the other majority refrained from answering. Finally, When asked about the Tribunal's impartiality and objectivity, the majority established that it was "partial and subjective" (Mihailović & Lazarević, 2017, p. 15-32). Interview data further confirm the last findings, with claims that "the Hague Tribunal cannot achieve peace and justice because it has only one truth and one basic premise – that Serbs are guilty" (Clark, 2008, P.338).

The perspective of selective justice also goes beyond opinion polls, and interviews. The ICTY's anti-Serb allegations have resurfaced once more following the recent re-trials of two formerly acquitted Serbian officials- Stanišić and Simatović-, whilst overlooking the acquittals of ethnic Croatian and Bosnian officials (Santora & Simons, 2021). Finally, another reason why the Tribunal is perceived as selective revolve around claims that it refused to investigate the crimes committed by NATO when it bombed Serbia (Clark, 2008), nor the crimes committed by the Kosovo Liberation Army against ethnic-Serbs during the

Kosovo war, as many of the perpetrators were later acquitted – as was the case for KLA commanders, Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj- (United Nations, 2012).

It is argued that the main reason behind Serbian opposition to the ICTY is greatly due to the fact that they committed most of the crimes during the war. Based on this, we can also argue, that justice *is* in fact being delivered, since most of the indictments have been against Serbs, and that ethnic bias allegations are strictly a Serbian societal phenomenon, followed by their self-victimisation. While the facts have established that the majority of the perpetrators were in fact Serbs, the notion of justice is not only a matter of actions but also the perceptions that these create. In that sense, the perceived antagonisation and victimisation of the Serbs by the Serbs, followed by denial and revisionist sentiments, indicate that the ICTY did not fulfil its goal to establish justice, at least not to its full extent (Clark, 2008).

Now that we've established the predominately Serbian perspective of justice, we move on to how justice provided by the ICTY, was perceived by the victims themselves. The Tribunal's official website establishes that "Bringing justice to victims and giving them a voice" was one of its main achievements through its mandate (ICTY, n.d.). On one hand, justice was established in the sense that if it weren't't for the Tribunal's existence, high-ranking political and military leaders would currently roam free, enjoying their impunity (Milanović, 2016). Similarly, by hearing over 50,000 different testimonies, reading more than 1 million pages of transcripts and watching thousands of video recordings of victims, the tribunal did in fact contribute to giving them and their stories a voice. Beyond this, the scope of justice provided by the ICTY for the victims is very limited, the question is *why?* On one hand, limitations of justice are not necessarily linked to the Tribunal's incompetence, but rather to its strict definitions and perceptions of what it should entail. Generally speaking, courts' understanding of the word "justice" strictly fall under individual criminal responsibility. In this sense, their ability to successfully prosecute and punish perpetrators already constitutes as establishing justice. On the other hand, we also have the misplaced expectations of the victims in relation to justice. In other words, they hoped that the ICTY, apart from putting their aggressors behind bars, would help them alleviate their traumas and rebuild their lives (Šimić, 2016). However, this was much more complicated in reality. In fact, the Tribunal has often been criticized for its inability to provide effective reparations to the victims, thus labelling its provision of justice as "abstract" often lacking the "Human perspective" (Šimić, 2016, p.9).

Modern criminal law, is unfortunately, perpetrator-based, rather than victim-based, often glossing over their needs and failing to bring about a shared universal recognition for their social and symbolic status (Armakolas & Vossou, 2008). In B&H's Criminal Procedural Code, for instance, there are countless of articles that reference perpetrator's rights- right to fair trial, presumption of innocence, right to defense and so on- (Šimić, 2013). Meanwhile, victims and their rights are only mentioned in terms of property claims. There are no legal processes established to ensure emotional reparations and and alleviate their suffering. For this reason, the justice given to victims is not only "abstract" but also predominantly retributive as opposed to restorative. This, in part, is good because it essentially brings perpetrators to justice, however, it is also insufficient in promoting effective reconciliation processes (Ramet, 2012)

Has it contributed to Reconciliation?

Efforts of reconciliation in the region began in 2000, with Serbia being the last country to enter the process following Milošević's withdrawal from presidency. It was considered a top-down process, motivated by vast international pressures in order to incorporate the elements necessary, *inter alia,* local judiciaries, in order to bring about long-lasting peace. In this sense, it can be said that the existence of the ICTY contributed to effectively build the capacities of these judicial institutions. In addition, throughout its mandate – established 7 years before reconciliation processes were even considered-, its investigations, trials and verdicts have, not only helped establish the facts regarding the atrocities committed during the 90s, but also helped bring those responsible to justice. These are all elements that favour the claims of ICTY contributions in establishing the preconditions for reconciliation. However, the impact that these elements have provided depends greatly on their acceptance and recognition by the local communities of the former Yugoslavia, especially when it comes to establishing the facts (Klarin, 2015).

Serbia, and to a lesser extent Croatia, has a long history of rejecting the ICTY's work, especially regarding the Srebrenica genocide. The curious thing is that the Serbian Penal Code was amended to align itself with the EU acquis but has simultaneously excluded the verdicts and general consensus of the ICTY and, by default, the ICJ -the only two courts that have dealt with the Srebrenica genocide-. This is mainly due to the vast amounts of denial and revisionism present in Serbian society, followed by the national glorification of war criminals, which, have inevitably acted as hurdles for reconciliation in the region

(Kostić, 2018). Furthermore, the controversies regarding the Tribunal's alleged ethnic bias, particularly by the Serbs, has also been a detrimental factor for the Tribunal's work, placing it in constant competition with conflicting ethnic narratives regarding the truth -and the facts- about the war. If truth is needed for reconciliation, the affected populations – including victims and perpetrators- must accept it. However, the blame shouldn't't be placed solemnly on Serbia -or Croatia-, but rather on the perception the ICTY has created for itself in the Balkan region due to initial distancing and lack of outreach towards the people it was supposed to bring justice to (Clark, 2012).

There are, however, opposing arguments regarding the ICTY's impact to reconciliation. The first one is directly linked to claims regarding retributive justice and its lack of effectiveness in administering peace processes. The reality, however, proves the latter to be inaccurate, especially considering the fact that there are no concrete studies that systematically highlight the correlation between trials and reconciliation despite general assumptions. This means that there is still a need to address whether criminal tribunals, have actually succeeded in aiding for reconciliation in actual practice. The second one is closely linked to the previous point, as it argues that it is very difficult to measure a tribunal's contributions to reconciliation in general. In our case, there aren't any studies made that confirm a link between the actions made by the ICTY and the interactions among different ethnic groups in the region. To further complicate matters, there is no universal consensus as to what reconciliation is and what it entails. It is a multifaceted phenomenon, and sometimes indicators of its success may not be as obvious. It also seems to depend greatly on how institutions choose to define it, in order to measure it. For that reason, there are often two types of reconciliations: one defined through processes such as cease fire agreements and peace accords, and the other one defined by forgiveness and rebuilding of society. The ICTY, for instance, would be considered an element in the former understanding of reconciliation, rather than the latter. Finally, although we have talked about the Tribunal's issue with acceptance and reputation in the region, there are arguments that dismiss the ICTY's "above-all" attitude and place the blame on the physical distance of the Tribunal itself, form the countries where the crimes took place. This particularly could also explain the struggle to keep the Balkan people informed of its work in the region. The confusion and overall rejection of the ICTY's work, judgements and mandate, could have been avoided with a proper and effective outreach program, which is where the ICTY failed (Clark, 2009).

However, even with all this in mind, and the fact that the ICTY has played a significant role in establishing awareness on the atrocities committed in the 90s, the reality is that societies remain entrenched along ethnic narratives, each clinging to their own version of the truth. Even though, the Tribunal has done significant work on a judiciary level, it has neglected the societal and political aspect that its work entails – whether they chose or not-. Finally, apart from rejecting the prospects of regional reconciliation, local reconciliation between victims and perpetrators can also be added to the ICTY list of shortcomings (Clark, 2009).

CONCLUSIONS & RECOMMENDATIONS:

Before moving on to the concluding remarks it is important to, once again, remind ourselves of the main objectives set out throughout the thesis. The main goal was to evaluate the extent of the ICTY's successes, and analyze the motives behind its shortcomings and controversies, with a particular focus on its work as an International Tribunal, its contributions in the field of International Criminal Law, and finally its impact in the region in terms of justice and reconciliation.

When it comes to the ICTY's work as an international tribunal, it appears that its shortcomings outshine its successes. For instance, the quality of Judges is a remark that is often used to undermine the legitimacy of the Tribunal's work, as they weren't professionally or practically equipped to take on the task of trying convicts on an international scale, furthermore the lack of consensus regarding basic judicial functions led to disparities in its proceedings and judgments. One example of said contradictions was regarding Article 7(1) and 7(3), which referenced the notion of individual criminal responsibility. The Different standards and interpretations of this Article and its sub-sections left many victims, and convicts alike, skeptical of the Tribunal's ability to issue effective justice. Particularly considering that fact that judgments under Article 7, led to disproportionality lighter sentences. Another highly controversial practice in the ICTY was related to its due process, often highlighting its unjust use of witness protection and non-disclosure, since it was said to interfere with convict's fundamental rights of cross examination during his/her trial. The *Tadić* case is often used by

critics to reference this practical issue. Yet, many prosecutors and individuals that make up the ICTY's constituency have highlighted that this particular element in its due process is witness and victim-oriented to ensure their safety, rather than an intricate plan to sabotage defendants during their trial hearings.

The issue of cooperation and judicial assistance also burdened the efficiency of the tribunals work, especially when considering the extensive dependency, it's constituency and overall legitimacy had towards it. The ICTY had no authority to exercise hard-power dynamics, and for that reason it relied a lot on external powers and influences in order to operate. The Tribunal did show aspects of resilience and determination by adopting measures of interim justice in order to maximize its efficiency within it obvious limitations. However, the neglect it experienced, not only form the international community, but also from its local counterparts, made basic judicial practices, such as gathering evidence or apprehending and extraditing suspects, very difficult. This not only led to delays in its completion plan and prosecutions, but also belittled the Tribunal as a serious judicial institution.

The fact the ICTY, was a pioneer of the use of guilty pleas and plea agreements by international courts can be seen as both, beneficial and detrimental. Detrimental, in the sense that, it could be seen as a way for the ICTY to punish the accused – and thus abide by its mandate- without achieving true justice for the victims – at least not in a restorative way-. Additionally, it is very likely that defendants exploited and manipulated the exercise of plea bargains to their own advantage in order to get lower sentences. However, it could also be seen as beneficial since it not only dealt with the issue of trial delays, but also helped fill the gaps regarding certain events by disclosing crucial facts –locations, names, and operations- that would otherwise be unknown. Furthermore, the idea of also giving a voice to the perpetrators and acknowledge their perspectives further accentuated the Tribunal's impartiality claims and gave us extensive amounts of documentation that can be used to counter revisionist attitudes in the region. It also helped establish closure between victims and their aggressors, which is a crucial steppingstone towards restorative justice. However, this last remark is only effective if the accused are sincere in their apologies.

Finally, we also concluded that the controversy regarding acquittals also left a stain in the ICTY's legacy for several reasons. The first one is the release of individuals who have been officially acknowledged for committing crimes against humanity. Secondly, the setbacks these acquittals entailed, especially since these individuals were considered high-ranking officials. Thirdly, public discontent, especially from the victims. All these elements contributed to skepticism regarding the Tribunals ability to provide adequate and competent hearings and

initial judiciary decisions. Additionally, the recent re-trials and re-sentences of the only two Serbian individuals who got acquitted, have re-ignited allegations of anti-Serbian bias, since the other 3 individuals who were also acquitted – of Croatian descent- were not re-trialed.

Although the ICTY had limited successes, some of its criticisms were also, to a certain extent, disproportional. In the long-run the Tribunal had made significant contributions to international criminal law, and helped, to a great extent, establish the facts about the events that took place in the former-Yugoslavia in the 90s, as well as punish those responsible for them. Additionally, we must forget that the ICTY was the first *ad hoc* tribunal created in a post-WWII period, so it was be expected to encounter setbacks and challenges along the way. Issues such as, shortage of experienced prosecutors and Judges, absence of effective enforcement, lack of international and national cooperation, and complications with crucial judicial tasks, were not a product of incompetence per se, but rather a consequence of transitioning elements practiced in national courts to an international scale. One could argue that its risky to implement a defective and pre-mature tribunal to deal with mass atrocities, but the urgency of the situation left the international community no choice.

On the other hand, looking back at the ICTY's legacy as a representative of international criminal law, we can compile an adequate list of achievements that place the ICTY as a favourable model through which future International Criminal Courts and Tribunals should build up on. For one, we could say, even if it's to a limited extent, as some critics would like to point out, the ICTY has made a fundamental contribution in creating the pillars needed for international criminal law to take shape in countries where there isn't a developed notion of it. Furthermore, we must also point out its extensive contribution in establishing the separate recognition of women as possible victims of crimes against humanity, rather than merely "collateral damage". Which, in turn, has also helped open a window for gender perspectives to slowly assert themselves in conversations regarding conflict management and resolution. What's more, it also made significant contributions to strengthen the rule of law, particularity in sharing, transferring and passing on its experiences– good and bad-, not only to future international courts and tribunals, but also to the local courts in the Balkan region so that they could carry on its legacy.

Perhaps the Tribunal's greatest failure has been towards the Balkan people – including victims and perpetrators- . For decades, the survivors of the mass atrocities committed during the 90s had to sit through multiple trials, and relive their trauma over and over again, only to have their sorties and experiences questioned, watch their aggressors get lower sentences, and, in some cases, even get exonerated. Furthermore, for those that argue that the ICTY did in fact

bring justice to victims, they often refer to the kind that doesn't extend beyond legal terms, also known as retributive justice. Additionally, for some ethnic groups in the region, the ICTY is perceived as a bias institution with the sole purpose of blaming and antagonizing some groups over others through the use of a selective kind of justice. This ethnical entrenchment not only rejects the established facts provided by the tribunal, but also increases tensions within the region and heightens the idea of collective guilt: instead of focusing the blame on the perpetrators themselves, it has extended to entire ethnic groups. Although, this may not be entirely the ICTY's fault, it seems that its judgments have added more fuel to the fire.

Given the international nature of the Tribunal, It is speculated that its main concerns weren't focused on building a positive reputation in the Balkans at all, but rather on how it was going to be perceived by the international community, especially by experts in international law, and what its contribution was to the development in international criminal law. This not only proves its significant success and contributions to the field, but also why it's a widely misunderstood institution in the region itself: it simply wasn't a priority. Although, it is true that when talking about reconciliation specifically, statistical data has concluded that the impact of the Tribunal may not be as direct, nevertheless, the ICTY, and particularly its judgments, has caused an important level of truth obstruction which impedes the acceptance of the past, and thus prevents these countries from moving forwards. However, there is one very important element that deserves to be highlighted: the war was still ongoing when the ICTY was created. Meaning that, perhaps the UNSC's goal, at least during the Tribunal's creation, wasn't to help the region find and maintain peace, but rather to simply stop the fighting. This not only explains its focus on negative peace but could also be the reason for providing retributive justice as opposed to restorative justice. Perhaps the most crucial lesson taken from the ICTY's mandate and legacy, is the fact that its objectives were too ambitious from the start. The intention to establish peace, justice - the restorative type- and reconciliation in the region, although a good initiative on paper, was disproportional to the tribunals' capacities, not to mention an overestimation of the severity of the conflict and its implications in the region.

With all this in mind a crucial question comes to mind: What would've happened if the tribunal didn't exist at all? Milosevic would most likely still be in power, other high-ranking war criminals would now be active members of society, as they continue to live in impunity. Additionally, ethnic nationalism would take over the region, the world would be clueless about the war and the atrocities committed, and the notion of International criminal law as we know it would've been very different, perhaps even less refined. These facts alone are enough to put things into perspective, and ooverhsadoow the practical weaknesses of the Tribunal.

Throughout the research process of the thesis, I encountered various works that make reference to very interesting elements that were, unfortunately, not part of this investigation. There were extensive essays and articles regarding the impacts of the International Residual Mechanisms for Criminal Tribunals, which has currently inherited the essential functions of the ICTY following its finalization. This would be particularly interesting especially in relation to the idea of transitional justice with a special focus on the aftermath beyond the ICTY's work. Another very interesting area of investigation would be a comparative analysis of the effectiveness between the ICTY, and its sister tribunal the ICTR, in order to conclude whether or not the errors committed by the former Tribunal were amended by the latter, and if so, how? Perhaps, as a separate research question, it would be intriguing to write a thesis focusing particularly on the ICTY and public opinion, through the use of systematic and empirical data in order to identify, not only what each ethnic group in the region felt about the Tribunal at the time, but also explore how different each narratives and perceptions about the conflict were, and how these opinions have transcended over time. In relation to the previous recommendation, we could also focus on creating an in-depth analysis of the ICTY's outreach program itself, and why it entered into force later rather than sooner. Finally, another interesting approach would be to concentrate on one country of the former-Yugoslavia specifically. For instance, a good example would be to examine the ICTY's impact in Serbia explicitly in order to understand the ethnic bias allegations and the core motives behind their revisionist attitudes.

Although I didn't encounter any problems throughout the thesis *per se,* there were two specific issues I noticed that made it difficult for me to focus on providing an impartial evaluation of the ICTY successes and failures. Most of the sources consulted were subjective and biased based on who wrote them: in general terms, western authors praised the Tribunal's work, whereas local authors were the main source of its criticisms. Although this isn't particularly new, it did take some time for me to compile a balance between the good and the bad aspects of the ICTY's work. Additionally, it was very hard to find recent sources regarding the ICTY, unless they are related to the International Mechanism for Criminal Tribunals, which is not the focus of our thesis. The majority of the sources used, that talk about the ICTY specifically, date back to 2017 -coinciding with the year of its termination-.

BIBLIOGRAPHY:

Akhavan, P. (1996, May). The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and beyond. *Human Rights Quarterly, 18*(2), 259-285.

Armakolas, I., & Vossou, E. (2008). *Transitional justice in practice: The International Criminal Tribunal for the Former Yugoslavia and beyond.* UNISCI.

BALKAN. (2003, December 03). *VIEW FROM THE HAGUE: DEBATES ON GUILTY PLEAS.* Retrieved from icty.org: https://www.icty.org/x/file/Outreach/view_from_hague/balkan_031203_en.pdf

Barria, L. A., & Roper, S. D. (2005, September). How effective are international criminal tribunals? An analysis of the ICTY and the ICTR. *The International Journal of Human Rights, 9* (3), 349-368.

BBC. (2016, March 18). *Balkans war: a brief guide*. Retrieved from bbc.com : https://www.bbc.com/news/world-europe-17632399

Blackstone School of Law. (2016, July 25). *What Is Criminal Law?* [Video]. YouTube. https://www.youtube.com/watch?v=6Gc6La918aA

Braithwaite, J. (1999). Restorative Justice: Assessing Optimistic and Pessimistic Accounts. *Crime and Justice, 25*, 1-127.

British Red Cross . (n.d.). *Introduction to international humanitarian law.* Retrieved from redcross.org: https://www.redcross.org.uk/about-us/what-we-do/protecting-people-in-armed-conflict/international-humanitarian-law

Bube, P. C. (2018). *From Retributive Justice to Restorative Justice.* The International Symposium on Ecological Governance . Batesville,: Lyon College.

Burton, K. D. (24 de November de 2020). *War Crimes on Trial: The Nuremberg and Tokyo Trials*. Retrieved from The National WWII Museum: https://www.nationalww2museum.org/war/articles/nuremberg-and-tokyo-war-crimes-trials

Carter, S. (2016). *Justice in the Balkans: Developing International Law after Yugoslavia.* Department of History. Victoria: The University of Victoria.

Clamp, K. (2014). *Restorative Justice in Transition.* New York: Routledge.

Clark, J. N. (2009). Judging the ICTY: has it achieved its objectives? *Southeast European and Black Sea Studies, 9*(1-3), 123–142.

Clark, J. N. (2009). Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation. *he European Journal of International Law, 20*(1), 415–436.

Clark, J. N. (2012 , January 23). *The ICTY and the Challenges of Reconciliation in the Former Yugoslavia* . Retrieved from E-International Relations : https://www.e-ir.info/2012/01/23/the-icty-and-the-challenges-of-reconciliation-in-the-former-yugoslavia/

Clark, J. N. (2008). The three Rs: retributive justice, restorative justice, and reconciliation. *Contemporary Justice Review, 11*(4), 331-350.

Coalition for the ICC. (2016, October). *Trials in absentia and international criminal justice*. Retrieved from Coalition for the International Criminal Court : https://www.coalitionfortheicc.org/news/20161005/trials-absentia-and-international-criminal-justice#:~:text=Trials%20in%20absentia%20are%20trials,to%20be%20present%20at%20trial.

Cornell Law School. (n.d.). *International criminal law*. Retrieved from Legal Information Institue [LII]: https://www.law.cornell.edu/wex/international_criminal_law

Danner, A. M. (2006, January). When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War. *Vanderbilt Law Review, 59*(1), 1-63.

DeFrancia, C. (2001, November). Due Process in International Criminal Courts: Why Procedure Matters. *Virginia Law Review, 87*(7), 1381-1493.

Ekeløve-Slydal, G. M. (2016). *ICTY Shifts Have Made Its Credibility Quake.* Oslo: Torkel Opsahl Academic EPublisher.

European Comission. (n.d.). *crime against humanity*. Retrieved from Migration and Home Affairs: https://ec.europa.eu/home-affairs/pages/glossary/crime-against-humanity_en

Felter, C. (2022, March 28). *The Role of the International Criminal Court*. Retrieved from Council on Foreign Relations : https://www.cfr.org/backgrounder/role-international-criminal-court#:~:text=The%20ICC%20was%20created%20to,over%20the%20court%20still%20rages.&text=The%20ICC%20seeks%20to%20investigate,as%20genocide%20and%20war%20crimes

Forum for Living History. (2003). *The role of ICTY in the making of history.* Retrieved from Forum for Levande Hisotria : https://www.levandehistoria.se/sites/default/files/wysiwyg_media/dlh_the_role_of_icty.pdf

Gupta, M., & Rodkey, D. (2018, January 16). *The Story of ICTY: Legal Success Emerging from Tragedy*. Retrieved from JURIST: https://www.jurist.org/commentary/2018/01/mohit-gupta-icty/

Grabbe, H. (2002, July). European Union Conditionality and the "Acquis Communautaire". *International Political Science Revi, 23*(3), 249-268.

Harmon, M. B., & Gaynor, F. (2007). Ordinary Sentences for Extraordinary Crimes. *Journal of International Criminal Justice, 5*, 683^712.

Hermann, D. H. (2017). Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflflict in the Search for Justice. *Seattle Journal for Social Justice, 16*(1), 71-103.

ICRC. (2004). *What is International Humanitarian Law?* Retrieved from ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW: https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf

ICTY. (n.d.). *About the ICTY*. Retrieved from icty.org: https://www.icty.org/en/about

ICTY & UNICRI. (2009). *ICTY manual on developmental practices.* Turin: UNICRI Publisher. Retrieved from Icty.org: https://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf

ICTY. (n.d.). *Achievements*. Retrieved from Icty.org: https://www.icty.org/en/about/tribunal/achievements

ICTY. (n.d.). *International Criminal Tribunal for the former Yugoslavia*. Retrieved from icty.org: https://www.icty.org

ICTY . (n.d.). *The former Yugoslavia- The conflicts* . Retrieved from Icty.org : https://www.icty.org/en/about/what-former-yugoslavia/conflicts

ICTY. (n.d.). *The Tribunal - Establishment*. Retrieved from Icty.com: https://www.icty.org/en/about/tribunal/establishment

CTY. (2021, May). *Key Figures of the Cases*. Retrieved from Icty.org: https://www.icty.org/en/cases/key-figures-cases

International Committee of the Red Cross. (2022, MARCH 07). *Frequently asked questions on the rules of war*. Retrieved from icrc.org: https://www.icrc.org/en/document/ihl-rules-of-war-faq-geneva-conventions

International Committee of the Red Cross. (n.d.). *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950.* Retrieved from ICRCenter: https://ihl-databases.icrc.org/ihl/WebART/390-550006?OpenDocument

International Criminal Court. (2020). *Understanding the International Criminal Court.* The Hague: International Criminal Court 2020. Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf

International Criminal Law Services. (2018). *What is International Criminal Law?* ICLS – OSCE-ODIHR.

International Criminal Tribunal for the Former Yugoslavia . (2018, January 03). *Panel I: Discussion on ICTY's Contribution to International Criminal Courts and Tribunals* [Video]. YouTube. https://www.youtube.com/watch?v=YKkx8rzYLgk

International Justice Resource Center. (n.d.). *INTERNATIONAL CRIMINAL LAW*. Retrieved from IJRCenter: https://ijrcenter.org/international-criminal-law/

Karnavas, M. G. (2011). The ICTY Legacy: A Defense Counsel's Perspective. *Goettingen Journal of International Law, 3*(3), 1053-1092.

Kerr, R. (2006). Prosecuting war crimes: Trials and tribulations. *International Journal of Human Rights, 10*(1), 79-88.

Klarin, M. (2015). The Elusive Reconciliation in the Former Yugoslavia: Role of the ICTY. *FICHL Policy Brief Series*(31).

Kostić, M. (2018, January 22). *Public Opinion Survey in Serbia Sheds Light on ICTY Legacy.* Retrieved from EJIL: Talk!: https://www.ejiltalk.org/public-opinion-survey-in-serbia-sheds-light-on-icty-legacy/

Mackintosh, K. (2006, January 11). *The development of the International Criminal Court: some implications for humanitarian action*. Retrieved from Humanitarian Practice Network : https://odihpn.org/publication/the-development-of-the-international-criminal-court-some-implications-for-humanitarian-action/

Mallinder, L. (2013). International Criminal Tribunal for the Former Yugoslavia. In L. Stan, & N. Nedeldky, *Encyclopedia of transitional justice* (Vol. 3, pp. 237-241). Cambridge : Cambridge University Press.

McDonal, K. G. (1999, May). The International Criminal Tribunal for the former Yugoslavia: Making a Difference or Making Excuses? [Speech Transcript] icty.org, Available at: https://www.icty.org/fr/press/international-criminal-tribunal-former-yugoslavia-making-difference-or-making-excuses

Meron, T. (2006, July). Reflections on the Prosecution of War Crimes by International Tribunals. *The American Journal of International Law, 100*(3), 551-579.

Mihailović, S., & Lazarević, S. (2017). *Obaveštenost građana Srbije o ratovima '90-ih godina, ratnim zločinima i suđenjima optuženima za ratne zločine.* Belgrade: DEMOSTAT.

Milanović, M. (2016, April). The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem. *The American Journal of International Law, 110*(2), 233-259.

O'Brien, J. C. (1993, October). The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia. *The American Journal of International Law, 87*(4), 639-659.

Prosecutor v. Gotovina et al. (n.d.). Case No. IT-06-90. Case Information Sheet. United Nations- International Criminal Tribunal for the Former Yugoslavia. Available at: https://www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf

Prosecutor v. Jovica Stanišić & Franko Simatović. (n.d). Case No. IT-03-69. Case Information Sheet. United Nations- International Criminal Tribunal for the Former Yugoslavia. Available at: https://www.icty.org/x/cases/stanisic_simatovic/cis/en/cis_stanisic_simatovic_en.pdf

Prosecutor v. Prlic et al., IT-04-74-T (International Criminal Tribunal for the former Yugoslavia March 18, 2007).

Prosecution v. Tadić A/K/A "Dule". (1995, August). IT-94-1. Decision on the prosecutor's motion requesting protective measures for victims and witnesses. Available at: https://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm

Pruitt, K. (2014). Destroying the Legacy of the ICTY: Analysis of the Acquittals of Jovica Stanišić and Franko Simatovi□ć. *San Diego International Law Journa, 15*, 359-375.

Ramet, S. P. (2012). The ICTY – Controversies, Successes, Failures, Lessons. *Southeastern Europe*(36), 1-9.

Santora, M., & Simons, M. (2021, June 30). *Tribunal Convicts Former Serbian Officials of Crimes in Balkan Wars*. Retrieved from New York Times: https://www.nytimes.com/2021/06/30/world/europe/balkan-war-crimes-trial-verdict.html#:~:text=For%20the%20first%20time%20high,the%20wars%20that%20ravaged%20the

SC Res 827, UNSCOR, 48th year, UN Doc S/RES/827 (25 May 1993). < https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/PDF/N9330628.pdf?OpenElement > accessed 31 May 2022

Scharf, M. P. (1997, January). A Critique of the Yugoslavia War Crimes Tribunal. *DENY. J. INTL L. & POL'Y, 25*(2), 305-312.

Scharf, M. (2004). Trading Justice for Efficiency: Plea-Bargaining and International Tribunals. *Journal of International Criminal Justice, 2*, 1070–1081.

Schultz, E. (2012, May). From the Nuremberg and Tokyo War Crimes Trials to the International Criminal Court: The Converging Paths of Great Britain and Germany [Master's Dissertation, The University of Hawai'i at Mānoa]. ScholarSpace. https://scholarspace.manoa.hawaii.edu/bitstream/10125/101594/Schultz_Elizabeth_r.pdf

Sepinwall, A. J. (2009). Failures to Punish: Command Responsibility in Domestic and International Law. *Michigan Journal of International Law, 30*(2), 251-303.

Šimić, G. (2016). Has the ICTY brought justice to the victims of war in Bosnia and Herzegovina? . *Indian Journal of Law and International Affairs , 1*(1), 1-12

.

Šimić, G. (2016). *ICTY and the Question of Justice.* Retrieved from Harvard Human Rights Journal: https://harvardhrj.com/online/icty-and-the-question-of-justice/

Šimić, G. (2013, July 30). *Searching for reparation: has the ICTY brought real justice for the victims in Bosnia and Herzegovina?* Retrieved from Peace Insight: https://www.peaceinsight.org/en/articles/ict-bosnia-and-herzegovina/?location=western-balkans&theme=human-rights

Simonovic, I. (1999). The Role of the ICTY in the Development of International Criminal Adjudication. *Fordham International Law Journal, 23*(2), 440-459.

Simons, M. (2013, June 14). *Hague Judge Faults Acquittals of Serb and Croat Commanders*. Retrieved from New York Times: https://www.nytimes.com/2013/06/14/world/europe/hague-judge-faults-acquittals-of-serb-and-croat-commanders.html#:~:text=PARIS%20%E2%80%94%20A%20judge%20at%20the,top%20Serb%20and%20Croat%20commanders.

Swaak-Goldman, O. Q. (1997). The ICTY and the Right to Fair Trial: A Critique of the Critics. *Leiden Journal of International Law, 10*, 215-221.

The Law Academy. (2021, November 30). *Aggression | International Criminal Law* [Video]. YouTube. https://www.youtube.com/watch?v=oRvV317HRv4

The Law Academy. (2021, November 11). *Crimes Against Humanity | International Criminal Law* [Video]. YouTube. https://www.youtube.com/watch?v=6GK-iozvO7s

Trahan, J., & Vukušić, I. (2020). The Legacy of the ICTY: The Three-tiered Approach to Justice in Bosnia-Herzegovina and Benchmarks for Measuring Success. In C. Stahn , S. Brammertz , C. Rohan , & C. Agius, *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach* (pp. 462-477). Oxford: Oxford University Press.

Trial International . (n.d.). *CRIMES AGAINST HUMANITY*. Retrieved from Trialinternational.org: https://trialinternational.org/topics-post/crimes-against-humanity/

UNDOC. (2019, April). *Topic one - Concept, values and origin of restorative justice*. Retrieved from United Nations Office on Drugs and Crime : https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html

UNGA, Report of 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 199: Note by the Secretary General, UNGAOR, 49th year, UN Doc A/49/342 (29 August 1994) < https://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf >

UNITED NATIONS. (1950, October 21). *Geneva Convention relative to the Protection of Civilian Persons in Time of War (2nd part)*. Retrieved from United Nations Human Rights Officer of the HIgh Commissioner: https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-protection-civilian-persons-time-war

UNITED NATIONS. (n.d.). *Genocide*. Retrieved from Office on Genocide Prevention and the Responsability to Protect: https://www.un.org/en/genocideprevention/genocide.shtml

United Nations. (2012, November 29). Retrial Judgement Summary for Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj. *JUDGEMENT SUMMARY* . The Hague, The Netherlands.

United Nations. (2015, July). Rules of Evidence and Procedure. *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 199.* IT/32/Rev.50, 1-117. Available at: *https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf*

UNITED NATIONS. (n.d.). *War Crimes*. Retrieved from Office on Genocide Prevention and the Responsability to Protect : https://www.un.org/en/genocideprevention/war-crimes.shtml

UN security Council. (1993, May). Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended in September 2009). *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*, 1-77. Available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

University of London Postgraduate Laws. (2019, January 28). *International Criminal Law Introduction* [Video]. YouTube. https://www.youtube.com/watch?v=srY0zCyF2zM

Vukušić, I. (2021, October). Later Rather Than Sooner: Time and Its Effects on the Karadžić and Mladić Trials. *International Criminal Law Review*, 1-20.

Whiting, A. (2009). In International Criminal Prosecutions, JusticeDelayed Can Be Justice Delivered. *Harvard International Law Journal, 50*(2), 323-364.