A comparative study of the ICTY and the ICTR and their "successes"

A deeper look at the legacy that will be left behind by these tribunals

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Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have lived under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus peace and justice go hand in hand.

-Antonio Cassese, former ICTY President

Introduction

After World War II the international community felt a strong need to bring to justice those that committed crimes during the war. Thus the Nuremburg and Tokyo trials were set in motion. Even though these trials are considered the first war crimes tribunals it should be stated that they shared more characteristics with national criminal tribunals than that of international criminal tribunals such as that of the former Yugoslavia and Rwanda. For the Nuremburg and Tokyo trials only the defeated leaders were tried, "even though allied leaders had engaged in such acts as attacking cities through conventional, incendiary, and atomic bombings, thus failing to distinguish between combatants and civilians – a cardinal principle of international humanitarian law."[1] This set a tone of vengeance for the victors without bringing other individuals to justice that also committed crimes during the war.

Another reason why the Nuremburg and Tokyo trials can be seen as national criminal tribunals rather than international criminal tribunals is because only the victors and the conquered were involved. By the time the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established, the United Nations (UN) had gained more influence in the world; thus giving these two tribunals a truly international character by appointing individuals from different countries to hold positions.

Both the ICTY and the ICTR are the first of their kind. It is important to look closely at the manner in which these tribunals have operated in order to learn the lessons that are taught by the tribunals for future endeavors. As international law is progressing, other tribunals such as the ICTY and ICTR are being established in order to prosecute individuals that have committed atrocious crimes in other regions of the world. At the moment, the UN has established three more tribunals that are based on the ICTY and the ICTR: the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. These tribunals can all take lessons from the ICTY and the ICTR which will be discussed further in Chapter 6. Other lessons taught by the ICTY and the ICTR have also had influence on the establishment and procedures of the International Criminal Court (ICC). The ICC was created on a more permanent basis differing from the ad-hoc character of the other tribunals, and has placed greater emphasis on working alongside

[1] Forsythe, David P., *Human rights in international relations* (Cambridge University Press 2006) 91.

national justice systems. These changes could not have been made without the precedent set by the ICTY and the ICTR.

For my thesis I would like to focus on the two tribunals that are most well known in the world, the ICTY and the ICTR. These tribunals have not yet been completed and there are already tribunals set up in part by the UN that have modified the workings of the ICTY and the ICTR. I would like to take a look at the manner in which these tribunals have functioned over the years and what lessons can be learned from them in order to ensure that future tribunals, such as the tribunals mentioned above, can prevent the problems that have been endured by the ICTY and the ICTR.

The Comparative Method

In the course 'The Comparative Method: an Introduction' it became apparent that the objective of the comparative method is to test for social or cultural differentiation in the historical development of common institutions, ideas and social, political, and economic structures.[2] Basically it includes a wide range of studies that compare events or developments that have or perhaps have not led to the same historical outcomes. Important aspects of comparative historical analysis that set it apart from other methods include that this method is mainly concerned with explanations that generate certain outcomes. For example, in this thesis I will be comparing the ICTY and the ICTR as both have a similar structure and explain which factors may or may not facilitate the outcome of the tribunals to be successful. Another aspect is that "comparative historical researchers explicitly analyze historical sequences and take seriously the unfolding of processes over time."[3] The objects of research do not only occur at specific points in time but are complex processes that change over time. Neither tribunal in my thesis has been completed so certain processes over time need to be taken into account. When looking at the cooperation of the countries of the former Yugoslavia towards the ICTY much has changed over time. At the time the ICTY was established the political climate was such that cooperation was very limited but as time passed, the political climate in these countries changed as to make cooperation with the ICTY possible. Another factor that is relevant is the use of qualitative and quantitative research. According to Charles Ragin, qualitative researchers use a more holistic approach and compare entire cases with one

[2] Notes from the class 'The Comparative Method: an Introduction.'
[3] Mahoney, James and Dietrich Rueschemeyer, *Comparative Historical Analysis in the Social Sciences.* (Cambridge University Press 2003) 12.

another and aims for historical interpretation in order to account for specific historical outcomes.[4]Quantitative research is more focused on the number of cases and/or variables, however in the comparative method the use of both is another reason why this method is widely used. One of the most used methods within comparative historical analysis is that of Boolean algebra. This method uses a truth table in order to show whether or not certain variables are needed during an event or process in history in order to produce a certain outcome. However, this method is better suited when variables are clearly present or absent in order for an outcome to be produced. In this thesis the variables are more complex as financial means are not always clear, and cooperation of involved parties can change over time thus not being present or absent. The case-oriented method will be most suited for my thesis as it is a holistic method that emphasizes qualitative rather than quantitative, thus allowing the use of a small number of cases and a small number of variables.

As explained the comparative method can be used in many different manners and as I am using two tribunals to compare with one another, the case-oriented comparative method will be most useful. By using this method I will compare different aspects of both tribunals in order to uncover the successes and obstacles of the ICTY and the ICTR. I will compare annual reports and completion strategies in order to give an impression of the problems that have occurred during the establishment of the tribunals and the problems that have since followed, such as budgetary problems and time limitations. I will examine different court cases from both tribunals and discuss the difference between national and international jurisdiction to establish the different troubles that have occurred while working with national jurisdictions and other stakeholders of both tribunals, such as lack of cooperation and outreach efforts that have been wanting. Some of these problems have already been recognized by the UN. The creation of the other three tribunals that followed has differed from the ICTY and the ICTR which is why these will also be mentioned during my thesis. These aspects will be compared as these are the factors that are most involved in the establishment and procedures of the tribunals. Other aspects can also be discussed; however I would like to focus on the establishment and procedural phases of the ICTY and the ICTR. By doing so I will formulate recommendations at the end of chapter six in order to give an overview of successes and obstacles that will need to be taken into consideration for future tribunals.

[4] Ragin, Charles C., *The Comparative Method: Moving beyond qualitative and quantitative strategies*, (University of California Press 1987) 3.

I have chosen to compare the ICTY and the ICTR because they are the first of their kind. The conflicts that occurred in both regions are of a different nature as will be explained later in this chapter. In order to try and learn lessons from these tribunals both have to be compared in order to understand the true underlying problems with such ad-hoc tribunals and what advantages can be taken from them. I have chosen to only compare these two tribunals as the other three that have been mentioned were established at later dates and have already made certain modifications.

The literature and sources that will be used during the analysis include annual reports, completion strategy reports, legal documents referring to particular cases, the legal documents that describe the functioning of the Gacaca courts and several articles and books that have been written on the subject.

First, I will provide a brief overview of the establishment of these two tribunals in order to provide a more comprehensive view. The two conflicts that led to the creation of the tribunals will also be discussed. In the first chapter I will be comparing the objectives of both the ICTY and the ICTR. The annual reports and resolutions that stem from these tribunals will be the basis for my comparison. The financial means of the ICTY and the ICTR will be reviewed, in particular what role financial means play during an ad-hoc tribunal and the support given by member states through personnel and materials needed for the tribunal.

Chapter two will take a closer look at the completion strategies of the tribunals. Both tribunals were expected to be finished in 2008 according to the first resolution that was issued by the Security Council with a completion date[5]. The completion strategies that were set up for the ICTY and the ICTR will provide a background to what objectives were most important to these tribunals.

Next, chapter three will discuss a few examples of cases from both the ICTY and the ICTR that have changed international law or the proceedings of the tribunals. An analysis of the successfulness of the tribunals will also be provided.

Chapter four will be focused on the difference between the 'big fish' and the number of 'smaller fish' that are being tried by the two tribunals. The accountability of high-ranking officials versus low-ranking officials will be discussed along with what this means for reconciliation.

[5] Resolution 1503 adopted by the Security Council on 28 August 2003 concluded that both the ICTY and the ICTR needed to establish completion strategy reports. Both tribunals received deadlines: investigations were to be ended by the end of 2004, trial activities to be ended by the end of 2008 and all work was to be completed by 2010.

In the fifth chapter, I will be comparing national indictments with international indictments. The Gacaca courts that have been established in Rwanda have added momentum to the number of persons that are able to be prosecuted. However, what is the difference between the manner in which the international and national jurisdictions punish criminals? Another aspect that will be discussed is the outreach programs of both tribunals, along with the referral of cases to national jurisdiction.

Last but not least, the effectiveness of the tribunals will be discussed. Which recommendations can be taken from the lessons the international community has learned from the ICTY and the ICTR? There are some more recent tribunals that have already put some of these recommendations into practice such as the three tribunals mentioned above, thus providing more information for future endeavors.

The establishment of the ICTY

The Socialist Federal Republic of Yugoslavia was formed by six republics including, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. However on 25 June 1991 Slovenia and Croatia declared its independence and were soon followed by Macedonia, and Bosnia and Herzegovina. Serbia and Montenegro continued together under the name of the Federal Republic of Yugoslavia. Many problems arose as soon as the different republics succeeded as most states retained minorities from other nationalities.

The wars that soon followed began in 1991 immediately after the disintegration of Yugoslavia. Slobodan Milosevic, who at the time was the Serbian president, eventually let Slovenia go as it was an ethnically pure state in the sense that no Serbs resided in this country. However, that left Croatia and Serbia alone to battle each other. The violence continued to escalate and the Yugoslav Army was repeatedly used in order to protect Serbian citizens, which slowly led to the creation of a Serb Army under the flag of the Yugoslav army. The violence escalated between the different ethnic and religious groups leading to numerous wars in which civilians were beaten, raped, and murdered.

The Bosnian war took place between March 1992 and November 1995. The disintegration was by now a fact and Bosnia and Herzegovina were in conflict with the Federal Republic of Yugoslavia, which consisted of Serbia and Montenegro at the moment. Serb forces had remained in Bosnia after they had declared their independence which led to many violent conflicts in the region. The most well-known conflict is the Srebrenica massacre of July 1995 which resulted in the death of more than 8,000 Muslims in Bosnia and

Herzegovina. This was the largest mass murder that had taken place in Europe since the Second World War.[6]

Another war that should be mentioned is the Kosovo war that took place between 1998 and 1999. Again the conflict was with Serbian forces as Slobodan Milosevic felt that he was losing his control over the different regions. Members of the Albanian population in Kosovo were starting to radicalize and attacked several Serbian targets through the Kosovo Liberation Army. NATO and the United States supported the Kosovo Liberation Army, which eventually led to the NATO bombing campaign in order to intervene in the conflict.

The United Nations thus created the International Criminal Tribunal for the Former Yugoslavia through Resolution 827 on 25 May 1993. It was the first war crimes tribunal since the Nuremburg and Tokyo trials, but it was also the first in its kind with an international character. The main purpose behind the tribunal was to bring to justice those who perpetrated crimes such as crimes against humanity and genocide with an emphasis on the instigators or authorities that allowed the crimes to happen.[7] However, the creation of the ICTY led to several problems. Many critics were afraid that the wars would be prolonged as the authority that was accountable would not want to be prosecuted. Even the first prosecutor for the ICTY, Judge Goldstone, "noted that truth commissions had certain advantages over criminal trials as far as establishing facts in a form broadly understandable and thus in providing education and catharsis."[8] These criticisms did not prevent the United Nations from going through with the tribunal.

The tribunal was structured around three main organs: the Chambers, the Office of the Prosecutor and the Registry. The Chambers were divided between the Trial Chambers that were meant to ensure fair trials, and the Appeals Chamber dealt solely with the Appeals. The Office of the Prosecutor was mandated to "investigate and prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."[9] The Registry was to organize the administration and the organization of the tribunal, including the responsibility for bringing witnesses to testify, fair representation of the accused and the interpretation and translation efforts.

As the ICTY was the first of its kind there were no known precedents to build on. The tribunal was confronted with many obstacles such as the investigation of crimes during a war

[6] "Tribunal Update: Briefly Noted", Institute for War and Peace Reporting, TU No 398, (18 March 2005).
[7] Forsythe, *Human Rights,* 97.
[8] Forsythe, *Human Rights,* 98.
[9] "Office of the Prosecutor", at http://www.icty.org/sections/AbouttheICTY/OfficeoftheProsecutor, viewed 28 April 2010.

in which there was limited access to crime scenes in the first few years.[10] However, there were other approaches to gain the information that was needed, such as through the interviewing of witnesses and victims. One of the main obstacles would be that of legitimacy. As mentioned above many critics did not believe in the functioning of the tribunal. Truth commissions were preferred[11], especially by the perpetrators as they would make use of the golden parachute[12] and not stand trial for the atrocities that had been committed by them.

The establishment of the ICTR

During the colonial period, the Belgian colonizers needed to control a greater area than they were able to handle in Rwanda. The Tutsi minority was easier to control than the entire area and as the Tutsi's were already in power at the moment, the Belgian colonizers used this to their advantage. At that moment the difference between Hutu's and Tutsi's was mainly an economic one. Hutu's were farmers and Tutsi's had control over the livestock which was worth more money. A Hutu could become a Tutsi and a Tutsi could become Hutu which would indeed indicate that it was more likely an economic difference rather than an ethnic difference.[13] However, the Belgian colonizers needed a manner in which to relate to the Tutsi population. Studies were done on the anatomy of the citizens of Rwanda and the Belgian scientists came to the conclusion that the Tutsi's could be from the northeast which would mean they had come into contact with European civilizations and might even be related to them in the far distance.[14] This would explain why the Tutsi's were taller, well-built and lighter skinned than their Hutu neighbors. Tutsi's thus received a privileged position under the control of Belgium. However, the exclusion of Hutu's in politics, as well as Hutu children being denied to go to certain schools, led to much aggravation within the Hutu population. They made up almost 90% of the population and had no say in important matters.

The Hutu revolution of 1959 however changed the prospective for the Hutu population. As soon as the Belgian conquerors realized they were losing control, their support for the Tutsi's was withdrawn. The Tutsi's tried to remain in power but were very much in the

[10] Ibidem.
[11] Ramsbotham, Oliver, Woodhouse, Tom, Miall, Hugh, *Contemporary Conflict Resolution* (Cambridge 2005) 241.
[12] High-ranking officials that are being tried by the international community can be given immunity if the person in question provides all the information that is required and steps down. In conflict studies this is referred to as a golden parachute.
[13] Veen, R. van der, *Afrika: van de koude oorlog naar de 21e eeuw* (Amsterdam 2002) 102.
[14] Veen, R. van der, *Afrika: van de koude oorlog naar de 21e eeuw* (Amsterdam 2002) 108.

minority compared to the Hutu population. On 1 July 1962 Rwanda declared its independence and a Hutu government was established. The resentment against the Tutsi's that had been festering during the colonization was able to manifest itself now that the Hutu's controlled the government. Many attempts were made to install peace in the region, yet there was little incentive to make peace between the two groups.

On 6 April 1994 the plane of the Rwandan president Habyarimana was shot down. Within the hour blockades were placed by Hutu extremists in order to systematically wipe out the Tutsi minority. Within a hundred days after the assassination of Habyarimana approximately 800,000 individuals were murdered. Men, women and children that had lived next door to each other became enemies in less than 24 hours. Lists of names were distributed listing Tutsis and Hutu moderates that were to be murdered. Many sought refuge only to be beaten, raped, burnt alive, or murdered.

The international community did not respond during the genocide, because "they saw no vital self interests in such action. Somalia in 1993 had shown that international intervention in a situation where persons of ill will engaged in brutal and inhumane power struggles could be a dangerous venture."[15] Instead the United Nations decided to establish the International Criminal Tribunal for Rwanda after the fact. However, the United Nations did admit that they felt that the international community had failed Rwanda by not preventing or stopping the genocide even though the warning signs were there.[16] Thus the ICTR was created by Resolution 955 on 8 November 1994.

The structure of the ICTR was to be made up of three components: the Chambers, Office of the Prosecution, and the Registry. The Chambers were to consist of three Trial Chambers and an Appeals Chamber. The Appeals Chamber was to be shared with that of the ICTY. [17] The 16 judges that were appointed to these chambers eventually proved to be unable to handle the caseloads; thus after much perseverance by the ICTR and the ICTY a pool of 18 *ad litem* judges was added in order to alleviate some of the pressure incurred by the completion date established by the Security Council.[18] The Office of the Prosecution was also divided into two divisions: the Prosecution Division and the Appeals and Legal Advisory Division. The third component was that of the Registry which deals with the administration and organization of the Tribunal.

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[15] Forsythe, *Human Rights*, 103.
[16] *Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda*. The Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda (15 December 1999) 3.
[17] "The Chambers" at http://liveunictr.altmansolutions.com/tabid/103/Default.aspx, viewed 28 April 2010.
[18] Ibidem.

Under the authority of the Registry, there are also other programs that are of significance for the effective functioning of the ICTR. The first of which is the Witness and Victims Support Section (WVSS). In the aftermath of the genocide many Rwandans were afraid to testify as many of the perpetrators were those with high functions in the new government and/or residing in the same community as the victims. One of the objectives of the WVSS is the protection of witnesses, including safe movement of witnesses, twenty-four hours security surveillance, and accommodations of protected witnesses at safe houses.[19] Another important program organized by the Registry is that of the Defense Counsel and Detention Management Section. This section was created in order to ensure that proper defense counsel was provided conform international standards. As the national jurisdiction in Rwanda had disintegrated during the genocide, it was important that such programs were established through support from the UN.

[19] "Witness Support and Protection at ICTR" at http://liveunictr.altmansolutions.com/tabid/106/default.aspx, viewed 28 April 2010.

Chapter 1: Objectives of the ICTY and ICTR

The International Criminal Tribunal for the former Yugoslavia set a precedent for the manner in which the international community should deal with genocide, war crimes and crimes against humanity. Shortly followed by the ICTR, both tribunals have been the first of their kind. The international community needed a manner in which to respond to these atrocities because there was a realization that "without establishing a culture of law and order, and without satisfying the very deep need of victims for acknowledgement and retribution, there is little hope of escaping future cyclical outbreaks of violence."[20] The international community vowed that 'never again' would such atrocities happen; thus perpetrators needed to be brought to justice which ultimately would also lead to the creation of the more permanent version of these tribunals, the International Criminal Court (ICC).

As described above both tribunals consist of three main branches that have been established in order to try individuals that have been accused of any of the crimes that are listed in the statute, including murder, torture and rape. Two new things have happened here: the emphasis on the individual accountability and rape being classified as an instrument of terror. First, the emphasis on the individual will be discussed. As stated in the first annual report of the ICTY:

> "If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal…….. The history of the region clearly shows that clinging to feeling of 'collective responsibility' easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes."[21]

In order to protect certain ethnic or religious groups from being labeled as 'collectively responsible' the individual is now being accused for his or her crimes and can no longer be protected by the senior position or familial ties within a certain group. The entire group was not responsible for the actions of say the militias that committed the crimes, even though "there is evidence that ethnic cleansing was a state policy…this explanation ignores that many Bosnian Serbs did not want secession, that many Serbs in Croatia at first backed moderate

[20] Ramsbotham, Oliver, Woodhouse, Tom, Miall, Hugh, *Contemporary Conflict Resolution* (Cambridge 2005) 241.
[21] *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 1991.* Secretary-General United Nations (S/1994/1007: 29 August 1994) 12.

nationalists, and that many Serbs evaded the draft."[22] There are certain scholars as explained above that believe that it was an ethnic conflict and others that nuance this position. However, the fact remains that this was the work of individuals and not entire ethnic or religious groups.

Secondly, rape was now finally listed as a war crime, for example by the ICTR in the sentencing judgment of Jean-Paul Akayesu on 2 September 1998 and many other cases that would follow.[23] Rape has been recognized even during the Nuremburg and Tokyo trials, however never in the capacity that it had been until the trial against Akayesu. It is now seen as a means to evoke terror during wartime. According to certain sources, "there are also indications that such practice has been closely linked with the intention to humiliate or terrorize, and thus to facilitate the process of 'ethnic cleansing'."[24] This has ensured that political and legal accountability has shifted and can be seen as examples for other countries to follow.

There has also been criticism toward the International Criminal Tribunals as many question jurisdiction, the high costs of the trials (as they are ad-hoc tribunals), and the time that has been put into these proceedings. According to some, the tribunals were used in order to ease the guilt felt by the international community or even as another tool used by the enemy to keep these countries under their control.[25] Especially at first, it could have seemed that way as these tribunals were being set-up without a formal structure or any criminals in detention.[26] However, there is always going to be criticism when something new is being established and despite that, as Sean Murphy put it very well:

> "The real success of the ICTY lies in the fact that, despite these obstacles, it is a functioning international criminal court that is providing a forum for victims to accuse those who violated civilized norms of behavior;…stigmatizing persons…and forcing them to relinquish any official power…and generating a body of jurisprudence that will undoubtedly continue to build over time."[27]

The legacy that is meant to be left behind by the ICTY and the ICTR can further international law by setting a precedent for dealing with these atrocious events.

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[22] Milosevic, Milan 1997 'The media wars: 1987-1997', in Jasmina Udovicki and James Ridgeway (eds), *Burn This House Down: The Making and Unmaking of Yugoslavia*, Durham: Duke University Press, 109.
[23] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: http://www.unhcr.org/refworld/docid/40278fbb4.html (accessed 16 February 2010).
[24] Vulliamy, Ed, *Seasons in Hell: Understanding Bosnia's War* (London 1994), 199.
[25] Ramsbotham, *Contemporary Conflict Resolution*, 241.
[26] Karns, Margaret, Mingst, Karen, *International Organizations: The Politics and Processes of Global Governance*, (London 2004) 93.
[27] Karns, *International Organizations*, 93.

When taking a look at the completion strategies of both tribunals it becomes evident that the referral of cases to national jurisdictions has become part of the strategy.[28] This furthered the experiences of national jurisdictions to handle cases such as these in the future. Further explanation of the outreach programs and the legacy that is to be left behind by these two tribunals in order to prepare national jurisdictions shall be given in chapter five.

In order to better understand the objectives of both tribunals it would be helpful to look at the UN resolutions that have established these tribunals, the annual reports that are created, and the means by which these tribunals have had to survive over the past years. These elements will be discussed in the sections to follow.

The UN resolutions

The two most significant UN resolutions for either tribunal are the resolutions that set a new standard for international law. Resolution 827 established the International Criminal Tribunal for the former Yugoslavia and was passed on 25 May 1993, and Resolution 955 established the International Criminal Tribunal for Rwanda and was passed on 8 November 1994. These resolutions determined the jurisdiction and structure of both tribunals. Another responsibility carried by these resolutions is that they mark the beginning of a new era in which the international community takes responsibility for prosecuting persons responsible for genocide and other war crimes[29]. Annexed to both resolutions are the Statutes of the ICTY and the ICTR which spell out the manner in which both tribunals should be governed. Another resolution that has some significance is Resolution 977 which determined the location of the Rwanda tribunal to be in Arusha, Tanzania. Meaning that neither of the tribunals is located in the country in which the crimes took place in order to create a safe distance from the places where these conflicts where played out.

The other set of resolutions mainly includes expansions of the tribunals, by for example, increasing the number of judges or by making it easier for the tribunals to continue its work within certain limits. Important examples of these resolutions include: Resolution 1684 of 13 June 2006 which ensured that 11 judges would be considered permanent until 31 December 2008 for the ICTR. The same goes for resolution 1837 of 29 September 2008 and

[28] *Report on the completion strategy of the International Criminal Tribunal for Rwanda* Secretary-General United Nations (S/2003/946) 14.
[29] Resolution 827 and 955, at http://liveunictr.altmansolutions.com/Legal/SecurityCouncilResolutions/tabid/93/Default.aspx, viewed 28 April 2010.

1877 of 7 July 2009 for the ICTY as this tribunal was also struggling to keep its employees. Resolutions 254 and 256, both of 19 March 2009, discuss the budget of the tribunals and manners in which they can obtain the staff of the tribunals with incentives. Resolution 1503 of 28 August 2003 called on the ICTR to establish a completion strategy such as the one that had been developed by the ICTY.

Comparison of the Annual Reports

As mentioned before there are many annual reports regarding both tribunals. The ICTY produced 16 annual reports and the ICTR produced 14 annual reports. Therefore I have decided to analyze the first and last reports and every other fifth report in more depth in order to get a global view of the reports. The other reports have been skimmed in order to ensure that major differences between the reports or important new findings were not left out.

The first difference that immediately stands out is the amount of pages that are included in the annual reports for both tribunals. Until the year 2006 the annual reports for the Yugoslavia tribunal were at least double the size that the annual reports for Rwanda were. The Yugoslavia tribunal was the first of its kind and it is only logical that everything is spelled out fully and correctly in order to prevent any misunderstandings. As can be read in the first annual report for the Rwanda tribunal it has to share the same prosecutor and the same members of the Appeals Chamber with the ICTY.[30] Since the Yugoslavia tribunal was already set up before the Rwanda tribunal was established, it had already gone through the start up problems that the Rwanda tribunal was going to face. Legal advisers from the Yugoslavia tribunal went to Kigali in order to share their experiences and lend their expertise to the advisers from the ICTR. Eventually two advisers from the ICTR also provided support for the ICTY in order to keep a fresh pair of eyes in the mix.

The ICTY was the first of its kind and had many problems, however "the total lack of progress towards peace in the region and the need to demonstrate to the international community that the United Nations was not sitting back idly while thousands were being

[30] *First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda,* Secretary-General United Nations (S/1996/778: 24 September 1996) 3-4. According to Article 12, paragraph 2 of the statute the members of the Appeals Chamber for the former Yugoslavia will also be the members of the Appeals Chamber for Rwanda. This included the judges: Judges Antonio Cassese, Jules Deschênes, Adolphus Karibi-Whyte, Haopei Li and Ninian Stephen. Article 15 of the statute states that the Prosecutor will also be shared by the two tribunals which would mean that at the time Judge Richard Goldstone was Prosecutor for two international criminal tribunals at the same time.

brutally abused or massacred,"[31] was a much greater problem that needed to be overcome. In order to establish a tribunal to deal with the conflict in the former Yugoslavia, the Security Council had to bypass member states under Chapter VII of the Charter of the United Nations in order to prevent it from being discarded or not ratified. This was a problem that was not discussed in the annual reports for the Rwanda tribunal even though the international community was also criticized for its slow reaction towards the genocide in Rwanda. However, this could also be because the reports for Rwanda basically outline the setup for the tribunal without sharing much background information.

As time progressed, the annual reports were able to focus on the activities that have been dealt with over the year rather than the structure or procedures of the tribunals. Most of the reports included summaries of the trials that had been going on during the year which provides much information on what the tribunal was doing. The focus shifted toward the completion strategy for the tribunals as both were doing everything in their capacity to conclude the remaining trials. For example, in the 16th annual report of the ICTY the cooperation of the former states of Yugoslavia was urged. The ICTY asked for Serbia's cooperation in order to apprehend the two remaining fugitives that needed to be prosecuted.[32] Serbia's National Security Council and Action team had not been able to locate these two individuals, but the communication with this team had improved greatly compared to the year before. However, there are still criticisms of which the Office of Prosecutor had its doubts "with regard to negative and unjustified statements made by Government officials and agencies calling into question the integrity of the Tribunal. These seem to be in contradiction with the level of cooperation provided by the professional services." [33] This raised doubt on how much cooperation was actually being provided and made it more complicated with regards to the completion strategy.

Other activities that were focused on in the later annual reports were the activities of the Office of the Prosecutor and the Office of the Registrar including working with national jurisdictions and the outreach programs. According to the 13th annual report of the ICTR, the outreach program had conducted various workshops in order to strengthen Rwandan judicial capacity, two seminars were held on international criminal law, and many discussions with

[31] *First Annual 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 1991*,Secretary-General United Nations (S/1994/1007: 29 August 1994) 10.
[32] *Sixteenth Annual 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 1991*, Secretary-General United Nations (S/2009/394: 31 July 2009) 16.
[33] Ibidem, 17

other agencies were held on sexual exploitation and abuse sensitivity guidance.[34] These are only a number of activities that were performed by the different branches and gives insight into the direction the tribunals were headed. The completion dates were nearing and both tribunals needed to ensure that the work that had been done so far could be set forth and the information that had been gained would not be lost.

Means (financial and personnel)

The financial situation that is sketched in the beginning of both tribunals' first annual reports is not something to be wished for. The Prosecutor, in the name of the Rwanda tribunal, sent all Governments a letter on 3 May 1995 asking for cooperation

> "recalling the terms of Security Council resolutions 955 (1994), this appeal calls on Governments to provide active assistance in the following areas: (1) recruitment of candidates for positions as investigators and interpreters; (2) secondment of personnel; (3) recruitment of liaison officers; (4) provision of information on the situation of refugees; (5) provision of information concerning war crimes."[35]

Due to the ad-hoc character of the tribunals and meager financial means, the Tribunals were not able to make long-term commitments which also made it difficult to fill positions such as that of the Prosecutor. Thus assistance was asked from the other member states in order to set up the tribunals properly.

It had been very clear from the beginning that the ICTY and the ICTR were going to have trouble with funding. In the first annual report of the ICTY it was already mentioned that one of three difficulties for the tribunal would be financial.[36] There was limited financing to begin with and as the tribunals were being set up to be ad-hoc tribunals it was very difficult to receive financing for the long term. Initially the General Assembly committed funding for the ICTY for only six months. This obviously brought problems with it, as there was no means to rent a space because the lease was not able to be signed for longer than six months. Judges were not able to be hired due to the lack of security they were given as they were only ensured of pay for the first six months.

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[34] *Thirteenth Annual Report of the International Criminal Tribunal for the Prosecutions of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda,* Secretary-General United Nations (S/2008/514: 4 August 2008) 17.
[35] First Annual Report ICTR, 10.
[36] First Annual Report ICTY, 15.

As the ICTY costs slightly less than $ 275 million per year and the ICTR costs almost $ 235 million per year, funding plays a big role in the success of both tribunals.[37] As can be seen on either website of the ICTY and the ICTR member states are required to cooperate with the tribunals. This is done through financial assistance, arresting accused persons, implementing protective measure for witnesses, enforcement of sentences, etc.[38] This alleviates some of the financial pressure, however budgetary problems continue to be a problem for both tribunals. Neither the United Nations, nor the member states expected the ad-hoc tribunals to exist this long. Thus prolongations such as have occurred during both tribunals need to be kept in mind for future endeavors in order to keep prospective tribunals better funded.

Conclusion Chapter 1

The objectives of the ICTY and the ICTR have been clear from the beginning: "to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace."[39] As stated before, these two tribunals were the first international war crime tribunals, only preceded by the Nuremberg and Tokyo trials which have been since labeled as multinational tribunals as not all countries were included at the time.

The resolutions that were created for these tribunals have established the procedural workings of the ICTY and the ICTR. Others that have followed ensured that the tribunals were able to function to the best of their ability and have created a completion date to try and speed up the trials in order to have an end date in sight.

The annual reports both tribunals submit each year are also part of the legacy that is to be left behind. It has established a clear structure of a criminal tribunal so that national courts can soon follow suit in order to deal with war crimes such as genocide, and crimes against humanity. Rape is now considered a war crime and the focus has shifted from a group of people, towards individuals that can be held accountable for the crimes that they have committed. Over the years, the annual reports have been able to focus on what has been done and what still needs to be done. However since Resolution 1503 the focus has indeed shifted towards the completion strategy and the outreach programs which will be discussed in further chapters.

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[37] Forsythe, *Human Rights*, 103-106.
[38] "International Co-operation with the Tribunal", at http://liveunictr.altmansolutions.com/tabid/113/default.aspx, viewed 8 May 2010.
[39] First Annual Report ICTY, 11.

Chapter 2: Completion Strategies

The ICTY submitted its first completion strategy on 24 May 2004. Since this date there has been a report every six months. The same goes for the ICTR; however the first report was submitted on 6 October 2003. These documents were meant to serve as a review of what the tribunals have accomplished up until that point and what activities still needed to be completed in the near future.

As explained in chapter one there have been complications that the tribunals have had to endure. Qualified personnel have been very hard to acquire for both the ICTY and the ICTR. The problem of obtaining personnel may be the same; however the reasoning behind it has changed. In chapter one the obstacle was the short-term commitment that was given which could not give employees the security they needed. Retaining employees in later years was complicated as the workload that the trials created was too large for employees to handle and thus the first completion strategy reports asked for extra *ad litem* judges, for example. The completion date was not realizable with the number of employees the tribunals started out with. In the first completion strategy for Rwanda of 6 October 2003 it is even stated that the projections the ICTR had prepared, taking into consideration the capacity at which the tribunal was working, it would be impossible to complete all trials by 2008.[40] Thus the request for extra *ad litem* judges had to be followed. The projections given by the reports however, reflected statistics of a court that was working at maximum capacity. Reality was very different as there were many factors outside the power of the tribunals, such as problems with witnesses that were not able to testify for various reasons and poor health of certain accused that prolonged particular cases. Even in 2003 it was clear that trials were not to be completed before 2011.[41]

The completion strategy reports were meant to establish the end of the tribunals, however this also caused much turmoil for employees as their employment was no longer a secure position. In the latest completion strategy filed by the ICTY of 1 June 2010 it was even stated that "the situation is critical, and the departure of our uniquely qualified staff for more secure employment has begun to adversely impact the proceedings."[42] This is a factor that should be able to be overcome by the tribunals; however funding has also been a problem since the establishment of the ICTY and the ICTR.

[40] First Completion Strategy ICTR, 15.
[41] Ibidem, 15.
[42] Thirteenth Completion Strategy ICTY 1 June 2010, 5.

These two factors are very significant problems in the completion strategy reports as the lack of personnel and the departure of qualified staff could create another delay for the completion of the trials as stated in the different reports. If these problems are not dealt with, the tribunals will have to extend the completion date once again, which will create a landslide of problems as funding will also still be a problem. Tribulations such as these should be looked at carefully before commencing future endeavors.

Comparison of Completion Strategies

The main purpose of the completion strategies was to give an overview of the accomplishments made by the two tribunals and an indication of the work that was still to be concluded before the completion date. These projections were continually updated due to factors that caused complications in concluding the many trials the ICTY and the ICTR had to deal with. There were also still accused that remain at large, including two high ranking officials for the ICTY and four high-ranking officials for the ICTR. The ICTY and the ICTR have both stated that these accused will be tried even though they are not yet in custody. If these accused are captured it would create additional workload setting back the completion date. However, until these fugitives have been apprehended the completion date will be set back even further as they are to be tried by the tribunals and not by means of national jurisdiction.

In chapter eight of the first completion strategy for the ICTR an overview was given of the total remaining workload, such as was also included in the other completion strategy reports. The main concerns that were listed since the first report included the difficulty of ensuring witnesses, counsels' illness, unexpected evidence, and the lack of *ad litem* judges.[43] Measures had been taken in order to be able to continue trials in the event that a judge or counsel becomes ill, however the other factors are more difficult to deal with. The Witness and Victims Support Section were in charge of supporting and protecting the witnesses which at times made it easier for witnesses to testify during trials. Countries such as Rwanda, Mali, Senegal and Zambia have all implemented protective measures for witnesses in order to ensure that witnesses continued to testify at the trials.[44] This should have prevented most complications with witnesses for the ICTR. On the other hand, the ICTY seemed to be having

[43] First Completion Strategy Report ICTR, 13.
[44] "International Co-operation with the Tribunal", at http://liveunictr.altmansolutions.com/AboutICTR/FactSheet/InternationalCooperationwiththeTribunal/tabid/113/Default.aspx viewed 8 May 2010.

trouble getting people to testify as the general perception of the ICTY was negative, which had reduced the percentage of individuals willing to testify from 40% in 2004 to 28% in 2009.[45] The perception of these tribunals was very important in order to ensure cooperation with stakeholders. This should be taken into consideration when creating new tribunals as transparency has proven to be very important for the individuals that are affected by these tribunals.

Extensions of both tribunals

The completion strategy reports were first started in 2003 due to Resolution 1503 in which the Security Council indicated that the trials for both tribunals were expected to be completed by 2008.[46] However, with the resources available to the ICTY and the ICTR these completion dates were not able to be met. The main reason for the establishment of the two tribunals, according to scholars such as David P. Forsythe, was that different Security Council members "saw no self-interest in a complicated intervention. But they felt the need to do something. So they created the tribunal in a short-term, public relations maneuver, leaving various contradictions to sort them out later."[47] This reasoning seems to carry some ground as the United Nations required member states to cooperate with both tribunals, without being able to gain the funding needed to establish such tribunals to work at full capacity to prosecute the many accused. The ICTY had indicted 161 persons and the ICTR had indicted 98 persons that were involved in both conflicts. Requiring the tribunals to be completed by 2008 was wishful thinking as the tribunals were still trying cases in 2010 with fugitives still at large that were required to be tried by both the ICTY and the ICTR.

As the completion date was approaching it had strained both tribunals. Referrals to national jurisdiction had become a big part of the workings of the ICTY as well as that of the ICTR. The many factors mentioned above that have prolonged certain cases have not been accommodating as "the tribunal's courtroom capacity and staffing levels are insufficient to adequately support 10 ongoing trials, and the number of trials has also impacted on the speed of translations, which are relied upon in all cases, but particularly those involving self-represented accused."[48] The tribunals have tried to minimize the consequences of such factors, but as long as the loss of experienced staff continued, so did the pressure to complete

[45] Klarin, Mirko. 'Impact of the ICTY Trials on Public Opinion in the former Yugoslavia', 3.
[46] Resolution 1503
[47] Forsythe, *Human Rights*, 98.
[48] Thirteenth Completion Strategy ICTY, June 2010, 3.

the trials. The tone that was set in the reports was not very optimistic as the request for more security for the staff of the tribunals had yet to be met fully. Even the work of the outreach program was in danger due to complications with receiving funding. This, however, will be discussed further in chapter five.

Another important factor that would help accomplish the completion date was the referral of cases to national jurisdictions. Around 13 accused were transferred from the ICTY to national jurisdictions between 2005 and 2007. This relieved the workload of the tribunal and ensured that most senior leaders would be brought to trial as soon as possible.[49] The referral of these cases would also give the national jurisdictions the possibility to try these cases on their own before the ICTY and the ICTR have been completed. This way, if any help was required, officials from either tribunal would be able to assist in any complications faced by the national jurisdictions.

Conclusion Chapter 2

Any project in the business world comes with review meetings in order to evaluate the progress that has been made and to estimate the time it will take to complete the remaining tasks. The same reasoning should be followed by the ICTY and ICTR for which the completion strategy reports were being used. It is also necessary to create deadlines in order to motivate employees to strive towards that particular date. However, both tribunals had to deal with the same difficulties from the beginning. There was not enough funding which led to not enough personnel. The workload that was being forced on employees made it very difficult for the tribunals to retain staff. This only made it more complicated for the tribunals to reach the completion dates, as the requests that had been included in every completion strategy report were not fully being answered.

Other problems included the remaining fugitives that continue to shift the judicial calendar of both tribunals. As long as they are not apprehended the tribunals will not be able to be concluded unless the Security Council rules otherwise. There are many other factors that contribute to prolongation of trials, such as mentioned above. However, most of these factors are unable to be anticipated and thus extra time should be added in order to take these factors into consideration. The completion strategies did state that the projections did not include

[49] Thirteenth Completion Strategy ICTY, June 2010,19.

these factors as they are unpredictable. It may be better to take this into contemplation in order to ensure more time for the trials in case any of these factors turn into obstacles.

Luckily, the referral of cases has been added to the completion strategies. National jurisdictions were now able to take over certain cases in order to relieve the tribunals as they were already understaffed. This created a stronger relationship between the tribunals and those of the national jurisdictions which made the flow of communication much easier.

Persons accused by the Tribunal are provided fair trials meeting the highest standards of international justice. Absolute respect for the rights of the accused is an essential ingredient of justice and lies at the heart of the Tribunal's work.

-Hans Holthuis, ICTY Registrar (2001-2008)[50]

Chapter 3: Court cases

The most important feature of the tribunals is the court cases. On the websites of the ICTY and the ICTR there is a complete listing of all the trials that have been held, including the Trial Chamber decisions, judgment and sentences. The cases are divided into the categories: cases in pre-trial, cases at trial, cases on appeal, completed cases, transferred cases and fugitives.

The ICTR has so far completed 50 cases including 8 cases that are pending appeal and 8 cases that were acquitted. There are still 24 cases in progress at the moment and 2 that are still awaiting trial. Thirteen fugitives still remain at large including the four high-officials as mentioned above. The ICTR has not been able to complete as many cases; however the Gacaca courts that were officially established in 2005 were able to alleviate the tribunal by taking over numerous cases. The Gacaca courts will be further discussed in Chapter 5.

The ICTY on the other hand has completed 123 cases of which 12 were acquitted, 13 referred to national jurisdiction and 36 cases that have been withdrawn or have deceased. There are still 38 cases ongoing of which 2 high-officials that are still at large. The ICTY has rid the states of the former Yugoslavia of some of the most senior officials that were accountable for the wars in the region thus preparing the path to reconciliation. The tribunals have been able to be unbiased supervisors by making clear that it has charged accused of every ethnic background involved in the conflict.[51] This transparency is very important for cooperation of stakeholders in both conflicts

There are four cases that are noteworthy for both tribunals and will be discussed further in this chapter. Each of the tribunals has been important for their own reasons. The first trial that will be discussed established rape as a crime against humanity, the second was of significance as Slobodan Milosevic could be seen as one of the main instigators in the conflict in the former Yugoslavia, the third case is the first of false testimony for the ICTR, and finally the last case ensured the focus on the individual.

[50] This quote by Hans Holthuis is seen as one of the main objective of the Registry, at http://www.icty.org/action/cases/4, viewed 12 May 2010.
[51] "About the ICTY", at http://www.icty.org/sections/AbouttheICTY, viewed 12 May 2010.

Successes

Success is a relative term. When is a tribunal successful? According to certain sources the ICTR was the less successful of the two as it was only able to prosecute a relative small number of the many that were involved in the genocide.[52] What was not mentioned was the reason behind the relative small amount of cases compared to the number of individuals that had participated. The Hutu population represents almost 90% of the population and a great portion of this group played a role during the genocide. To bring this many accused to trial would burden the entire system, not to mention it did not receive the means to try this many individuals from the United Nations and its member states.

According to yet other sources, these criticisms should not be directed towards the ICTR. Much of the problems concerning witnesses can be attributed to the location in Arusha. Witnesses that have to appear before the court have to travel through four different countries, which takes time and money.[53] Money that the Witness and Victims Support Section does not have. The ICTR was not established to help Rwanda move passed the horrible events that occurred during the genocide, but was meant for the international community's guilty conscience for not intervening when the warning signs were clear. Even when it became apparent that the conflict had exploded, "it was ignored and officials avoided using the term *genocide*, knowing full well that if invoked, they would be forced to take action under the terms of the Genocide Convention."[54] However, the ICTR had been established and was an important first step towards justice and reconciliation.

When can there be spoken of success when looking at the evidence that is provided? Each conflict had its own unique character and required individual ways of dealing with the consequences. The two conflicts that led to the creation of the ICTY and the ICTR were of completely different magnitudes. When looking at the number of indictments it could seem that the ICTY was more successful as it had tried more accused than the ICTR.

Both tribunals can be considered successful as they have each made significant contributions to international law. There are always going to be flaws in such tribunals as long as they have to rely on funding and support of other countries. The start that has been made and the lesson learned for the future seem to be enough to consider that both tribunals have been of considerable importance.

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[52] Armstrong, David, Lloyd, Lorna, Redmond, John, *International Organisation in World Politics,* (New York 2004) 244.
[53] Karns, M., *International Organizations,* 93.
[54] Ibidem, 451.

Examples

There are some proceedings that need to be elaborated on as they have had serious repercussions for international law or the manner in which the tribunals continue to function. These examples will include the trials against: Jean-Paul Akayesu, Slobodan Milosevic, GAA, and Kvocka et al.

Jean-Paul Akayesu

Jean-Paul Akayesu was the bourgmestre (mayor) of the Taba commune and at least 2000 Tutsis were killed between 7 April and the end of June 1994 during his rule.[55] He was charged of fifteen different counts including: genocide, complicity in genocide, and crimes against humanity. He stood trial for various charges as he "facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises."[56] During his reign as bourgmestre hundreds of Tutsis came to the bureau communal to seek refuge, however many women were subjected to sexual violence and beatings.

The case against Jean-Paul Akayesu is very significant as it was the first conviction for genocide to have been recorded and it established sexual violence as a crime against humanity.[57] During the Nuremburg trials it had also been established that rape was systematically used, however neither high-ranking officials nor soldiers were ever convicted for this type of crime. The fact that the systematic use of rape was established as a crime against humanity has made a major impact on international law as it is no longer seen as an illegal act committed by an individual and set precedent for the many trials to follow in both the ICTY and the ICTR.

Jean-Paul Akayesu was sentenced to life imprisonment as nine of the fifteen counts were proven which included three sentences for life imprisonment. It should be said though the high ranking Hutu officials that were convicted of these crimes were only sentenced to life imprisonment, even though the lower Hutu officials were able to receive the death penalty.[58] The reasoning behind this has been speculated to be due to the lower Hutu officials being

[55] "The Prosecutor of the Tribunal against Jean-Paul Akayesu" *Case No: ICTR – 96 – 4 – T* (2 October 2008) 2.
[56] "The Prosecutor of the Tribunal against Jean-Paul Akayesu" Amended Indictment *ICTR-96-4-I,* 2).
[57] Forsythe, *Human Rights*, 104.
[58] Forsythe, *Human Rights*, 105.

sentenced in national court which were mainly staffed by Tutsis.[59] These are only speculations and will further be discussed in chapter five which discusses the difference between international and national indictments.

Slobodan Milosevic

The most important case for the ICTY was that against Slobodan Milosevic. As the president of Serbia and later as the president of the Yugoslav Federation, Milosevic is seen as the highest official that was involved in the crimes that were committed in the former Yugoslavia. The ICTY recognized that Milosevic was part of a joint criminal enterprise that served the purpose for the removal of the Albanian population from Kosovo in order for Serbia to gain control over the province.[60] Milosevic had gained power over the media and thus created a perfect platform for his 'Save the Serb nation', with assemblies that contained "professional demonstrators dressed in folk costumes, carrying placards and banners rich with Serb national and Orthodox religious symbols."[61] Instilling fear in the minds of Serbian citizens, Milosevic created a crisis frame in which Serbian citizens were to become victims of attacks by other ethnicities and thus the citizens needed to come into action. Milosevic is said to have fashioned demonstrations, news reports of Serbian women being raped and set free hooligans and criminals to run rampant on the citizens in order to infuse the situation.

On 1 April 2001 Milosevic was arrested by Serbian authorities and transferred to the ICTY on 29 June 2001. He then refused to enter a plea in the three different indictments against him for Kosovo, Croatia and Bosnia.[62] Milosevic was indicted for numerous crimes including, genocide, deportation, extermination, attacks on civilians, and the plunder of public or private property. The trial began on 12 February 2002 with the Prosecution concluding its evidence on 25 February 2004. The Trial Chamber ruled that there was enough evidence to continue proceedings and Milosevic prepared to defend his own case.

One of the main problems during the trial against Milosevic was that he insisted on defending himself.[63] This led to many clashes between Milosevic and the court appointed lawyers over the manner in which the trial should proceed. However, in order to ensure a fair trial counsel was needed to assist in the case. On 10 April 2002, Milosevic wished for two

[59] Forsythe, *Human Rights*, 104.
[60] "Indictment and charges against Milosevic" *Case Information Sheet Slobodan Milosevic*, (IT-02-54) 4.
[61] Oberschall, Anthony "The Manipulation of Ethnicity: from Ethnic Cooperation to Violence and War in Yugoslavia", *Ethnic and Racial Studies* Volume 23 Number 6 November 2000, 992.
[62] Case information sheet Slobodan Milosevic, 7.
[63] Forsythe, *Human Rights*,102.

different associates by the names of Zdenko Tomanovic and Dragoslav Ognjanovic, thus replacing Ramsey Clark and John Livingston that had officially been instated as his counsel.[64] Other problems were Milosevic's ill health which stalled proceedings.[65] His ill-health would eventually lead to the termination of the proceedings due to his death on 11 March 2006.

GAA

The case against GAA[66] was significant to the ICTR since he was the only person to have stood trial for giving false testimony. GAA was charged with giving false testimony under solemn declaration and contempt of the tribunal. He pleaded guilty and was imprisoned for nine months. Neither the ICTR nor the ICTY have had to render a verdict in a case of giving false testimony.

GAA had testified as a witness for the Prosecution in the trial of *The Prosecutor v. Jean de Dieu Kamuhanda* on 19 and 20 September 2001. On 6 July 1999 GAA gave an eyewitness account of the bloodbath that had taken place at Gikomero on 12 April 1994 as a survivor and had identified Kamuhanda as being involved in these crimes.[67] However, on 18 May 2005 at the Appeal hearing for Kamuhanda, the witness testified that he had never been in Gikomero at the time that the crimes were committed and thus could not have witnessed any crimes. GAA, according to his own saying, had found his religion again and did not feel comfortable with the lies he had told and decided to recant. He denied in court that he had received a bribe or any other incentive to do so.

Other witnesses testified that GAA was present in Gikomero at the time the crimes had taken place, and when the story was further investigated it seemed that the recantation was false. The reason for recanting was due to a defense investigator, Leonidas Nshogoza, who promised a reward of 1,000,000 Rwandan Francs if GAA were to give false testimony.[68] This amount was never paid and GAA pleaded guilty in order to ensure that there was still an eyewitness account against Kamuhanda.

As GAA was an innocent victim of the crimes that were committed in Gikomero, it was taken into consideration that he had remorse for the false testimony he had given. Indeed perjury should be taken very serious as this could affect further proceedings and should be punished, however the counsel for the accused "contended that the Accused was a poor

[64] Case information sheet Slobodan Milosevic, 7.
[65] Forsythe, *Human Rights,* 102.
[66] This is a pseudonym that was used for the accused as GAA is a protected witness.
[67] "The Prosecutor against GAA" *Case No. ICTR-2007-90-R77-I* (28 November 2007).
[68] Ibidem.

farmer whose extended family depended on him as its sole breadwinner. He suggested that he was the naïve victim of inducements given by an official of the Tribunal."[69] This taken into consideration with being a genocide victim made the penalty less severe. However to prevent further cases of contempt a certain punishment was still required, thus he was imprisoned for nine months.

Kvocka et al

Another important case for the ICTY was that of *The Prosecutor v. Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic and Dragoljub Prcac* as it established that "it was possible to limit the facts at issue and to centre the discussion on the individual responsibility of each of the accused."[70] As stated above, the manner in which the individual was now being held accountable set a different tone than that after World War II.

The five accused were held accountable for the crimes that were committed in Prijedor, a city in northern Bosnia and Herzegovina, after Serb forces had taken control on 30 April 1992. Soon after the occupation, the Omarska camp was opened in order to interrogate prisoners. The conditions in which these prisoners were held were horrendous and many did not leave the camp alive. One of the witnesses of the Omarska camp stated:

> "After the tragedy there, I don't think that I can say that I'll ever be happy again. First, I lost my father and sister. My daughter is suffering extremely serious after-effects from the events and so am I. I would like to know who has the authority to make me leave my house, my town, my country and so become a refugee somewhere on the other side of the world. I hope that those responsible for it will be punished both by God and by you, and I hope that you will do so honestly and fairly."[71]

The crimes that were committed at the Omarska camp include persecutions, assault and rape, torture, and murder. The five accused were all involved at different levels, of which Radic and Zigic were known as the most brutal men.

Even though these men cannot be held accountable for the entire system of crimes that were committed in the former Yugoslavia, they were aware of what was going on and committed crimes or let crimes be committed at the Omarska camp. These five accused were

[69] "Judgment and Sentence of GAA"*Case No. ICTR-07-90-R77-I* (4 December 2007) 4.
[70] "Press Release" *Judgment in the Case the Prosecutor Against Miroslav Kvocka, Milojica Kos, Mlado Kos, Mlado Radic, Zoran Zigic and Dragoljub Prcac* (2 November 2001).
[71] Ibidem, 4.

considered to be members of a criminal enterprise and therefore carried certain degrees of responsibility. Kvocka, Kos and Prcac were sentenced to 7, 6, and 5 years in prison. These three men received a less severe punishment as they mainly observed the violence that was happening at the camp without intervening. Kvocka even had Muslim brothers-in-law that were held at the camp which he wanted to help. Yet he failed to prevent the violence even though he was the commander's right hand.[72] The other two convicted, Radic and Zigic, seemed to have enjoyed the system and the violent acts they were able to commit and were punished by 20 and 25 years in prison.

Conclusion chapter 3

There are many different views on what factors conclude to successful tribunals; however as can be taken from number of indicted the ICTY was found to be the tribunal that was most successful. Both tribunals have contributed to international law when it comes to significant precedents such as the systematic use of rape now being seen as a crime against humanity, and the manner in which individuals are now being tried. It is important to recognize the significance of the trials described above. They have all created precedents on which future tribunals can build on.

The ICTY has been seen as the more successful tribunal of the two; however reconciliation has remained a difficult task in the countries of the former Yugoslavia. Many are still displaced and are not always able to return to their hometowns. In light of this can the ICTY still be considered successful? It has indicted both high-ranking officials as well as low-ranking officials and 161 cases is a significant amount but it is still too early to deduce that the tribunal has been successful for anything other than bringing to trial the accused of the horrendous acts that took place in the former Yugoslavia from 1991 and further.

[72] Ibidem, 7.

Chapter 4: Big Fish vs. Small Fish

There are many different levels of criminals that have been tried by the ICTY and the ICTR. Some have been convicted of crimes against humanity as they did nothing to prevent such crimes from taking place, while others such as Slobodan Milosevic are seen as high-level officials that incited such crimes to take place. As will be further mentioned in this chapter, the ICTR tried many high-level officials that received life imprisonment while the lower-ranking officials were tried by national jurisdictions and were able to receive the death penalty. The difference between these 'Big Fishes' and 'Small Fishes' can also be seen in the manner in which reconciliation takes place which will also be discussed in this chapter.

The ICTY at the moment still has two senior officials that remain at large: Ratko Mladic and Goran Hadzic. Mladic is charged with Genocide, complicity in Genocide, Crimes against Humanity, and Violations of the Laws or Customs of War and Hadzic is charged with Crimes against Humanity and Violations of the Laws or Customs of War.[73] Especially Mladic is seen as the most wanted fugitive. These high-ranking officials must be brought before the ICTY or it could have consequences for the completion date of the tribunal. The ICTR counts 13 fugitives that remain at large including four high-level officials that also continue to shift the completion date of the ICTR. The remaining nine fugitives will be able to be referred to national jurisdictions; however the other four shall be tried by the ICTR.[74] This goes to show that high-ranking officials that are thought to have been in charge of the crimes that were committed during both conflicts need to be tried by the tribunals in order to show that the people that were responsible are indeed being held accountable by the international community.

In this chapter the discussion will turn to the difference between the accountability of high-ranking officials and those of low-ranking officials and/or citizens that have been involved in either conflict. Authors such as Anthony Oberschall, and James Fearon and David Laitin will be used in order to understand the role of ethnicity in both conflicts and how this was used by high-ranking officials in order to move the lower-ranking officials into a position where violence seemed to be the only option.

[73] "Fugitives", at http://www.icty.org/sid/10010, viewed 20 May 2010.
[74] Eleventh Report on the completion strategy of the International Criminal Tribunal for Rwanda, (14 May 2009) 15.

Accountability 'Big Fish' vs. 'Small Fish'

It is important to understand the dynamics between individuals that are involved in conflicts such as occurred in Rwanda and the former Yugoslavia. For example, the fear that was instilled in the Serbian citizens by the media created a crisis frame in which ordinary citizens could not do anything to stop the violence. In Rwanda, most of the Hutu population joined in the violence after the propaganda that had been spewing on the Hutu Power Radio. These fears were not created out of thin air. In each of their histories there have been conflicts between the different groups that live in these countries, but the fear of repetition is how high-ranking officials were able to set these conflicts in motion. .

First, we will take a look at the conflict in the former Yugoslavia. How is it possible that citizens that were once neighbors came to believe that their neighbor was now their enemy? The media was controlled by the different ethnic and religious groups that were residing in the former Yugoslavia and thus were able to spread propaganda, but as Oberschall rightly asks, "How is it that when the media unleashed the war of words and symbols before the war of bullets, so many believed the exaggerations, distortions and fabrications that belied their personal experiences?"[75] The explanation given would be that of the memories of former wars that happened in the region. This history was used by leaders such as Milosevic in order to enflame the Serbian citizens to protect themselves. The media was able to report on rapes by Albanians against Serbs which again instilled fear in the citizens and as these incidents are repeated enough times or exaggerated enough through the media eventually ordinary citizens will come to believe such stories.

Looking back at the beginning of this chapter there is still the difference between high-ranking officials and low-ranking officials that needs to be discussed. Why would elites use the media in order to instigate such conflicts? According to Fearon and Laitin, political elites use this violence in order to gain power and build their political support.[76] Using the fear that is instilled in the citizens by the media, Milosevic would be able to move his followers in order to gain more control over the other minorities. "If an ethnic public is very scared of what might happen if the other group harbors aggressive intentions, this may be enough for them to increase their support of the incumbent as a defensive move."[77] As long as the fear of being killed by a neighbor from another group is real for the citizens they will place

[75] Oberschall, 'Manipulation of Ethnicity', 987.
[76] Fearon, James, Laitin, David, 'Violence and the Social Construction of Ethnic Identity' *International Organization* 54, (Autumn 2000) 853.
[77] Ibidem, 854.

themselves in crisis mode and follow the leaders that have the answer for survival. This would imply that high-ranking officials carry a greater accountability as they created the system in which terror was used during the conflicts, and were not simply working in the system such as the lower-ranking officials. Looking back at the case of Kvocka et al in Chapter 3, the lower-ranking officials were indeed punished by lesser means. They needed to be punished as they did nothing to stop the violence; however they were not the brains behind the system that invoked the violence to occur.

The genocide that occurred in Rwanda, however, was of a different nature. There were no different ethnicities, different languages or different religious beliefs. From the beginning of time the difference between the two groups, Hutus and Tutsis, had been that of an economic difference such as explained in the introduction. Thus there was not much of an ethnic conflict until the Belgian scientists created the ethnic difference between Hutu's and Tutsi's. As Tutsi's had always been at the advantage economically, high-ranking Hutu officials used this group as a scapegoat for everything that was wrong with the system in Rwanda. As the Belgian colonizers had taught the Hutu's, the Tutsi's were related to the Europeans and came from far away. As land was running out and the citizens needed land to sustain themselves, the Hutu's felt they had more right to the land due to 'primary acquisition.'[78] Once again it was high-level officials that would use the media, such as Hutu Power Radio in order to instill fear in the minds of the Hutu's blaming the Tutsi's for the economic problems that the Hutu's were facing.

What does this mean for reconciliation?

Reconciliation can prove to be very troublesome when different groups living in the same region have to deal with the aftermath of violent crimes and genocide. However, both tribunals were created more than fifteen years ago, thus the process of reconciliation has already been started. According to some scholars, the intervention of the international community and the establishment of the tribunals allowed the traumatized victims to step

[78] 'Primary Acquisition' is explained by Patrick Geary in his book *The Myth of Nations* as being "the ancestors of modern nations – speaking their national language, which carried and expressed specific cultural and intellectual modes – first appeared in Europe, conquering once and for all their sacred and immutable territories and in so doing, acquiring once and for all their natural enemies." Basically, it means that the idea for primary acquisition started in Europe and once a nation was settled it was not to be moved and any other that wanted to fight over the territory became an enemy. Just as Hutu's believed that they had right to the land and the Tutsi's had become the enemies.

back for a second and not be confronted by the perpetrators right away.[79] However, as some authors point out "in both Bosnia and Rwanda what reconciliation means is the acceptance, by the survivors of 'ethnic cleansing' and 'genocide' respectively, that they should live with those who were either directly responsible for atrocities or had colluded with them."[80] Changing this frame of mind seems nearly impossible as it seems only logical that these different groups could not imagine reconciling after such horrendous acts.

The individuals that committed the crimes in both conflicts have mostly been punished by the ICTY; thus reconciliation should be one of the next steps. The outreach and legacy programs that are set up by both tribunals have tried to focus on reconciliation matters, however this has been mainly centered around the national jurisdictions and making sure that these countries are ready to take over the tasks of the tribunals. These tribunals are taking longer than had been expected and many citizens from Rwanda and the former Yugoslavia are not able to reconcile because not all perpetrators have been tried.

The ICTR has not completed as many cases as that of the ICTY, even though there are many more criminals that need to be brought to justice as a large part of the population was involved in the genocide. By being able to try many more through the Gacaca courts, the atrocities are being spoken about in a manner that could start to clear the air. However, there are many complications that come with systems such as that of Gacaca as "it has effectively created an impression of collective guilt among Hutu, implying that nearly all Hutu, particularly men, who were the vast majority of those accused in Gacaca, were guilty of participation in the genocide."[81] This could prevent reconciliation from taking place as it sends the wrong message. The tribunals were able to try any individual from any background, yet the Gacaca courts are using the Hutu's as a collective group. The mainly unbiased workings of the tribunal ensure that persons that are responsible are tried and that the Hutu's are not being used as a scapegoat. There were also Hutu's that suffered during the hundred days of genocide. Even though the tribunals are not always efficient, especially the ICTR, it could enable reconciliation in the long run as the tribunals should act as a neutral base.

[79] Ramsbotham, *Conflict Resolution*, 233.
[80] Humphrey, Michael, "International Intervention, Justice, and National Reconciliation: the Role of the ICTY and ICTR in Bosnia and Rwanda" *Journal of Human Rights* Volume 2 Number 4 (December 2003) 502.
[81] Longman,Timothy, "An Assessment of Rwanda's Gacaca Courts" *A Journal of Social Justice* 21, 310.

Conclusion Chapter Four

There is a difference between 'Big Fish' and 'Small Fish' when holding somebody accountable for a crime. The creators and organizers behind the violence are to be held most accountable. This is the precise reason why mainly high-officials are tried by the two tribunals. These high officials were in positions in which they could have prevented such acts of horror from commencing. The waiter that was recruited cannot be considered an architect of the violence as he was merely a puppet. However, the waiter may have partaken in acts of violence or have been aware of such acts being done without doing anything about the situation.

The 'Big Fish' are important for the completion of the ICTY as well as the ICTR. The main purpose of these tribunals is to try those that carry the most responsibility for such atrocious crimes as murder, torture and rape. If these individuals are not brought to justice, the victims may feel as though the international community had failed them once again.

Also discussed in this chapter was the use of fear by high-officials in order to try and gain the support of the citizens. Milosevic was in control of state-TV and was therefore able to spread propaganda through news reports that Serbian women were raped by Albanian men. The same goes for the Hutu-extremists as they used the Rwandan's favorite medium, the radio. Hutu Power Radio was used to call out names on the list of those that were to be exterminated. Ordinary citizens do not create such crisis frames on their own and they do not have the power to control large media as do the high-ranking officials. These officials are supposed to set an example and not abuse their power. Therefore, there should also be difference between punishing 'Big Fish' and 'Small Fish.'

The second part of this chapter focuses on reconciliation. This is extremely difficult when societies have faced such atrocities as happened in the former Yugoslavia and Rwanda. The individuals responsible for the horrendous system that was put in place during both conflicts needed to be brought to trial. The ICTY and the ICTR have both played a significant role in ensuring that the indicted were ensured of a fair trial according to international standards. This could also be helpful to reconciliation in the long run as it could prevent a feeling of persecution of all individuals involved in the conflict.

Chapter 5: International vs. National indictments

As can be seen in chapter two about the completion strategies of both tribunals, it has become difficult to complete all trials by the dates set by the Security Council. For this reason, certain cases have been transferred to national jurisdictions. Much communication between the tribunals and national jurisdictions is needed in order to ensure the capability of the national jurisdictions to try those that have committed atrocities in that specific territory. Much work has already been done by both tribunals to ensure that personnel of both judicial systems have the training needed to perform the specific tasks that are required by international law.

In this chapter the punishment of the international criminal tribunals will be compared with the punishment prescribed by that of national jurisdictions. A closer look will thus be provided at the Gacaca courts in Rwanda that have played a significant role in reconciliation in this country. Another point that will be discussed is the outreach programs of both tribunals as they were meant to prepare national jurisdictions to deal with such trials following conflicts.

The ICTY has only transferred 13 accused to national jurisdictions in the region of the former Yugoslavia. Therefore the ICTY will not be mentioned as much during this chapter as it has proven difficult to transfer cases. The ICTY has set up different activities through its outreach program in order to inform the stakeholders in the region about the proceedings of the tribunal; however "the lack of national trials in Bosnia only highlights the lack of shared political community."[82] The Yugoslav Republic has disintegrated and along with it any sense of unity.

Gacaca Courts

In Rwanda, another alternative was needed, besides the ICTR and the national jurisdiction, to bring justice to the victims of the genocide. On 19 June 1994, the Government of National Unity was put in place in order to ensure that those that participated in the genocide would be brought to justice. However, this brought many complications as a large amount of the population was involved in the genocide. In the current system not all of the perpetrators would have been able to be convicted as this would take an enormous amount of

[82] Humphrey, "International Intervention", 501.

time with only 12 officials that were able to oversee the proceedings. The clogging of the penitentiary system would then also become a problem.

Therefore the Organic Law of 30 August 1996 was adopted which established the specialized chambers for genocide crimes in the civil and military courts. There were four different categories that would be tried through this system. The first category included the planners of the genocide, leaders of political parties, army, religious denominations or militia, and those who committed rape. The second category included the accomplices of deliberate homicides, or those who caused injuries with the intention of killing. The third category included those who committed criminal acts without the intention of causing death. Lastly, the fourth category included those individuals that had committed offences against property.[83] However, this also did not give the wanted results as only 6000 files were able to be dealt with in 5 years. This number still remains larger than the capacity of the ICTR.

An alternative was found in the Gacaca courts. According to the official website, National Service of Gacaca Jurisdictions, the Gacaca courts

> "is a system of participative justice whereby the population is given the chance to speak out against the committed atrocities, to judge and to punish the authors with the exception of those classified by the law in the first category who will be judged and punished by the ordinary courts according to common law rules."[84]

By involving the citizens they are expected to become a part of the process of reconciliation. Victims of the genocide recognized that justice was being done and the perpetrators knew that there was no manner in which they could escape punishment. The five objectives of the Gacaca courts included: to reveal the truth about what had happened, to speed up the genocide trials, to eradicate the culture of impunity, to reconcile the Rwandans and reinforce their unity, and to prove that the Rwandan society had the capacity to settle its own problems through a system of justice based on the Rwandan custom.[85] Especially this last objective is very important. After the genocide, the international community was forced to intervene in order to help Rwanda, just as it did with the former Yugoslavia, by bringing justice to the victims through the establishment of a tribunal. After the genocide, Rwanda no longer had a judicial system that would be able to punish perpetrators, let alone punishing almost 90% of

[83] "National Service of Gacaca Jurisdictions", at http://www.inkiko-gacaca.gov.rw/En/Generaties.htm, viewed 25 May 2010.
[84] Ibidem.
[85] Ibidem.

the population. In order to improve reconciliation it was indeed time that the citizens were involved.

On 26 January 2001 another law was established, Organic Law N° 40/2000 creating "Gacaca Courts" for prosecutions of offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994 in Rwanda. This law and the amendments that have since followed outlined the manner in which these Gacaca courts functioned. On 18 June 2002 the first pilot project of the Gacaca courts was launched very successfully and after only 5 months the courts became operational in 118 Sectors instead of 12 such as in the pilot.[86] On 10 March 2005 the first trials were started.

The Gacaca courts were indeed successful as they were able to hold thousands more individuals accountable and put a strong emphasis on reconciliation; however, there are also certain difficulties that came along with this traditional manner of punishment. A great number of the population actually participated in the genocide and were not always willing to be punished by the Gacaca courts, officials that also committed crimes during the genocide interfered with the operation of the Gacaca courts, and officials refused to reside over Gacaca courts as they were aware that friends and family could be on the list of prosecution.[87] However, many still remained silent in the fear that they would be murdered if they were to accuse those that have received a high position in the new government. There seemed to have been some relief as justice was finally being done, however the survivors of genocide could once again become victims if they accused the 'wrong' person. According to Peter Karasira, a member of the Documentation Department of the Gacaca Jurisdictions, "they fear convicting the people they have been living with since the end of genocide and they fear those who will be let out of prison en masse. The question on a number of survivors' lips is 'is this justice or injustice?'"[88] The problem here is that there is no sure way of taking that fear away from victims that have survived such horrendous acts.

The pilot phase of the trials that were organized by the Gacaca Courts lasted from 10 March 2005 until 14 July 2006. In this period of four months, 7721 trials had been completed which amounted to 21.81% of the total amount of trials that needed to be completed.

The international community had paid much attention to the developments of the Gacaca courts. There had been mixed feelings about the implementation of this traditional

[86] "Report on Data Collection", at http://www.inkiko-gacaca.gov.rw/pdf/ikusanya%20english.pdf, viewed 25 May 2010.
[87] "Editorial Report on Data Collection", at http://www.inkiko-gacaca.gov.rw/pdf/ikusanya%20english.pdf, viewed 25 May 2010.
[88] Karasira, Peter 'Gacaca: Justice for All or Injustice for Some?' *Documentation Department Gacaca Jurisdictions*.

manner of justice. Human rights groups were critical of the Gacaca Courts due to the lack of defense counsel, the lack of real judges, and the location of these courts within communities.[89] Witnesses and judges could be bribed or scared by the persons standing trial. These concerns were indeed well-founded, yet "Gacaca has held thousands of individuals accountable for crimes against humanity, allowed communities to develop accounts of the past, and encouraged dialogue about what went wrong in 1994."[90] Just as with the ICTR there are advantages and disadvantages that need to be taken into considerations when trying individuals for crimes they have committed.

Outreach

Both the ICTY and the ICTR had established an outreach program in order to continue the work that the tribunals have started through other stakeholders in both countries. The end of the tribunals' mandates were in sight, but there was still much work to be done in order to bring justice to all the victims.

Of the two tribunals, the ICTY has placed more focus on the outreach program. When viewing the website of the ICTY on their outreach program it seems as though the main purpose behind it is to make the tribunal transparent to those citizens that were involved in the conflict.[91] Yet according to the completion strategy of 1 June 2010 it seems to be more about being able to pass on the workload of the ICTY to the national jurisdictions. As can be seen in the completion strategy, most of the activities were established for lawyers, investigators, and victim protection officers with the purpose of creating a "direct dialogue with local actors as one of the best tools for fostering understanding of the Tribunal's work."[92] Not much is mentioned about the ordinary citizen that was not able to return to their hometown. This is not very surprising as this particular program does not actually have the funding in order to accomplish the objectives it stated on the website and in the completions strategy reports. Thankfully, the European Commission was willing to support this program, yet no other organizations were mentioned.[93] This is yet another aspect that needs to be taken into consideration when other tribunals are being created. It is important to have clear objectives and to be able to reach those targets.

[89] Longman,Timothy, "An Assessment of Rwanda's Gacaca Courts" *A Journal of Social Justice* 21, 307.
[90] Ibidem, 304.
[91] "Outreach Program", at http://www.icty.org/sid/242, viewed 28 May 2010.
[92] Thirteenth Completion Strategy Report ICTY, 20.
[93] Thirteenth Completion Strategy Report ICTY, 20.

Legacy and capacity building seemed to have become a priority as the end dates of the tribunals' mandates were nearing. On 23 and 24 February 2010 an international conference was held in order to discuss the legacy of the Yugoslav Tribunal and exchange views on the impact the ICTY has had so far.[94] Also discussed were insufficiencies that needed to be dealt with in future instances, such as coordination between international agencies and access to the Tribunal's records. This does seem to be an important objective, as the problems that are dealt with now, will serve as an example for future tribunals or national jurisdictions that will need to deal with such atrocities that occurred in the former Yugoslavia.

The ICTR only seemed to mention the Outreach and Capacity-Building programs in depth in the completion strategy. However, this seemed to be the correct manner as the ICTR was not claiming any objectives that they were not able to reach. This program was also funded by the European Commission and had the cooperation of the Government of Rwanda, but it was nevertheless underfunded.[95] It does however seem to have taken criticisms seriously as they had been using the radio to allow journalists to broadcast daily about court proceedings.[96] This was monitored by the Tribunal's staff and was meant to reach citizens in the rural areas of Rwanda. The most interesting part of this project was that the radio was the same medium that was used to indoctrinate the Hutu citizens to turn in or kill their Tutsi neighbors. By using this medium as a manner in which to educate the citizens of Rwanda about the tribunal and to read aloud the judgment delivery of the perpetrators ensured that this medium was once again being used for something positive.

Another aspect of the Outreach and Capacity-Building program was the training of Rwandan judges, prosecutors, and court staff so that these members of the court were able to take over the tasks of the ICTR. The tribunal was coming to an end even though this date may change due to the four high-officials that still remain at large; after the tribunal has ended there will still be much work that needs to be done by national jurisdictions. As explained above in the section on the Gacaca courts, it may be very well possible that new cases may come to light as citizens fear this manner of justice less than that of the tribunals. If this is the case and the tribunal has already ended, the Rwandan courts will need to be able to prosecute these perpetrators.

The ICTY has also focused on capacity-building by ensuring meetings with the regional counterpart's judges in order to share the experiences the tribunal has had with the

[94] Ibidem, 25.
[95] Eleventh Completion Strategy ICTR, p. 15
[96] Ibidem, p. 16

different regions. There have also been joint projects with the European Union in order to enable prosecutors and interns from the states from the former Yugoslavia to work for the Office of the Prosecutor.[97] However, there have not been many cases referred to national jurisdiction which means that these kinds of projects should remain a priority for the ICTY

Conclusion Chapter Five

There are indeed some differences between national and international indictments, yet it may be time for the survivors of both conflicts to become more involved in the process. The mandates of both tribunals have been repeatedly extended but both will be coming to an end soon. Many trials are being referred to national jurisdictions and few trials still need to be completed.

In Rwanda the Gacaca courts seemed to have started out successfully. This speedy manner in which to prosecute those that were involved in the genocide should bring the victims the relief that justice is being done. However, there were still many bumps in the road such as that high-officials that were involved in the genocide had taken important positions in the new government, and the obstacles that were created by the many that were involved in the genocide but did not want to be brought to trial. The reconciliation process still has a long way to go as it is still apparent that victims are afraid of a repetition.

The outreach programs that were established by both tribunals also make it possible for national jurisdictions to be prepared for trials that were being referred to them as the mandates of both tribunals were coming to an end. Both tribunals have set up activities in order to become more transparent for individuals in the countries that were most affected by the proceedings of the tribunals.

[97] Sixteenth Annual Report ICTY, 19.

Chapter Six: How effective are these Tribunals in actuality?

The ICTY and the ICTR can both be considered a good starting point for internationally prosecuting those that have committed atrocious crimes. As explained above, the international community started these tribunals for mostly selfish reasons as it felt the need to intervene without making the mistakes that happened in Somalia which caused American casualties. This being said, the ICTY and the ICTR, without proper funding, were both able to prosecute high-officials that were found to be instigators and/or assistants of the conflicts in both regions. The workings of these tribunals have not been without flaws as many of the critics have made clear, yet both tribunals have been able to leave behind a legacy which has partly transformed international law.

The true effectiveness of the tribunals will not be able to be measured until both have been completed. However much information has already been gathered about the manner in which the tribunals have proceeded. The ICTR may not be considered very effective as it has not tried many accused; however it has a set precedent in certain cases, such as those of Jean-Paul Akayesu and the witness under the name of GAA. The Gacaca courts have also affected the tribunal as they have taken over a substantial amount of cases that still needed to be tried. Yet reconciliation always seemed to be far away. The citizens of Rwanda still lived in fear for a repetition of the crimes that were specifically committed during those hundred days. Some were even afraid to testify at the Gacaca courts for fear of retribution from the perpetrators. Thus other measures should be taken in the future. The lessons learned from both tribunals can be of great contribution to further international law and the workings of national jurisdictions all around the world.

The United Nations have learned a great deal about the tasks that should be performed by such war crimes tribunals and are able to further their knowledge in such instances as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon all which have made minor adjustments in the workings compared to those of the ICTY and the ICTR. These first two tribunals have set a precedent for the manner in which these courts should function. One of the adjustments that will be considered in this chapter is that of the Extraordinary Chambers in the Courts of Cambodia and the request to use both Cambodian staff and international personnel in order to further reconciliation.

The legacy of the ICTY and the ICTR: Sierra Leone, Cambodia, and Lebanon

The ICTY and the ICTR have since been followed by three other special tribunals created in part by the United Nations. International law has been growing considerably when it comes to human rights. It is very difficult to assess which human rights are those of basic necessity due to the different cultural, ethnic and religious groups. On the other hand, it is very important that work continues to be done internationally, as many countries that are involved in conflict are not able to bring those responsible to trial without help from the international community.

The Special Court for Sierra Leone

The Special Court for Sierra Leone was established on 16 January 2002 by the Government of Sierra Leone in cooperation with the United Nations in order to prosecute those responsible for violations of international humanitarian law and Sierra Leonean law committed since 30 November 1996.[98] The Special Court differs from the ICTY and the ICTR in that it is a mixed tribunal containing both personnel provided by the Government of Sierra Leone as well as international personnel. Another important difference is that the Special Court has jurisdiction over both international and national crimes. The basic structure of the Special Court does remain the same as that of the ICTY and the ICTR and includes the Chamber, the Office of the Prosecutor and the Registry. These two differences are mainly in order to involve the people of Sierra Leone in the decision-making process and take some of the responsibility away from the United Nations. The ICTY and the ICTR were not able to uphold the completion date and had to rely on member states in order to finish in timely manner. However, budgeting still remains a problem as the budget for the Special Court for Sierra Leone is also made up of contributions that member states are willing to make.

One of the most important contributions of the Special Court for Sierra Leone is that it ruled that forced marriages could fall under crimes against humanity.[99] Just as the ICTY and the ICTR, this has ensured that international law is able to advance in order to deal with the conflicts that are festering in the world. The legacy that the ICTY and the ICTR will leave behind is also relevant to Sierra Leone, because "the International Criminal Tribunal for the

[98] "About the Special Court for Sierra Leone" at http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx, viewed 2 June 2010.
[99] Judgment, *Brima, Kamara, and Kanu* (SCSL-04-16-T), Appeals Chamber, 22 February 2008.

former Yugoslavia and International Criminal Tribunal for Rwanda delivered a number of precedent-setting rulings that recognized the existence of specific sexual and gender-related crimes amongst war crimes and crimes against humanity."[100] Thus ensuring that new contributions such as that of forced marriage as a crime against humanity can be possible.

The Extraordinary Chambers in the Courts of Cambodia

During the reign of the Khmer Rouge which lasted from 17 April 1975 until 7 January 1979, almost three million people died. The almost four year control over Cambodia was followed by a civil war which lasted until 1998. However, in 1997 the government of Cambodia asked the United Nations for assistance in creating a tribunal to prosecute those leaders of the Khmer Rouge.[101] The Extraordinary Chambers in the Courts of Cambodia was created in 2001.

The main difference between the ECCC and the ICTY and ICTR is that the Government of Cambodia required that these trials be located in Cambodia and include Cambodian personnel. The international community was asked for support as the judicial system of Cambodia was weakened and was not able to ensure that the requirements of international standards could be met. Even though the United Nations was asked to intervene,

> "the disagreements between the UN and the Cambodian government concerning the structure and composition of the Chambers were, from the beginning, fundamental. It is clear from the final 'compromise' that the disagreements have been resolved almost entirely in line with the position taken by the Cambodian Government."[102]

However, this could be seen as a positive effect as this takes responsibility away from the United Nations and places more responsibility in the hands of the government of the territory in which the crimes were committed.

As explained above, the outreach programs are not always able to reach the persons that are affected most by these tribunals, making it difficult for reconciliation to take place. When citizens are involved from the start there is more possibility to work together. However, as Cambodia has done wisely, it is important to ask the international community for help in

[100] Frulli, Micaela, "Advancing International Criminal Law: the Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime Against Humanity", *Journal of International Criminal Justice*, 2008 6(5), 2.
[101] "Introduction to the ECCC" at http://www.eccc.gov.kh/english/about_eccc.aspx, viewed 2 June 2010.
[102] Bertodano, Sylvia de, "Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers", *Journal of International Criminal Justice* 2006 4(2) 12.

order to oversee the process of the trials to ensure fair trials soon after a conflict. These tribunals are mainly for those that have been affected by the conflict and therefore must be involved because, "it is hoped that fair trials will ease the burden that weighs on the survivors. The trials are also for the new generation – to educate Cambodia's youth about the darkest chapter in our country's history."[103] The guilt that was felt during the creation of the ICTR is not present during these trials, which is a very important reason why the Government of Cambodia needed to be more involved in the establishment of this special court. After a conflict, the judicial system may not always function properly, which is where the international community comes in. Other than that, it is very important that these hybrid models are used in the future.

The Special Tribunal for Lebanon

The Special Tribunal for Lebanon was created in order to prosecute those individuals that were responsible for the attack of 14 February 2005 in Beirut killing the former Prime Minister Rafiq Hariri and 22 others.[104] The structure of this special tribunal can be compared to both tribunals that have been mentioned before, as there is again a mixture between international and national personnel.

However, once again there are minor adjustments that can help future endeavors. Each of the tribunals mentioned, including the ICTY and the ICTR, have had horrible problems receiving funding. The ICTY and the ICTR were not able to function properly as a proper budget was not assigned at first. When the ad-hoc tribunals lasted longer this also meant that the tribunals would have to keep begging for more money. The budget of the Special Tribunal for Lebanon is 49 % paid for by the Government of Lebanon. This ensures that less money has to be funded through member states, who do not always give what they originally pledged anyway.

Another development was the outreach program that the Special Tribunal for Lebanon has started, similarly to those of the ICTY and the ICTR. As the tribunal has half of its personnel coming from Lebanon, it is necessary to inform citizens about the tribunal so that the citizens know what is going on and who is being punished for these actions. The transparency that is being created can be very useful for cooperation with NGO's and other

[103] "How will the Khmer Rouge Trials benefit the people of Cambodia?" at http://www.eccc.gov.kh/english/faq.view.aspx?doc_id=40, viewed 4 June 2010.
[104] "Special Tribunal for Lebanon", at http://www.stl-tsl.org/action/home, viewed 2 June 2010.

states, by raising awareness of the STL, acting as intermediary with The Netherlands, to provide information at different levels and create understanding about the extent and limits of its mandate.[105] When creating an open dialogue, criticism that may have been spewed is being softened as the explanations as to why things are not going the way they are supposed to be going is already on the table. These tribunals are still trying to learn from past mistakes, and the STL has made some good adjustments. However, the true outcomes of these tribunals all cannot be seen until they have been completed.

Recommendations

There are some adjustments that were made by the last three special tribunals that were created by the United Nations, which shows that there are some lessons that are already being learned. First, a realization needs to be made that "despite their immense contribution to international criminal law and their relative success in fulfilling their backward-looking role in terms of punishment, it is apparent that the international tribunals after the war in Yugoslavia and the genocide in Rwanda cannot serve as models for the future."[106] They have indeed contributed to international law by setting such precedents as rape being a crime against humanity and the focus on the individual. However, they have not been very successful when it comes to reconciliation and the involvement of the individuals that were touched by or involved in the violence that had partaken in both regions.

The first recommendation would thus focus on localization. When looking at sources that take a deeper look at conflict resolutions, it becomes clear that there are significant steps that need to be taken in order to start the process of post-war reconstruction. After such horrendous conflicts have taken place most judicial systems have already collapsed. Therefore countries such as Rwanda and Cambodia asked the United Nations for support because "the 'impartiality' requirement is crucial, since otherwise the judicial and policing systems lose legitimacy, but this cannot be expected to go unchallenged, because disappointed interests will interpret the maintenance of order as suppression."[107] In order to keep this under control and to ensure that the renewed judicial system cannot be taken advantage of, the international community is needed to support the process. However, as can be seen through the ICTR, when the international community becomes too involved through guilt it can be conflicting.

[105] "Outreach" at http://www.stl-tsl.org/sid/146, viewed 4 June 2010.
[106] Stensrud, Ellen Emilie, "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia", *Journal of Peace Research* vol. 46, no. 1, 2009.
[107] Ramsbotham, *Conflict Resolution*, 205.

The ICTR has been able to try those that were most responsible for the crimes that were committed in both territories, yet the Gacaca Courts on a more local level created a dialogue. When looking at the ICTY the same can be noticed as most locals do not know the status of the proceedings of the tribunals. In this case the outreach program can be described as weak at best. The localization of these tribunals has been a tremendous step forward. Especially the addition of the outreach program to the Special Tribunal for Lebanon can in the future prove to be of great significance.

This goes hand in hand with the problems that are being faced considering reconciliation. Reconciliation was not a priority when the ICTY and the ICTR were created. Some skeptics even believed that a truth commission could be more useful than these tribunals. However, amnesty and reconciliation can sometimes be combined with tribunals such as these. Reconciliation is important after such conflicts, and by trying those most responsible it could give the victims the peace they need. Yet this is not always enough as some may never be tried due to lack of evidence. Amnesty does not mean that there is no justice, but especially in conflicts such as that of Rwanda where a great number of citizens were involved in the genocide, it is not always possible to try all individuals that committed crimes. Thus using alternative such as the Gacaca courts could be helpful in certain cases. The Gacaca courts ensured a dialogue between victims and perpetrators and though this may not always run smoothly as mentioned in chapter five, these alternatives should be taken seriously if these alternatives are possible in future conflicts. Reconciliation needs to be more of a focus in future tribunals as this could also help the national jurisdictions get back on its feet.

The budget is another problem that has tormented almost all tribunals that have been created. As mentioned before, Lebanon is one of the few tribunals of which the Government provides half the budget. The United Nations has trouble attaining the yearly contributions that the member states are supposed to provide, which means that trying to have member states fund such tribunals can prove to be even more difficult. These new hybrid-models should be able to rely more on the government as the Special Tribunal for Lebanon has done as half of the personnel is provided by the government in the first place. This cooperation should be of more focus in order to not have to rely on other member states for contributions.

Not all problems can be overcome and some problems may be easier to resolve, but these two tribunals have set a good precedent. There are some adjustments that have been made by the last three tribunals in order to revise the organization or structure of the tribunals. Yet these measures could never have been taken if it were not for the ICTY and ICTR. As mentioned many times before, the real results will not be available until the ad-hoc tribunals

have been completed. All that can be said now, is that the ICTR and the ICTY need to be researched in order to fully understand the complexities behind the tribunals and provide better information for those tribunals that are still to come. The problems that have been incurred by the ICTY and the ICTR are not problems that will resolve themselves in the future. Even though financially the tribunals have had to endure different struggles, there is still work to be done in the outreach programs in order to teach and share experiences with others. Hopefully, future endeavors will not be plagued by the difficult start up and the complications of obtaining qualified staff due to a lack of funding and security. There have been many critics of the tribunals, but both the ICTY and the ICTR have made tremendous progress and made a start in order to ensure that future conflicts such as these will be dealt with more speedily.

Conclusion

It has become apparent that the ICTY and the ICTR have made significant contributions to international law. These tribunals were the first of their kind and were able to establish rape as a crime against humanity and also created the focus on the individual responsibility for perpetrators. Both tribunals were established in order to try those responsible for the horrendous acts that were committed in the territories of the former Yugoslavia and the genocide that had taken place in Rwanda.

There was much criticism regarding the formation and structure of the tribunals. There was no precedent and the United Nations was not able to establish long-term agreements from the beginning. This complicated the establishment as qualified personnel was hard to find without the guarantee of future employment. There were resolutions created by the Security Council and the organization of the tribunals was created in a time where many questioned the legitimacy of these tribunals. The ad-hoc nature also hurt the establishment of these tribunals as there was no way of knowing how much time trials would take and if the perpetrators could all be located in time. The ICTY was created before the ICTR which made it possible for the ICTR to copy the statute and structure of the ICTY. This is reflected through the shared prosecutor and appeals chamber. The structure of both tribunals was also similar. The only difference that could be found was the emphasis that was placed on certain aspects in the annual reports as discussed above.

The completion strategy reports that began in 2003 also did not help the workings of the tribunals. In almost all completion strategy reports there are complaints about obtaining qualified personnel. Staff was not returning to work for the tribunal as again there was no guarantee for future employment. The completion dates were repeatedly set back but that was no guarantee for personnel to be assured of a job once the trials had commenced. Various manners in which to obtain qualified personnel were discussed in the chapters above, however this seems to remain a problem that will not vanish for either tribunal. Outreach programs and capacity-building programs were also established in order to further develop relations with national jurisdictions in order to be able to refer cases. However, this also seems to be an obstacle for the ICTY as it has proven difficult to refer cases to national jurisdictions. The ICTR, on the other hand, has been able to refer many cases both to national jurisdictions and to the Gacaca Courts.

The two most extraordinary accomplishments of the tribunals are as mentioned above: the establishment of rape as a crime against humanity and the focus that has been forwarded

to the individual. Due to such important precedents, other laws, such as that against forced marriage, were able to be established. The four cases that were mentioned in chapter three were of great significance for both the ICTY and the ICTR and will remain a part of the legacy, even though some critics do not believe that these tribunals can be seen as models for the future. The tribunals that have followed since have made many improvements for the organization and establishment, but without the trials above, there would be no precedent from which to build. It is very important to remember that the ICTY and ICTR may have their flaws, yet so did the League of Nations when it was first established. The United Nations has been able to learn from its predecessor, just as future tribunals will be able to learn from the ICTY and ICTR.

There are differences between the various individuals that have committed crimes in either of the conflicts which were the reason for the establishment of both tribunals. There are individuals that when captured, such as Slobodan Milosevic, could mean a great deal for the reconciliation for the conflict in the former Yugoslavia. These individuals were responsible for creating the environments which led to the atrocious crimes that were committed in either territory. However, the smaller fish should not be forgotten. Especially during the genocide in Rwanda, the Hutu population which made up nearly 90 percent of the population was largely involved in the violence. These were not only leaders, but also neighbors that killed each other due to the fear that was instilled through Hutu Power Radio. This also made it necessary for Gacaca Courts to be created, as it is also important to try those that may not have created the system of violence but that did participate in the violence or at the very least did nothing to prevent these crimes from being committed. These alternatives were not available to the ICTY as the Yugoslav Republic had already completely disintegrated.

These Gacaca Courts that were mentioned played a big role in the process towards reconciliation in Rwanda. The international indictments were mainly used in order to try the individuals that were most responsible for the crimes that were committed in either the former Yugoslavia or Rwanda. International indictments were also not able to sentence individuals with the death sentence. The difference between international and national indictments was not of great significance for the ICTY as there are not many cases that are being referred to the national jurisdictions in the states of the former Yugoslavia. Yet, for the ICTR these alternatives were of great significance as they would come to rely on the options to refer cases to the national jurisdictions and otherwise to the Gacaca courts. As mentioned in chapter five, it is very difficult to ensure that the Gacaca courts are able to try individuals in a fair manner. Many critics have stated that it has opened the dialogue in Rwanda in some cases; however

there are also cases that are being reported that judges and witnesses for the Gacaca courts are being terrorized, beaten and sometimes murdered. The ICTY on the other hand has not had to deal with such complications as the tribunal has been in control of the trials and has been able to ensure fair trials according to international standards.

The question then is: what kind of legacy are these tribunals leaving behind? Can these tribunals be used as future models or should they be told as a cautionary tale? These are difficult questions to answer as neither the ICTY nor the ICTR has been officially finished. These accomplishments will not be clear for some time, but in the mean time there are three other tribunals that were in part set up by the United Nations. These special tribunals and trials are able to learn from the biggest mistakes that were made by the first two tribunals. The international character still remains a part of the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon, yet there are also national personnel that work for these tribunals in order to establish a national character that is able to confront those that are responsible for conflicts. As explained, it is important that the international community is involved in order to ensure fair trials, but these are conflicts that need to be dealt with by the citizens of the specific countries or territories in question. These trials however can also take many advantages from the ICTY and the ICTR through the establishment of outreach programs. Even though the outreach programs of these two tribunals have been lacking, future tribunals can take this program and it expand it as half of the personnel from these hybrid-models resides in the country in question. The new standards of international law can also be further developed by these tribunals as they already have a precedent to work from.

Even though these tribunals have not yet finished, they have set precedents, good and bad, that will help improve future endeavors. As listed with the recommendations, it is indeed important to keep the citizens of the countries involved in the process. In this manner it could also improve reconciliation. Taking for example the ICTR, the international community had failed to intervene during the genocide, and in order to make up for that the tribunal was created. Yet, it was not until the Gacaca Courts that the citizens of Rwanda started talking more openly about the crimes that were committed in 1994. The involvement of national personnel is therefore necessary to establish some form of reconciliation. Last, there are of course organizational and budgetary problems that need to be dealt with, as the Special Tribunal for Lebanon has already attempted. These recommendations are very logical and may take time before such problems are able to be dealt with, but the criticism towards the ICTY and the ICTR are not all founded. These tribunals were the first of their kind and may

have had starting problems, but so does everything else when it is being established for the first time. The important thing is to learn from the mistakes, make adjustments and accomplish greater objectives in the future.

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