



# “The Role of England and United State of America in the Development of ICTY and ICTR”

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## Abstract

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.<sup>1</sup> 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.<sup>2</sup>

## 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

<sup>1</sup> 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.

<sup>2</sup> Veen, R. van der, *Afrika: van de koudeoorlog naar de 21e eeuw*(Amsterdam 2002) 102.

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.”<sup>3</sup> 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.

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

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.<sup>4</sup> 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

<sup>3</sup> Forsythe, David P., *Human rights in international relations* (Cambridge University Press 2006) 91.

<sup>4</sup> Notes from the class „The Comparative Method: an Introduction.“

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.”<sup>5</sup> 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 another and aims for historical interpretation in order to account for specific historical outcomes.<sup>6</sup> 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

<sup>5</sup> Mahoney, James and Dietrich Rueschemeyer, *Comparative Historical Analysis in the Social Sciences*. (Cambridge University Press 2003) 12.

<sup>6</sup> Ragin, Charles C., *The Comparative Method: Moving beyond qualitative and quantitative strategies*, (University of California Press 1987) 3.

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.

## **The Role of England and US in the Development 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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> However, the creation of the ICTY led to

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<sup>7</sup> 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.

<sup>8</sup> "Tribunal Update: Briefly Noted", Institute for War and Peace Reporting, TU No 398, (18 March 2005).

<sup>7</sup> Forsythe, *Human Rights*, 97.

<sup>9</sup>Forsythe, *Human Rights*, 97.

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.”<sup>10</sup> 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.”<sup>11</sup> 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 in which there was limited access to crime scenes in the first few years.<sup>12</sup> 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<sup>13</sup>, especially by the perpetrators as they would make use of the golden parachute<sup>14</sup> and not stand trial for the atrocities that had been committed by them.

### **The Role of England and US in the Development 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.<sup>15</sup> 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.<sup>16</sup> This would explain why the Tutsi’s were taller, well-built

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<sup>10</sup> Forsythe, *Human Rights*, 98.

<sup>11</sup> “Office of the Prosecutor”, at <http://www.icty.org/sections/AbouttheICTY/OfficeoftheProsecutor>, viewed 28 April 2010.

<sup>12</sup> Ibidem.

<sup>13</sup> Ramsbotham, Oliver, Woodhouse, Tom, Miall, Hugh, *Contemporary Conflict Resolution* (Cambridge 2005) 241.

<sup>14</sup> 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.

<sup>15</sup> Veen, R. van der, *Afrika: van de koudeoorlog naar de 21e eeuw* (Amsterdam 2002) 102.

<sup>16</sup> Veen, R. van der, *Afrika: van de koudeoorlog naar de 21e eeuw* (Amsterdam 2002) 108.

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 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."<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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. Under the authority of

<sup>17</sup> Forsythe, *Human Rights*, 103.

<sup>18</sup> *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.

<sup>19</sup> "The Chambers" at <http://liveunictr.altmansolutions.com/tabid/103/Default.aspx>, viewed 28 April 2010.

<sup>20</sup> *Ibidem*.

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.<sup>21</sup> 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.

### 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.”<sup>22</sup> 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.”<sup>23</sup>

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

<sup>21</sup> “Witness Support and Protection at ICTR” at <http://liveunictr.altmansolutions.com/tabid/106/default.aspx>, viewed 28 April 2010.

<sup>22</sup>Ramsbotham, Oliver, Woodhouse, Tom, Miall, Hugh, *Contemporary Conflict Resolution* (Cambridge 2005) 241.

<sup>23</sup>*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.

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 nationalists, and that many Serbs evaded the draft.”<sup>24</sup> 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.<sup>25</sup> Rape has been recognized even during the Nuremberg 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“.”<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.”<sup>29</sup>

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.

## Conclusion

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.”<sup>39</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> *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).

<sup>26</sup> Vulliamy, Ed, *Seasons in Hell: Understanding Bosnia's War* (London 1994), 199.

<sup>27</sup> Ramsbotham, *Contemporary Conflict Resolution*, 241.

<sup>28</sup> Karns, Margaret, Mingst, Karen, *International Organizations: The Politics and Processes of Global Governance*, (London 2004) 93.

<sup>29</sup> Karns, *International Organizations*, 93.

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.

