The International Criminal Tribunal for the former Yugoslavia: Analysis of its Contribution to the Peace and Security in the Former Yugoslavia and the Rule of Law in International Relations

by

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Abstract

The aim of this study has been to explore the political and legal significance of the International Criminal Tribunal for the Former Yugoslavia, both within the territory of the former Yugoslavia and beyond. Within these parameters, the overall purpose of the study has been to examine, firstly, whether the ICTY has contributed to the restoration of peace and security in the territory of the former Yugoslavia, and secondly, whether, using the experience of the ICTY, it is reasonable to expect that the newly established International Criminal Court (ICC) will make a similar contribution to international peace and security and the rule of law in international relations more generally. Therefore, the academic aim of the thesis is to use the results of the empirical research on the ICTY as a basis for reasoned speculation about the ICC. In seeking to answer whether the ICTY has contributed to peace and security in the former Yugoslavia, the thesis analyses the cooperation of the actors within and outside the former Yugoslavia, both state and non-state, arguing that the ICTY has not achieved its main objective. Using the lessons of the ICTY, the thesis seeks to modify expectations about the potential of the ICC to contribute to the maintenance of international peace and security by helping to manage similar conflicts in the future. In answering whether the ICTY has contributed to the rule of law in international relations, the thesis has contextualised the ICTY within the history of similar attempts to use international law and international institutions to prohibit and/or regulate the use of force in international relations. The overall conclusion is that the ICTY has not achieved this goal either.

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Abbreviations

CICC	Coalition for International Criminal Court
EEC	European Economic Community
EU	European Union
FRY	Federal Republic of Yugoslavia
FY	Former Yugoslavia
GA	General Assembly
ICC	International Criminal Court
ICJS	International Criminal Justice System
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ISS	International Security System
ILS	International Legal System
JNA	Yugoslav People's Army
NGO	Non-Governmental Organisation
OSCE	Organisation for Security and Cooperation in Europe
SC	Security Council
SFRY	Socialist Federal Republic of Yugoslavia
SG	Secretary General of the United Nations
UN	United Nations

Chapter 1

Introduction

The general aim of this introductory chapter is to outline the overall objective of this thesis, by spelling out the research question and explaining the methodology used in answering it. In doing so, the chapter also points to the academic and policy relevance of the research question. At the same time, the chapter is intended to present the structure of the overall argument followed through in the subsequent chapters by breaking down the main research question into four sub-questions, which form the basis of the four substantive chapters, indicating the reasons for doing so.

The overall research question that this thesis seeks to answer is, firstly, whether the ICTY has contributed to the restoration of peace and security in the territory of the former Yugoslavia, and secondly, whether it is reasonable to expect that the ICC will contribute to the strengthening of the rule of law[1] in international relations and thus better maintenance of the international security system. The aim of the thesis is to examine the record of the ICTY vis-à-vis peace and security and the rule of law in the former Yugoslavia and incorporate the results of that examination into the wider theoretical framework that defines the expectations in relation to the ICC and its potential vis-à-vis international security system and the rule of law in international relations.

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[1] Ideally, all disputes among states, as well as peoples, should be resolved without resorting to force. If the international system reached that state of affairs, that is, if force was completely eliminated from inter-state relations, it would be possible to say that international community existed. This is the essence of Immanuel Kant's dream of perpetual peace: 'The greatest challenge for the human race, which nature compels it to meet, is to attain a universal civic society based on the rule of law' (quoted in Damrosch and Scheffer, 1991: 49).

The overall academic purpose of this thesis is to explore the possibility of using historical research on the International Criminal Tribunal for the former Yugoslavia (ICTY)[2] as a basis for speculation about the future of the newly established International Criminal Court (ICC)[3]. Since the task given to the ICTY by the Security Council is to contribute to the restoration of peace and security in the former Yugoslavia[4], the focus of the historical research has been on finding the evidence of such contribution. Using the analysis of the evidence of the ICTY's contribution to peace and security in the former Yugoslavia, inferences are made about the potential of the ICC to contribute to the maintenance of international peace and security by helping to manage similar conflicts in the future. The overall aim is to contribute to the discussion on the ICC by modifying the expectations about it on the basis of the experience of the ICTY. What is the basis for believing that the ICC will act as a sufficient deterrent and stop men and women intent on committing war crimes, crimes against humanity, and genocide? Will it act as a sufficient deterrent to stop unscrupulous and opportunistic political and military leaders starting conflicts in the first place? Or, will it deter them from using criminal means and methods of fighting that are punishable under International Humanitarian Law (IHL)?

It is clear from the previous paragraphs that the research question used in this thesis is actually the same as the objective of the ICTY given to it by the UN Security Council, indicating the policy relatedness of the thesis. But the effectiveness of the ICTY in restoring peace and security in the former Yugoslavia is also subject of an academic debate because of

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[2] International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1 January 1991 was formally established by the UN Security Council on 25 May 1993 (S/RES/827).

[3] International Criminal Court was formally established on 1 July 2002 after the Rome Statute had been ratified by over sixty states.

[4] See S/RES/827.

its role in generating support for the ICC. Therefore, answering whether the ICTY has had a significant impact on the restoration of peace and security in the former Yugoslavia is important not just for the former Yugoslavia but for the wider world. It is argued in this thesis that lessons from the ICTY should be used to modify the expectations from the newly established ICC.

Particularly important in forming the perception about the ICTY, which then reinforces the expectations about the ICC, has been a network of governmental, non-governmental and other organisations, called the international community and consisting of diplomats, international civil servants, NGO activists, lawyers, scholars and journalists. In general, the establishment and operation of the ICTY has been met in academic and policy quarters with a mixture of scepticism, which sometimes borders on cynicism, and idealism, which also sometimes borders on utopianism. It is important to recognise that the origins of both sets of positions are combinations of their interpretations of the past and aspirations for the future[5]. The description of the supporters and opponents of the ICTY as idealists and sceptics is based on the seminal work of E.H. Carr *The Thirty Years' Crisis 1919-1939* and his description of realists and utopians[6] in the study of international politics. Carr argues that the key difference between realists and idealists is their conception of international politics- whereas realists see politics primarily in terms of power, while idealists see it primarily as a branch of ethics. Similar differences between realist and idealist positions also exist in relation to international law where 'foundational divergence remains between those who regard law primarily as a branch of ethics, and those who regard it primarily as a vehicle of

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[5] Kenneth Waltz uses the term images, whereas Martin Wight prefers the term traditions (see Waltz, 1979 and Wight, 1979).

[6] For a brief introduction to the realist and idealist positions, confrontation of which resulted in the first big debate within the discipline of International Relations (IR), see Chapter 1 in Dougherty and Pfaltzfraff, 1990. The best discussion of this perennial divide within IR remains Carr's Thirty Years' Crisis 1919-1939.

power' (Carr, 1939: 222). By analysing both sets of positions, this thesis attempts to find common ground which would incorporate lessons of the past with hopes for the future[7].

This chapter argues that the scepticism and idealism accompanying the ICTY and the ICC, with their variations from excessive scepticism bordering on cynicism on the one end to excessive idealism and utopianism on the other, can be attributed to the dominant preconceptions about the notions of war, peace, and justice in international relations. For this reason, the following section provides a brief overview of the most significant conceptions of the phenomenon of war coming mainly from IR and IL scholars. The emphasis is on the alleged difference between conventional wars and 'new wars', identifiably different from other wars in the past. This is followed by a section on the dominant conceptions of the relationship between war and justice, focusing in particular on the shift from conflict prevention to conflict management as the primary purpose of international law. The emphasis in this section is on the current use of international law, or more precisely, IHL, in managing 'new wars'. This section is followed by a section spelling out the methodology used in answering the main research question. The last section provides a short summary of the main points in each of the subsequent substantial chapters.

In summary, the chapter discusses some of the post-Cold War era changes in the dominant conceptions about international politics[8] and in particular changes about war and

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[7] Many authors argue for a mixture of idealism and realism in approaching questions of war and peace, justice, and governance in international relations (see Doyle, 1997; Brown, 1992). Policy-makers like the former US Secretary of State Madeline Albright also advise an approach based on lessons from the past as well as ideals about the future.

[8] During the 1980s, the dominant image of international relations was neo-realist, associated primarily with the seminal work of Kenneth Waltz Theory of International Politics. The realist conception of international relations is summarised in the following words: 'International politics is a struggle for power; war is inevitable in the international anarchy; there is no right and wrong, only competing conceptions of right; there is no society beyond the state; international law is an empty phrase' (quoted in Doyle, 1997: 43, n.9). The end of the Cold War has seen resurgence of normative theories of international relations, traditionally associated with the

peace on the one hand, and justice and international law on the other, which contributed to the idea that prosecution of individuals may contributed to restoration of international peace and security, which is the rationale for the existence of the ICTY. Whereas the traditional view was that the pursuit of justice in international relations is not prudent because of the normative pluralism underpinning international relations, which for that reason could only lead to conflict and war, the contemporary view is increasingly that peace and justice can go hand in hand. Doyle argues for a conception of international relation where both peace and justice are included: 'Peace, indeed, is the greatest challenge the human species faces before it can begin to tackle effectively the equally hard questions of global governance and justice. But peace in its turn depends on approaching an understanding of justice and governance capable of bridging borders' (Doyle, 1997: 10). *Peace and justice*

Images of War: Conventional and New Wars

The aim of the following section is to demonstrate how the changes in the conception of the phenomenon of war and the emergence of liberalism as the dominant paradigm for understanding it in the 1990s fundamentally affected the perception of the Yugoslav war. The section argues that the idea that prosecuting individuals for violations of IHL can contribute to peace and security in the Yugoslav context can be attributed to this change. It needs to be emphasised that like all paradigms concerned with the systematic study of war and peace, Realism and Liberalism are in fact combinations of knowledge about the past and aspirations about the future. It is important to understand how the two paradigms have developed over time and how they conceive the phenomenon of war, how they explain the causes of war,

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English School of International Relations and in recent years advocated by scholars like Chris Brown, Ken Booth and others.

how they link the causes with the conduct of war, and the strategies they propose for preventing and controlling war. What is the origin of war, that is, is war natural or social and historical phenomenon? What are the main causes of war? What are the main consequences of war? Can war be prevented, and if it can be prevented how can this be achieved? If it cannot be prevented, can it at least be controlled and how can this be done? These are the main questions this section is seeking to address.

There are analytical and normative differences between the two paradigms informing the attitudes towards the ICTY. The analytical differences primarily relate to the nature of war and the ethical differences are mainly concerned with what should be done about it. This section argues that the differences in the conception of war between paradigms follow from their different conceptions of the history of international relations, and in particular the role of war in the context of the discussion about the issue of continuity and change. Some writers in the nineteenth century, like Jellinek, argued that war was not only 'a necessary factor but also an element of progress in this anarchical society' (quoted in Lauterpacht, 1975: 11). Similarly, Heinrich von Treitschke argued that 'since there cannot be, and ought not to be, any arbitrary power above the great personalities which we call nations, and since history must be in eternal flux, war is justified. War must be conceived as an institution ordained by God' (quoted in Brierly, 1944: 19). Hegel on the other hand, offered the argument that nothing done in the interest of the preservation of the state could be illegal (Pal, 1951: 243).

Drawing on the fact that war has been a perennial element of human history, Realists argue that war and conflict in general cannot be abolished forever, and that only particular wars can be stopped. Liberals, on the other hand, argue that war and conflict as a means of settling differences between people can be abolished if enough people internalised this

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possibility. This liberal aspiration is evident in the preamble of the Charter of the United Nations, which expresses the determination of the contracting parties to 'save the future generations of the scourge of war'. It is argued that it is particularly important for the political and military leaders to internalise the so-called non-violent conflict resolution strategies.

During the Cold War, it was clear to everybody that a nuclear war had to be prevented at all cost because it would be impossible to stop it from escalating into a catastrophe in which nobody would be better off and everybody would be worse off. Realists and idealists agreed that nuclear war had to be prevented, but they differed over how that could be achieved. While realists argued that nuclear war could be prevented through deterrence, idealists argued that the best strategy for preventing nuclear war would be through education for peace. So, throughout the post-Second World War period, the relations between the US and the SU oscillated between threats and rapprochement.

Both scepticism and idealism about the possibility of the ICTY and the ICC to contribute to peace and security originate from a more general attitude towards the potential of non-military means in achieving peace. Sceptics traditionally argue that only overwhelming force can guarantee peace and security, suggesting that the best strategy for peace is to prepare for war. Since idealists argue that the cause of war is to be found in the hearts and minds of people, they believe in the transformative power of reason. They believe that 'reason could demonstrate the absurdity of the international anarchy; and with increasing knowledge, enough people would be rationally convinced of its absurdity to put an end to it' (Carr, 1939: 36). Martin Wight expresses his scepticism about the transformative potential of reason in international relations, arguing that international politics is the 'realm of repetition

and recurrence' and concluding that 'it is incompatible with the progressivist theory' (Butterfiled and Wight, 1966: 25-26).

Definitions of conventional and new wars

Definitions of war have been suggested by historians, behavioural scientists, military experts, and lawyers, to name but a few. Various definitions emphasise different features of war as being the most important for defining war. Clauzewitz, the most influential among traditional writers, defines war as 'act of violence intended to compel our opponent to fulfil our will' (Clausewitz, 1968: 1). Similarly, Lauterpacht defines war as 'a contestation between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases' (Lauterpacht, 1952: 202). The emphasis in both definitions is that war is an inter-state affair and that violence is used for a political purpose. The importance of the argument that war is only an inter-state conflict is that other forms of violence by other groups are not considered as war. Even laws of war sought to strengthen the monopoly of states over the use of force. Quincy Wright argues that laws of war were developed to make war a monopoly of the state to be carried only for 'reason of state' and not for private profit (Wright, 1965: 329). A similar point is also made by van Creveld who argues that what makes war different from mere crime is the fact that they are fought by states and them alone (van Creveld, 1991: 40; 126). Therefore, the establishment and maintenance of the monopoly on the use of force by states has been reflected in the traditional definitions of war. Hedley Bull argued that 'within the modern states system only war in the strict sense, international war, has been legitimate; sovereign states have sought to preserve for themselves the monopoly of the legitimate use of violence' (Bull, 1977: 185).

The insistence that only inter-state violence could be properly considered war was important because it was thought that only states were capable of keeping violence under control. Other forms of violence involving non-state actors were considered to be particularly barbaric. Writing in 1842, Thomas Arnold wrote:

> The truth is that if war carried on by regular armies under the strictest discipline is yet a great evil, an irregular partisan warfare is an evil ten times more intolerable, it is in fact to give a licence to a whole population to commit all sorts of treachery, rapine and cruelty, without any restraint; letting loose a multitude of armed men, with none of the obedience and none of the honourable feelings of the soldier (quoted in Best, 1983: 120)

What Arnold expresses here so eloquently is the view that over time states internalised certain rules of warfare and that armed conflicts fought by non-state actors have no such ethical framework. The significance of the ICC is that it is trying to extend rules of war to conflicts involving non-state actors.

After the end of the Cold War, inter-state violence is no longer the dominant form of violence in international relations, but that does not mean that conflict has been replaced by cooperation in international relations because other forms of non-conventional warfare are on the rise. Van Creveld argues that 'large-scale, conventional war- war as understood by today's principal military powers- may indeed be at its last gasp; however, war itself, war as such, is alive and kicking and about to enter a new epoch' (van Creveld, 1991: 2). Donald Snow has defined the new wars of the 1990s as 'organised armed violence between groups within states for the purpose of overthrowing and replacing an existing regime or to secede from the existing state' (Snow, 1995: 66). He also argues that 'new wars' are nothing but

more or less systematic murder and terrorising of civilian populations (Snow, 1996; see also Gutman and Reiff, 1999).

Whereas conventional wars were fought by states trying to expand their power, new wars are, paradoxically, wars of weak or dissolving states[9]. Fighting following state failure or loss of monopoly on the use of force is typically characterised by loss of command structure. This is particularly important, for in these circumstances fighting becomes individualised, resembling the situation of *bellum omnium contra omnes*, posited by Hobbes and Arnold, the intolerable evil. Is it therefore intrinsic in the nature of new wars that they set off a chain of consequences that can be neither controlled nor anticipated, however imperfectly? Unlike realists, liberal internationalists believe that conflict in international relations is not inevitable, and that war can be eradicated altogether. Realists start from the premise that war is inevitable arguing that all the international community can do about it is to try to regulate it. This is essential for the understanding of the idea and origin of IHL. It is important to understand the implication of these two positions on the creation of expectations about the ICTY and ICC. Is it possible to 'put an end to the state of war, once and for all', as Stanley Hoffmann proclaims (Hoffmann, 1968)? If it is not possible to abolish war, is it possible to bring it under some sort of control?

Causes of conventional and new wars

A particularly important position within the overall conception of war concerns the issue of its causes. In terms of locating the causes of war, two views emerged- one, associated

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[9] In the literature, these states are called failed and rogue states. See subsequent chapters for a more detailed discussion.

with the realist tradition, which posits that the causes of war are to be found in the material world, and another, the liberal one, which argues that the causes of war are in fact in human mind. According to the former position, the way to prevent war is to establish control over the material world. The latter position argues that peace can be achieved if control is established over human minds. Traditionally, realist scholars have located causes of war either in human nature or in the anarchic nature of the international system. This absence of central authority has been interpreted by realists as a constant source of instability and conflict. They see international relations as a jungle, where the only rule is to survive and in doing so use all available means. Hobbes said that every man has the natural right to protect himself and in doing so he is free to choose any means available to him. Discussing the condition of international anarchy as determining factor behind states' behaviour in their relations with other states, Walter and Snyder argue that 'the security dilemma gives rise to predators and predators intensify the security dilemma' (Walter and Snyder, 1999: 21).

It is argued in this section that the causes of the Yugoslav conflict were seen and interpreted by its participants and observers in terms of their pre-existing understanding of war and conflict. It is particularly important to notice the shift in the 1990s from the structure of the international system to the intentions of evil political and military leaders. In the case of the Yugoslav conflict, to claim that structural causes of the Yugoslav conflict outweigh the responsibility of individual leaders would completely undermine the idea of the ICTY. The most prominent explanation of the Yugoslav conflict that emphasises structural forces, as opposed to personalities of political and military leaders, as causes of the conflict, is the one that the peoples of Yugoslavia were burdened by their history of conflict.

Consequences of conventional and new wars

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Another shift in the general conception of war, which affected the understanding and response to the Yugoslav conflict is the shift in emphasis from political to humanitarian consequences. The study of war has traditionally been intrinsically linked with the study of the state. Charles Tilly argues that 'war made the state and state made war' (quoted in Hobden, 1999). Aron argues, 'all states known to us are born of war' (Aron, 1966: 588). Mary Kaldor argues that 'the rise of the modern state was intimately connected to war' (Kaldor, 1999: 5). Contrasting the conventional wars of the past with new wars of the 1990s, she also argues that 'new wars are part of the process which is more or less a reversal of the process through which modern states evolved' (Ibid: 5).

Wars not only affect individual states, they are also intimately related to the issue of change within the international system. The inter-state international system which emerged after the Treaty of Westphalia in 1648 was the result of the Thirty Years' War which ended the dominant political position of the Catholic Church in Europe. Wars have been the major force changing the structure of international system. Gilpin discusses the notion of hegemonic war to argue that throughout history hegemonic wars have shaped the structure of international system in accordance with the interests of the hegemonic power at any particular point in time (Gilpin, 1981: 15). Looking at the political consequences of the Yugoslav conflict, it would be difficult to argue that it has affected the structure of the international system in the same way. However, this thesis argues that the Yugoslav conflict has had a systemic effect on the international system. The main consequence of the Yugoslav conflict on the international system has been the change in the international system for the prevention and regulation of force.

However, the distinction between political and humanitarian consequences is often difficult to draw in practice. The movements of large number of refugees, which is a humanitarian consequence of wars, often causes political instability in neighbouring countries. This was particularly evident in the aftermath of the conflict in Rwanda and its effect on the stability of its neighbouring countries, like Burundi, Uganda, and Zaire. On the humanitarian level, Yugoslav war resulted in around three million internally displaced people and refugees. Most of these people remained in the territory of the former Yugoslavia, but the number of those who found refuge in Western Europe and the North America runs into hundreds of thousands.

Conduct of conventional and new wars

The issue of conduct of war is concerned with the selection of means to achieve desired ends in war. In this respect, new wars are also said to be different from conventional wars in the way they are conducted. What makes them distinguishable from inter-state wars is that they are fought by warring sides which do not posses the kind of command and control traditionally possessed by states. In these circumstances, violence can be unrestrained and violations of IHL are inevitable. Using the Bosnian conflict as an archetype of new wars, Mary Kaldor writes:

> what were side effects have become central to the mode of fighting. Conspicuous atrocities, systematic rape, hostage-taking, forced starvation and siege, destruction of religious and historic monuments, the use of shells and rockets against civilian targets, especially homes, hospitals, or crowded places like markets or water sources, the use of landmines to make large areas uninhabitable, are all deliberate components of military strategy (Kaldor and Vashee, 1997: 16).

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Kaldor's views about the conduct of new wars are also shared by many international lawyers and journalists, two important groups of supporters of the ICTY. Antonio Cassesse, the first President of the ICTY argues that these conflicts are 'less a noble clash of soldiers than the slaughter of civilians with machetes or firing squads, mass rape of women in special camps, the cowardly execution of non-combatants' (Cassese, 1998: 5). Roy Gutman, who won the Pulizer Price for his story about Serbian 'concentration camps' and also played an important investigative role for the Office of the Prosecutor of the ICTY wrote: 'Wars today increasingly are fought not between armies where officers are bound by notions of honour but by fighters... who are not soldiers in the conventional sense of the word. The goal of these conflicts is often ethnic cleansing- ... not the victory of one army over another.' (Gutman and Reiff, 1999: 10).

Historically, the selection of means and methods for fighting a war, strategy, moved from artistic towards scientific enterprise. In the medieval times, wars typically meant total devastation of enemy's territory, plunder and slaughter of population. In the middle ages, the conduct of war had artistic connotations (Van Creveld, 1991: 95). In the late 18th century, the emphasis turned to the rational conduct of war, which involved the use of science in the planning and preparation for war, and in particular in the mobilisation of men and resources for war.

What is particularly important to recognise in relation to the selection of means and methods is how they related to the ends of the warring parties. Van Creveld examines the selection of means and methods of warfare in a situation where there is a significant military disparity:

Necessity knows no bounds; hence he who is weak can afford to go to the greatest lengths, resort to the most underhand means, and commit every kind of atrocity, without compromising his political support and more importantly still, his own moral principles. Conversely, almost anything that the strong does or does not do is, in one sense, unnecessary and, therefore, cruel. For him, the only road to salvation is to win quickly in order to escape the worst consequences of his own cruelty; swift, ruthless brutality may well prove to be more merciful than prolonged restraint' (Van Creveld, 1991: 175).

Van Creveld's analysis seems particularly pertinent to the situation in the early stages of the Yugoslav conflict, when the Serbian side enjoyed military superiority[10].

The fundamental question that the Yugoslav conflict raises is the extent to which violations of IHL were acts of individuals acting in their own interest or to what extent they are part of an official policy. This question is particularly pertinent to the issue of whether 'ethnic cleansing' was a premeditated policy or a phenomenon that could not be attributed to any plan or design. While noting that wars are inhumane even when fought without excesses, the Commission of Experts[11], which conducted a study of the Yugoslav conflict and set the direction for the ICTY, found that 'these inhumane ways were designed to serve a political purpose'. This conclusion was also shared by a large part of the media covering the conflict, so Jonathan Steele wrote: 'They were not atrocities that arose in the passion of war or were

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[10] During the early stages of the Yugoslav war there were so many instances where the Serbs had the opportunity to march into Zadar, Sibenik, Gospic, Sarajevo, and other cities and they did not because they feared the condemnation from the international community. At the same time, the Croatian and Bosnian defenders, typically of criminal origin, committed numerous crimes against Serbian civilians within those same cities justifying their actions as legitimate defence. However, determining precisely the military capacity of warring sides in the context of an internationalised war like the Yugoslav one is not easy. Writing on the military situation in Sarajevo, Martin Bell correctly observed that 'the city's defenders could succeed by failing', adding that '...a military victory could also be a political defeat. The Muslims could win the war by losing it. And vice versa the Serbs.' (Bell, 1995: 107).

[10] For a more detailed discussion on the Commission of Experts, see Chapter 3.

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carried out by local commanders, but were part of a systematic plan' (The Guardian, 03/04/01).

Dealing with conventional and new wars

Si vis pacem, para bellum [If you want peace, prepare for war].

The emergence of new wars sparked some of the old debates about how the organised international community should respond to them. Essentially, there are two alternatives of how to deal with wars. One involves the use of force and the other involves the use of reason[12]. Van Creveld argues that the military power possessed by the big powers is not a suitable means for putting 'new wars' under control (Ibid: 27). Similarly, Donald Snow argues that in the contemporary world violence is simultaneously less important and more difficult to manage than before (Snow, 1996: 3)[13]. The difficulties of fighting small, highly mobile Yugoslav army and police units from the altitude of 6,000 meters were experienced by Nato during its air campaign in 1999. The limits of air power in humanitarian interventions were particularly exposed when Nato' bombs ended up killing civilians they were supposed to protect.

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[12] Quincy Wright, one of the most prominent IR scholars, argued that the answer to the problem of war was in developing a general discipline of International Relations that would include understanding, predicting, evaluating, and controlling international relations. The study of war, he thought, should combine four approaches: historical (descriptive), artistic (theoretical/artistic), scientific (predictive) and philosophical (normative) (Wright, 1965). Liberal materialists like Wright and Laswell believed that human reason could illuminate IR in the same way as it did in economics (Kohler, 1998).

[12] The concept of 'asymmetrical power' reflects the prevailing new perception of reality of international relations and in particular the sources of threat and instability where weak or dissolving states are seen as the main threat to the international security system.

There seems to exist a consensus, though, that the best way for dealing with new wars is through their internationalisation, which is an essential precondition for their successful management. Once it became established that the successful means of dealing with the Yugoslav conflict required its internationalisation, the policy of the international community in relation to the Yugoslav conflict began to closely follow the paradigmatic shifts within the international community. In this context, prosecution of individuals thought to be the most responsible for violations of IHL in the course of the conflict came to be seen as a credible peace strategy. The On War project of the International Committee of the Red Cross (ICRC) concluded that successful resolution of 'new wars' requires their internationalisation (see also David, 1997; Brown, 1996; Licklider, 1992). The proponents of this particular form of internationalism, employing the concept of solidarity with the victims of new wars, believe that international presence and involvement in intra-state conflicts will always improve chances of peace.

The following section looks at the shifts within the international law governing the use of force in the post-Cold War period, which came about mostly as a consequence of the human rights revolution. The re-emergence of IHL, up to that point a largely dormant branch of law, can be contributed to this shift. But, in order to understand the changes that took place in the 1990s, it is necessary to look closely at the traditional international law governing the use of force.

War and Justice/International Law

The idea that the prosecution of individuals responsible for the violations of IHL during the conflict in the former Yugoslavia could contribute to the restoration of peace and

security there cannot be properly understood outside of the context of the paradigmatic changes discussed in the previous section. The following section analyses another set of paradigmatic changes relating to the conception of the role of international law in the prevention and/or management of conflict in international relations. Understanding the paradigmatic shifts in the conception of the role of international law, and IHL in particular, in the management of 'new wars', is essential for understanding the rationale for the establishment of the ICTY and hopes that the ICC will contribute to the strengthening of international rule of law and thus international peace and security.

The emergence of international law from the shadows of irrelevance during the Cold War and its coming into the mainstream of international politics should be seen in the context of the general ascendancy of support for non-violent conflict prevention and conflict resolution strategies. The fact that the Cold War was brought to an end not through the power of arms but ideas helped to strengthened the hand of those who argued that non-military means are superior to military ones in preventing, stopping and controlling armed conflicts. The end of the Cold War opened the possibility to extend the rule of law in ever increasing number of areas of international relations. As ever, extension of the rule of law into the war situation has proved particularly challenging. In 1987, Michael Gorbachev called for a new world-wide security system including the strengthening of the rule of law and acceding to the jurisdiction of international courts. Gorbachev's comments followed the ruling of the ICJ in the USA vs. Nicaragua case after which the US declared it would not consider the ICJ's rulings as binding in the future[14].

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[14] The ICJ suffered a major blow in 1984, with the case of *Military and Paramilitary Activities in and around Nicaragua*. The Court decided that the US support for the 'contras' in Nicaragua was a violation of international law. The US refused to accept the ICJ's decision that it held compulsory jurisdiction over the US in this case and walked out of the court further damaging the ICJ's legitimacy and significance.

This section argues that the latest attempt to create an organisation of states and individuals at the international level where force would be excluded from the means for settling disputes among its members has its origin in the earlier similar attempts associated with liberal internationalists whose efforts were focused on building an international order based on legitimate and effective international institutions capable of making, interpreting and enforcing international law. Therefore, to properly understand the latest attempts to create an international community, it is necessary to analyse the traditional liberal internationalist conception of international law in order to find out the similarities and differences in the traditional and contemporary conceptions of the role of international law in international relations and in particular its role in preventing and/or regulating armed conflict in international relations.

Definitions and origin of international law

The term 'international law' was coined by Jeremy Bentham in 1789 (Bull, 1977: 32). Its emergence is intrinsically linked to the Reformation movement and corresponds with the emergence of the modern inter-state system discussed in the previous section (Brierly, 1944: 11). Through mutually accepted rules and norms of behaviour, states sought to protect their own security and prosperity against the omnipotent Catholic Church. 'The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilised states in their relations with one another' (Brierly, 1928: 1). Therefore, traditional international law was considered to be binding only on civilised nations in their mutual interactions. The so-called non-civilised nations and states were excluded. Historically, international law developed towards becoming universal, that is, to include all

states. Therefore, the origin and development of international law is intrinsically linked to the emergence and development of the international system that emerged after the Peace of Westphalia in 1648.

Historically, international law has had a dual purpose. It either enables or constrains certain behaviour. It has served as a means through which the international community has sought either to promote or to prohibit or regulate certain behaviour, which is either individually or collectively beneficial or detrimental. Given the simultaneous presence of conflict and cooperation in international relations, and given the limited utility of both strategies in pursuit of one's ends, it could be said that the general purpose of international law and international institutions has been the management of conflict and cooperation in international relations. The role of international law in the maintenance of international peace and security is twofold. On the one hand, it seeks to impose limits on the use of force and on the other it seeks to strengthen peace and security by encouraging and facilitating international cooperation. The argument behind the latter role is that increased cooperation results in increased interdependence, which then acts as a disincentive to states to pursue war. This dual purpose of international law was recognised in the writings of traditional international lawyers like Oppenheim, who distinguished between international law of peace and international law of conflict (see Oppenheim, 1947 and Lauterpacht, 1952). Therefore, the overall purpose of international law is two-fold: to channel the competition between states towards peaceful means of resolution and protect the security of states, and facilitate mutually beneficial cooperation. Therefore, security and prosperity are at the heart of the purpose of international law and organisation.

International law of war

Historically, international law of war has had a dual purpose- to prevent and/or regulate war. The former tradition is identified as *jus ad bellum* and is associated with the just war theory, and the latter is known as *jus in bello*. Therefore, the general purpose of international law of war is to prevent the use of force in international relations in the first place, and if that is impossible, to minimise the humanitarian cost of conflict. The abolition of the use of force as a means for settling disputes in international relations and the establishment and development of an international community based on the rule of law has been the enduring ideal of liberal internationalists. Looking at the history of international relations, it is clear that international relations have moved in that direction despite the fact that force is far from being abolished in the contemporary world. At the same time, cooperation is more evident in some areas of international relations than in others. To achieve cooperation in security matters have always been particularly difficult and laws governing the use of force reflect this difficulty.

War has been conceived by some authors as a paradigmatic case of Hobbes's state of war and anarchy where violent conflict is completely unrestrained by any moral or legal limits. The general idea of international law of war is that war is not a complete anarchy where violence has no limits, and where ends justify all means. In other words, laws of war are based on the belief that even in war there are, or, there ought to be, some rules of proper conduct. Roberts and Guelff have argued that the evidence of armed conflict being governed by rules can be found in all societies and cultures (Roberts and Guelff 1982: 2). Although these rules do not work perfectly, they argue, they clearly restrain the behavior of nations at war, at the margin.

Law of war defines 'who may use violence against whom, for what ends, under what circumstances, in what ways, and by what means' (van Creveld, 1991: 198). Traditional international law insist that only states and no other groups are allowed to use force, regardless of their reasons. The pre-WW1 international law allowed states to use force for whatever reason, but after the experience of the WW1, it became generally accepted that international law should impose restrictions on the circumstances under which states may use force. In this context, it became universally accepted that states may use force only in self-defence and this principle is embodied in Article 51 of the UN Charter. The principle of self-defence as a justification for the use of force in international relations has been the least controversial in international law. However, under the influence of various currents of liberal thought, international law increasingly imposes conditions on the right of states to use force in self-defence. Today, states are not allowed to defend themselves unless the means and methods they use are not legitimate. Therefore, it could be concluded that historically, international law has always been used with dual purpose: to legally proscribe war, and to regulate its conduct (Brierly, 1944: 25, 73).

The role of international law in the prevention of conflict (jus ad bellum)

The liberal internationalist attitude towards the proper role of international law in relation to war is well illustrated by the following words of Hans Kelsen, one of the most prominent international lawyers in the period before and after the WW2:

To eliminate war, the worst of all social evils, from interstate relations by establishing compulsory jurisdiction, the juridical approach to an organisation of the world must precede any other attempt at international reform... The elimination of war is our paramount problem. It is a problem of international policy, and the most important

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means of international policy is international law' (Kelsen, 1943, quoted in Brierly, 1944: 73).

Traditional international law of war is concerned with creating limits on the use of force in international relations. Historically, there have been proponents of international law who argued that the proper role of international law of war is to prohibit war altogether. Proponents of the idea of the rule of law in international relations insist that the rule of law excludes the use of force. Quincy Wright, one of the most prominent liberal internationalists in the period between WW1 and WW2 argued that the role of international law was to impose limits on who, under what circumstances, may wage war:

> The war must, first of all, be a legal war, that is, it must satisfy the criteria established in international law. This meant that belligerents must be sovereign powers with the lawful authority to commit members of their society to kill and risk being killed. Moreover, it was necessary for a state of war to exist so that the causes and aims of the war be clearly declared (Wright, 1965: 329)

The requirement that war be declared by a lawful authority was essential because it makes it possible to determine which side started the war and why. In international law, there used to be a sharp distinction between the state of war and peace. As Barnhoorn and Wellens argue, 'traditionally, the states of war and peace have been distinguished rather sharply; legally speaking there was either peace or war' (Barnhoorn and Wellens, 1995: 88). In new wars, like the Yugoslav conflict, where the warring sides are not states, it is impossible to determine these facts.

The most general rule in relation to the use of force is that force should be used only in self-defence. In using force, every effort must be made that only minimal force is used, which is sufficient for the successful self-defence, but not more than that. This principle of minimum force necessary, which forms the basis of the international law of war and international humanitarian law, is also recognised in most domestic criminal justice systems where individuals are allowed to use force in self-defence but it must not be excessive.

Historically, the relationship between international law and war can be summarised so as to say that it 'legalised and limited war, it did not make it a crime' (Aron, 1966: 111). It has done this by specifying the forms of declaration of war, by forbidding certain ways of conduct, and by assigning certain obligations towards civilians and other non-combatants. Understanding the difference between the criminalisation of aggressive war and the criminalisation of the conduct of war is essential for understanding the difference between the ICTY and the International Military Tribunal (IMT) at Nuremberg[15]. Whereas the IMT sought to legally prescribe aggression, the ICTY is concerned only with prescribing certain means and methods of warfare. This is the key difference between the IMT and ICTY (Stone, 1970: Laughland, 2002; Crawford, 2003). In this respect, it could be argued that the ICTY represents a step back not forward in efforts to create an international community where the use of force is excluded from the list of methods for solving disputes among its members. Alternatively, this could be interpreted as an attempt to establish the first legal case in this new territory of non-state armed conflict.

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[15] This difference can be described in terms of the difference between the concepts of crimes against peace and crimes against humanity. Crimes against peace include the planning, preparation, or initiation of a war of aggression. In other words one country cannot make aggressive war against another country. Nor can a country settle a dispute by war; it must always, and in good faith, negotiate a settlement. Crimes against humanity include killings of the civilian population and the wanton destruction of cities, towns or villages and devastation not justified by military necessity.

It is clear from the above discussion that the development of international law has reflected the tension between those who think that the only proper role of international law is to make war itself illegal, and those who respond that it is an unrealistic proposal and instead argue that international law should limit itself only to targetting excessive violence, not justified by military necessity. In general, the positions could be summarised as follows: whereas for pacifists all wars are unlawful, for militarists all wars should be lawful. 'A remedy must be found for those who believe that in war nothing is lawful, and for those for whom all things are lawful in war' (Grotius quoted in Butterfield and Wight, 1966: 91). This is the basis of international humanitarian law.

The role of international law in the management of conflict (*jus in bello*)

Inter arma sine lege [In times of war law is silent] (Cicero, quoted in Jochnick and Norman, 1994: 50)

The difference between jus ad bellum and jus in bello is that the former seeks to legally prohibit war as such, whereas the latter only seeks to limit it without making it illegal. Analysing the history of the development of laws of war, and the development of IHL in particular, two forces can be identified: one which argued that IHL is an unintended consequence of states' interactions and the other which argued that the development of IHL is the product of conscious efforts of non-state actors, especially the ICRC. Based on this analysis, it can be argued that there are two forces behind the development of IHL in the 1990s, pushing it in different directions. One can be identified with those forces which

attempt to advance and protect the principle of military necessity and the other which try to protect the principle of humanity. The former are typically identified with states, and in particular the military within states, and the latter are typically identified with non-state actors, including non-governmental organisation, academics, lawyers, and activists.

The normative argument underpinning the idea of international humanitarian law is that even in war, people, even in their capacity as combatants, owe a duty of care to other human beings, regardless of their duty under domestic law to defend their country. In this context, military and political leaders have a particular obligation to do everything they can to minimise the humanitarian consequences of war. These obligations include the duty to treat prisoners of war and civilians humanely. The general idea of international law and its role in establishing moral limits in war originates in the generally accepted moral duty of combatants in armed conflict not to inflict 'unnecessary harm' against each other or use excessive force, which is not justified by military necessity.

In this context, the normative message that the ICTY tries to convey to the people of the former Yugoslavia is that norms of international law, and IHL in particular, must have precedence over all other considerations. Notoriously, Hitler once said that IHL must not be allowed to prevent his people achieving their interest, and referring to the genocide of Armenians by the Turks said: 'Who, after all, still remembers Armenians?' (quoted in Joschnik and Norman, 1994: 90). Contrary to these views, the ICTY declared that 'the rules of international law must be followed even if it results in the loss of a battle or even a war' (quoted in Jochnick and Norman, 1994: 90). In this way, the ICTY signals that, in a new world order, pragmatism and principles merge because the results of a military victory involving widespread or systematic violations of IHL would not be recognised by the

international community. Whereas the traditional way of postulating the relationship between ends and means was to say that just ends justify all means, the contemporary position is that even the most just ends achieved through unjust means are unacceptable. It is important to recognise that the whole logic of *jus in bello* rests on a completely different theory of action relating means and ends[16] than that of *jus ad bellum*. Whereas *jus ad bellum* is concerned with the analysis of the purpose for which force is used, *jus in bello* analyses the selection of means to achieve any given purpose. In other words, whereas *jus ad bellum* analyses motives, *jus in bello* assumes them (Seabury, 1989). The use of IHL as an instrument of peace represents a form of philosophical reductionism in response to perceived complexity of 'new wars', where the aim of outside intervention is not to understand the motives of the parties conflict but to impose a solution on them. This intervention is reduced to a management exercise where resources are manipulated in order to achieve a predetermined objective.

The importance of subjecting the states' sovereignty to observance of IHL is that observance of IHL becomes the criterion for the inclusion into the international community. Laws of armed conflict are said to be fundamental to a civilized world; laws that are designed to protect people, human beings, from the barbarity of war. To act outside these laws, to disobey these laws, to flaunt these laws is to become *hostis hurnani generis*, an enemy of all humankind. In days past 'enemies of all mankind' were slave traders and pirates. They could be brought to justice wherever found. Today such enemies include those countries and individuals who violate the fundamental laws that limit war.

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[16] Michael Waltzer argues that it is possible to fight an unjust war by just means, using the example of German Field Marshal Romel who commanded the German forces in Africa during the WW2 arguing that he 'fought a bad war well, not only militarily but also morally' (Waltzer, 1992: 38).

A particular problem with subjecting the sovereign right of states to use force to the constraints of international law is that war can represent the ultimate means of their survival. At the same time, war is the ultimate means of punishment of offenders of international law. Therefore, in accepting international regulations on their freedom to choose methods of self-defence, states put their fate in the hands of the international community. Given the nature of the international community, and the unpredictability of the will of its members to use their resources in defence of others, this is obviously not an attractive proposition to states. For this reason, IHL concedes that laws of war and IHL in particular need to reflect the self-interests of states, and not be simply imposed on them by the international community.

Analysing the development of the IHL in the 1990s, it is clear that the emphasis has been on prohibition and regulation of certain methods rather than means of warfare. This thesis argues that the emphasis on methods rather than means is consistent with the change in the conception of the causes of 'new wars' and in particular the belief that they are primarily caused by criminal political and military leaders. This is not consistent with the history of IHL, which sought both to restrict the selection of weapons available to combatants as well as their specific uses. As various weapons were developed and their deadly impact witnessed, the international community tried to respond by making certain weapons illegal to use under all circumstances, even in self-defence. Historically, international laws of war sought to prohibit the use of, for example, poisonous gases. Another example of an inhumane weapon causing unnecessary harm is the dum-dum bullet, prohibited under the Hague Conventions[17]. However, at the Rome Conference that adopted the Statute of the ICC none of the proposals for the inclusion of nuclear and other weapons of mass destruction into the list of prohibited

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[17] It is interesting to note that at the same time that dum-dum ammunition was made illegal, initiatives were made to make aerial bombardment illegal because of its indiscriminate targeting of civilians. Hundred years

means of warfare were adopted. In other words, the normative base of IHL can readily be trumped by the powerful states in the international system.

Under the principles of IHL, the use of force is limited to what is necessary to defeat the enemy. In this way, IHL is an attempt to strike a balance between military necessity and humanity. The origin of the humanitarian principle is to be found in Montesquieu's principle that nations ought to do, in war, the least harm possible' (Aron, 1966: 6). 'The doctrine of just war includes the principle that military necessity is itself subject to moral limits' (Butterfield and Wight, 1966: 124). It is essential for the understanding of IHL to realise that it is based on a compromise between two opposing principles: principles of humanity and military necessity. This inherent tension between these two principles has reflected on the reality of IHL at any point in time in its development. Tension between the proponents of the principle of humanity and those of the principle of military necessity is clear today as it has always been. Humanitarians try to push IHL towards *jus ad bellum*, and militarists try to instrumentalise it to complement rather than restrain their military strategies.

The tension between these two opposing principles underpinning IHL has been evident in the course of the establishment and operation of the ICTY as well as in the policy of 'safe areas'. Although the Statute of the ICTY doe not include the crime of aggression, the Commission of Experts established and the ICTY accepted that the Yugoslav conflict was caused by the attempt of the Serbian political and military leadership to create a Greater Serbia on the ruins of the former Yugoslavia[18]. During the fighting, the international community used IHL to establish 'safe areas' and in doing so it used IHL not to protect the

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later, at the Rome Conference, the prohibition of dum-dum bullets was included in the ICC Statute, whereas aerial bombardment mysteriously disappeared.
[18] The Final Report of the Commission of Experts is discussed in more detailed Chapter 3.

population of those areas, as the principle of humanity would require, but to prevent the loss of territory held by the Bosnian Muslims[19]. After the fighting ended, IHL has been used to undermine the negotiating position of politicians and institutions which were not cooperative (Karadzic, Mladic, Milosevic).

Methodology

The aim of this section is to explain how the research question will be answered. Answering whether the ICTY has hitherto contributed to the restoration of peace and security in the former Yugoslavia is not based on quantitative research. Such research would have required the definition of a variable called 'peace and security in the former Yugoslavia' which would have to be measurable. A comparison of the value of the variable with and without the contribution of the ICTY would then have to be compared in order to establish whether or not the ICTY has contributed to peace and security in the former Yugoslavia. Similarly, to make empirically based inferences about the contribution of the ICTY to the rule of law in international relations, it would be necessary to define the rule of law in a way which would allow it to be expressed in quantitative terms[20].

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[19] Secretary General expressed this ambiguity between defending territory or population: '...is its role to defend the geographically defined safe area or is it to deter, through its presence, attacks on the civilian populations living therein?' (S/1994/555).

[20] Quantitative research is typically associated with positivism which is also typically associated with naturalism, that is, the belief that social sciences should share the same methodology with natural sciences, where the overall aim is control and prediction of the natural world by humans. 'This emphasis on control and prediction is not simply an extraneous or contingent feature of scientific method. Rather, it is crucial to the whole scientific enterprise that we understand something only when we succeed in isolating those factors that causaly produce it. When applied to social phenomena and history, the result is a generalising science that sees human beings as fundamentally alike across space and time, and as such, subject to the same natural laws as other phenomena. By following the correct set of scientific procedures, it should be possible, at least in principle, to provide rational solutions to all problems concerning the organisation of society, a use of rationality concerned only with finding the most efficient means to attain one's ends.' (Smith, 1989: 166)

Instead, rather than being based on measurement, the argument presented in this thesis is based on the classification of evidence, that is, it is based on qualitative comparison. The aim of the research has been to use evidence in a novel way to make descriptive inferences. The thesis is based on the comparison of different historical periods where the aim is to look for continuities and discontinuities across different historical periods. Therefore, in answering whether the ICC would contribute to the rule of law and thus strengthen the international security system, this thesis uses an historico-inductive approach[21]. One important reason for using the inductive method is that the phenomenon under study, new wars, is an evolving phenomenon (Snow, 1996).

The historico-inductive approach has often been contrasted to the theoretico-deductive approach in the study of international relations, and the two approaches have often been described as being incompatible. The difference between historical and theoretical approaches is that historical explanations are based in narratives ('the organisation of material in a chronologically sequential order, and the focusing of the content into a single coherent story, albeit with subplots' (Levy, 1997: fn.15, p. 27), whereas theoretical explanations are based on empirical verification or falsification of theories. Historical explanations are primarily based on descriptions of unique, complex events. In Chapter 5, this thesis examines the ICTY in the context of a wider process, called institutionalisation of ICJS, within which other international tribunals and permanent ICC are discussed. Also, the difference is that the emphasis of historical explanations is on an understanding of the past and the emphasis of theoretical explanations is on predicting the future.

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[21] Historical method should not be confused with historicism, which Modelski described as tendency to pronounce 'laws of history' (Modelski, 1978: 105).

The reason this thesis uses primarily a historical approach is that it is particularly well suited to the research question[22]. This thesis argues that the question of whether the ICTY and the ICC can contribute to international security system should be properly answered by looking at their establishment in the context of the history of attempts to limit the use of force in international relations, and in particular in using international law for this purpose. The thesis follows the history of the idea of international criminal jurisdiction and explains why it became reality in the 1990s, emphasising material factors, which have been largely neglected in the explanations behind the establishment of the ICTY and the ICC provided by international lawyers, who see it as a logical step, an inevitability. While it is true that the establishment of the ICTY and ICC can be attributed to changes in people's minds, it would be wrong to ignore material factors behind these developments. Therefore, in assessing the significance of the ICTY and the ICC this thesis rejects legalism- the view that law can be effective regardless of political conditions, as well as idealism- a tendency to take normative aspirations for facts.

Whereas the aim of the historian studying a particular war, like the Yugoslav conflict in the 1990s, is primarily descriptive, to provide a rich picture, the aim of this study is to postulate about the systemic impact of the Yugoslav conflict on the structure of the international system, particularly on the creation of the international criminal justice system and its impact on the reform, or even transformation, of the international security system. In this context, the primary purpose of this study is not to provide a comprehensive and detailed history of the Yugoslav conflict. Still, the thesis is intended to make an empirical contribution to the literature on the history of the Yugoslav conflict by providing some original primary

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[22] 'Historians and political scientists who study the causes of war, for example, share more in common than do positivists and post-modernists in either discipline' (Levy, J (1997) Too Important to Leave to the Other,

The focus of this particular study is limited to some aspects of the Yugoslav conflict that are significant for the study of its internationalisation and criminalisation because the primary objective of the thesis is analytical, that is, to explore whether there is a link between the Yugoslav conflict and the international system, exemplified by the ICTY and the ICC.

This thesis therefore uses a combination of a historical and theoretical approach. The historical aspect of the approach is evident in the emphasis on the chronological presentation of the material and the theories of international relations are used to guide research. The purpose of using theory in this thesis is not to test the theories. Theda Skocpol argues that 'history, or historical sociology, is not incompatible with social science' (Skocpol, 1984: 374-386). Buzan and Little also agree that theory and history of IR can go hand in hand (Buzan and Little, 1994)[23]..

In analysing whether the ICTY has contributed to peace and security in Yugoslavia and whether it is reasonable to expect that the new ICC will contribute to international peace and security particular attention will be given to distinguishing between empirical and normative material. In doing so, it must not be forgotten, as Charles Beitz has argued that 'normative concerns justify and shape the empirical study of politics' (Beitz, 1979: 182). E.H. Carr also points to the delicate line separating empirical and normative statements in the study of politics: 'Every political judgement helps to modify the facts on which it is passed. Political thought is itself a form of political action. Political science is the science not only of what is, but of what ought to be' (Carr, 1939: 7). Similarly, Smith has argued that 'social theories, we have seen, are constitutive or expressive of social reality in a way that theories in

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International Security, 22/1, pp. 22-33)

[23] For an argument in favour of this use of history and theory, see Elman and Elman, 1997.

the natural sciences are not. Social theories do not stand outside or above the reality they seek to describe, explain, or evaluate' (Smith, 1989: 202).

Chapters

The aim of this section is to outline the structure of the overall argument presented in the thesis and explain the reasons for breaking it down in the four substantive chapters.

The purpose of Chapter 2 is to describe and analyse the process of internationalisation of the Yugoslav conflict with a view of explaining first, how and why the role of the international community evolved from mediation, to monitoring, and eventually adjudication and enforcement. In this context, attempt will be made to describe and explain why the international intervention took the judicial form. The chapter will examine to what extent the explanation for the policy of prosecuting individuals believed to be responsible for violations of IHL lies in the nature of the conflict and to what extent it can be attributed to the developments within the international community.

Another question the chapter is aimed at addressing is the issue of whether internationalisation of Yugoslav conflict can be used as a model for intervention in similar conflicts elsewhere. This question is particularly pertinent in situations involving conflicts where the international community is not prepared to use force. Focusing in particular on the role of the media and academics in the process of criminalisation of the Yugoslav conflict, the chapter is intended to provide some general lessons about the effectiveness and legitimacy of the role of non-state actors and non-violent means of intervention in new wars.

While Chapter 2 is aimed at providing a more detailed account of the protagonists of the Yugoslav conflict on the ground, Chapter 2 looks for the explanation for the criminalisation of the Yugoslav conflict beyond the Yugoslav borders. The chapter is particularly concerned with examining to what extent the decision to establish the ICTY can be attributed to the nature of the conflict itself and to what extent developments outside Yugoslavia were at play. In examining the factors contributing to the establishment of the ICTY, the chapter focuses on the developments within the international security system and the international legal system.

The main purpose of the analysis of the process through which the ICTY came into being is to explore whether the way the ICTY was established influenced the way it came to be operated. In this context, the focus of analysis will be on determining the relative significance of individual actors in the process leading up to the establishment of the ICTY and how and why their interaction resulted in the ICTY as it is.

Following on from the analysis of the process of the establishment of the ICTY, Chapter 4 goes back to the territory of the former Yugoslavia to examine whether the ICTY has been successful in contributing to the restoration of international peace and security there. Using the notion of liberal peace as ideal model, the chapter compares it with the situation on the ground, focusing in particular on the issue of to what extent the judgements of the ICTY have been internalised by the actors within Yugoslavia. The aim here is to establish whether the ICTY has actually managed to do what it was supposed to do. In dealing with the issue of effectiveness of the ICTY, the chapter analyses the motives of the actors within and outside Yugoslavia.

The purpose of the analysis of the actual effectiveness of the ICTY on the ground is twofold. On the one hand, the chapter is trying to establish how much the ICTY has achieved after ten years of existence. On the other hand, the chapter is trying to incorporate the experience of the ICTY into the expectations vis-à-vis the newly established ICC.

Following from Chapter 4, Chapter 5 moves back to the realms of the international security system and the international legal system to examine how the existence of the ICTY has affected the developments within these two systems over the 1990s. Whereas Chapter 2 seeks to establish whether and to what extent the establishment of the ICTY was the result of the developments outside the former Yugoslavia, Chapter 5 analyses whether the ICTY has contributed to the reform of the international security system and creation of the international criminal justice system. In other words, while the aim of Chapter 4 is to analyse the significance of the ICTY within the former Yugoslavia, the aim of Chapter 5 is to examine its effect on the international community, and in particular the role of the ICTY in creating and sustaining international support for the establishment of the ICC.

Finally, the last chapter in intended to round up the discussion in the preceding chapters, reiterating the aims and objectives of the study and its practical and theoretical significance, both within the former Yugoslavia and beyond.

Chapter 2

Internationalisation and Criminalisation of the Yugoslav Conflict

Introduction

There were a number of large scale armed conflicts in the world in the 1990s, but the disintegration of Yugoslavia stands out as the most covered, discussed, and analysed. The Yugoslav conflict has attracted an unprecedented level of international attention among similar conflicts in the post-Cold War world. The Yugoslav conflict was probably the single issue that occupied the headlines of the media in the UK and in many other countries, especially in Europe in the last decade. At the same time, the number of academic works documenting and analysing the conflict now runs into hundreds and is still growing. The conflict has been analysed from a number of perspectives, much of which lies outside of the scope of this study, so will not receive detailed attention. This chapter is focused on the reports and opinions about the Yugoslav conflict that are primarily concerned with documenting and analysing war crimes and other atrocities committed in the course of the fighting. The interpretations of the conflict used in this chapter is informed by the disciplines of International Relations and international law, and in particular international humanitarian law (IHL)[1].

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[1] The term international humanitarian law was coined by the President of the ICRC, Jean Pictet in the 1960s. Many, particularly in the military, still refer to it as the law of armed conflict or the law of war. For an account of the history of the change from the law of war to the law of armed conflict and international humanitarian law, see Gordon, 1999:xi.

It is evident that the conflict has generated internationally a wide range of reactions at variance with each other. This is partly related to the complexity of the conflict itself and partly because the conceptual framework on the basis of which international observers had previously analysed war and conflict changed in the course of the conflict. Overall, there has been a limited understanding of the conflict internationally. In particular, there has been an underestimation of the interdependence between the Yugoslav conflict and its international environment.[2] At the same time, the Yugoslavs themselves have not fully understood the international processes and developments after the end of the Cold War and how their lack of understanding of these processes and developments might be costly. Locals and foreigners were caught by the speed of events and relied on their preconceived assumptions about each other. This chapter seeks to disentangle and explain some of these misunderstandings, and in particular the interactions between Yugoslav and international actors in the conflict that have led to the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY).

It will be argued that the disagreements within the international community were often glossed over in order to limit the damage to the credibility of international institutions involved in the management of the conflict, but the consequences of such disagreements continue to impede efforts to restore peace and security in the former Yugoslavia. Susan Woodward argues that for the intervening states 'maintaining united front was more important than any particular outcome in the Balkans' (Woodward, 1995: 6). This factor is relevant to the legacy of the ICTY and the potential contribution of the proposed International Criminal Court to similar conflicts

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[2] For an excellent analysis of the interplay of endogenous and exogenous factors in the development of the Yugoslav conflict, see Woodward, 1995.

in the future. In analysing international policies towards the conflict in Yugoslavia, it is important to distinguish between different kinds of international actors, which include governments, intergovernmental organisations (IGOs), non-governmental organisations (NGOs), and even individuals[3]. Increasingly, international intervention does not just involve states, but involves a broader range of actors and forms.

The lack of understanding of the conflict has resulted in the inconsistency and failure of international policies that were intended, first to prevent the conflict, and, after it erupted, to contain it and reverse its consequences. In summary, the policies towards the conflict can be classified as unilateral and collective or international. This chapter is primarily concerned with analysis of international responses within the framework of various international institutions, notably the European Union (EU), the Organisation for Security and Cooperation in Europe (OSCE), the North Atlantic Treaty Organisation (NATO), and in particular the Organisation of United Nations (UN) and its organ responsible for the maintenance of international peace and security, the Security Council. In addition, the chapter is also concern with the role of non-state actors in the process of internationalisation and criminalisation of the Yugoslav conflict, in particular the media and non-governmental organisations (NGOs). The policies of individual governments are analysed in so far as they influenced the overall collective policy.

The fact that large number of actors played an active part in the formulation of international policy is particularly relevant to Yugoslavia where international

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[3] For example, many legal scholars, including Francis Boyle of the Chicago Law School, Marc Weller of the Cambridge University, and Michael Williams of the Washington Law School played influential international roles as legal advisors to Bosnian and Albanian delegations at internationally organised peace conferences at Dayton in 1995 and Rambuillet in 1999.

intervention also included the judicial form[4]. The new types of intervention employ a variety of different means that go beyond military intervention. The new types of interventions call for new types of capability, particularly in the field of expertise. A new 'industry' consisting of international lawyers, human rights advocates, social psychologists, counselors and others has developed. In many cases NGOs are better funded, equipped and staffed than many governments or even intergovernmental organisations. Therefore, any analysis of the process of internationalisation of the Yugoslav conflict that did not take into account non-state actors would be incomplete. The role of media and NGOs in the formulation of international policy towards the conflict in Yugoslavia is essential in understanding the process of internationalisation and criminalisation of the Yugoslav conflict.

It will be argued in this chapter and the rest of the thesis that the lack of understanding of the Yugoslav conflict was the key reason for the failure of international policies. As Martin van Creveld points out, the most fundamental questions posed by any armed conflict include questions relating to the identity of the participants, their political and military objectives, and the methods they use in the course of the fighting (Creveld van, 1991). In the case of the Yugoslav war, the key questions that have to be answered in order to understand the Yugoslav conflict fall into three clusters:

1. Was the break up of Yugoslavia inevitable, given the systemic changes outside Yugoslavia? Could Yugoslavia have survived the collapse of communism? Are the origins of the Yugoslav conflict confined to the territory of Yugoslavia? In other words, are the causes of the Yugoslav conflict primarily internal or external?

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[4] The term international judicial intervention was coined by David J. Scheffer, the former US Ambassador-at-Large for War Crimes Issues. See Scheffer, 1996.

2. Could the break up have been peaceful rather than violent, i.e. was the violent break up inevitable? Under what conditions could it not have been violent? Who was responsible for the violence? In other words, can the Yugoslav conflict be explained as a consequence of the security dilemma which followed the disintegration of Yugoslav institutions, particularly those responsible for security, or can it be attributed to predatory or pathological intentions of the individual political and military leaders, particularly Slobodan Milosevic, former President of Serbia[5]?

3. Was it inevitable that the violations of IHL would occur in the conflict? Were these violations individual acts or part of systematic policies? Who was responsible for these violations? In other words, is the overall manner in which conflict was fought the result of a conscious strategy or the consequence of the breakdown of social institutions and the restraints they imposed on individuals and their conduct?

The answer to the last cluster of questions is directly related to the central concern of this thesis, the issue of individual criminal responsibility for violations of IHL. By establishing the ICTY, the UN Security Council asserted that prosecuting such violations would contribute to the restoration and maintenance of peace in the territory of the former Yugoslavia (S/RES/827). It will be argued in the chapter that the answer to the last cluster of questions is logically derived from the answer to the first two clusters of questions. In other words, individual criminal responsibility for violations of IHL follows logically from perceptions of political and moral

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[5] Although Slobodan Milosevic has not been formally charged with aggression, there is a wide-spread consensus that he is the single most responsible individual for the Yugoslav conflict. This view is shared by diplomats (e.g. Zimmermann, 1993) and representatives of non-governmental organisatios

responsibility for the eruption of conflict. Consequently, the extent to which the policy of prosecuting individuals for the violations of IHL will also contribute to the restoration and maintenance of peace and security in the territory of the former Yugoslavia depends on the answer to the first two clusters of questions as to the causes of the conflict.

One of the most important questions in relation to the Yugoslav conflict is the issue of responsibility of political and military leaders for the outbreak of hostilities and for the violations of IHL. In relation to this issue, two schools of thought exist, one which argues that the conflict and the atrocities can be attributed to the history of conflict and culture of revenge among Yugoslav peoples, and another which blames politicians, who cynically generated fears and suspicions among ordinary people and exploited for their own personal gain. US Ambassador Richard Holbrook, who was the chief architect of the Dayton agreement that ended the war in Bosnia wrote: 'Yugoslavia's tragedy was not foreordained. It was the product of bad, even criminal, political leaders who encouraged ethnic confrontation for personal, political, and financial gain' (Holbrook, 1998: 23-4). Similarly, Warren Zimmermann, the last US Ambassador to Yugoslavia wrote: 'Yugoslavia's death and the violence that followed resulted from the conscious actions of nationalist leaders who coopted, intimidated, circumvented, or eliminated all opposition to their demagogic designs. Yugoslavia was destroyed from the top down' (Zimmermann, 1993: vii).

The structure of the argument presented in this chapter has two elements. First, there is an account of the origin of the conflict within Yugoslavia, that is, its evolution

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and the media. Christopher Bennett argues that 'Yugoslavia was destroyed by at most a handful of people, and to a great extent by a single man, Slobodan Milosevic' (Bennett, 1995: 247).

from a political and constitutional crisis into an armed conflict. In this context, the participants in the conflict are analysed in terms of their political and military objectives. Particular attentions is given to the description of how the changes in the international environment influenced the political and military objectives of the various parties to the conflict. This is followed by an account of the relevant changes in the international security system which affected the perceptions of the Yugoslav conflict by various international actors and how they developed their responses accordingly. In other words, the second part seeks to answer how and why the Yugoslav conflict came to be seen in the way it did, focusing in particular on the creation of a view within the international community that prosecution of individuals believed to be responsible for serious violations of IHL could, firstly, deter further crimes, and secondly and more importantly, contribute to the restoration of peace and security in the former Yugoslavia.

The Political, Constitutional and Military Aspects of the Conflict in Yugoslavia

It has now been almost a decade since 'the land of the South-Slavs', the Socialist Federal Republic of Yugoslavia (SFRY) ceased to exist as a state. The argument that the disintegration of Yugoslavia was inevitable has been generally accepted, both in the literature and the public at large. For example, the opening paragraph of the Srebrenica Report, submitted by the Secretary General to the General Assembly on 15 November 1999 begins with the observation that the process of disintegration of Yugoslavia accelerated in 1990s, indicating that by 1999 there was a consensus within the international community that the disintegration of Yugoslavia

was indeed inevitable[6]. To make this conclusion on the basis of the events in the 1990s is to read Yugoslav history backwards. In contrast to this now widely-held view, this chapter argues that the end of SFRY was far from inevitable and that it was brought about by a combination of unilateral moves within Yugoslavia and a series of controversial decisions on the part of the international community. When the argument about the inevitability of Yugoslavia's disintegration was first made by Croatian nationalists in 1990, it did not attract much international support among policy-makers and academics firstly because it went against the existing international practice and law, and secondly because it was based on an intellectually discredited notion of historical determinism. Indeed, the international community supported a united Yugoslavia until June 1991. On his visit to Yugoslavia in June 1991, the US Secretary of State, James Baker expressed his support for a united Yugoslavia by emphasizing that the US would 'under no circumstances' recognize Slovenia and Croatia as independent states (Zimmermann, 1995: 12). However, the pendulum of international opinion was to swing rapidly in the opposite direction almost as Secretary Baker's plane was taking off from Belgrade airport. Within days of the eruption of hostilities in Slovenia on 26 June 1991, the international community had diametrically changed its position.

The objectives of the international community in relation to the Yugoslav constitutional crisis were not predetermined in terms of any specific political outcome. The principal objectives were democratisation of the political and economic systems and prevention of the use of force. In other words, the international community supported reforms of the political and economic systems in line with the

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[6] Report of the Secretary General pursuant to the General Assembly Resolution 53/35, A/54/549, available at www.un.org/peace/srebrenica.pdf.

changes taking place elsewhere in Eastern Europe, but it did not support the disintegration of the Yugoslav state. The main reason for the support for the SFRY reversing so quickly was the perception of Serbia as being opposed to democratic transition from a one-party to a multi-party system and against human rights. At the same time, secession was identified with democratisation and the promotion of human rights. Warren Zimmermann, the last US Ambassador to SFRY wrote later that 'democracy and unity were the Siamese twins of Yugoslavia's fate' (Zimmerman, 1995:6). At the same time, the Yugoslav People's Army (JNA[7]), which became increasingly isolated as the only remaining functioning federal institution, was seen as solely an agent of Serbia and not of the other Yugoslav republics[8]. Use of force by the JNA was therefore viewed as illegitimate, as a unilateral act by a single republic and an action against democratisation and human rights. In the change political climate, support for a united Yugoslavia was identified as giving support to the JNA's use of force. The German Chancellor Helmut Kohl stated: 'Tanks and violence cannot hold a country together', while the Austrian Foreign Minister Alois Mock warned that if the JNA used force, his country would immediately recognise Slovenia and Croatia as independent states (Ibid). Once the federal government led by a Croat, Ante Markovic, ordered the JNA out of barracks, the international support for SFRY immediately evaporated.

Although the disintegration of Yugoslavia is now an established fact, the controversial circumstances through which it was brought about and in particular the role played by the international community undermines the legitimacy of the

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[7] It should be remembered that Bosnia was opposed to the disintegration of Yugoslavia and recognition of Croatia and Slovenia at the time. President Alija Izetbegovic stated his opposition to the recognition of Croatia and Slovenia to Lord Carrington, chair of the EC's International Conference Yugoslavia (ICY).

subsequent course of international intervention in the conflict, and in particular the legitimacy of the ICTY. It will be argued below that the manner in which the policy of recognition of Slovenia and Croatia by the EC was conducted demonstrates the extent to which international institutions are hostage to the unilateralism of their most powerful members.

As soon as the international community accepted that the disintegration of Yugoslavia was inevitable, it fatally undermined its diplomatic involvement in the conflict and made an agreed solution, acceptable to all sides impossible to reach. Following acceptance of the inevitability of disintegration of Yugoslavia, the international community chose to recognise the constituent republics as sovereign states, although processes of disintegration were evident in the republics (Hayden, 1999). In other words, the international community treated the disintegration of Yugoslavia as given, while ignoring those same disintegrating processes within the republics triggered by the disintegration of the federal institutions. Recognition was not based on the existing customary practice of recognition, which can be summarized as recognition of the facts on the ground[9], or, that is, on the effective governmental control over the whole of the state's territory. It was evident that Croatia, and especially Bosnia and Herzegovina, did not meet the 'capacity principle' at the time of their recognition, since significant sections of the population contested their statehood. The rationale for their recognition was that they deserved to be recognised, and that not granting them recognition would be morally wrong – although it will be seen later that the republics did not actually meet the international community's own

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[9] There are no strict conditions for recognition of states. The decision to recognise a particular state is left in international law to the discretion of each individual state. However, according to the customary norms of international law and Article 1 of the Montevideo Convention on the Rights and Duties of

normative criteria, aside from the de facto criteria. In the post-Cold War era, it is increasingly states' demonstrably peaceful intentions towards other states and respect for human rights rather than ability to govern their territory and people that qualifies them to join the international community. This particularly applies to the states that became independent after the disintegration of the former Soviet Union and Yugoslavia. In refusing to recognise the Federal Republic of Yugoslavia (FRY), consisting of Serbia and Montenegro, as successor of the former SFR Yugoslavia, declaring it de facto a rogue state, the US Permanent Representative at the UN Edward Perkins said: 'Specifically, they must prove to the members of the UN that the so-called FRY is a peace-loving state' (quoted in Thomas, 2003: 21).

The position of pre-1991 international law on self-determination was that the right to self-determination was inalienable, but this was not interpreted to encompass a right to secession. Reflecting the international consensus on affirming the territorial integrity of states and opposition to allowing secession, the 1960 General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples states, 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations' (para 6). The right to self-determination applies to situations of colonial rule, rather than existing sovereign states. U Thant, as UN Secretary General in the 1960s, stated how, 'As an international organization, the United Nations has never accepted and I do not believe will ever accept the principle of secession of a part of its Member States' (quoted in Buckeit, 1978: 87). Analysing the Yugoslav case is not only to understand why the international community

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States from 1933, the state as a person in international law should posses the following qualifications: a permanent population, a defined territory, and an effective government.

considered it was justified in breaching existing international law and practice, but also to understand how international rules were changed in the process of their application (or non-application) to the Yugoslav case.

The customary rules governing recognition have always been subject to changes in the international political system. In the course of analysis it will be noted how changing approaches to international law also reflect changes in the relative position of different international actors. It may be noted historically how recognition of weaker states have been subject to external normative criteria that have not been applied to more powerful states. After the break up of the Ottoman Empire in 1878 at the Congress of Berlin the new states (Bulgaria, Serbia, Montenegro, Romania) were granted independence subject to accepting obligations to protect the minority religious groups. Later in 1919, it was the new states of Eastern Europe, including the Kingdom of Serbs, Croats and Slovenes who were subject to the League of Nations' minority regime, although the Great Powers did not have to (Macartney, 1934: 212-294). Even defeated Germany was not subject to its regime. Of relevance to contemporary policy towards Yugoslavia, the Council of the European Communities (EC) adopted the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union at its meeting on 16 December 1991, which stated conditions under which states applying for independence could be recognised. These conditions included respect for the provisions of the UN Charter, the Helsinki Final Act (1975) and the Charter of Paris (1990), especially with regard to the rule of law, democracy, human rights, rights of ethnic and other minorities - and ironically the inviolability of borders. Notably the Helsinki Final Act specifically reaffirms the existing territorial borders of the European states.

There were separate but related debates within SFR of Yugoslavia over the issue of self-determination and whether there existed a right to secession. The Yugoslav Constitution was ambiguous on the latter point. What was to become the key controversy in these internal debates was the issue of who had the right to self-determination, namely, the constituent republics or the constituent nations.[10] This issue became very divisive. Under the Constitution, the population enjoyed rights not merely as members of a republic, but also as members of ethnic groups beyond republican borders (as well as members of the working class, reflecting the Communist ideology). That rights were enjoyed by constituent nations beyond republican borders reflected the fact that the pattern of ethnic settlement did not neatly coincide with the territories of the republics. For example, the population of Bosnia was 44 percent ethnic Muslim, 31 per cent ethnic Serbian and 17 per cent ethnic Croatian according to the last census of 1990 (Cohen, 1993). The principle that the right to self-determination did not belong to republics but to constituent nations of Yugoslavia also more accurately reflected the nature of the political contestation, and later military conflict, which manifested itself along ethnic lines.

The view that internal borders should be changed in accordance with the geographic dispersion of ethnic groups was initially supported by the Dutch, who held the EC presidency in the latter part of 1991, but after German insistence that it would open a Pandora's Box, they abandoned this view (Owen, 1995: 342). However, this did not mean that the issue went away. In June 1990 Serbian President Slobodan Milosevic warned that the internal borders of Yugoslavia were predicated on the

continuation of the federal state. The implication of the moves to break up Yugoslavia into constituent parts, he warned, would open the question of redrawing the borders between the republics (Zametica, 1992: 22). As the common institutions vanished, the gravity of the conflict was increasingly reflected at the level of ethnic groups. In Croatia there were cleavages between ethnic Croats and ethnic Serbs and already by summer 1990 barricades had appeared in particular areas reflecting these cleavages. In Bosnia there were also clear cleavages between the three main ethnic groups and their party representation, which has often been characterised as resembling a census. Ethnic Serbs boycotted the referendum in March 1992 for Bosnia's independence, while the ethnic Croats in Bosnia voted in the referendum as a tactical move to disassociate Bosnia from the rest of Yugoslavia in order to join Croatia later on.[11]

As part of the diplomatic effort to bring a solution to the Yugoslav crisis, the EC established the International Conference on Yugoslavia (ICY), chaired by the former British Foreign Secretary Lord Carrington. Within the framework of the Commission, the ICY had a special commission to deal with the legal aspects of the crisis. The five-member commission became known as the Badinter Commission (Shearer, 1994:126; Hayden, 1999: 87-98), after its chairman, the French constitutional jurist Robert Badinter. The significance of the Badinter Arbitration Commission was that it was a commission appointed by an international institution with the authority to adjudicate on an internal matter of an existing state, which was not a member of the institution – representing another departure from existing

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[10] According to Yugoslav Constitution, the constituent nations of Yugoslavia were Serbs, Croats, Slovenians, Macedonians, Montenegrans, and Muslims. For a discussion on Yugoslavia's ethnic rights approach, see Hayden, 1999 or Pupavac, 2000.
[11] That the Croats had only voted tactically was immediately evident in their creation of separate military forces and civilian authorities. After the Croatian authorities outlawed Muslim forces on their territory in 1992 fighting between them broke out.

international norms, namely, the social contract conception of international law, to be discussed in later chapters.[12] The key issue before the Commission was whether the situation represented secession or dissolution of a state. After the Commission decided that the situation was a case of dissolution of a state, but not of the republics themselves, it opened the door for further internationalisation of the crisis. The Badinter Commission failed to take into account how if Yugoslavia was in a process of disolution then on the basis of the same evidence, the republics of Croatia and Bosnia were also in a process of dissolution. However, the policy of internationalisation was not followed consistently.

The significance of the findings of the Badinter Commission is that it opened the possibility for international military intervention at the request of the republics that wanted to secede from Yugoslavia without consultation of the government of Yugoslavia, which was widely perceived as synonymous with Serbian government. Its findings also sent a message to Serbia that it would be treated as aggressor, and thus subject to possible international military intervention unless it accepted the findings. Through the process of internationalisation of the conflict, in which recognition of Slovenia and Croatia was the critical moment, the EC acted not only as a mediator but actually took sides, abandoning the principle of impartiality.

The decision to legitimise the disintegration of Yugoslavia along republican lines was the turning point that led to the establishment of the ICTY. The initiative for the internationalisation of the Yugoslav crisis came first from Austria and The

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[12] At this stage it will just be noted that the trend away from the social contract conception of international law represents a reversal away from modern law based on principles of self-determination, democracy and equality, as discussed in *Between Facts and Norms* by Jurgen Habermas, (1996).

Vatican and later on from Germany. The policy of recognition was based on two arguments. First, it was argued that because of the potential consequences of the armed conflict in Yugoslavia, the situation there could not be treated as an internal matter. It was argued that recognition would enable the international community to intervene militarily if needed, because the consent of the federal Yugoslav government would not be necessary. This view was rejected by France and Germany who argued that intervention would be an open-ended commitment to keeping the peace in Yugoslavia. Their position was based on the argument that any solution that was not accepted by all sides to the conflict, and this included the Serbs, meant that the international community would in fact commit itself to imposing that solution militarily, and the fact was that neither France nor Britain were prepared to commit their armed forces without a clear political and military objective and an exit strategy. It is important to remember that Germany could not use its own armed forces because of its Constitution, which prohibited the use of its armed forces abroad[13]. Lord Carrington, the chairman of the ICY warned German Foreign Minister that premature recognition would lead to indefinite peacekeeping, but his warning was ignored (Bierman and Vadset, 1998:16).

The differences that emerged between the key European allies in relation to the Yugoslav crisis coincided with an important stage in the process of European integration, the signing of the Maastricht Treaty in December 1991. The imperative of keeping the process of integration on the track forced the European allies to shore up their differences, so they devised a compromise scenario. They decided to recognise the Yugoslav republics as independent states on the basis of additional conditions,

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[13] This provision was subsequently changed at the time of the Kosovo crisis to allow German armed forces to be deployed in peacekeeping operations.

issuing Guidelines for Recognition of New States in Eastern Europe and the Soviet Union. Despite this attempt to give recognition policy procedural orderliness, Germany defied the findings of the Badinter Commission and unilaterally recognised Croatia and Slovenia on 23 December 1991 promising to establish full diplomatic relations by 15 January 1992. Not only did Croatia not meet the *de facto* criteria in relation to capacity, but Croatia did not meet the normative criteria set by the international community – the Badinter Commission's report had in fact inter alia expressed reservations about the position of minorities in Croatia[14].

These events suggest the argument that the lack of understanding of the political and constitutional aspect of the Yugoslav conflict resulted in misunderstandings over the military aspect of the conflict. In particular, the international community failed to understand the admittedly complex constitutional position of Serbia and Serbs within Yugoslavia and the role of the JNA.[15] According to the Yugoslav Constitution, the republics had the authority to use the conventional police forces to protect the security of their citizens in peacetime. In addition, republics were also in charge of the Territorial Defence forces (TDF), which were conceived during the Cold War as a form of popular resistance to external aggression, presumably based on Soviet models. Essentially, the Yugoslav defence doctrine, which was later adopted by all of the warring parties, was based on the Marxist notion of 'people in arms' fighting a total war. This is particularly important to note because

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[14] One of the requirements for recognition was provision of sufficient guarantees to ethnic and other minorities that their fundamental human rights would be respected and protected. Because of its large Serbian minority, which constituted between 13 to 20 per cent of the total population in Croatia, this requirement was particularly important for Croatia. Despite not having provided these guarantees, Croatia was recognised on 15 January 1992. The law protecting minorities was passed in Croatian National Assembly in 2002. For a discussion of the issue of recognition, see also Hayden, 1999 and Woodward, 1995.

under this doctrine the distinction between civilians and soldiers virtually disappears. In wartime, however, the overall command of the TDF forces belonged to the JNA.

The paradox and uniqueness of the constitutional position of Serbia was that although nominally it was equal in status to other republics (in terms of its peacetime monopoly to use force to protect the security of its citizens), it could not use such force on all parts of its territory, namely in the autonomous provinces of Kosovo and Vojvodina, without their consent. Furthermore, in relation to the issue of the right to self-determination, crucial in the internationalisation of the conflict, were it to apply to the republics, rather than the constituent nations, Serbia could not exercise its right and secede from Yugoslavia without the consent of its two constituent parts. It is important to emphasise that this peculiarity of the constitutional position of Serbia within Yugoslavia has not been recognised by the international community. In practice, this meant that Serbia's powers over the whole of its territory, and crucially, its ability to defend itself was intrinsically linked to the sovereignty and territorial integrity of Yugoslavia. For this reason, the disintegration of Yugoslavia was most fiercely feared by Serbia and Serbian people living in other parts of Yugoslavia. Contrary to the view that Serbia dominated other republics, it is more accurate to say that the survival of Serbia depended on the survival of Yugoslavia, which in political terms meant that the survival of Serbia depended on an all-Yugoslav consensus. The insistence of Serbia on redrawing the borders of the republics that wanted to secede from Yugoslavia can therefore be interpreted as a tit-for-tat strategy and not a preconceived policy of territorial expansion. Serbia's insistence on the preservation of Yugoslavia was also consistent with the Constitution of Yugoslavia which sought to

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[15] The following discussion is not a comprehensive analysis of all aspects of the constitutional aspects of the Yugoslav crisis. For a comprehensive analysis, and in particular the logic of 'constitutional

prevent unilateralism and promote consensual decision-making in order to preserve the 'brotherhood and unity' of the Yugoslav nations and nationalities. In retrospect, it can be said that both the unity of Yugoslavia and its peaceful dissolution depended on the consensus not just between but also within republics.

In other words, this chapter argues that the lack of understanding of the political and constitutional aspect of the Yugoslav conflict resulted in misunderstanding about the political and military objectives of the warring parties, in particular of Serbia. The assumption that the military objective of Serbia was to create Greater Serbia was simply assumed although Slobodan Milosevic, the man who is supposed to have masterminded this policy, never mentioned it, at least in public. Furthermore, the lack of understanding about the causes of the conflict and its military aspect, and in particular the military objectives of the warring parties led to overemphasis on the conduct of war. In these circumstances, it is not surprising that any violations of IHL were decontextualised. This led to the widely-held belief that 'ethnic cleansing' was not only a result of conflict, but a predetermined and carefully organised policy. In particular, this relates to the dominant view that 'ethnic cleansing' was a deliberate policy, and that it was undertaken within the overall military objective of creating Greater Serbia[16]. It is argued here that 'ethnic cleansing' was used as a part of war propaganda aimed at discrediting and criminalising the Serbian leadership and Slobodan Milosevic in particular, in order to force them to

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nationalism', consult Hayden, 1999.

[16] See The Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) (S/1994/674/Add.2 (vol.1). The findings of the Commission have been used as a basis for the work of the ICTY. The argument that links 'ethnic cleansing' and the military objective of creating Greater Serbia, and established prima facia case for individual criminal responsibility of Slobodan Milosevic was made by Michael Williams and Norman Cigar. They argue that 'the atrocities of Serbian forces were part of a planned, systematic, and organised campaign that constituted a central means of pursuing an official goal of territorial expansion and its corollary of making an area "ethnically pure"'. . See, http://users.aol.com/BalkanInst/home.html.

accept the disintegration of Yugoslavia. The effect of these attempts to undermine the negotiating position of the Serbian side was evident in the fact that successive peace deals were rejected by the Bosnian Muslims[17]. Their bargaining tactics where they sought to dictate conditions of the peace agreement from the position of military inferiority cannot be explained without understanding the policy of criminalisation of the Serbian leadership the aim of which was to discredit Serbian bargaining position.

The ugly euphemism of 'ethnic cleansing' became the hallmark of the Yugoslav conflict and critically shaped public perceptions about its participants and their responsibility for it. It has to be emphasised that the role of the media and NGOs in supporting the claim that 'ethnic cleansing' was a deliberate policy was essential in constructing the international framework for understanding the conflict in Yugoslavia. By ignoring or misunderstanding the political and military objectives of the parties to the conflict the media and NGOs created the impression that the conflict in Yugoslavia was a conflict between Good and Evil. For these reasons, the Yugoslav conflict is a case study of new, post-Cold War conflicts for the fact that the participants in it included actors outside Yugoslavia, and that these actors included not just state actors but also non-state actors. It is important to recognise that as the Yugoslav conflict became more internationalised, the relative importance of the international community in the conflict became more significant in determining the course of the conflict. The experience of Yugoslavia demonstrates that creating perceptions about the conflict was as important as fighting on the ground in determining the outcome.

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[17] Richard Holbrook, who was the chief architect of the Dayton Peace Accord that formally ended the conflict in Bosnia testifies how the deal was in jeopardy of being rejected by the Bosnian Muslim delegation at the last minute. It was only after the US threatened to withdraw its support for them that they agreed to sign the agreement (Holbrook, 1999).

In discussing the issue of truth in war, the chapter acknowledges the difficulty of finding the truth in war in general. As US Senator Hiram Johnson noted in 1917: 'The first casualty when war comes is truth' (quoted in Knightley, 2000: cover page). For a political scientists seeking truth about any war the difficulty is exacerbated not only by the genuine difficulty of comprehending reality of a social phenomenon of enormous complexity such as war, but also by deliberate attempts of those involve in it to distort it. In the Yugoslav case, distortion of truth and propaganda was part of the strategy of the warring sides, and was particularly crucial for the militarily weaker sides as they sought international support. The key person within the Bosnian government who worked towards this end was Ejup Ganic, member of the collective presidency. David Owen describes him as follows:

> He has one central policy objective, namely to involve the US army as a combatant in the Bosnian conflict to defeat the Serbs. As he sees it, to achieve this aim – of which he makes not secret – he is entitled to use whatever means are necessary. To him the ends justify those means (Owen, 1995: 83-4).

In this context, there has been a lot of evidence that the Bosnian government was behind some of the worst atrocities against its own people in order to blame the Serbs, including the 'bread queue massacre' in May 1992, and the 'market place massacres' in 1994 and 1995. Although the final official assessment was that the attack was conducted by the Bosnian Serbs, various intelligence officers of Canada, UK, Denmark, Sweden, Norway, Belgium and the Netherlands established independently of each other that this was an act by the ABIH to show the Bosnian Serbs in a bad light (Wiebes, 2003: 67)[18].

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[18] The claim that the incident at the Markale market place was organised by the Bosnian government was investigated by David Binder, a long term Yugoslav correspondent of the New York Times (The

The truth about the Yugoslav conflict is much more complex than it was presented by the media. Because of the generally weak command structures, there were many examples of ad hoc local alliances. For example, it was not unusual for the Bosnian Serbs to shell Muslims or Croats on request from either of the two (Wiebes, 2003: 248-9; Owen: 384-5). The lack of clarity about the overall political and military objectives on the Serbian side in particular often resulted in individual commanders and even soldiers taking initiative, opening fire without any military purpose of engaging in smuggling with their opponents on the other side of the front line. O'Shea testifies how three different corps of the Krajina Serbs sharing the same front line with the Bosnian Muslims' 5th Corps and the Fikret Abdic's forces in Velika Kladusa in the Bihac area had three different strategies (O'Shea, 1998: 28).

Given the complexity of the Yugoslav conflict and in particular the atomisation of fighting, finding out the truth about war crimes becomes extremely difficult. At the same time, this complexity gives opportunity for myth creation and propaganda. The difficulty of finding out the truth about the Yugoslav conflict has been eloquently expressed by Edgar O'Ballance:

> Massacres, death camps and much publicised atrocities will be remembered as milestones of this Balkan conflict, especially with prolonged and controversial war-crimes trials in prospect, so other aspects, some verging on bizarre, should be emphasised before partisan propaganda, factional embelishment and denigration, and selective omission distorts beyond recognition what really happened (O'Ballance, 1995: 245)

Nation, Vol. 261, No. 10, 02/20/95). See also Kenneth Roberts, 1994 and Burgh and Sharp, 1999: 164-69)

The argument that 'ethnic cleansing' was a means through which Serbia sought to expand its territory was largely based on the correct observation that Serbs in Croatia and Bosnia were militarily superior in relation to Croats and Muslims[19]. This unequal distribution of military capabilities was the key factor in determining the strategies of the warring sides. While the Serbs relied on heavy guns, they did not have the requisite capability in infantry to defeat the Croats or Muslims. On the other hand, the strategy of Croats and Muslims relied on propaganda, and in particular on foreign media. In the early stages of the conflict, the Croats and Muslims welcomed foreign journalists. As Martin Bell testifies, after they achieved military superiority, their attitude towards journalists changed (Bell, 1995: 100). This view is supported by US General Charles Boyd, who argues that in terms of their overall military objectives, there was no difference between the warring parties (Boyd, 1995). Hence, a proper analysis of the military objectives of the warring sides has to include both intentions and capabilities. An account of both intention and capability is particularly important in determining individual criminal responsibility, which is the key task of the ICTY, because the difference between a criminal and a non-criminal is not in their respective military capacities but in their intentions. This is the main problem with analyses that determine responsibility only on the basis of military capability. In terms of their intentions, there was no difference between the warring sides. As Eve-Anne Prentice argues that all of the warring parties in the Yugoslav conflict used their military capabilities to the full extent possible:

> Throughout the war the West blamed the Serbs for the fighting while minimizing the impact of battles launched by Croats and Muslims. The Serbs

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were better armed and battle ready, so were better equipped to pursue their war aims. But their goal was the same as that of the Croats and Muslims: to control as much territory for their people as possible (Prentice, 2000: 8-9).

In order to counter the military superiority of the Serbs, particularly in heavy weapons, the Croats and Muslims relied on propaganda. The ultimate aim of this exercise was to cause moral outrage among the Western public which would then be forced to intervene militarily on their side. The key element in this strategy were foreign journalists who were targeted by the government propagandists on the Croat and Muslim sides. As Christopher Bennett, himself a journalist, points out:

> As war broke out in Slovenia, Yugoslavia could no longer be ignored and all of a sudden the country was swarming with journalists, many of whom had never been there before and had minimal knowledge of Yugoslav affairs. All were prime targets for rival republican media whose propaganda offensive which had always been directed as much at international opinion as at the domestic public went into overdrive (Bennett, 1995: 161)

In the circumstances where there was extensive coverage of the Yugoslav conflict by the mass media in the West, Croatians and Bosnian Muslims realised that they could use this to generate outrage among the general public which would then force the politicians to intervene militarily. In doing so both Croatian and Bosnian government employed 'spin doctors' of the Rudder Finn public relations firm to get their message across among the policy-making elite in Washington. Rudder Finn were behind all of the sound-bites and images which came to define the conflict in the

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[19] The Serbs enjoyed military superiority only in the first phase of the conflict, and this superiority was limited to heavy weapons and equipment, but not personnel. In the latter stages of the conflict, the

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popular perception, including the stories of 'ethnic cleansing' and 'concentration camps' and they lobbied policy makers at several major international fora in 1992, including the OSCE emergency summit meeting in Helsinki, the Islamic Conference meeting in Istanbul, the UN General Assembly meeting, and the London Conference[20].

It has been argued that the media played an 'extremely important, even unprecedented role in setting the international agenda' in relation to the Yugoslav conflict (Biermann and Vadset, 1998: 60). Kenneth Roberts has argued that 'the power of modern journalists, especially the television journalists, has nowhere been more apparent than in Bosnia' (Roberts, 1994). This is consistent with the general trend where the media is playing an increasingly important role in bringing issues to the attention of the wider international audience[21]. In addition to these structural changes within the media, and its role in international politics, the 1990s have also witnessed the emergence of a new type of reporters. In addition to being unwilling victims of manipulation by propagandists among the warring parties, many journalists

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balance shifted, thanks to arms shipments to Bosnia from Iran, despite the UN arms embargo.

[20] James Harf, who was the director of Rudder Finn at the time, gave in 2003 his first interview after ten years. In his last interview, given to the French journalist Jacques Merlinou in 1993, he described how he considered the identification of Serbs with the Nazis to be the greatest achievement of his team (Nin, 04/09/03). Clearly, this 'achievement' would not have been possible if the level of general knowledge about Yugoslav conflict and its protagonists had been greater. James Harf describes the general lack of knowledge about Yugoslavia among the policy-making elite in Washington as follows: 'In the US, as in many other parts of the world, there was a lack of knowledge and information about Yugoslavia in terms of its geography and politics, and especially about Croatia, Bosnia, and Kosovo. Most Americans, including members of the Congress, did not have a clue where it was, let alone what was going on there' (Nin, 04/09/03).

[21] This situation has prompted the former UN Secretary General B.B. Ghali to say that the Cable News Network (CNN) has become the 'sixteenth member of the Security Council'. Similarly, the former US Secretary of State Warren Christopher said that the CNN 'cannot be allowed to be the North Star of the US foreign policy'.

used the conflict in Yugoslavia as a personal crusade without trying to hide the fact that they were partial (see Vulliamy, 1994; Bell, 1995)[22].

The importance of the role of the media in the Yugoslav conflict cannot be over-emphasized. On the one hand, the media was the key factor behind international policy towards the conflict, and on the other it critically affected the strategies of the warring parties. The analysis of the media role in the conflict demonstrates that the process of internationalisation of the Yugoslav conflict was not driven by politicians but by media and the NGOs, who 'shamed' the politicians into action. A clear lesson for military strategists is that media can alter the military situation on the ground because perceptions of what is going on can be as important as actual fighting on the ground.

What the study of the Yugoslav conflict demonstrates is that the revolution in the information and communication technology has fundamentally changed the nature of armed conflict. This revolution has made the boundary between actors on the ground and observers all but disappear. In this context, the notion of internationalisation of a conflict acquires a different meaning. Given the fact that the Yugoslav conflict was the most internationalised conflict in the 1990s, drawing lessons from the experience of international intervention there is important for other conflicts in the future.

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[22] Many authors have pointed out a shift in the 1990s whereby NGOs also abandoned their neutrality in war (see Vaux, 2001, Duffield, 2002).

Structural, Ideological, and Legal Changes in International Relations after the end of the Cold War and their relevance for the process of internationalisation of the Yugoslav conflict

The intervention by the international community in the conflict in Yugoslavia and in particular the decision to establish the ICTY as an instrument to help restore peace and security there cannot be understood without understanding the interplay between the events in Yugoslavia and the wider developments in international relations after the end of the Cold War. These changes primarily relate to the changes in the conceptions of security and the rule of law in international relations. Whereas the first part of the chapter was intended to give an account of the events in Yugoslavia, this section aims to describe developments in international arena and how they related to each other. In order to give an account of the continuities and changes, this section gives first an account of the thinking that dominated during the Cold War in particular in relation to war and conflict and then moves on to examine the more recent literature.

As argued by Marsh and Stoker, conception of structure and agency is implicit in any social theory that purports to explain any social phenomenon (Marsh and Stoker, 1995:191). Traditionally, the discipline of International Relations has been concerned with explaining the causes of war. According to the seminal work of Kenneth Waltz, *Man, the State and War* (1959), in seeking to locate the causes of war, the International Relations (IR) scholars identified three levels of analysis: the level of the individual, the level of the state, and the level of the international system. Some argued that the causes of war is to be found in human nature (St. Augustin,

Spinoza, Morgenthau, Niebhur), the nature of the state (Rousseau, Bentham), and the structure of the international system. Waltz's seminal contribution was that he argued that the cause of war can only be located if all three levels are taken into account. In his subsequent work, *Theory of International Politics* (Waltz, 1979), Waltz himself adopted the view that the cause of war is in the anarchic structure of international politics. The significance of this view, which had been dominant among the IR scholars during the latter stages of the Cold War (1980s) was that it ignored the issue of agency, i.e. level of the state, in explaining the changes in international order. In other words, regardless of whether they were communist of liberal, all states had no choice but to behave in accordance with the structural condition of international anarchy which applied equally to all states.

The realist conception of international structure was based in the concept of power where power was conceived exclusively in terms of material resources, military and economic, available to states. According to this view, the only way to achieve peace was to balance power with power. This resulted in the theory of mutually assured destruction (MAD). Ideational aspects of power, that is, the power of ideas, were completely ignored. The corollary of the argument about the anarchic nature of international politics is the notion of 'security dilemma'[23], which ignores whether the intentions of states are peaceful or aggressive, asserting that it is the perceptions of other states which mattered, and invariably they interpreted any increase in the power of other states as potential threat to their own security. Over two thousands years ago, Thycidides argued that the cause of the war between the Athenians and Spartans was the growth of Athenian power and the anxiety that it

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[23] For the use of the concept of 'security dilemma' in the Yugoslav conflict and other intra-state conflicts, see Walter and Snyder, 1999.

caused in Sparta. In other words, the analytical focus of structural realism is on capabilities of states rather than on their intentions. All states are simply assumed to be aggressive and threatening. In other words, given the opportunity, all states are predators. The significance of Waltz's argument is that it locates causality exclusively at the level of structure and completely ignores agency. In this conception of international security, the idea that individuals can be responsible for war is simply illogical. In sum, during the Cold War, the causes of war were understood to reside exclusively at the level of structure and not agency.

The end of the Cold War signaled the end of the dominance of structural realism within the discipline of International Relations, although the realist conceptual framework remains strong within security studies. In recent years, structural realism has been challenged by the theories of globalisation (Baylis and Smith, 1997). Similarly to the theory of interdependence in the 1970s, the theories of globalisation challenge the centrality of states in the realist paradigm arguing that states are no longer able to control the flows of goods, money, and information across their borders. One of the consequences of the revolutionary changes in the information technology is the development of new sociological theories like constructivism[24] which have also challenged the established dominance of material factors over ideas as explanatory factors. Within the field of security studies, the importance of ideas for the formation of security communities, i.e. the extension of oases of peace by peaceful means, has been highlighted by Adler and Barnett (Adler and Barnett, 1998).

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[24] For a historical analysis of the constructivist challenge to rationalist theories (neo-realism and neo-liberalism) and a list of references, see Katzenstein et al, 1998

The idea that constructivism introduced into the mainstream IR debate is that the analysis of any social system, including the international security system has to include both material and ideational factors. In other words, any analysis of the international security system has to include the material capabilities of the members of the system as well as their intentions. The ideological aspect of the end of the Cold War was that instead of competition between two rival ideologies, the post-Cold War world became dominated by a single ideology. The end of the ideological conflict between communism and liberalism coincided with the change in the perception of treat to international security. Francis Fukuyama has argued that the end of the Cold War represents the end of history, understood as conflict of ideas (Fukuyama, 1992). Observing the emergence of a widespread consensus concerning the legitimacy of liberal democracy as the most rational and most ethical form of government he argues that the ideological evolution of human kind has come to its end and that liberal democracy has prevailed. The consequences of this alleged end of ideological conflict is that the issue of the purpose of social organisation has become redundant and that the nature of social relations of cooperation and conflict has moved from politics to management. However, some authors have argued that the ideological conflict of the Cold War era was going to be replaced by the conflict between religions or civilisations (Huntington, 1998).

The consequence of the ideational changes after the end of the Cold War, i.e. the emergence of liberalism as the dominant 'meta-theory' explaining social and political relations, has been evident in the intellectual shift from the purpose people attach to their action to the methods of achieving predetermined actions. In other words, the shift represents a philosophical move towards problem-solving. In relation

to the problem of armed conflict, this shift is clear in the difference between the objectives of the Nuremberg Tribunal and the ICTY, from causes of war to conduct of war. Whereas the priority of the Nuremberg Tribunal was to condemn the resort to war as an act of state policy, the ICTY is concerned only with the conduct of war. It is noticeable that the Statute of the ICTY does not contain provisions dealing with the issue of aggression[25].

This chapter argues that one of the most significant changes in the international security system after the end of the Cold War is related to the re-conceptualisation of war and conflict. It further argues that the decision to establish the ICTY is directly related to this change. Today, intra-state wars are conceptualised not so much in terms of their causes but in terms of their consequences. In particular, there is an increased emphasis on humanitarian consequences, which manifest themselves in the flows of refugees. This has led to the shift in the strategies of the international community to deal with conflict, so that instead of trying to address the root causes and resolve conflicts, today's strategies are focused on containing or managing intra-state conflicts. The priority is to minimize the effects of conflicts on the more powerful states. This approach does not address the underlying causes of the conflict, which include the political and military objectives of the warring parties, but simply attempts to find a working consensus on which an international coalition of states with the capacity to deal with the conflict can be established. In sum, the international community has moved from dealing with the causes of conflict to dealing with their consequences.

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[25] The Statute of the proposed International Criminal Court, adopted at the Rome Conference in June 1998 does not contain the crime of aggression either.

The point has been made in the chapter that the end of the Cold War resulted in decrease of major international conflict, particularly the one involving the nuclear powers. However, it also resulted in many conflicts that had been kept under control by the two superpowers to escalate. At the same time, though, it became possible for the US, as the only remaining superpower, to manage these conflicts without fear for the security of the whole world. The international security agenda today is dominated by intra-state, as opposed to inter-state conflicts. After the end of the Cold War, the UN has intervened in intra-state conflicts, such as El Salvador, Mozambique, Somalia, Cambodia, and former Yugoslavia (Biermann and Vadset, 1998:285). The UN was established to deal with the threat of inter-state conflicts and its existing principles, structures, and organisational culture are not best suited to deal with these new threats to international security. The key theoretical question in relation to the causes of these new conflicts and the manner in which they are fought is to what extent they resemble Hobbes's 'war of all against all' (Hobbes, 1968) or a Clausewitzian notion of war as 'continuation of rational policy by other means' (Clausewitz von, 1968).

The new situation was summarised by the Secretary General of the UN, B.B. Ghali in his address to the judges of the ICTY on 21 January 1994:

> The situation in which the United Nations has to act is, as you know, radically different from that which immediately followed the Second World War and became established during the cold war. The issue now is not simply to maintain peace between States while respecting the sovereignty of each one of them. We have to deal with confrontations which divide and tear peoples apart even inside individual States. It is these new conflicts which now pose the

greatest threat to international peace and which do the greatest outrage to the rights of the individual. As a result, we have to invent new responses and find new solutions (address of the Secretary General to the judges of the ICTY on 21 January 1994, ICTY Yearbook, 1994:150)[26]

Changes in the international security system have been reflected in the changes in security studies. After the end of the Cold War, the main threat to international peace and security is seen to come from intra-state conflicts (Creveld van, 1991; Walter and Snyder, 1999; Snow, 1996; Kaldor, 1999; Kaldor and Vashee, 1996; Gurr and Harff, 1994). What is noticeable in the literature on new wars is that they are increasingly seen as being apolitical, which demonstrates the earlier point that the issue of human conflict and war in today's world in seen in managerial rather than political terms. The traditional Clausewitzian maxim about the inseparability of war from politics has been replaced with a new paradigm, which increasingly sees new wars as criminal activities with no political connotation (see Creveld, 1991; Kaldor, 1999). Also, the new wars tend to erupt in less developed parts of the world (Creveld, 1991; Kaldor, 1999; Snow, 1996). In addition to this, most commentators agree that the principal target in these conflicts is the civilian population (see in particular Kaldor, 1999). In terms of the way they are conducted, new wars are seen as more savage and often approximating total war. Donald Snow argues that new wars, which he coins 'uncivil wars', 'often appear to be little more than rampages by groups within states against one another with little or no apparent ennobling purpose or outcome; they are indeed 'uncivil wars' (Snow, 1996: 1). Often, these wars result as a result of state 'failure'. 'Failed states' have been defined as those states that have

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[26] For a more detailed analysis of the international security agenda after the end of the Cold War, see Ghali, 1992 and Ghali, 1995.

no chance of providing either security or prosperity to their citizens (Snow, 1996: 99). Snow links the lack of political objectives to the method of warfare in these new wars, and in relation to the war in Bosnia he argues that 'the goal of creating ethnically pure communities in different parts of Bosnia is not so much a specific goal as a justification for grabbing land' (Snow, 1996: 106). He also argues that what makes new wars particularly brutal is the fact that the warring parties have no 'common centre of gravity' to which both sides would appeal. He says: 'Violence is unmitigated by concern for the political consequences among the target population.' (Snow, 1996: 107).

A particularly salient point in relation to the causes of new wars is made by Kaldor, who argues that new wars are often conducted with no political purpose in mind, which makes their participants criminal (Kaldor, 1999). This point and the location of causality at the level of individuals is particularly relevant to the international view of the causes of war in Yugoslavia.

Walter and Snyder criticise the overemphasis on the underlying aims of actors in civil wars, arguing that a comprehensive analysis of civil wars must include the strategic environment in which actors operate and make their decisions (Walter and Snyder, 1999). In other words, they seek to redress the imbalance between the structure and agency in the contemporary literature on intra-state conflicts. They identify five strategic environments that can encourage groups to go to war even if they do not necessarily have aggressive aims, the most important of which is government breakdown. They argue: 'Groups have little to fear from each other when the central government can effectively enforce rules and arbitrate disputes. There are,

however, times when the government's ability to rule and promote order and stability fail, and it is at these times when security dilemmas are most likely to emerge.' (Walter and Snyder, 1999: 5). Jack Snyder and Robert Jervis argue in the same volume that the 'security dilemma is likely to be more severe in civil than in international anarchy' (Snyder and Jervis in Walter and Snyder, 1999: 15). Woodward argues that the notion that the causes of the conflict in Yugoslavia were, even in part, structural, i.e. that the situation which evolved through the process of disintegration of the federal state resembled security dilemma, was completely rejected by the US and other international negotiators at Dayton peace talks, adding: 'They based their strategy on the assumption that the war was caused by Slobodan Milosevic and that multiethnic coexistence and cooperation could resume once predatory leaders were removed from the scene.' (Woodward in Walter and Snyder, 1999: 87). The role of the ICTY in removing Slobodan Milosevic and Radovan Karadzic from the scene was evident in 1996 and 2000. Furthermore, Woodward argues that the most important part of the peace-building strategy in Yugoslavia is to break the link between predatory and criminal leaders and vulnerable mass of population. Consequently, the obligation of all parties to cooperate fully with the ICTY was given top priority (Ibid, 94-5).

The combined effect in the dominant paradigm of war and conflict and the other changes in international relations associated with the new importance being given to international law and international institutions were crucial in the process of internationalisation of the Yugoslav conflict, and in particular in its criminalisation. It is important to note that these institutions are not the same as traditional institutions. In other words, they are not based on the same principles. In fact, they are less based

in principles, they are more pragmatic in reflecting the power relations in international relations. It needs to be emphasised here that the position adopted in this chapter is that changes in international law are the result of the changes in international politics and not vice versa.

Internationalisation of the Yugoslav conflict would not have been possible without a fundamental change in international law in relation to the issue of intervention in intra-state conflicts. The changes in relation to the norm of non-intervention, which had been essential part of international legal system have been summarised by Lori Damrosch:

> In a few short years the terms of the debate have shifted dramatically. Instead of the view that intervention in internal conflicts must be presumptively illegitimate, the prevailing trend today is to take seriously the claim that the international community ought to intercede to prevent bloodshed with whatever means are available. Legal arguments focus now not on condemning or justifying intervention in principle, but rather on how best to solve the practical problems of mobilising collective efforts to mitigate internal violence (Damrosch, 1993:364)

It is argued in this chapter that the fact that the Yugoslav conflict ended up in the hands of the lawyers can be attributed to the material and ideational aspects of the changes in international politics after the end of the Cold War. On the one hand, the international security system is no longer bipolar. In other words, the military preponderance of the US remains under no threat from other states. At the same time, liberalism, as a form of organisation of society, no longer has an alternative capable of

mounting a serious challenge to its dominance. This has enabled the US, the self-proclaimed guardian of liberal ideals, to employ other forms of power, including ideological, on the various conflicts in the world. It is argued here that the use of IHL in the management of the Yugoslav conflict illustrates these two sets of changes.

This chapter has argued that the misunderstanding of the causes of the Yugoslav conflict, and in particular the political and military objectives of its warring parties can be attributed partly to the warring parties themselves but also to the international media and other observers. The role of the militarily weaker sides in the internationalisation of the conflict is particularly important, because it may have increased the demand for international intervention in similar conflicts elsewhere. As Schattschneider (1960) argues, conflict is inherently expansive, and the losing side is inevitably pushed to draw new parties to in hope of altering the outcome. Crucial in the expansion process, however, is the redefinition of the conflict in an increasingly general terms to provide incentives for the audience to join the fray. In the Yugoslav context, the definitions of the conflict as 'massive and systematic violations of human rights' served exactly this purpose by 'shaming' liberal states into action and mobilising the supporters of human rights world-wide. Schattschneider calls this process 'mobilisation of bias'.

Therefore, creating outrage in order to mobilise public against an enemy is not new or peculiar feature of the Yugoslav conflict[27]. What is interesting about the Yugoslav war is that this kind of propaganda worked. This effectiveness of the Croats

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[27] Similar stories were used before, like for example, the story during the American civil war 'of southerners slashing the throats of some prisoners of war from ear to ear, cutting off the heads of others and kicking them about as footballs' (Falk et al, 1971: 377) or stories circulating during WW1 that Germans were boiling down dead soldiers into food for swine (Ibid, 377).

and Muslims to get the international support cannot be explained without understanding why the international community was so receptive to the Muslim propaganda, and in particular their claims of genocide. The US General Chuck Boyd, the Deputy Commander of the US European Command (EUCOM) claimed that 'even when US military intelligence exposed many media reports from Sarajevo as little more that Bosnian propaganda, Clinton Administration officials were more likely to believe press reports than EUCOM or the UN' (Wiebes, 2003: 65).

In answering why Western governments were willing to listen to the media than their own intelligence services, Wiebes argues that reasons were partly internal to the intelligence community, that is, that the complexity of the conflict often caused confusion and even division within Western intelligence community. The consequence of these divisions within the intelligence services was that the information that they did provide was often manipulated and distorted by politicians for their own reasons.

Wiebes takes a particularly close look at the divisions within the US intelligence community which includes a number of different agencies, often competing against each other. Although there was no 'single view of the intelligence community', the prevailing view in relation to the relative responsibility of the warring sides for the violations of IHL was that all of them were guilty of atrocities and that there were no 'good guys' (Wiebes, 2003: 63). However, at the end of 1994, the CIA performed an about-turn and the service started to adhere to Clinton administration's course more closely. After James Woolsey, head of the CIA, resigned in early 1995, the CIA became 'more political and more hawkish' (Ibid: 67).

'Especially after Woolsey's departure as CIA director, intelligence started to serve as support to the policy of Clinton administration, which was largely pro-Bosnian. This meant that parts of the American intelligence community were brought into conflict with friendly Western services [in particular, British]' (Ibid: 87). John Sray, the CIA chief officer in Sarajevo at the time of the 'market place' massacre, claimed that the Bosnians were responsible for both incidents (Sray, 1995). Similarly, the British JIC (Joint Intelligence Committee) arrived at the same conclusion (Ibid: 68).

The conclusions that Wiebes draws from his study of the role of the Western intelligence in the Bosnian conflict are indicative of the role of the British intelligence services in producing the British Government's assessment of Iraq's weapons of mass destruction in 2002:

> as the conflict progressed, and the press, public opinion and the politicians increasingly took the side of the Bosnians, some intelligence services 'turned'. This was especially true of the Americans. The phenomenon of the politicisation of intelligence emphatically raised its head. Studies were sometimes written to please the most serious policy-makers, as opposed to providing them with intelligence' (Wiebes, 2003: 86).

The politicisation of the intelligence and the media reporting of the Bosnian conflict had their beneficiaries and losers within the US government. The former include Madeleine Albright, and the latter Warren Christopher. It was to a large extent thanks to her ability to adapt to the new increased significance of the media during the Bosnian conflict that enabled Albright to become the first women Secretary of State. On the other hand, Christopher was more of a traditionalist and relied exclusively on

reports he received from the official intelligence sources, which ultimately cost him his position in the State Department.

Apart from the reasons mentioned above, the explanation of why the media was effectively able to snatch from the intelligence services its traditional role also needs to include the changes of the environment in which the intelligence community found itself during the Cold War. In many respects, they have been unable to adapt to the realities of new wars. In traditional conflicts, the emphasis is on 'studying the (measurable) military capabilities of the opponents' (answering what they are capable of). In peacekeeping operations and asymmetric warfare, knowledge of the capabilities of the parties is subordinate to a deep understanding of their intentions and motives, without losing sight of the capabilities (Wiebes, 2003: 17). Wiebes's point confirms the main point made in this chapter, that the international community failed to understand the political and military objectives of the warring parties, with predictable consequences.

In analysing the reasons for the internationalisation and criminalisation of the Yugoslav conflict, Chapter 2 has been mainly focused on the actors within the former Yugoslavia and their role in the process. The following chapter looks more closely at the actors outside the former Yugoslavia, analysing their stakes in the process of criminalisation of the Yugoslav conflict, focusing in particular on their actions that contributed to the establishment of the ICTY.

Chapter 3

Background to the Establishment of the ICTY by the United Nations Security Council

Introduction

Chapter 2 gave an account of how the Yugoslav conflict evolved from a constitutional dispute into a full-scale armed conflict and how the conflict became a matter of international concern. This chapter attempts to explain how and why the internationalisation of the Yugoslav conflict led to the establishment of the ICTY. It should be noted that the internationalisation of the Yugoslav conflict is a gradual process, in which distinct stages, described in terms of different policy objectives and means and agents for their implementation, can be identified. In describing and evaluating the role of the ICTY in it, it is necessary to understand that the ICTY is just one among other initiatives of the international community to restore peace and security in the territory of the former Yugoslavia and that other policies, including economic sanctions, peace-keeping, and others were used by the Security Council. This chapter is particularly concerned with the reasons for the establishment of the ICTY and in particular the origin of the rationale that prosecution of individuals could help bring about peace and reconciliation in the former Yugoslavia. In arguing that the reasons which led the Security Council to establish the ICTY can be partly attributed to the Council's view of the nature of the Yugoslav conflict, and in particular its view that the individual political and military leaders were to blame for the failure of numerous cease-fires to last, this chapter also argues that the more

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important reason for the establishment of the ICTY was the growing conviction within the international community and in particular in the US, that international criminal tribunals could be used as means for intervening into similar intra-state conflicts where there is no will to intervene militarily.

By establishing the ICTY, the UN Security Council (SC) created a precedent in its own history. Although the UN Charter envisages the possibility of the SC establishing auxiliary organs, never before had the SC used a judicial institution as an instrument of peace. As Lescure and Tritignac point out:

> By creating this Tribunal in times of war, the Security Council created this body as an instrument in the peace process and thus conferred upon it a political dimension the management of which constitutes one of the most important factors for those who are responsible for its operation. The deployment of law in the cause of peace is certainly the most significant innovation in the creation of such a Tribunal (Lescure and Tritignac, 1996: 6).

It is argued in this chapter that the reasons for the establishment of the ICTY as an instrument of restoring peace and security in the territory of the former Yugoslavia and its potential and limits in achieving this objective can be properly understood only in the context of the changes within the international security and the international legal systems in the 1990s. This wider context will be fully explored in Chapter 5, which argues that the establishment of the ICTY is in fact part of a wider process, called in this thesis institutionalisation of the international criminal justice system (ICJS). Identifying changes within international security and international

legal systems in the 1990s and their link with the situation in Yugoslavia is the focus of this chapter.

It was demonstrated in Chapter 2 that the Yugoslav conflict became internationalised from the very start, which meant that the responsibility for finding a peaceful solution to the conflict became shared between the international community and the Yugoslav actors. As the time went by, internationalisation became increasingly identified with intervention, that is, the relative importance of the international community in relation to the actors within Yugoslavia in the search for peace became greater. Initially, the international community was represented by the European Community (EC) but as the conflict dragged on and as tens of thousands of refugees continued to arrive to the European Union imposing a significant burden on the welfare state there, the involvement of the UN Security Council (SC), the only international institution whose decisions have a binding character, became increasingly seen as inevitable. As the capacity of the Yugoslav government to stop the violence rapidly diminished, Yugoslavia came to be seen as an archetype of a 'failed state'[1], and the calls for the deepening of the role of the international community by the media and non-state actors intensified.

International non-state actors were particularly influential in helping to create the view that the Yugoslav conflict was primarily a humanitarian problem and that the Yugoslav sovereignty should not be used as an argument against international intervention on humanitarian grounds. The insistence on the humanitarian aspect of the conflict also helped to forge a consensus that all means, including military force,

should be used. This position was based on the argument the victims of the Yugoslav conflict were entitled to assistance and that the international community had the moral duty to provide it[2].

Although the passing of the buck by the EC to the UN testifies to the failure of the policy of internationalisation and recognition of independence of Slovenia and Croatia to bring peace to Yugoslavia, the analysis of the role of the EC in the previous chapter indicates that the involvement of the EC in the Yugoslav conflict cannot be dismissed as irrelevant. The significance of the EC in the process of internationalisation of the Yugoslav conflict and its impact on the future policy choices of the UN Security Council which led to the establishment of the ICTY is evident in at least two aspects. On the one hand, the EC tried to use the rationality of international principles, norms, and procedures as a means of resolving a security problem. On the other hand, as this course of action failed to deliver intended results, it helped to forge the consensus that any solution to the Yugoslav conflict would have to be imposed on the Yugoslav actors.

The EC used international law as a normative framework for international collective action and an instrument of peace. In doing so, it wanted to signal its belief in the power of reason (persuasion) as opposed to the power of force (coercion). This can be explained partly by the genuine belief within EC, informed by the experience of European integration, that economic expertise combined with popular belief in

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[1] The term 'failed state' has been used to describe states 'in which institutions of law and order have totally or partly collapsed under the pressure or amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map'. (Thurer, 1999).

[2] In 1988, the UNGA passed resolution 43/131 recognising the 'right of intervention' which opened new avenues to organisations providing humanitarian assistance. This resolution was based on the principle of 'right to humanitarian assistance' embodied in the Geneva Conventions that states that all

common interest can overcome people's irrational fears from the past which perpetuated the myth that only sovereign state can guarantee their freedom and security. At the same time, the EC as a whole did not have other means at its disposal, that is, it did not have its own armed forces. On top of this, Germany, the leading force of the policy of internationalisation of the Yugoslav conflict had its own constitutional barriers to deploying its armed forces abroad. On the other hand, the involvement of the EC, and in particular the failure of its peaceful means to end the conflict helped to create a consensus that the solution to the problem had to be imposed on the Yugoslav actors.

As the frustration of the international community grew with every broken cease-fire[3] and continued impediments to the delivery of humanitarian assistance by the warring sides this gradually led to calls for the external imposition of the solution to the conflict, even if that meant the use of force. What was significant about this calls for military intervention is that they came mainly from those who did not have any military capacity at their own disposal, the non-state actors and states like Germany. This resulted in very unusual situation where actors traditionally associated with the use of peaceful methods were advocating the use of force and the military people advised caution. Since the only state that had sufficient military capacity to intervene was the US, the focus of attention of those who wanted military intervention turned towards the US government. The US Chief of General Staff Colin Powell was adamantly opposed to military intervention in Yugoslavia arguing that Yugoslavia would be a new Vietnam. On the other hand, the US permanent representative at the

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innocent victims of armed conflict have the right to receive humanitarian assistance regardless of the nature of the conflict (Mercier, 1995: xiv).

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UN Madeline Albright was most hawkish. Reportedly, she said to General Powell: 'What is the point of having this military if we are not going to use it?' (Owen, 1995: 130).

In summary, it could be said that, in the search for peace in Yugoslavia, the EC was not particularly successful but it demonstrated a great deal of initiative and innovation. This is evident in the constantly evolving methods in the search for peace, which moved from mediation[4] to monitoring[5] and finally to adjudication[6]. In its pursuit of peace, the EC used various methods, ranging from expert assistance to economic sanctions. In its selection of policy options, the EC was always limited in that it could not use force. It neither had the authority or the will to use force. It was also demonstrated that the means and objectives of the international community in its policy towards the Yugoslav conflict changed over time. This ineffectiveness is partly attributed to the complexities of the conflict itself and partly because of the changes in the framework through which the conflict was analysed. This ineffectiveness is attributable to the lack of sufficient degree of consensus, both within Yugoslavia and within the international community in relation to the causes of the conflict. Therefore,

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[3] There were 15 cease-fire agreements in Croatia alone. The constant dilemma for the international community was whether the breaches of agreements were attributable to unwillingness or inability of the signatories to uphold them.

[4] In 1991 the EC established the International Conference on Yugoslavia (ICY), which later changed its name into International Conference on the Former Yugoslavia (ICFY). The first chairman of the ICY was Lord Carrington. In 1992, he resigned and Lord Owen was appointed as his successor. In 1993, after the rejection of his peace plan, he was forced to resign and was succeeded by Carl Bilt, who was the last chairman before the ICFY was replaced by the Contact Group on the former Yugoslavia in 1994. Carl Bilt continued as representative of the EU in the Contact Group and following the Dayton peace agreement in 1995 he was appointed UN High Representative in Bosnia.

[5] In 1991 the EC, in cooperation with the Organisation on the Security and Cooperation in Europe (OSCE) established the European Community Monitoring Mission (ECMM) to monitor the implementation of cease fire agreements.

[6] In 1991 the EC established the Commission of Experts, also known as the Badinter Commission after its chairman Robert Badinter. Originally established with the intention on adjudicating on the matters of succession, the mandate of the Commission was expanded to determine which Yugoslav republics met the criteria for international recognition.

it is difficult to talk about the consistencies in the policy of the international community towards the conflict.

The complexities of the Yugoslav conflict were reduced in the course of its internationalisation. Greater international involvement and in particular possible military intervention required a clear-cut distinction between the warring sides, which the civil war narrative[7] could not easily provide. For this reason, the conflict became increasingly interpreted as aggression by Serbia. To support this account, some inconvenient facts, which would have fatally undermined this argument, like the fighting between Croats and Muslims, the fighting among Muslims in the Bihac region, and deliberate targeting of Muslim civilians by their own forces, were largely ignored by the Western media[8].

However, rather than arguing that the reason for the selective and distorting reporting of the Yugoslav conflict by the media was some great conspiracy, this chapter argues that it was the result of a wide-spread adoption of the prism of 'new wars' through which the reporters saw the conflict. In these circumstances, the conflict in Yugoslavia was seen by many journalists and others as a case study of 'new wars'. Their reporting was the product of the 'new wars' paradigm and at the same time it reinforced the paradigm itself. The Yugoslav conflict was used by the international community as a precedent in the evolutionary custom of humanitarian

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[7] This view was based on an analogy with a wildfire. It implied that the Yugoslav conflict could not be stopped from outside but by depriving the warring sides of weapons and ammunition its end could be hastened.

[8] A notable exception was David Binder, who was the New York Times correspondent from Yugoslavia for many years, and thus knew the politics of the region too well to adopt the rhetoric of 'ethnic cleansing' and 'genocide'. However, after he published a number of reports which shed a different light on the Yugoslav conflict and in particular some well-known incidents which became the hallmarks of the conflict itself, he was removed from his position and asked to write obituaries in the New York Times (interview with David Binder, December 2002).

intervention. Susan Woodward has criticised this approach as false humanitarianism whose main purpose was to enable the politicians in the intervening states to avoid explaining their policy choices to their electorates (Woodward, 1995: 397).

This chapter argues that the establishment of the ICTY would not be possible without the changes in the international security and international criminal justice systems in the 1990s. At the same time, the chapter argues that the ICTY influenced these developments. The following sections are intended to identify these changes and link them with the conflict in Yugoslavia. *international criminal justice system and ICTY*

Developments within the International Security System contributing to the Establishment of the ICTY

Security is the longest standing concern of the International Relations (IR) discourse. For the realist tradition of speculation about international relations the most fundamental objective of all collective action at the international level is how to achieve and maintain security, and in analysing the sources of insecurity and conflict it differentiates between the domestic and international realms. The difference between domestic and international politics is typified by the existence of laws and effective institutions for their enforcement at the state level and the absence of these institutions at the international level. Also, realists insist that whereas domestic politics is the realm of natural harmony of interest, international politics is the realm of natural conflict. While acknowledging that there have been times and places in which peace and cooperation prevailed over competition and conflict, Stanley Hoffmann argues that they should be seen as 'oases of peace' and 'periods in which

competition is less fierce' but the overall, long-term condition of international relations should be properly described as state of war (Hoffmann, 1965: vii).

The starting point for students of international security, and in particular the causes of war, is the notion of international anarchy (Aron, 1966; Hoffmann, 1965; Wight, 1979). Most IR scholars agree that anarchy is defined simply as absence of government. However, there are wide differences among scholars as to what the consequences of the absence of government at the international level. Broadly speaking, some argue that given the structural condition of anarchy conflict between states is inevitable, whereas others say that despite the absence of centralised law enforcement mechanisms at the international level cooperation among states is possible.

International anarchy is often compared to a jungle or a sea in which big fish eat small fish. Thomas Hobbes described this so-called state of nature as condition in which life of an individual is 'nasty, brutish and short' (Hobbes, 1968). This view of international relations was dominant among security experts in the post-Second World War period, especially in the 1950s and 1980s. After the end of the Cold War, President George Bush declared his intention to help to create a new world order which would be based on cooperation instead of rivalry, collective action as opposed to unilateral. He described his vision of the new world order as 'the world where the rule of law supplants the rule of the jungle, a world in which nations respect the shared responsibility for freedom and justice, world where the strong respect the rights of the weak' (quoted in Williams, 1998: 284).

In analysing the changes in the international security system in the 1990s, particular attention is given to the changes at the structural level and the level of the constituent elements of the system. The biggest structural change, which heralded the end of the Cold War, was the end of the bipolar system caused by the disintegration of the Soviet Union. At the same time, the collapse of the Soviet Union ended the global ideological rivalry between communism and liberalism. What is new about the membership of the international system is the increased importance of non-state actors. This is significant because for at least the last three centuries, that is, since the Peace of Westphalia, international security system was dominated by states.

During the Cold War the structural position of individual states within the international security system was determined on the basis of their possession of military capability and on the basis of their intentions towards other states[9]. Military capacity represents capacity of a state to inflict harm on others, and in this respect, the US and the Soviet Union with their vast nuclear arsenals were considered as superpowers because of their capacity to inflict harm on any other state. However, no single state, not even the US and Soviet Union could achieve global supremacy without entering into alliances with other, smaller powers. For this purpose, the US created NATO in 1949 and the Soviet Union followed by creating the Warsaw Pact.

Distinguishing between states' capacity and intentions is important because of the different methods for ascertaining them. Philip Reynolds writes:

> Since the threat is seen in terms of capability for violence and not in actual intentions, because of the fact that weapons apparently can be evaluated due to

their material nature, while good will is less tangible, then all nations with this capability are potentially at least inimical (Reynolds, 1994: 10)

Another change in the post-Cod War era is that military power is not the only element of state power. At the same time, revolutionary developments in the information technology have fundamentally altered the nature of military power. Other aspects of power, such as possession of information and expertise are seen as essential elements of power.

Historically, states have attempted to achieve security through unilateral, bilateral and multilateral strategies. In the ninetieth century war was widely accepted as a legitimate instrument of national policy. In the twentieth century, it became accepted that unilateral actions often have unforeseen, unintended damaging effects on the international system as a whole. In other words, it became accepted that wars have their own logic and because of that they often escalate beyond the aims for which they are initiated. For this reason, unilateralism gave way to multilateralism, and the concept of national security was added the concept of international security.

During the Cold War, the main threat to international peace and security was perceived to be coming from the potential nuclear confrontation between two superpowers, the Soviet Union and the United States. This threat was a combination of their capacity and stated intentions. Today, paradoxically, the threat to international security is perceived from some states' incapacity, that is, from their inability to perform traditional functions of a state. Also, sources of threat are not limited to

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[9] The central element of structural realism is the notion of the security dilemma, which emphasises the inevitability of competition between states, where the emphasis is not on the intentions but on the

states. As Toffler and Toffler argue: 'Mafia families, Branch Davidian cultists, archaeo-Trotskyite groupscules, Sendero Luminosa Maoists, Somalian or Southeast Asian warlords, Serbian Nazis, and even, perhaps, individual loonies could hold nations at random.' (Toffler and Toffler, 1994: 261). A recent report of the Panel on United Nations Peace Operations, the so-called 'Brahimi report', identified HIV/AIDS, arms, illicit trafficking in diamonds, intra- and inter-state conflicts, refugees and internally displaced persons as threats to international peace and security[10].

Generally speaking, the existing international security system is not different from previous ones in that all international security systems in the history reflected the existing balances of power and the dominant perception of threat to the existing order. The first collective international security system was established in Europe in 1815, when European powers, having defeated Napoleon, agreed to guarantee each other's security. Ever since the Peace of Westphalia in 1648, the dominant threat to international peace and security has been perceived to be coming from aggressive states. The whole system was state-centric- states were the constituent elements of the international security system and at the same time, states were also the main threat to the stability of the system.

The state-centric conception of the international system to preserve international peace and security meant preventing conflict between states. For this purpose, states were defined in terms of territory, population and government. The UN Charter reflects these concerns by prohibiting violations of territorial integrity and

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capacity of causing harm.
[10] Available at www.un.org/peacekeeping.

political autonomy of all states, regardless of their power. This is the principle of sovereign equality. Under the state-centric conception of international security, states are assumed to be capable of keeping the peace within their own borders. However, in many contemporary situations involving weak states, states do not possess the monopoly on the use of force.

While the origins of the discipline of IR are related to the search for the causes of war, the dominant trend in contemporary IR accepts that threats to security can never be completely eradicated. Instead, the focus of contemporary IR theory is how new threats to international peace and security, including new wars can be managed. It is argued here that the shift from war prevention and eradication to management of war is the context in which the shift in the analyses of new wars to their conduct should be understood[11].

Since its inception, the effectiveness of the UN has been marred by the lack of its own military capacity which would enable it to act independently of the member states[12]. For this reason, the UN has always had to rely on the cooperation of states, and this cooperation has depended on their capacity and willingness to act. The end of the Cold War opened a possibility for greater cooperation between member states in the enforcement of the decisions of the international community represented by the SC. In his *Supplement to the Agenda for Peace*, B.B. Ghali (1995) stated that enforcement actions should be performed by ad hoc 'coalitions of the willing', that is, by groups of states able and willing to enforce the will of the international community. Through this statement the Secretary General acknowledged that without

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[11] See Chapter 2.
[12] It is often said by realists that the UN is no more than the sum of its constituent parts.

relying on groups of states and regional organisations like NATO, the UN could not enforce its will at all.

After the end of the Cold War, the idea that the causes of international instability are to be found within states rather than in inter-state relations became increasingly accepted. In the context of 'failed' and 'rogue' states, the traditional methods and instruments of international intervention, established during the Cold War, became ineffective. In the 1990s, the traditional peace-keeping, which was developed as a way of dealing with inter-state conflicts, has gradually changed to include additional peace-enforcement and peace-building mechanisms[13]. In this context, the establishment of the ICTY as an instrument of peace demonstrates the realisation within the international community that new wars require new approaches to peace-building, including disarmament, demilitarisation, and reconciliation are necessary elements of lasting peace in many post-conflict societies[14].

The history of collective security systems is the history of attempts to limit unilateral use of force. According to the UN Charter, unilateral use of force is permitted only in the case of self-defence. The notion of self-defence was originally intended to allow states to use force in situations where their territorial integrity and political independence was violated by another state. However, in practice, states used the principle of self-defence to justify their use of force to protect not only their territory but also their nationals, even if violations of their rights occurred in the territory of another state. By broadening the notion of national interest, the most

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[13] For an argument in support of the traditional peace-keeping, see Bierman and Vadset, 1998. For an alternative model, see Durch, 1997.
[14] See 'Brahimi report', that is, the Report of the Panel on Peace Operations, 21 August 2000, available at www.un.org/peacekeeping

powerful states justified their use of force beyond their borders. Typically, the more powerful the state the broader its conception of its national interest, to include not just its territory and people, but also its values[15].

The ability of states to use force in international relations has always been determined on the one hand by their military power but also by international rules and norms on the use of force[16]. In the beginning of the inter-state system, there were few normative limits at the international level preventing the use of force by states. Clausewitz expressed well the prevailing moral attitude towards the use of force by saying that war was an integral part of foreign policy, and the only thing that distinguished war from other forms of pursuit of self-interest was in the means that it employed[17]. The UN Charter was the first international treaty which expressly prohibited aggressive war. According to the UN Charter states are entitled to use force only in self-defence (both individual and collective) or with the authorisation of the UN SC.

Following the end of the Cold War, the notion of state sovereignty has become increasingly questioned[18]. As stated earlier, the UN Charter sought to protect two values: territorial integrity and political autonomy of its member states. To say that states have political autonomy means to say that their governments should not be subject to any dictatorial interference, coercion, or threats from other states as long as

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[15] Whereas during the whole duration of the Cold War, the US used its own forces only on seven occasions, in the post-Cold War period it has used its own force on twenty occasions (Nash in Keysen and Sewall, 2000: 153).

[16] This is to say that even when states break rules, they try to justify their actions, they never act in complete ignorance of them.

[17] Clausewitz is most often quoted for arguing that politics is a continuation of war by other means (Clausewitz, 1972).

[18] For a more detailed discussion on the issue, and in particular how the principle of sovereignty has been challenged by the concept of human rights, see Chapter 5.

they do not violate the same rights to territorial integrity and political autonomy of other states. In other words, by respecting the sovereignty of others, states could rest assured that their own sovereignty would be respected.

Looking at the development of the international security system in the twentieth century, including the development of the normative framework underpinning it, it could be said that it reflected the debate between two schools of thought, broadly identified under the labels of realism and liberalism. Realists have argued that international peace can be achieved only through the establishment of a preponderant military power at the global level. In the absence of such a global hegemon, realists argued, the only rational strategy for any state to follow is self-help, which means maximisation of military power in order to deter any potential aggressor. Liberals, starting from the premise that the causes of war are in people's mind, argued that peace could be achieved through peaceful means, through internalisation of law. In other words, while realists have emphasised deterrence as the only effective strategy, liberals argued that ultimately peace could only be achieved through the internalisation of rules and norms. For this reason, they advocated the development of international institutions which would possess the necessary legitimacy and effectiveness to create, interpret and implement international laws.

Therefore, despite the periods of dominance of realist thought and state practice reflecting it, there was also a steady development of international institutions and international law. This is particularly true of the post-Second War period and the establishment of the United Nations. In this period, numerous subsidiary organs,

special agencies, and other institutions within the UN system were established. At the same time, many international conventions, treaties have been concluded, so that the number of treaties reached in this period is greater than the number of international treaties in the whole previous history. After the end of the Cold War, there has been re-emergence of enthusiasm for international law and international institutions as a means to solve international disputes.

The calamity of the WW1, which apparently benefited no one, gave credence to the liberal claim that wars erupt because of people's stupidity and ignorance. It was believed that if only politicians knew that their actions would lead to war and destruction, they would not do it in the first place. Liberals believed in the power of reason in educating the people and changing the world for the better. The discipline of IR was established with intention that the expert knowledge of IR specialists would enable politicians to make rational decisions. Quincy Wright argued that the answer to the problem of war was in developing a general discipline of IR which would include understanding, predicting, evaluating, and controlling international relations (Wright, 1965). Liberals of positivist inclination like Wright were convinced that human reason could illuminate international relations in the same way that it had comprehended the economy using the natural science model (Kohler, 1998). E.H. Carr, himself a realist, amply summarised this belief in the transformative power of reason on international relations: 'Reason could demonstrate the absurdity of the international anarchy; and with increased knowledge, enough people would be rationally convinced of its absurdity to put an end to it' (Carr, 1939: 42).

The end of the Cold War was accompanied with the revival of the Kantian notion of peace (see Doyle, 1995; Russett, 1993). The key difference between liberal theories of international relations in relation to structural realism which posited that states are functionally similar units (see Waltz, 1979) is that this theory makes a difference between the states that constitute international system. Whereas structural realists argue that states wishing to survive in the international system have no choice but to pursue a policy of maximisation of power, liberal theory argues that states are bellicose or peaceful depending on whether they are ruled by a democratic government or not. In other words, whereas structural realists emphasise the anarchic structure of international relations as the determining factor of states' behaviour, liberals argue that factors endogenous to the state, including the development of civil society are crucial. Liberal argument that undemocratic governments are typically aggressive and democratic are inherently peaceful has increased its purchase in recent years among both politicians and theorists. James Baker, the former US Secretary of State said: 'Democracies do not resort to war against each other' (quoted in Doyle, 1997: 15). Even when liberal states do go to war, it is never for the same reasons for which illiberal states, ruled by despots and tyrants do it. John Rawls, one of the most important liberal scholars has argued that 'when liberal people go to war, it is only with unsatisfied societies, or outlawed states' (Rawls, 1999: 48).

The revival of the Kantian theory of democratic peace after the end of the Cold War illustrates the increased belief that creation of an international community based on shared values of democracy and human rights is not just desirable but possible[19]. It has been argued that international relations, or at least relations between

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[19] Most definitions of community define it in terms of shared values, symbols, and norms that provide social identity (see Adler and Barnett, 1998).

some states, have moved from the state of anarchy (see Aron, 1966; Hoffmann, 1965), through some intermediary phases, like mature anarchy (see Buzan, 1991) and security community (Deutch, 1956), to international community ruled by law (Shaw, 1994). Building on the seminal work of Karl Deutch in the 1950s[20], who argued that the US and Canada were the best example of the possibility of the existence of such a community at the international level, Adler and Barnett argue that international community exists as an oasis within international anarchy. States belonging to this international community develop peaceful dispositions towards each other. The key idea explaining this evolution is that states learn to trust each other through long-term cooperation and that internalisation of liberal values is possible.

The enthusiasm for the creation of an international community has led to the re-conceptualisation of security policies in liberal states and the blurring of the traditional distinction between interests and values. Speaking on the issue of humanitarian intervention, Tony Blair said:

> 'No longer is our existence as states under threat. Now our actions are guided
>
> by a more subtle blend of mutual self-interest and moral purpose in defending
>
> the values we cherish. If we can establish and spread the values of liberty, the
>
> rule of law, human rights, and an open society then that is in our national
>
> interest too. The spread of our values makes us safer.'[21]

One consequence of the disappearance of the threat from the Soviet Union and of the rise of liberalism in international relations in recent years is that today, the main threat to international security is seen to be coming from 'failed' and 'rogue' states.

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[20] See Deutsch, 1953; and 1957.
[21] Speaking at the 50th anniversary of NATO, April 1999.

Broadly speaking, failed states are defined as such because of their loss of capacity to govern. This situation covers situations of internal rebellions, insurgency and so forth. Rogue states are defined in terms of their unwillingness to act in accordance with international law. This classification of new threats to international security, which emphasises on the one hand, capacity (failed states), and will (rogue states) enables the international community to redefine the whole notion of intervention. In the case of failed states, international intervention is justified on security reasons, and in the case of rogue states it is justified on moral imperatives. The argument in the case of failed states is that international community has the right to intervene to protect itself from the lawlessness and anarchy and the security vacuum that accompanies collapse of state institutions. In the case of rogue states, the argument for international intervention is that these states either have predatory intentions towards their neighbours or are involved in blatant violations of human rights of their own people.

The increased acceptance about the universality of human rights also gave rise to the idea that victims of human rights abuses are entitled to protection from the international community. In the late 1980s it became increasingly accepted by the international community that the principle of state sovereignty should not be used as a basis on which a state could refuse the international community to provide assistance to its citizens in case of natural and man-made emergency[22]. In other words, it became increasingly accepted that state consent is not required if the international community wanted to provide humanitarian assistance.

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[22] See General Assembly Resolution 46/182.

In 1988, the UNGA passed resolution 43/131 recognising the 'right of intervention' which opened new avenues to organisations providing humanitarian assistance. This resolution was based on the principle of 'right to humanitarian assistance'[23] embodied in the Geneva Conventions that states that all innocent victims of armed conflict have the right to receive humanitarian assistance regardless of the nature of the conflict (Mercier, 1995: xiv). An important step towards further legitimisation of this principle came in 1991 when the Security Council decided to invoke it to provide refuge for the Kurds in northern Iraq. Provision of humanitarian assistance to victims has been elevated to the level of absolute principle and the discussion has been shifted to the means of securing the assistance actually gets to the victims. Throughout the Yugoslav conflict, the international community has moved progressively towards justifying all means in providing humanitarian assistance, including the use of force. Impeding the delivery of humanitarian assistance has been treated as a serious violation of IHL and the Security Council authorised the UNPROFOR to use force not just in self-defence, as in traditional peace-keeping operations, but also in the delivery of humanitarian assistance[24].

After the end of the Cold War, security became increasingly defined in terms of 'human security', as opposed to the traditional conception in terms of 'national security'[25]. United Nations Development Programme defines human security as

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[23] Arguably, this represent the internationalisation of a principle under French criminal law where person not assisting another person in grave need is criminally responsible. Bernard Kouchner, the first President of the Medecens Sans Frontiers, who later became the Minister for Humanitarian Affairs in the French government has been particularly prominent advocate of this principle.

[24] In S/RES/761, the Security Council threatened to use 'other measures' against those who impede the delivery of humanitarian assistance. In subsequent resolutions, the Security Council reiterated that the delivery of humanitarian assistance was an integral part of its efforts to restore peace and security in Bosnia and Herzegovina (S/RES/770). In S/RES/781, the Council imposed a no-fly zone over Bosnia in response to continued obstruction of its humanitarian efforts.

[25] For an introduction to changes in international security after the end of the Cold War, see Chapter 10 in Baylis and Smith, 1997.

'being concerned with widening of people's choices' and the means by which 'people can exercise their choices safely and freely' (quoted in Evans, 2001: 1). After the end of the Cold War, security is increasingly defined not in terms of threats to the state but to 'identity' (Clark, 2001: 198). Clark describes this trend in the literature on security as 'individualisation of security' (Clark, 2001: 207). Claude Bruderlein acknowledges the primary role of the states in the maintenance of international peace and security, but at the same time he advocates the adoption of the concept of 'human security', which would allow NGOs and other non-state actors to play a more prominent role: 'Human security can serve as a platform to call on non-state actors, along with states, to help in dealing with the causes of global insecurity' (Bruderlein, 2001: 355). It is argued here that the establishment of the ICTY reflects these changes in the conception of security, because changes in the conception of threats to international security necessitated alternative ways of dealing with these new threats.

In 1995 the Commission for Global Governance published its report, *Our Global Neighbourhood*, in which it proposed to expand the provisions of the Genocide Convention and the UN Charter to allow non-state actors to bring 'threats to the security of people' to the Security Council's attention and allowing the Council to intervene in states' internal affairs in 'cases that constitute a violation of the security of people so gross and extreme that it requires an international response on humanitarian grounds' (Ottunu and Doyle, 1998: 136).

The increased prominence of non-violent means of conflict resolution also meant that international peace strategies are no longer implemented exclusively by states. The increasing acceptance of the non-state actors as elements of the new post-

Cold War international security system is reflected in the words of B.B. Ghali: 'Peace in the largest sense cannot be accomplished by the UN system alone or by governments alone. NGOs, academic institutions, parliamentarians, business and professional communities, the media and the public at large must all be involved' (Ghali, 1992: 42). The rise of the relative importance of NGOs in international relations, including international security, demonstrate the extent to which the notion of power has changed in the contemporary world to include the power of knowledge and information. Peter Willetts has argued that NGOs and 'epistemic communities' of international experts owe their increased influence in international politics to their moral integrity and professional competence (Willetts, 1996: 46- 48). Although NGOs do not take part in the decision-making process, their influence in international institutions is in agenda-setting and monitoring of the implementation of policies. Willetts has argued that NGOs have managed to establish their position not just in traditional areas of 'low politics' but increasingly they are playing an important part in the area of security (Willetts, 2000).

It has been argued in this chapter that the reactions of the international community towards the Yugoslav conflict, including the decision to establish the ICTY, resulted from the changes in the international security system in the 1990s. As Lori Damrosch has argued, one of the most important changes has been the broadening of the notion of 'threat to international peace' by the international community to include threats to its 'moral fabric', that is, to its values of democracy and human rights. In this context, the Yugoslav conflict 'shocked the conscience of the world'. Reflecting the normative change in international relations, and increased acceptance of democracy and human rights as universal values, the Security Council

has demonstrated increased willingness to treat intra-state conflicts as threat to international peace[26].

The argument presented in this section is based on the assumption that international security system includes not only material factors but ideas as well. Accordingly, it has been argued here that the response of the Security Council to the Yugoslav conflict, and in particular the decision to establish the ICTY, was influenced by the normative changes in the international security system in the 1990s. At the same time, the conflict in Yugoslavia and the ICTY were not just the outcome of these developments- they actively influenced these developments.

Developments within the International Legal System contributing to the Establishment of the ICTY

It has been argued throughout this thesis that the end of the Cold War- a turning point in the history of international relations, which had profound effect on the structure of the international security system- resulted in fundamental changes in the international legal system. Those changes were crucial in the creation of the ICTY. In fact, to understand the changes in the international legal system, which made the establishment of the ICTY possible, it is necessary to contextualise them within the changes within the international security system (see Mullerson, 1994, Beck et al, 1996, Abbot et al, 2000).

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[26] However, the Yugoslav conflict is not the first inter-state conflict where the Security Council intervened. In 1966, the situation in Southern Rhodesia was deemed as such (S/RES/232). In 1977, the apartheid in South Africa provoked Security Council to react (S/RES/418). It also reacted in 1961 over

Generally speaking, the social purpose of law is to regulate particular activities which are of interest to the society or the community affected by them. In practice, law seeks to encourage and facilitate the desirable ones and discourage and prevent the undesirable ones. Two principal targets of legal regulation have been violence and cooperation. Law has sought to prevent and limit violence and promote and facilitate cooperation. Historically, international law developed as an instrument of peace. The most fundamental purpose of international law has been, on the one hand, to put limits on the use of force in international relations, and on the other to facilitate international cooperation.

The development of IHL in the 1990s, and the establishment of the ICTY cannot be properly understood outside of the context of the developments within the international security system discussed in the previous section. The history of the disciplines of IR and International Law (IL) show that IL has consistently followed developments in IR. For example, in the nineteenth century it was generally accepted that war, as an instrument of foreign policy could not be prohibited because such a prohibition would infringe states' sovereignty. Laws of war, which later became known as IHL, were developed in order to limit the methods of warfare, not war as such. After the WW1, IR was concerned with finding out causes of war in order to eradicate war. This coincided with attempts on the legal front to legally proscribe war (Kellog- Briand Pact in 1928). After the WW2, IR became dominated by realism, which did not treat international law as particularly relevant factor affecting the behaviour of states. During the Cold War, international law was generally considered by IR scholars as an epiphenomenon, and IL scholars of were not given much

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situation in Kongo (Zaire)(S/RES/161), in 1991 over the Kurdish situation in Iraq (S/RES/688), and in 1992 in Somalia (S/RES/733).

credence by IR realists. After the end of the Cold War, however, scholars from the two disciplines found that their interests overlapped more closely. Two areas of collaboration are particularly noticeable- international military intervention and international judicial intervention[27].

Ann-Marie Slaughter Burley has argued that 'the resurgence of rules and procedures in the service of an organised international order is the legacy of all wars, hot or cold' (Slaughter Burley, 1993: 205). The question is whether the development of IHL in the 1990s represents the solidification of the new power relations established after the end of the Cold War, or whether IHL could play an autonomous transformative role and contribute to international peace and security and the rule of law in international relations. Analysing similar changes in the past, Martin Wight has argued that

> ...international law seems to follow an inverse movement to that of international politics. When diplomacy is violent and unscrupulous, international law soars into the region of natural law; when diplomacy acquires a certain habit of cooperation, international law crawls back into legal positivism (Wight and Butterfield, 1966: 29).

The idea of putting limits on war, and in particular the notion of civilian immunity, that is, the idea that civilian population and prisoners of war should be spared, was inspired by Rousseau's view on war, in his *Du Contract Sociale (1762)*:

> War then is not a relationship between man and man, not between state and state, in which private persons are enemies only accidentally not as men, not

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[27] See Abbot, 1989; Abbot et al, 2000; Arendt, Beck, et al, 1996; Beck et al. (eds.), 1996; Damrosch and Scheffer, 1991; Damrosch et al, 1993; Keohane, 1997; Scheffer, 1996; Slaughter- Burley, 1993;

even as citizens. But simply as soldiers, not as members of their fatherland, but as its defenders[28].

The development of IHL in the 1990s reflects, as it has always done, the tension between liberals of pacifist inclination and realist proponents of militarism. In other words, the development of IHL in the 1990s has reflected the tension between those who have wished to use it as an instrument of peace, and those who wished to use it as an instrument for the management of war. Brierly argues that the origin of the law of war is in the mutual recognition of both belligerents and neutrals that their actions and principles of humanity and military necessity affect one another. Referring to Grotius, Butterfield and Wight wrote: 'A remedy must be found for those that believe that in war nothing is lawful and those for whom all things are lawful in war' (Butterfield and Wight, 1966: 91).

The general idea of IHL is to put limits on the means and methods combatants use to achieve any given military objective. In the Yugoslav context, this emphasis on means rather than ends was reflected in the often repeated position within the international community that no outcome of the conflict achieved through illegitimate means would be recognised. In other words, the international community wanted to emphasise that it did not have stakes in the outcome of the conflict, as long as rules of warfare were respected by the warring sides. The principles underlying these rules include military necessity, that is, the principle that only minimum amount of force that is necessary for the attainment of military victory should be used. This principle is linked with the principle of humanity, because any excessive cruelty which is not

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Sewall and Keysen (eds.), 2000.
[28] Quoted in Best, 1983.

justified by military necessity is considered to be barbaric and thus prohibited. In the context of the Yugoslav conflict, the international community particularly insisted that the warring sides resist from deliberately targeting civilians. Simply speaking, the whole point of IHL is to minimise the 'human cost' of war.

These principles of IHL are directly relevant to the Yugoslav conflict. It has been argued that in the Yugoslav conflict civilians were not only accidentally killed[29] but deliberately targeted. It has been argued that the Serbian political and military leaders in particular have included killing of civilians into their overall strategy, and the Commission of Experts has been instrumental in making this claim. The so-called practice of 'ethnic cleansing' is said to have been used as a deliberate strategy in the Yugoslav conflict[30]. The Commission of Experts concluded that violations of IHL in the Yugoslav conflict were not an unintended consequence of the breakdown of law and order but part of a policy:

> ...the history of war clearly reveals that professional armies that are under effective command and control commit fewer violations than fighting units that are not properly trained in the law of armed conflict and are not under the effective command and control of commanding officers. But when military commanders order violations, permit them to happen, fail to take measures to prevent them, and fail to discipline, prosecute or punish violators, then the worst can be expected. Unfortunately, in this conflict, the worst did occur.

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[29] The military term of 'collateral damage' has often been used to describe non-intentional civilian deaths in wars.

[30] The Commission of Experts was established on 14 October 1992. It had 12 sessions and issued two interim reports on 9 February 1993 (S/25274) and 5 October 1993 (S/26545). It published it Final Report in 1994. It consisted of five members, experts in international law. Members of the Commission of Experts included Professor Fritz Kalshoven, Mr. William Fenwick, Judge Keba Mbaye, and Professor Torkel Opsahl. Professor Cherif Bassiouni was subsequently coopted as rapporteur on the gathering and analysis of facts. Subsequently, following the resignation of the Chairman due to the

This is the sad commentary on those who committed these crimes, but it is an even sadder one concerning the military and political leaders who ordered these crimes or made them possible. War is sufficiently inhumane without having it carried out in the most inhumane ways. Tragically, in this case, these inhumane ways were designed to serve a political purpose (Final Report of the Commission of Experts)

The significance of the work of the Commission of Experts in setting out the direction for the ICTY cannot be overestimated. Most of the indictments that the ICTY has issued are based on the investigations conducted by the Commission. More importantly, the Commission established the military and political objectives as well as the link between individual violations of IHL and policy objectives of the warring sides. It apportioned blame for the violations by arguing that there were 'quantitative and qualitative differences' between the warring sides. In doing this, the Commission used an unusual method to make a claim about the nature of the Yugoslav conflict without openly usurping the prerogatives of the Security Council. Despite the fact that it was outside of its remit, the Commission in effect established that the Yugoslav conflict was a case of aggression by Serbia. It has to be remembered that throughout the Yugoslav conflict all the resolutions of the Security Council were based on the 'threat to international peace and security' not 'actual breach of it'. In its Final Report, the Commission of Experts wrote:

The grave breaches of the Geneva Conventions and other violations of IHL occurring in this conflict are in part, the product of the military structure that results in a lack of effective command and control. The violations are also the

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funding problems and his disagreement with the working method, Cherif Bassiouni became the Chairman, having secured funding from the Soros Foundation (Higgins, 1993: 481).

result of the strategy and tactics applied by the warring factions (Final Report of the Commission of Experts)

These views of the Commission became widely shared among non-state actors, particularly among scholars and human rights activists. Similarly to the findings of the Commission of Experts, a report on the prima facia case for holding Slobodan Milosevic individually responsible for violations of IHL committed by Serbian forces published by two of the most influential supporters of the ICTY in the US, Paul Williams and Norman Cigar of the Balkans Institute, argued that 'the atrocities committed by Serbian forces were part of a planned, systematic and organised campaign that constituted the central means of pursuing an official goal of territorial expansion and its corollary of making areas 'ethnically pure'[31].

The interpretation of the Yugoslav conflict in terms of violations of massive and systematic violations of human rights and crimes against humanity[32], the international community sought to assert the grounds for its judicial intervention on the basis of universal jurisdiction. The notion of universal jurisdiction over international crimes is based on the claim that the nature of those offences is so grave to as constitute an offence *hostis humani generis* (an offence against all mankind) (Wedgwood in Sewall and Keysen, 2000). International crimes have been defined as 'acts which damage vital international interests; they impair the foundations and

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[31] Prima facia case for the indictment of Slobodan Milosevic, available at www.nesl.edu/centre/balkan4.htm.

[32] Definitions of crimes against humanity differ. According to Nuremberg judgements, crimes against humanity include murder, extermination, enslavement, deportation, and other inhumane acts against civilian populations before or during the war. The ICTY added to this lost torture and rape, and the experience in Latin America included forced disappearance and apartheid in South Africa. The defining characteristic of CAH is their widespread or systematic nature so that not every murder is characterised as a CAH. CAH also entail universal jurisdiction, which means that jurisdiction can be invoked regardless of whether they took place during wartime or peacetime.

security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations'[33]. The significance of defining certain crimes international is that it gives the right to third states or groups of states, like the UN, to intervene in the internal affairs of those states on whose territory crimes took place if the state is unable or unwilling to prosecute those crimes itself (Meron, 1995: 576).

It is important to bear in mind that the impact of international prosecution of violations of IHL is not limited only to the people affected by the fighting. By prosecuting international crimes the international community constitutes itself. In the case of former Yugoslavia, the purpose of the policy of prosecuting violations of IHL was not just limited to the peace process in the former Yugoslavia- the purpose was also to create an international consensus around the values that the international community attempted to protect there and elsewhere. At the 1993 UN World Conference on Human Rights in Vienna, it was agreed that the protection and promotion of human rights and fundamental freedoms was 'the first responsibility of governments' and a 'legitimate concern of the international community'. What this means is that human rights, and not state security or any other value, are the highest value to be protected. At the same time, international community is entitled to violate any state's sovereignty in order to prevent and stop violations of human rights.

It is difficult to see how the phenomenal development of IHL in the 1990s would have occurred without the human rights revolution, which provided the critical momentum broadening the support for IHL among human right activists. For many

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[33] Israel vs. Eichman, 36 International Law Reports 277.

years after the Nuremberg trials, and after the unsuccessful attempt to establish an international criminal court in the 1950s, there was no development of IHL. An important reason for the lack of support for IHL in this period was that the establishment of the UN and raised great hopes among pacifists that it might eradicate war forever. In 1949 the ILC concluded that, because IHL is premised on the acceptance that war is inevitable, codification of IHL would damage the credibility of the Security Council in maintaining international peace and security[34].

In 1960s and 1970s the development of IHL came close to stagnation, with only the ICRC and the military being interested in it. Many human right activists considered it too complicated and too technical. The renewal of interest in IHL was assisted by the rapid development of human rights, especially after the Tehran Conference on Human Rights in 1968[35]. Gerald Draper wrote in 1972 that the progress in the law of armed conflict 'has come perilously close to stagnation before the impact of the movement for a regime of human rights was brought to bear'. (quoted in Gordon, 1999: xiii).

It is no coincidence that *jus in bello*, rather than *jus ad bellum* would be developed in the age of new wars, because the literature on new wars is not concerned with the causes of these wars but with the way they are conducted. In other words, the focus of attention is not on the military objectives of the warring parties, and most authors argue that they often have no discernible military objectives drawing a parallel with 'wars of savagers' of the past, but on the means they use in attaining their objectives.

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[34] ILC Annual Report, 1949, p. 281.

In the post-Cold War period, IHL was first invoked in relation to the Iraqi occupation of Kuwait in 1991, when it warned Iraq that it would be held responsible for violations of Geneva Conventions[36]. It is noticeable that SC only mentioned the responsibility of the state of Iraq, not mentioning personal responsibility of Iraqi leaders. The language of the SC resolutions in subsequent resolutions related to violations of IHL in Yugoslavia became much more precisely directed at individual leaders, in particular the military and political leaders of the Bosnian Serbs.

Under traditional international law, individuals could not be held criminally responsible. The reason for this was in the argument that it would violate the principle of sovereign immunity because it was accepted that individuals acting in pursuit of superior order could not be held personally responsible. At Nuremberg the precedent was that it was the first time individuals were held personally responsible for violations of international law. At Nuremberg the principle was established that 'the fact that a person acted pursuant to order of his Government or of any superior does not relieve him from responsibility under international law, provided that moral choice was in fact possible to him' (Bourke, 1999: 178).

The development of international criminal law and the notion of individual criminal responsibility in the 1990s reflects the previously discussed shift from structures to agency in causal explanations of the causes of war, and the re-conceptualisation of war in terms of massive or systematic violations of human rights. In recent years, it has become increasingly accepted that the causes of the violations

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[35] Resolution XXIII, Human Rights in Armed Conflict, adopted by the International Conference on Human Rights, Tehran, 12 May 1968.

of human rights and IHL can be attributed to wilful acts of so-called evil, brutal, despotic, and cruel individuals, examplified in the form of Saddam Hussein, Antonio Norriega, Slobodan Milosevic and others. Structural causes have been almost completely ignored in recent literature because 'structures are not physical persons with intentions and capabilities, nor can they be arrested, put on trial, and punished for their crimes' (Evans, 2001: 28).

Identification of the causes of conflict at the level of the individual plays an important part in peace-building strategies in post-conflict societies premised on the theories of cycles of violence[37]. Judge Antonio Cassese summarises the intended role of the ICTY in helping to restore peace and security in the territory of the former Yugoslavia:

> If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, than whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, "collective responsibility", a primitive and archaic concept- will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.[38]

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[36] S/RES/666, S/RES/670
[37] See Burton, 1997; Keane, 1996 and Pupavac, 2001.
[38] First Annual Report to the GA and ICTY Yearbook, 1994:87.

Prosecution of individuals responsible for serious violations of IHL is linked to the strategy of replacing revenge with due legal process and thus breaking the cycle of violence. The representative of the Secretary General stated at the first meeting of the first session of the ICTY that aim of the ICTY is 'to break the seemingly endless cycle of ethnic violence and retribution by providing for prosecution and judgement under the rule of law and thereby contributing to the restoration and maintenance of peace' (ICTY Yearbook, 1994: 220).

In analysing how and why the international community used IHL in the management of the Yugoslav conflict, it needs to be remembered that the establishment of the ICTY is just one of the strategies inspired by IHL. Other important policy based in IHL was the policy of 'safe areas', which illustrates well the ambiguity of humanitarian and strategic motives within the international community during its intervention in the Yugoslav conflict[39].

The policy of protected zones in Bosnia was different in two important respects. Firstly, the international community thought that the responsibility for the protected zones could not be left to the warring parties, which meant that the policy required international presence. Also, the whole policy was used to affect the course of the war. The initiative for the establishment of protected zones in Bosnia came from the ICRC, which made the proposal to the SC (S/RES/787) on 16 November 1992. However, there was tension between the ICRC and the SC in that the ICRC

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[39] In the Yugoslav conflict is that in the initial stages of the war the agent of IHL was exclusively the ICRC. In 1991, the ICRC helped the warring sides in Croatia to agree on the establishment of protected or demilitarised areas, which included hospitals in Osijek and Vukovar, and the Franciscan monastery in Dubrovnik (Biermann, 1998: 263). Despite the agreement, the warring sides continued to argue about the implementation of the agreement. The key was the claim of the Yugoslav People's Army (JNA) that Croatian forces were routinely deployed within hospitals in order to provoke retaliation.

wanted the protected zones to be quite small. At the same time, both the ICRC and the SC did not want to be seen to be appeasing the policy of 'ethnic cleansing'. Normally, the ICRC would be concerned with protection of population not territory, but because of the rhetorical commitment of the international community to the territorial integrity of Bosnia, they committed themselves to preserve its territory at the expense of the population. In doing this, they assisted not the civilian population which sought refuge but the government of Bosnia which wanted to prevent the population from leaving these territories. In its pursuit of its strategic policy objectives of keeping the Muslim civilian population on the spot, the Bosnian government relied on blackmail, accusing the international community that it was complicit in the policy of 'ethnic cleansing'. In 1993, the Bosnian government stopped evacuation of civilians in the safe area of Srebrenica for this reason. This is evidence of politicisation of the ICRC and the abandonment of their fundamental principle of neutrality. However, it should be noted that the initiative for this policy came from the Security Council, which by this time assumed a monopoly on the application of IHL in the conflict in the former Yugoslavia. Jean-Philipe Lavayer points out:

> First of all, the purpose of the Security Council's 'Safe Areas' was intended to protect minorities against the 'ethnic cleansing' policy. It was not just a matter of offering protection against the effects of fighting, as in the case of zones under special protection provided for in IHL; the aim was to enable the minorities concerned to stay on the spot. This was an entirely strategic objective. In establishing those 'Safe Areas' the Security Council was attempting to influence the very course of the conflict, and hence directly involved the UN in the armed conflict[40]

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[40] Bierman and Vadset, 1998: 272.

The policy of safe area deserves special attention in the analysis of the humanitarian intervention[41] in the Yugoslav conflict because it demonstrates how humanitarian principles were set aside in pursuit of less noble reasons. Although reluctantly, the UNHCR agreed to this policy in clear violation of the principle of civilian immunity and the right of non-combatants to leave the area of armed conflict. The SC also allowed Muslim government forces to remain within safe areas in clear violation of the requirement for their demilitarisation.

In retrospect, it can be said that the establishment of the ICTY, as well as the overall international intervention in the former Yugoslavia, has reflected the changes that have taken place in the international security and the international legal system after the end of the Cold War. At the same time, the conflict has provoked a lot of discussion among IR and IL scholars in relation to the reasons and forms of international intervention. Some have used the Yugoslav conflict to argue for a major institutional reform of the international security and legal systems, amounting to a complete transformation of principles of which they have been created. Knudsen and Jacobsen have proposed that 'fundamental human rights', concerning primarily the right to life, should be dealt with by the UN Security Council, whereas 'ordinary human rights', referring to social and economic rights, would be dealt with by the UN General Assembly (GA) (Jacobsen and Knudsen, 1999).

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[41] The The Danish Institute of International Affairs defines humanitarian intervention as 'coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation of the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law' (1999).

The establishment of the ICTY in 1993 represented the founding stone in the development of international criminal justice system in the 1990s. In his address to the judges of the ICTY on 21 January 1994 the UN Secretary General Boutros Boutros Ghali emphasised that the importance of the establishment of the ICTY was in that 'from now on war crimes and systematic human rights violations constitute a real threat to international peace and should be treated as such' (ICTY Yearbook, 1994: 149).

In analysing the significance of the establishment of the ICTY and its potential to contribute to the restoration or peace and security in the former Yugoslavia, particular attention needs to be given to the way it came to be created, because many of the problems that the ICTY has faced can be attributed to the way it was established. As the UN Secretary General Boutros Boutros Ghali explains:

The approach which in the normal course of events would be followed in establishing an international tribunal would be the conclusion of a treaty by which the member states would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g. the General Assembly or a specially convened conference), following which it would be opened for signing and ratification. Such an approach would have the advantage of allowing for a detailed examination and elaboration of all issues pertaining to the establishment of the international tribunal. It would also allow the states participating in the negotiation and conclusion of the treaty to fully exercise their sovereign will in particular whether they wish to become parties to the treaty or not. (UN Secretary General's Report no. S/25704 (section 18) of 3 May 1993)

The crucial element in the process of internationalisation of the Yugoslav conflict that particularly contributed to its criminalisation and the establishment of the ICTY was its comparison with the Second World War and Nazism. This comparison was evident in the media reporting and was adopted by most non-state actors, who sought to shame states into military intervention. Speaking at the opening of the Holocaust Museum in Washington in 1994, Madeleine Albright expressed her views on the nature of the Yugoslav conflict, as well as the nature of the violations of IHL committed in the conflict: 'The war, itself, is the result of the premeditated armed aggression. Bosnian Serb leaders have sought a "final solution" of extermination or expulsion to the problem of non-Serb populations under their control' (quoted in Bass, 2000: 262).

It will be demonstrated in Chapter 5 that the use of this emotive language by Madeleine Albright was to mobilise international community in support of a permanent international criminal court. The tragedy for the people of the former Yugoslavia was that this aim took precedence over the best course of action to bring peace to their country. Susan Woodward points out to the nature of the debate surrounding the Yugoslav conflict: '...those who propose to analyse (instead of taking sides) are accused of assigning moral equivalence between victims and aggressors' (Woodward, 1995: 3), adding that 'taking sides made matters worse for the most vulnerable in the former Yugoslavia, inhibiting policy that might have protected them' (Ibid: 4).

The analysis of the reasons for which the ICTY was established is important for the subsequent discussion of its effectiveness because the expectations from it are

largely based on the reasons for which it was established in the first place. Any such analysis needs to take into account the dual purpose with which it was established-one being confined to the territory of the former Yugoslavia and the other beyond it. On the one hand, and given the fact that it was established by the Security Council, the primary objective of the ICTY is supposed to be the restoration of peace and security in the territory of the former Yugoslavia. On the other hand, it is supposed to contribute to the development of the rule of law in international relations, particularly in greater respect for IHL in new wars. Speaking at the opening of the Holocaust Museum in Washington in 1997, the 'mother of the Tribunal', Albright said: 'It [ICTY] will establish a model for resolving ethnic differences, by the force of law rather than the law of force' (quoted in Bass, 2000: 284). The assessment of the effectiveness of the ICTY in helping to restore peace and security in the former Yugoslavia will be discussed in Chapter 4 and its effectiveness in terms of development of IHL will be further discussed in Chapter 5.

Chapter 4

Effectiveness of the ICTY in Restoring Peace and Security in the Former Yugoslavia

Introduction

This chapter assesses the effectiveness of the ICTY in restoring and maintaining international peace and security in the territory of the former Yugoslavia in the period between 1993 and 2002. The aim of this chapter is to analyse the contribution of the ICTY to the restoration of peace and security in the former Yugoslavia in this period and to use the results as a basis for critical re-examination of the expectations about the ICTY's potential to promote stable and just peace in the former Yugoslavia in the future. This is important firstly, for the people living in the territory of the former Yugoslavia and secondly, for the international community which established the ICTY. Ultimately, the effectiveness of the ICTY will be best judged by the people whose lives have been and will be affected most by the ICTY, the people living in the territory of the former Yugoslavia. Richard Goldstone, the first Chief Prosecutor of the ICTY said that 'the creation of the ICTY had raised expectations of the victims and unless the ICTY does not meet those expectations it will have caused more harm than good' (Goldstone, 1996: 486). For the international community, evidence of the effectiveness of the ICTY is important because of the emerging international criminal justice system and the plans to use the International

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Criminal Court (ICC) as an instrument of international judicial intervention in other conflicts[1].

The aim of this chapter is to interrogate the growing literature[2] on the role of justice in the aftermath of widespread and systematic violations of human rights and international humanitarian law (IHL) and in particular focus on the discussion on the effectiveness of prosecution of individuals responsible for those violations within the context of peace-building strategies. The existing literature tends to take for granted the effectiveness of these strategies. There is strikingly little empirical research being produced to evaluate and affirm the effectiveness of these strategies. Wishful thinking is not an adequate substitute for the absence of empirical evidence[3]. As Laurel Fletcher and Harvey Weinstein argue:

...their [international tribunals'] purported efficacy largely has been imported uncritically from the experience of emerging democracies over the last twenty years. The result is that the theoretical foundation for international criminal trials borrows heavily from writings developed in a political and legal context in which such proceedings were mere aspirations and with no empirical data to substantiate the purported benefits of international trials. (Fletcher and Weinstein, 2002: 584).

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[1] According to a draft plan presented to President G.W. Bush, prosecution of Saddam Hussein's top lieutenants as war criminals is an important part of the US strategy to topple his regime (The Times, 07/01/03).

[2] See Buruma, 1995; Douglas, 2001; Hayner, 2001; Ignatieff, 1997; Osiel, 1997; Hesse and Post, 1999; Neier, 1997; Teitel, 2000; Minear, 1998. Although they use a variety of very different approaches ranging from international law to sociology, the common concern of all these studies is how a society should confront its violent past.

[3] Confronted with the scepticism of Judge Robinson of the ICTY who asked for 'scientific' evidence that Biljana Plavsic's guilty plea to charges of crimes against humanity will contribute to reconciliation in Bosnia, which would merit leniency in sentencing her, the expert witness Alex Boraine could not offer any.

The analytical model on which the international judicial intervention in the former Yugoslavia is premised is inappropriate partly because of the inherently contradictory mixture of realist[4] and idealist[5] assumptions and objectives that it contains. Instead of questioning and exposing it, the prevailing analytical model the ICTY reinforced the simplistic and distorted picture of the conflict created by the media and NGOs. It will be argued in this chapter that the liberal media and NGO supported the ICTY primarily because they saw it as a stepping stone towards the establishment of an international criminal court (ICC). In such an atmosphere, any criticism of the ICTY and its operation was seen as detrimental to the idea of an ICC. It will be argued in this chapter that although the lack of criticism on the part of the 'global civil society' enabled the ICTY to grow as an institution, the long-term effect of the ICTY on the ICC and the rule of law in international relations will be negative.

Although, arguably, the motives of the governments of the most influential states, and in particular of the United States, and NGOs in supporting the ICTY and its role in resolving the Yugoslav conflict were different, the consequence of this collusion between governmental and non-governmental sector was that the ICTY remained outside of the scope of legitimate criticism. In addition to this and in line with the argument advanced in Chapter 2, the international community failed to recognise how the warring sides used the ICTY to pursue their own political and military objectives, both during and after the conflict. For this reason, instead of

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[4] In this context, the proponents of the realist view were the officials of the US government who took an active part in the establishment and management of the ICTY. The significant role of US officials seconded to the ICTY, particularly military lawyers from the Department of Defence, may be noted.

contributing to peace and reconciliation, the ICTY may end up perpetuating conflict and divisions. Canadian law professor Christopher Black, who is one of the most fervent opponents of the ICTY has contended that 'instead of resolving conflict as it claims, it is used to justify conflict, instead of creating peace, it is used to justify war and is therefore an instrument of war'[6].

idea of peace and justice

The argument is structured as follows: the first section deals with the ideas of peace and justice, and in particular with the idea of 'victims' justice', which informs the international judicial intervention in the former Yugoslavia. This section is aimed at providing an analytical framework for understanding the criteria for assessing the effectiveness of the ICTY. Cooperation of state and non-state actors with the ICTY is identified as being critical for the effectiveness of the ICTY. The second section gives an empirical account of 'victims' justice' in practice by following the cooperation of state and non-state actors, both within and outside the territory of the former Yugoslavia with the ICTY. The last section revisits some of the issues raised in the first section in the light of the empirical evidence presented in the second section.

Peace and/or Justice?

The belief that prosecuting individuals responsible for the serious violations of IHL in the territory of the former Yugoslavia could significantly contribute to the restoration of peace and security there testifies about the extent to which the prevailing international opinion about ways of war and peace and justice in

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[5] Idealists include the supporters of the ICTY whose ideals were not matched by resources at their own

international relations has changed in the period after the end of the Cold War. For this reason, it is necessary to briefly examine this shift.

The discussion about the relationship between peace and justice in international relations has a long tradition. Those who argue that the primary value to be pursued in international relations is peace and security are associated with the realist school of thought, while those who argue that justice is the purpose of all politics, including international, are usually associated with the liberal camp[7]. In general, the role of justice in international relations is at the core of normative approaches to IR[8]. For traditional Realists, preservation of peace and pursuit of justice are mutually exclusive objectives in foreign policy. In other words, peace and justice cannot be pursued simultaneously without detrimentally affecting each other. In this tradition Adam Smith argued that the state was concerned externally with defence and internally with justice (Waltz, 1959). Likewise in his classic work, Hedley Bull argued that preservation of international order takes priority over international justice, saying that '...to pursue the idea of world justice in the context of the system and society of states is to enter into conflict with the devices through which order is at present maintained' (Bull, 1977: 88).

Broadly defined, the objective of the international community acting through the ICTY in relation to former Yugoslavia was to help create a just peace. This policy

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disposal.

[6] Available at www.icdsm.org.

[7] In the post-Cold War era, it has become fashionable to label oneself coining the two terms together. The former US Secretary of State Madeleine Albright described herself as 'pragmatic idealist'. British IR scholar Chris Brown advocates 'utopian realism'.

[8] See, for example, Beitz, 1979; Brown, 1992.

was justified on the grounds that any peace agreement that is not just cannot last. On 24 November 1995, the Chief Prosecutor and the President of the ICTY issued a joint statement:

> 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 had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand[9].

The ICTY statement may be contrasted to the Realist position expressed by the Conservative Foreign Office Minister Douglas Hogg. Expressing his doubts about the wisdom of prosecuting political and military leaders while trying to achieve a negotiated settlement with them, he said in February 1993: 'If the authority - the responsibility for those crimes goes as high as ... I expect, we must ask ourselves what is the priority: is it to bring people to trial or is it to make peace?' (quoted in Observer, 15/03/02). Opposing Hoggs dichotomy, Richard Goldstone argued:

> ...if one is talking about short-term cease-fires, short-term cessation of hostilities, it could be that the investigation of war crimes is a nuisance. But if one is concerned with real peace, enduring and effective peace, if one is talking about proper reconciliation, then in my respectful opinion, there is and can be no contradiction between peace and justice (quoted in Williams and Scharf, 2002:32).

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[9] Available at www.un.org/icty.

As above quotations reveal, the support for the ICTY within the international community was not unanimous. Strong support was particularly evident among US political leaders, academics and journalists. David Scheffer, one of the chief architects of the policy of international judicial intervention said: 'We are finally learning that the pursuit of peace can coexist with the search for justice and that the pursuit of justice is often a prerequisite for lasting peace' (Scheffer, 1996: 34). Speaking at the signing of the Dayton Peace Accords which formally ended the conflict in Bosnia and referring to the importance of the ICTY in the peace-building process, President Clinton said: 'We have the obligation to carry forward the lesson of Nuremberg... Those accused of war crimes, crimes against humanity and genocide must be brought to justice... There must be peace for justice to prevail, but there must be justice when peace prevails.' (Ibid: 42). Secretary of State Madeline Albright went even further by saying: 'We believe that justice is a parent to peace' (Bass, 2000: 284). Journalist Ed Vulliamy joined the chorus of those rejecting a negotiated settlement: 'Justice being done and being seen to be done is the difference between a lasting peace and an interval between hostilities' (Ed Vulliamy, quoted in Williams and Scharf, 2002: 12).

The notion of justice featured prominently in the negotiations leading to the signing of the Dayton Accords, which formally ended the conflict in Bosnia. At Dayton it was agreed that those indicted by the ICTY could not stand for elected office or hold any other public office once the agreement was signed. The first provision in the General Framework Agreement concerning the ICTY is the obligation of the parties to 'cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law' (Article IX). The

second was incorporated into the Bosnian constitution and stipulated that 'no person who is serving a sentence imposed by the ICTY and no person who is under indictment by the ICTY may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina'[10] (Article IX of Annex 4 to the General Framework Agreement). Also, the Rambuillet agreement, which failed to prevent war over Kosovo included provisions relating to war crimes (a ban on those indicted to hold public office; cooperation in investigation and prosecution of violations of IHL; providing access to international experts and ICTY investigators; ban on the parties to grant amnesty to those indicted' (Williams and Scharf, 2002: 196-7).

Liberal Peace

In order to understand the conceptual framework that informs the belief that prosecution of individuals responsible for the serious violations of IHL could contribute to the restoration of peace and security in the former Yugoslavia, it is necessary to discuss the notion of liberal, positive peace, as opposed to primitive, negative peace. Cherif Bassiouni wrote:

> Peace is not merely the absence of armed conflict. It is the restoration of justice, and the resort to the rule of law to mediate and resolve inter-social and inter-personal conflicts...To sacrifice justice and accountability for the

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[10] Article IX of Annex 4 to the General Framework Agreement

immediacy of realpolitik and accommodation is to choose expedience over lasting goals and more enduring values (Bassiouni, 2000: 410)[11].

Just pe·.·

Traditionally, the idea of just peace is associated with liberal approaches to international relations. Lord Hankey argued that one of the main aims of any war should be to achieve durable and just peace because '...after a war we have sooner or later to live with our enemies in enmity' (quoted in Pal, 1951: 231). The idea of liberal peace is that peace that is not just cannot last, or in other words, peace that is imposed by force and not willingly accepted will not last. John Rawls, 'the most illustrious representative'[12] of liberal peace theory argues that there are two kinds of stability (peace): stability for the right reason, and stability as a balance of forces (Rawls, 1999). The idea of liberal peace has been adopted by the UN, which is evident in the former UN Secretary General B.B. Ghali's *Agenda for Peace* where he proposed the abandonment of the traditional approach of the UN to international security based on the concept of peace-keeping and instead proposed adoption of a more comprehensive approach involving preventive diplomacy, peace enforcement and peace building. The significance of the concept of peace building is that it opens the door for non-military forms of international intervention, including international judicial intervention. It also enabled non-state actors to play an increasingly

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[11] Cherif Bassiouni was a member and later on, after the resignation of Fritz Kalshoven, the Chairman of the Commission of Experts, which recommended to the Security Council the establishment of the ICTY.

[12] Teson, 1997: 105.

prominent in international security, an area traditionally exclusively reserved for states[13].

One of the cornerstones of the liberal theory of international relations is the belief in the persuasive power of reason and truth. This belief inspired the Chief Prosecutor at Nuremberg, Robert Jackson, to say: 'That four great nations,..., stay the hand of vengeance and voluntary submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason' (Falk and Kolko, 1971: 78). In this context, if the ICTY is to contribute to reconciliation and thus restoration of peace and security in the territory of the former Yugoslavia, it has to offer a version of truth that will be accepted by all parties in the Yugoslav conflict.

Truth and Justice

If the solution to the Yugoslav conflict is to be based on the liberal notion of peace, and if the ICTY is to contribute to reconciliation and thus restoration of peace and security in the territory of the former Yugoslavia, it has to establish an authoritative account of the causes and conduct of the Yugoslav conflict. In other words, it needs to offer a version of truth that will be accepted by all parties in the Yugoslav conflict.

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[13] The rise of role of peace-making as conduit for justice parallels the demise in development policy, understood as material advancement, for justice. Mark Duffield has characterised the merger as securitisation of development (Duffield, 2001).

In its Report, the Commission of Experts argued that 'peace in the future requires justice, and that justice starts with establishing the truth.' Generally speaking, to establish the truth about violations of IHL during the conflict in the former Yugoslavia means to answer the question who did what to whom and why[14]. As argued in Chapter 2, establishing truth about any war is notoriously difficult. The ICTY has broke new grounds in relying on experts, including statisticians, to establish the truth about the Yugoslav conflict, and in particular in apportioning blame to different warring sides. Patrick Ball, who appeared as an expert witness in the Milosevic trial writes in his study of the causes for the flight of Albanians from Kosovo:

This study breaks new ground for human rights analysis by using objective administrative data to evaluate - to corroborate or to refute - the claims made by witnesses and survivors, as well as to compare the claims of the various political actors involved in the conflict. The goal is to establish a solid empirical basis for legal, political, academic, journalistic, and other analyses of the mass migration of the Kosovo Albanians in this period (Ball, 1999).

Broadly speaking, acting through the ICTY, the international community aspired to use the rationality of international principles, norms and procedures as a

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[14] See Ball. P.Spirer, H.F. and Spirer, L.: Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis, intended to serve as a 'manual' for human rights NGOs collecting information about such violations; Ball, P.(1996):Who Did What to Whom? Planning and Implementing a Large Scale Human Rights Data Project. This model was used in the South African Truth and Reconciliation Commission (TRC): Ball, P.: Policy or Panic? The Flight of Ethnic Albanians from Kosovo, March - May 1999. All are available at http://hrdata.aaas.org/kosovo/icty_report.pdf). It is interesting that BBC journalist Martin Bell uses the same words: 'What we should be doing, or trying to do, is to show the situation on the ground, who is doing what to whom, and with what effect, and why' (Bell, 1996:142).

means for resolving a security problem. The assumption underpinning the peace-building role of the ICTY was that the breakdown of mutual trust between the people of the former Yugoslavia could be gradually restored if they placed their trust in the ICTY. Over time, the hope was that the 'culture of violence' would be replaced with 'culture of peace'. Eventually, new institutions facilitating continuing development of mutual trust would take over and make the ICTY redundant. Speaking on the wider implications of the ICTY, former US Secretary of State Madeleine Albright said: 'It will establish a model for resolving ethnic differences by the force of law rather than the law of force.' (Ibid: 284).

Prosecution vs. amnesty

In deciding to set up the ICTY, the UN Security Council preferred one course of action, prosecution, over another, amnesty[15], in dealing with the issue of violations of IHL. As argued in Chapter 3, the international community wanted to demonstrate that the crimes committed in the conflict in the former Yugoslavia were of such gravity that amnesty could be interpreted not just as an insult to the victims whose suffering would not be recognised but would corrode the fabric of international community based on human rights and democracy and ultimately seriously undermine the stability of international security system.

Arguably, the same goals can be pursued by using different means. Restoration or creation of democracy based on the rule of law and human rights can

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[15] See Haynor, 2000 for a comparative study of 21 truth and reconciliation commissions world-wide.

be achieved either through amnesty or prosecution. In analysing the consequences of the preference of prosecution over amnesty, it needs to be remembered that the two concepts are based on very different ontological, epistemological and methodological assumptions about the nature of truth and methods of attaining it. It has been argued that establishing truth about the causes and conduct of the Yugoslav conflict may not necessarily lead to reconciliation. Muller argues: 'Rather than aiming for some elusive thick social consensus in one narrative of the past is enthroned, arguing about the past within democratic parameters and on the basis of what has been called an 'economy of moral disagreement' might itself be a means of fostering social cohesion (Muller, 2002: 33).

In deciding to establish the ICTY, the international community rejected the idea used in other conflict situations to achieve reconciliation. Among other places, amnesties for crimes were given in Argentina, Chile, El Salvador, Guatemala, Haiti, Sierra Leone, South Africa, and Uruguay. In all these cases amnesties were given as a means of restoring peace and democratic government. Speaking at the Holocaust Museum in Washington in April 1994, Madeleine Albright[16] said: 'We oppose amnesty for the architects of ethnic cleansing. We believe that establishing the truth about what happened in Bosnia is essential to- not an obstacle to - national reconciliation. And we know that the Tribunal is no substitute for other actions to discourage further aggression and encourage peace' (quoted in Bass, 2000:263).

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[16] Informally known as 'the mother of all tribunals' (Bass, 2000: 262).

There is no single best way for societies emerging from crisis and conflict to address past abuses (Kritz, 1995). Mozambique, for example, adopted a policy of amnesty rejecting any policy to redress the past. In Bosnia, refugees have been returning to their homes, which testifies that it is possible to live side by side despite their wartime experience. However, it appears that returning refugees are very reluctant to talk publicly about the war, convinced that any such discussion will lead to conflict. The reason some refugees give for burying their memories is that they feel that their grievances have not been adequately been dealt with by the existing justice mechanisms among which the ICTY occupies the central position[17].

Truth, Reconciliation and History Writing

International judicial intervention, and the ICTY as an expression of that idea in practice, is based on the notion of 'victims' justice' as opposed to 'victors' justice'. The alleged difference between the two is that the former is motivated by humanitarian reasons and is ambivalent towards the intentions and capabilities of the warring sides. The first President of the ICTY, Antonio Cassesse, wrote: 'This is a truly international institution. It is an expression of the entire world community, not the long arm of our powerful victors' (ICTY Yearbook, 1994: 136-7).

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[17] Interviews with Muslim refugees returning to their homes in a village near Teslic in Repubika Srpska, May 2002 and with Serbian refugees returning to Croatia, May 2003.

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The notion of 'victims' justice' is closely liked to the insistence on truth-based justice for victims. Cherif Bassiouni argued that it is the victims who deserve to know the truth:

> Truth is... an imperative, not an option to be displaced by political convenience because, in the final analysis, there truly cannot be peace (meaning reconciliation and the prevention of future conflict arising from previous conflictual episodes) without justice (meaning, at the very least, a comprehensive expose of what happened, how, why, and what the sources of responsibility are) (Bassiouni, 1996: 24)

The supporters of the ICTY argue that creating a credible account of international crimes 'prevents history from being lost or re-written, and allows a society to learn from its past in order to prevent a repetition of such violence in the future' (Williams and Scharf, 2002: 121). The integrity of the legal proceedings and the respect for due process will determine the legitimacy and thus the effectiveness of the ICTY. The Deputy Prosecutor Graham Blewitt said that 'it would be much more difficult to dismiss live testimony given under oath than simple newspaper reports' (Ibid: 53). George Santayana said that a society that has not learned the lessons of the past is condemned to repeat its mistakes. In order to avoid this, argument goes, establishment of a historical record is necessary (Ibid: 53). Michael Ignatieff argues that 'great virtue of legal proceedings... [is] that their evidentiary rules confer legitimacy on otherwise contestable facts. In this sense, war crimes trials make it more difficult for societies to take refuge in denial - the trials do assist the process of uncovering the truth' (Ibid: 53).

At the moment, all sides have their truths that are mutually incompatible. These truths were established during the war and propagated and supported by the institutions that emerged after the war ended. It is these institutions and not just individuals who are responsible for violations of IHL that are resisting any move towards establishing a version of truth acceptable to all sides. The thorniest issue for all attempts to create a version of truth acceptable to all sides is the question of which side was acting in self-defence and which side was the aggressor. The second issue preventing the consensus on who did what to whom and why is the issue concerning the nature of violations of IHL, that is, to what extent they were systematic and to what extent they were acts of individuals. The third issue is the issue concerning the notion of command responsibility[18], that is, should the notion of command responsibility for violations of IHL be applied to armies acting in self-defence.

According to Bass and Goldstone, questioning the truth established by the ICTY must be prevented for moral and practical reasons because 'the denial of atrocity is closely linked to committing of atrocity' and because 'distorted memories can lay the groundwork for a fresh outbreak of violence.' (Bass and Goldstone in Keysen and Sewall, 2000: 54). In Bosnia a law has been drafted to make denial of the dominant truth about the conflict a criminal offence. Expressing his support for the objective of the ICTY to establish an authoritative historical record, Alija Izetbegovic, the wartime leader of Bosnian Muslims, said: 'This is the 21st century and we want

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[18] The notion of 'command responsibility' is controversial in legal theory and practice because it is contrary to the central tenet of the criminal law that everybody should be held responsible for their own actions. Nevertheless, the notion was used at the Tokyo Trials after the end of the Second World War.

the history to be written on the basis of arguments and facts, and in this case it means on the basis of a court judgement' (Oslobodjenje, 10/06/2002). As David Campbell wrote: 'Indeed, the greatest contribution of the war crimes trials may come from the construction of an archive and the furtherance of historical memory they aid rather than from the trial and punishment of certain individuals they seek' (Campbell,1998: 142).

Establishing Individual Criminal Responsibility

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced (Nuremberg judgement quoted in Pal, 1951:161).

The legacy of the Nuremberg Trials was tarnished by accusations that it was an exercise of 'victors' justice'. As demonstrated in Chapter 3, the establishment of the ICTY and the Commission of Experts before it was in many way reminiscent of the establishment of the Nuremberg Tribunal. However, whereas at the Nuremberg Trials the purpose of holding individuals responsible for the horrendous crimes perpetrated by the Nazis was to impose a punishment which corresponded to the gravity of their crimes, the aspirations of the advocates of the ICTY were more ambitions in that they argued that the punishment of individuals responsible for the violations of IHL would contribute to reconciliation among the people of the former Yugoslavia. In summary, whereas the Nuremberg espoused the notion of retributive justice, the ICTY claims to

be informed by a notion of restorative justice. The idea behind this concept is that the victims' suffering needs to recognised thus restoring their dignity. At the same time, the wrongdoing of those responsible for their suffering must be publicly condemned.

As mentioned above, one of the objectives of 'victims' justice' is to individualise responsibility for violations of IHL in order to prevent collective recriminations and resort to revenge by victims. One of the fundamental principles established by the Nuremberg Trials is that individuals, regardless of their obligation under domestic law to defend their state, have the duty to refrain from committing international crimes, even if the result of that leads to the military defeat and destruction of their state. The message that the ICTY sought to send, in particular to the Serbs, is that criminal methods, namely 'ethnic cleansing' are unacceptable way of fighting a war, regardless of whether it is justified or not, or in other words, regardless of whether it was fought in self-defence or not. The Prosecutor has sought to convince the Serbs that their alleged support for a greater Serbia was wrong because it could only be achieved by using criminal methods. The head of the Serbian Orthodox Church, Patriarch Pavle, agreed that the survival of Serbia must be conditioned on moral principles:

> ...if the only way to create a greater Serbia is by crime, then I do not accept that, and let that Serbia disappear. And also if a lesser Serbia can only survive by crime, let it also disappear. And if all the Serbs had to die and only I remained and I could live only by crime, then I would not accept that, it would be better to die (quoted in Williams and Scharf, 2002: 18).

This argument is too simple, it needs to prove the opposite argument

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As Susan Woodward argues[19], the peace-building strategy in the former Yugoslavia was premised on the assumption that the conflict was caused by predatory and evil leaders, in particular the Serbian leader Slobodan Milosevic. In this account, once the perceived link between the leaders and the manipulated masses was broken inter-ethnic harmony would follow. The ICTY was intended to be the central pillar of this policy and this is why the issue of cooperation with the ICTY featured prominently in the Dayton Accords and other peace agreements. Bierman and Vadset write: 'These radicals are a relatively small group and we should not equal them and their behaviour with the entire group which they purport to represent' (Bierman and Vadset, 1998: 307). In order to succeed in its mission, therefore, the ICTY has to separate criminals from the innocent and at the same time unite the innocent against the criminals.

This chapter argues that individualisation of responsibility is in fact instrumental in discrediting certain institutions and certain ideologies symbolically associated with those individuals. It is argued in this thesis that the primary aim of the proponents of the ICTY is to legitimise the idea that the break up of Yugoslavia was inevitable and indeed desirable and to discredit the idea that Yugoslav peoples can be allowed to arrange their mutual relations independently and responsibly.

Symbolic Justice: Prosecution Policy of the ICTY

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[19] Walter and Snyder, 1999: 94-5.

Given the nature and difficulty of establishing the truth about the conflict, and given the link between that and achieving reconciliation, the task of the ICTY in restoring peace and security in former Yugoslavia is enormous. According to the ICTY's own estimate, the number of war criminals at large in the FY is about 7,000 (Williams and Scharf, 2002: 17). The former US Ambassador to Bosnia put that figure even higher at 10,000, and the former ICTY judge Patricia Wald's estimate is between 30-50,000. As Martha Minow rightly recognises, there is a great difference between the ideal and the reality:

> It should be recognised that in a perfect society victims are entitled to full justice, namely trial of the perpetrator and if found guilty, adequate punishment. The ideal is not possible in the aftermath of massive violence. There are simply too many victims and too many perpetrators (Foreword, Minow, 1998: ix)

Given the sheer size of its task, the ICTY had to abandon the idea of comprehensive justice (justice for all) and adopt the idea of symbolic justice. Since its establishment in 1993, the ICTY has indicted around 100 people. At the time of writing, 41 individuals are in custody, 11 have been provisionally released, 24 are still at large, and 19 have been either transferred to national prisons or released. Of the 41 who are currently in the ICTY detention unit in Scheweningen, 9 were arrested by national police authorities, 17 by international forces in Bosnia (SFOR)[20], and 15 surrendered voluntarily.

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[20] Of those 17 who were arrested by SFOR, particularly interesting legal and political issues are raised by the cases of Stevan Todorovic and Dragan Nikolic. Fearing arrest by international forces in Bosnia, both moved to Serbia, which at the time refused to carry out arrests on behalf of the ICTY. However, both were kidnapped and handed over to SFOR.

In terms of the crimes they were charged with, there are significant differences across ethnic groups. Only Serbs have been charged with genocide. Both Serbs and Croats have been charged with systematic crimes (genocide and crimes against humanity) and Muslims have only been charged with 'ordinary', that is, war crimes committed by individuals acting in their own capacity. In terms of the recognition of their victimisation, only Bosnian Muslims have been recognised as victims of genocide and all three groups have been recognised as being victims of systematic crimes. This illustrates the prosecution policy of the ICTY[21].

Willliams and Scharf, two of the key members of the international community which established the ICTY and who continue to legitimise its operation, identify the functions of justice in the peace building process as

> denying collective guilt by establishing individual responsibility, enabling the dismantling of institutions responsible for perpetuating the commission of atrocities, establishing an accurate historical record, providing a catharsis for victims, and deterring future instances of violence in the current conflict as well as deterring atrocities in similar conflicts' (Williams and Scharf, 2002: 11).

Victims' Justice in Practice

(www.cdsp.neu.edu/info/students/marko/nin/nin105.htm)

[21] For a full list of all indictments, see www.un.org/icty.

The decisions, orders and requests of the International Tribunal can only be enforced by others, namely national authorities. Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants; it cannot seize evidentiary material, it cannot compel witnesses to give testimony, it cannot search the scenes where crimes have been allegedly committed. For all these purposes, it must turn to state authorities and request them to take action (Antonio Cassese, President of the ICTY, addressing the UN General Assembly, 7 November 1995)

The consequence of the fact that the ICTY was established and is operated by the international community rather than a victorious power[22] makes it completely dependent on the voluntary assistance it receives from other actors. This opens possibilities of two kinds: it may increase the legitimacy but harm the effectiveness of the ICTY but it may also increase its effectiveness but compromise its impartiality. Therefore, the effectiveness of the ICTY cannot be separated from its legitimacy- the degree of its effectiveness directly depends on its legitimacy, both within the international community and among the people of the former Yugoslavia.

Cooperation of State and Non-State Actors with the ICTY

As noted by Judge Cassese, the effectiveness of the ICTY is dependent on the cooperation of states. The fact that the ICTY was established by the UN Security

Council acting under Chapter VII of the UN Charter makes cooperation with it obligatory for all states[23]. The finding that a particular situation represents a threat to international peace and security means that states are not allowed to invoke the notion of sovereignty as a reason for non-compliance. The demand for non-conditional cooperation was reinforced in Article 29 of the ICTY Statute, which requires all states to cooperate with the ICTY.

Unconditional coooperation of states of the former Yugoslavia is essential for the success of the ICTY because most of the primary evidence is submitted by the state authorities of the former Yugoslavia[24]. At the same time, without support of the most powerful states, the ICTY has little chance of success. The issue of cooperation with the ICTY has been the thorniest issue for all the government in the region, causing resignation of government ministers and instability in both Croatia and Serbia. Cooperation of the actors within Yugoslavia with the ICTY is, in fact, synonymous with internalisation of the results of the war, and implicitly with the causes of the war.

In general, it is important to recognise the link between the objectives of the ICTY vis-a-vis reconciliation and peace and the selection of methods it uses in their pursuit. In assessing the effectiveness of the ICTY in restoring peace and security in the former Yugoslavia, it is necessary to distinguish the assistance its receives that is

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[22] However, the ICTY has come under criticism for representing victors' justice in relation to Nato leaders and its response of the Nato military intervention over Kosovo in 1999 (see Thomas, 2003).

[23] Under Article 25 of the UN Charter, resolutions of the Security Council are binding on all states.

[24] For example, in the Milosevic case, Croatian government sent to the OTP 1060 documents, more than 100 audio and videocassettes and other material and proposed a list of 60 witnesses. (Vjesnik, 13/02/2002).

motivated by principles from that motivated by self-interest. According to the theory of liberal peace only the cooperation for the right reason contributes to the aim and purpose of the ICTY. In this context, only transparent cooperation is acceptable and secret deals (e.g. kidnapping of indictees, offering bounty for Milosevic, Karadzic and Mladic, etc.) do not contribute to the ICTY's objectives.

The problem with the cooperation of the successor states of the former Yugoslavia with the ICTY is that they are not cooperating in good faith. It is evident that, for them, the cooperation with the ICTY represents continuation of war by other means. It is merely an alternative way to achieve the same goals that they pursued during the fighting. This is particularly obvious in the response and changing attitudes of Croatia, which has provided most of the information, some of which has since been exposed as forgeries and propaganda (Bass, 2000: 221), on which the Commission of Experts based its factual findings. At the time of the establishment of the ICTY, the focus of international attention was firmly on the Serbs and the Croatian authorities were not under pressure to deal with violations of IHL committed by Croats. However, as soon as the ICTY began indicting Croats in 1995, Croatia's relations with the ICTY increasingly soured. Similarly, the Bosnian government's support has also been motivated by their interest to gain international recognition for their policies. The degree of cooperation with the ICTY relates to perception that ICTY's prosecution policy is compatible with their perceived ethnic interests. In their

eagerness to assist the ICTY, the Bosnian authorities went as far as coaching a witness to lie[25].

It needs to be remembered that the justification for international judicial intervention was the perceived unwillingness or inability of the state authorities in the former Yugoslavia to prosecute individuals responsible for violations of IHL themselves. It will be argued that even where there is the will of the elites, that is often in conflict with their domestic public opinion. According to a research conducted on behalf of the ICRC, 3/4 of all civilians in Bosnia supported a side in the conflict, and this 'sidedness', particularly the tendency to blame the other side for starting the war, makes people more likely to ignore evidence of violations of IHL committed by their side and less prepared to accept that people on the other side suffered too. 'Across all the communities of Bosnia and Herzegovina, people say soldiers, or defenders, are required to do whatever is necessary to save their communities. For the real soldiers, not the aggressors, the rules would often have to be suspended.'[26]

Assuming that war violations of IHL were actually committed by a relatively small number of people on all sides, and since it is reasonable to assume that, given the choice, the rest of the population has no interest in shielding them from international prosecution, it is difficult to see why cooperation with the ICTY is problematic for the governments of the former Yugoslavia. How is it possible for a minority to control the majority? To answer that, it is necessary to understand the

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[25] See Tadic case, at www.un.org/icty.

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wartime and post-war politics in the successor states of the former Yugoslavia. Ideally, all cooperation should be consensual because everybody should be interested in war criminals facing justice. The aim of the following section is to provide an overview of the cooperation of the states of the former Yugoslavia and the reasons why this cooperation is not forthcoming. It will be argued in this section that the main problem besetting the cooperation with the ICTY in the territory of the former Yugoslavia is its lack of popular legitimacy and this is the main reason for its ineffectiveness.

Cooperation of the states of the former Yugoslavia with the ICTY

Croatia

The biggest problem for any Croatian government wanting to cooperate with the ICTY is that one of the objectives of the ICTY, individualisation of responsibility, is contrary to the national consensus about the nature of the conflict. In Croatia, the view that Croatia was a victim of Serbian aggression and that Croatia, acting in self-defence, had the right to use every available means to defend itself is almost universally shared. The Association of Organisations of the Homeland War Veterans adopted a Declaration by acclamation at the Marko Square in Zagreb demanding from the Parliament and the Government to promulgate seven laws. First and foremost, the Association is demanding an urgent adoption of a law which would grant amnesty to all Croatian defenders who have been charged or convicted of any crimes if they were

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[26] For details of the report studying the attitudes towards IHL among people with actual experience of

committed in defensive war against the enemy whose military and civilian components were integrated. (Vjesnik, 16/02/01). In this atmosphere, attempts to individualise responsibility are seen as an attempt to draw a moral equivalence between the victim (Croatia) and the aggressor (Serbia).

In this atmosphere, it is difficult for Croatian authorities to cooperate with the ICTY in cases involving indictments of Croats because the dominant argument in Croatia is that before any Croat is prosecuted, all Serbs have to be prosecuted first. A former head of the Croatia's Supreme Court Milan Vukovic said that because Croatia was a victim of aggression, Croatian defenders could not have committed any war crimes (Ivancic, 2000: 100). Whereas the new government accepts that some Croats may have committed war crimes, they still insist that those were acts of irresponsible individuals and not part of government policy. They argue that the objective of Croatian offensive against Krajina Serbs was not to expel them from the area despite the fact that eight years after the end of the war only a handful of Serbs, mostly elderly, have been allowed to return. In legal terms, they reject the application of the notion of 'command responsibility' to Croatian officers. They argue that 'prosecution of Croatian crimes would mean the criminalisation of the Homeland War[27]'.

In the period between 1991 and 2000, the Croatian authorities did not prosecute a single ethnic Croat for violations of IHL. The first indictments were made only in 2001 and several trials have been held since. Yet, not a single Croat has been convicted of violations of IHL by Croatian courts, although there have been war

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war, see www.onwar.org.

crimes trials conducted by them against ethnic Serbs or Muslims[28]. After the recent trial of eight former guards in the Lora military prison in Split ended with acquitals of all of them, Amnesty International wrote: 'Reports of continuing intimidation and harrassment of victims and witnesses... raises serious concerns about the ability of Croatia to fulfill its obligations under IHL to bring to justice those responsible for the worst possible crimes' (EUR 64/002/2002 (Public) 20/06/02).

One of the key objectives of the ICTY in establishing peace is to change the public perception of the individuals who committed atrocities but are treated as heroes within their communities. This is proving particularly difficult in Croatia where there are a number of organisations of war veterans and war invalids, actively resisting this, as well as prominent individuals. On 31 December 2002 555 Croatian dignitaries, including academics, sportsmen, artists, etc. signed a petition demanding that the government confront the ICTY and reject the indictment of Generals Ante Gotovina and Janko Bobetko[29] as unfounded and politically motivated.

In July 2001, following the publication of the ICTY indictment of Ante Gotovina, who was the commander of the Croatian forces taking control of the Krajina region in August 1995, the leader of the junior partner in the coalition government, Drazen Budisa, resigned causing fears that the government would collapse and the party of the late president Tudman, the HDZ (Croatian Democratic Union), would return to power. Budisa resigned in protest against ICTY's applying

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[27] The term Homeland War is widely accepted in Croatia.
[28] Particularly notable is the trial of the Muslim member of the Bosnia's collective presidency Fikret Abdic, further discussed below.

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command responsibility to Croatian military and political leaders, because, in his view, they were defending their country. Practically, every time an indictment has been issued against Croats by the ICTY, the government has found itself on the verge of collapsing.

Following the indictment of Ante Gotovina and accusations that the new government was allowing Croatia's Homeland War to be criminalised, Croatian Parliament adopted a resolution setting out its views on the causes and conduct of the Homeland War. A number of groups such as the Committee for the Protection of Truth About the Homeland War and the Staff for the Preservation of Dignity of the Homeland War have been established in Croatia in order to resist the perceived attempts of the ICTY to change the truth about the Homeland War. The Staff has collected over 400,000 signatures demanding a referendum on Croatia's continued cooperation with the ICTY.

Although the cooperation between the ICTY and the new government[30] in Croatia has slightly improved in that the new government has accepted that individual Croats may be responsible for violations of IHL, they still reject unconditional cooperation, which is critical for the success of the ICTY. Croatian deputy Prime Minister Goran Granic, who is also charged with running day-to-day contacts with the ICTY has said that the difference between Croatian and Serbian crimes is that Serbian crimes were organised and Croatian crimes were individual (Vjesnik, 14/04/00). At

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[29] The indictment of Ante Gotovina was published in July 2001 and that of Janko Bobetko in September 2002. For details, visit www.un.org/icty.

[30] The old government of Franjo Tudjman adopted the Constitutional Law on the Cooperation of the Republic of Croatia with the ICTY on 19 April 1996.

the same time, he has outlined that the new government was prepared to cooperate with the ICTY on the basis that Croatian crimes were treated as individual crimes.

In the situation where the perceived threat from the resumption of the conflict is still present, the demands of the ICTY to national authorities to arrest military personnel has a significant effect on the cohesion of their armed forces. The problem that the ICTY causes to the states of the former Yugoslavia is that it undermines the morale within their armies, making them ineffective. The Deputy Leader of the Croatian Party of Democratic Change said: 'What Croatian general is going to unswervingly lead his troops to victory if it is so easy to attach him the command responsibility for acts committed by irresponsible individuals.'

The new government's willingness to accept that some Croats may have committed violations of IHL was strongly criticised by Bishop Bogovic and illustrates the dilemmas they faced after the ICTY issued indictment against General Gotovina:

Let me address those in the Croatian parliament deciding on Croatia's fate and its independence- you have to be careful because your positions in the Parliament and the Government could vanish in the thin air, which could happen if you allow the destruction of the pillars on which this country stands, because those who are attacking the former president, generals, and Croatian defenders should explain to the people the route Croatia used to achieve its independence. It certainly was not the one suggested by the international

community because had we followed that route we would never have achieved independence (Vjesnik, 16/07/01).

The problem of Croatia's cooperation with the ICTY is intrinsically linked to the Croatian public's perception of the nature of the Homeland War. Political commentator Jelena Lovric writes:

Croatian public rejects problematisation of anything that Croatia did during the war. It rejects a priori legal proceedings against any Croatian general or soldier. As long as the nature of the Homeland War is not publicly problematised, which was not just a war of self-defence, Croatia will not be ready for fair trial of war crimes (Novi List, 09/05/2002).

Even those in Croatia who support the prosecution of war crimes allegedly committed by Croats do not question the moral integrity of the Homeland War, arguing that prosecuting individuals who may have committed violations of IHL 'brings understanding and sympathy for the individuals who failed to preserve their humanity in inhumane circumstances'. By attributing those crimes to circumstances, they implicitly argue that those individuals had no moral choice and therefore cannot be held criminally responsible for their actions (Stajalista, Vjesnik, 06/09/02).

Serbia

The extradition of Slobodan Milosevic to the ICTY on 28 June 2001 illustrated polarisation within Serbia in relation to the issue of cooperation with the

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ICTY. Essentially, the government is divided by those who support unconditional cooperation with the ICTY, those who support conditional cooperation, and those who reject any cooperation. The former argue that the obligation to cooperate with the ICTY is primarily a moral one, and that the Serbs need catharsis. The argument of the second camp is pragmatic- they argue that the nation as a whole should not be the hostage of individuals who are indicted by the ICTY. In addition, they argue, cooperation with the ICTY is the precondition for Western economic assistance for the economy. Their moral position towards the issue of extradition of Serbs to the ICTY can be brutally summarised as: if the price is right, nobody should be above the law. The third camp includes Milosevic's Socialist Party of Serbia (SPS) the Serbian Radical Party (SRS) and several smaller parliamentary parties. With the exception of these parties, there is a consensus that cooperation with the ICTY is inevitable if Serbia is to survive.

The situation among the general public is much more fluid and volatile. One poll[31] conducted in Serbia after the first week of the Milosevic trial showed that 41.6% of those polled gave Milosevic five out of five for his performance to date (Tribunal Update, No. 321)[32]. Since the trial of Slobodan Milosevic is intended to get the Serbian general public support the ICTY[33], this is particularly worrying[34]. In the light

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[31] The poll was conducted by the Strategic Marketing and Media Research Institute between 13-15 February 2002. Available at www.b92.net.
[31] Tribunal Update provides weekly reports from the within and around the ICTY. It is available on line at www.iwpr.net.
[31] 'The trial of Slobodan Milosevic is a show trial - and not to be criticised for that.' (Observer, 17/02/2002
[32] Tribunal Update provides weekly reports from the within and around the ICTY. It is available on line at www.iwpr.net.
[33] 'The trial of Slobodan Milosevic is a show trial - and not to be criticised for that.' (Observer, 17/02/2002).

of this apparent failure to win the hearts and minds of the ordinary people, Serbian national TV even stopped broadcasting the trial after four weeks. Even Prime Minister Djindjic, who was the driving force behind Milosevic's illegal extradition[35] acknowledged that the poor performance of the OTP at the start of the trial undermined his efforts to convince the public in Serbia to cooperate with the ICTY (BH Dani, 15/02/02). Moreover, even those in Serbia who fully support the ICTY were very critical about the OTP. Biljana Kovacevic Vuco, the President of the Yugoslav Committee of Lawyers for Human Rights, has said that its slackness and lack of professionalism is an insult to all those who insisted that Slobodan Milosevic had to be arrested and extradited[36] to The Hague (Politika, 27/02/2002). The phenomenal failure of the ICTY to win the hearts and minds of people in Serbia is evident in the fact that even NATO, a military alliance which bombed them for 72 days, is relatively more popular than the ICTY[37]. *ICTY for ... the hearts and minds of people in Serbia*

In Serbia, the main problem for those who support the ICTY is how to convince the public that the ICTY is not biased against the Serbs in view of the fact that the Tribunal has been slow to initiate investigations in relation to Serbian victims[38] and only Serbian political and military leaders have been indicted by the

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[34] Equally worrying is the evidence that Milosevic's trial has not generated much attention in Croatia, Bosnia or Kosovo (Tribunal Update, No. 253 and 254, available at www.iwpr.net.

[35] Milosevic was extradited on 28 June 2001 and the Law on the Cooperation with the ICTY was adopted in the Yugoslav Parliament in April 2002.

[36] There has been a lot of debate on the issue of legality of the process through which Slobodan Milosevic ended up in the custody of the ICTY. Supporters of the ICTY have argued that because the ICTY is not a state, Milosevic was not extradited but 'transferred' to the ICTY. This difference was made in order to bypass Yugoslav constitution which, like most other constitutions, prohibits extradition of its nationals to other states without explicit agreement. ?

[37] Interview with Mathias Helman, head of the Outreach Programme in Serbia on BK TV, 23/06/02.

[38] In response to the objections that it has not done enough for the Serbian victims, the ICTY repeatedly premised investigation of crimes committed against Serbian victims on the cooperation of the Serbian authorities with its investigation of crimes committed by the Serbs against others.

ICTY[39]. The significance of indictments against the very top leaders is that it blurs the distinction between individual and collective responsibility. For this reason, it is difficult for the Serbian general public to accept these indictments, especially in the light of the fact that the international community insists on it. New York Times editor wrote that although Milosevic was indicted in the court of law in The Hague, the whole of Serbia was on trial in the court of international public opinion, adding that Milosevic could not have committed the crimes he was charged with without the support of other people, and therefore Serbs have to accept their share of responsibility (NYT, 01/04/02).

At the beginning the ICTY had taken for granted the support of the people of all three ethnic groups against nationalist leaders. Perhaps belatedly recognising that the support was not forthcoming and that the effectiveness of the ICTY critically depends on the perception of the general public[40] the ICTY established the Outreach Programme in 1999, the aim of which is to bring the ICTY closer to the general public, particularly in Serbia. To soften the opposition to the ICTY, the international community turned to Serbian NGOs. The *Otpor* movement organised a campaign in Serbia in February and March 2001 under the slogan: Who is to blame? The streets of Belgrade were full of billboards depicting three things: war, empty shops, and police repression. On all three, there was the face of Slobodan Milosevic, suggesting that he was to blame. In retrospect, it is clear that the objective of this campaign was to

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[39] This refers to the indictment of Milan Martic, the former President of Krajina, Radovan Karadzic, the former President of Republika Srpska, Ratko Mladic, the former Commander in Chief of the Bosnian Serb Army, and Slobodan Milosevic, the former President of Serbia and Yugoslavia.

[40] This programme followed a report of two undergraduate students, K. Cibelli and T. Guberek, of the Tufts University called Justice Unknown Justice Unsatisfied? Available at www.epiic.org and www.hrc.uni-sa.biharnet.ba.

prepare the public in Serbia for the arrest of Slobodan Milosevic which followed on 31 March 2001.

In the last ten years, the number of war crimes cases tried in Serbia has been very small. In the 1990s, only Dusan Vuckovic and Vojin Vuckovic, members of a paramilitary unit from Serbia, were tried for killing Muslims civilians in Bosnia. The trial took place in Sabac in 1993. Dusan Vuckovic was sentenced to ten years in prison and Vojin Vuckovic got suspended sentence. Since the fall of Slobodan Milosevic from power in October 2000, there have been several more trials but the number is still very low.

Bosnia

English persons, therefore, of humanitarian and reformist disposition constantly went out to the Balkans Peninsula to see who was in fact ill treating whom, and, being by the very nature of their perfectionist faith unable to accept the horrid hypothesis that everybody was ill treating everybody else, all came back with pet Balkan people established in their hearts as suffering and innocent, eternally the massacred and never the massacrer (Rebecca West, quoted in Boyd, 1995: 22).

Despite the significant military, police, intelligence and other forms of presence of the international community in Bosnia, and despite the fact that the state institutions of Bosnia are subordinated to the High Representative, who represents

international community there, the ineffectiveness of the ICTY to contribute to reconciliation there is obvious. The three communities, Bosnian Muslims, Croats, and Serbs are politically divided as ever although there have been some refugees returning to areas where their ethnicity does not dominate. This has been illustrated in the elections since Dayton, where the same parties that led the country into war have kept winning the elections. Instead of contributing to peace, the ICTY is being used as a means to pursuing the same goals as during the war.

The ICTY has failed to prevent the perpetuation of wartime propaganda. As argued in previous chapters, allegations of war crimes were an integral part of the war effort of all warring sides, and in this applies in particular to the Bosnian Muslims' strategy to change the balance of force on the ground by internationalising the conflict[41]. At the same time, allegations of war crimes were targeted at domestic constituencies. Allegations were particularly evident in the aftermath of military defeats where the defeated side would use accusations of war crimes to divert public attention from their own responsibility for the loss of life. Military leaders on all sides used allegations of war crimes to dehumanise their enemies in the eyes of their own population, thus exacerbating hatred and making peace more distant. This manipulation continues to the present day, even in peacetime. War crimes trials are primarily used to eliminate political opponents, and the best example of this is the fate of Fikret Abdic, a political rival of Alija Izetbegovic, who was sentenced to 20 years for war crimes in a trial involving cooperation between Bosnian and Croatian authorities.

On 1 April 1992, when Bosnia was still at peace, but on the brink of war, Fikret Abdic, one of the three Muslim members of the Bosnian State Presidency and the most popular politician at the time in Bosnia, demonstrated enormous personal courage and went to the town of Bijeljina to negotiate with the Serbian paramilitaries, led by Zeljko Raznjatovic Arkan[42], who had taken control of the town. His peace mission was deliberately thwarted by Alija Izetbegovic, who asked him, on his return from Bijeljina, to publicly confirm that 3,000 Muslims had been killed in the town, despite Abdic's protestation that only one woman had been killed and a dozen people wounded. Abdic refused to go along with Izetbegovic's demand and inflate the number of casualties because he knew that making such a false accusation would inflame the situation and fatally undermine his negotiating position with the Serbs, destroying any chance of reaching a peaceful solution to the catastrophe looming over Bosnia[43]. Aside from personal rivalry, their rift stemmed from their conflicting strategies. Because of the militarily weak position of the Muslims, Abdic sought to find an agreement with the Serbs, but Izetbegovic pushed for internationalisation of the conflict, hoping for international military intervention. The case of Fikret Abdic demonstrates that the Muslims had a choice vis-à-vis war and peace and raises serious questions about the nature of the conflict and in particular the charge of genocide.

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[41] The police chief in Srebrenica, Hamdija Meholjic, claims that Alija Izetbegovic told him in 1993 that the US would intervene militarily on their behalf if 5,000 Muslims were killed in the UN designated 'safe area' of Srebrenica (BH Dani, 22/06/98).

[42] Zeljko Raznjatovic, known under his nickname Arkan, was indicted by the ICTY in 1997 but the indictment was only made public in 1999 before the bombing of Yugoslavia began. The timing of the publication of the indictment was interpreted as a warning to Slobodan Milosevic that he would be next. Arkan was assassinated in Belgrade in January 2000. His killers and their motives remain unknown, although a suspect was arrested in Austria in 2003.

[43] Interviewed on 18 April 2002 in a detention centre in Karlovac, Croatia.

Reconciliation is possible only on the basis of a truth accepted by a majority of people in all three communities in Bosnia. In other words, the majority of the people need to internalise the version of history established by the ICTY. This is particularly difficult in cases like Srebrenica where the Serbian side claims died around 2000 Muslims of which 1800 in combat and only 100 in acts of individual revenge. (Nezavisne Novine, 03/09/02). At the same time, the Bosnian Muslims claim that the number of dead is up to 12,000 without making any distinction between those killed in combat and those who were killed unlawfully. In response to the Srebrenica report of the Government of Republika Srpska, the Muslim- dominated daily Oslobodjenje wrote that the Report 'was yet another brick in the Chinese wall between the Serbs and the truth about their crimes'. Amor Masovic, the head of the Bosnian Commission for Missing Persons said that 'the whole world knows the truth' that 'Bosnia was a victim of aggression and although all sides committed violations of IHL, only on one side (Serbian) those crimes were systematic'. He went on to say: 'This truth has to be accepted, primarily, by the authorities in the Republika Srpska and Serbian politicians in the Bosnian institutions' (BH Dani, 14/07/02).

The Bosnian Muslim political and legal elite seems to be the most enthusiastic about the ICTY's mission. Similarly to the situation in Croatia, Bosnian Muslims are opposed to individualisation of responsibility because they insist on the collective responsibility of the Serbs. Insistence on collective responsibility and rhetorical support for a multiethnic Bosnia are not compatible. As argued earlier, the ICTY is seen as a continuation of war by other means. Amir Ahmic, the Liaison Officer of Bosnia and Herzegovina with the ICTY said:

After so much genocide, the Bosniaks [Bosnian Muslims] have witnessed the first genocide conviction from this Tribunal, and I believe, with God's help, there will be more. In its judgements, this Tribunal has established the existence of the so-called international conflicts, that is, the aggression against Bosnia and Herzegovina committed by the Federal Republic of Yugoslavia and Croatia. Never before had the Bosniaks had such an opportunity in the form of the Tribunal, and thanks God, it seems that they have used it. (Interviewed in Saff magazine, No. 84)[44].

These views clearly illustrate question whether the Bosnian Muslim elite is interested in peaceful coexistence and reconciliation for the ordinary Muslims. It appears that they are only interested in the support of the international community for the state of Bosnia because of their own selfish interests.

Cooperation of other states

The US was at the forefront of creating both tribunals and continues to be their leading source of political, financial, personnel, logistical, and information-sharing support (Scheffer, 1996:38).

All states support the ICTY with money through their regular annual UN assessment, but those who wish may also make additional contributions through a special voluntary fund[45]. For example, the Outreach Programme is funded entirely from voluntary contributions. Also, in 1998, the US, UK, and The Netherlands paid

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[44] Available on line at www.saffbih.com.

for two new courtrooms in order to speed up proceedings. Since the ICTY has no independent means of coercion at its disposal, it relies on states, particularly the most powerful one, the US to force the authorities in the former Yugoslavia to cooperate. In 1998, the US passed a law[46] prohibiting US financial assistance to any state or entity, which does not cooperate with the ICTY. In 1998, after the ICTY issued an indictment against Zlatko Aleksovski and Croatia's apparent refusal to arrest him and transfer him to The Hague the US Special Representative Robert Gelbard threatened Croatia with the US veto on Croatia's request for loans from the World Bank and the IMF.

The US played by far the most important role in establishing the ICTY and it continues to do so in operating it. The US not only contributes staff and other resources to the ICTY, the views of the US government and its satellites among non-state actors on the cause and conduct of the Yugoslav conflict have been critical in determining the OTP's prosecution policy. Speaking at the Holocaust Museum in Washington in April 1994, Madeleine Albright expressed her views about the causes of the Yugoslav war: 'The war, itself, is the result of a premeditated armed aggression. Bosnian Serb leaders have sought a 'final solution' of extermination or expulsion to the problem of non-Serb populations under their control' (Bass, 2000: 262).

As argued earlier, because of its limitations, the ICTY depends on the assistance it receives from other actors. In the operational sense, provision of

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[45] The ICTY's annual budget for 2002 was $115 million. Since its establishment, it has already spent

information by states with the most significant intelligence capabilities is critically important. This has been the major source of leverage that the US has used to manipulate the prosecution policy of the ICTY. Even Louise Arbour, the ICTY former Chief Prosecutor, complained that the cooperation she received from some states was not in good faith. She said that Western powers manipulate information or, 'slow the flow of information or accelerate it' in line with their political aims (Sellar, 2002: 183). The role of other states is pretty insignificant. It will suffice to say that with the change of government in 1997, Britain, previously in charge of the diplomatic aspect of the peace process[47], started to support the ICTY. The French ignored the ICTY for long time, but are increasingly playing a proactive role. The Germans too provided intelligence to Louise Arbour to indict Milosevic.

Cooperation of Non-State Actors

The Western human rights groups operate as the court's foot soldiers, providing it with personnel, information, resources and moral support (Sellar, 2002: 184).

The role of non-state actors in supporting the ICTY has been vital. Physicians for Human Rights performed exhumation of burial sites and forensic examination. International Commission of Jurists provided legal expertise. The Rehabilitation and

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nearly one billion dollars.

[46] The so-called Lautenberg amendment.

[47] The first Chairman of the International Conference on Yugoslavia was Lord Carrington. After his resignation in 1992, he was succeeded by Lord Owen. Both were formally representatives of the European Union and worked alongside Cyrus Vance, Thorvald Stoltenberg and Carl Bilt, successive special envoys of the UN Secretary General.

Research Centre for Torture Victims operates counselling services in the Witness and Victims Protection Unit of the ICTY. Open Society Institute donates money and personnel to the ICTY. The Human Rights Watch (HRW) has submitted numerous reports requested by the ICTY, its members have testified before the ICTY and has assisted the ICTY in other ways. International Criminal Justice Resource Centre (ICJRC) coordinated the assistance to the ICTY in equipment coming from the private sector in the US. The donors included Polaroid Corporation, Digital Equipment Corporation, Eastman Kodak, Douglas Toys and Magellan Systems. The Coalition for International Justice/Central and East-European Law Initiative (CIJ/CEELI), established and funded jointly by the US State Department and the American Bar Association (ABA) has assisted the OTP by reviewing the materials sent to it by the legal authorities in the former Yugoslavia. CEELI also served the cause of the ICTY through lobbying members of the US government and 'educating' the populations of the former Yugoslavia/The importance of the media in covering war crimes trial and their expected role in educating the population in the former Yugoslavia is evident in the initiative of the American Bar Association (ABA) to educate Croatian journalists about legal matters relevant for the coverage of war crimes trials. A leading Croatian legal expert has recently published a booklet aimed at journalists covering war crimes trials.

Apart from NGOS and universities, journalists have been another source of legitimacy for the ICTY reporting 'positively and supportively' about its work (Gutman and Reiff, 1999). Some of them, like, for example, Ed Vulliamy, Martin Bell

and Jacky Rowland have appeared as witnesses before the ICTY. As Richard Goldstone acknowledges:

> Their [ICTY and ICTR] success is to the credit of many people, not least of whom are the community of non-governmental organisations and the media. If these important sectors of international civil society had not kept faith in the underlying philosophy of justice for victims, the tribunals may well have suffered an ingnominious death, and international humanitarian law would not burgeoning as it is today (R. Goldstone, Tribunal Update 220, 7-12 May 2001, available at www.iwpr.net).

Victims' Justice in Theory and Practice

In analyses of political institutions, distinction is often made between their effectiveness and legitimacy. The EU is sometimes used as an example where functional effectiveness of its institutions is contrasted to their democratic deficit. This chapter has argued that the discussion on the effectiveness of the ICTY cannot be separated from its legitimacy. The effectiveness of the ICTY depends on and is directly derived from its legitimacy, both within the former Yugoslavia and beyond. Therefore, the analysis of the effectiveness of the ICTY necessarily involves the analysis of its legitimacy.

It needs to be remembered that the primary motive of the international community to intervene in the Yugoslav conflict was to send a message to the warring sides, and the world at large, that the results of the use of force would not be

recognised. In this context, the objective of the ICTY is to use the force of reason and reverse the results of the fighting on the ground and the extent to which it succeeds in achieving this objective must be the ultimate criterion of its effectiveness. In its resolutions, the SC repeatedly stated that the results of 'ethnic cleansing' would never be recognised by the international community. In this way, the international community decided to break a long tradition, described by Thucydides as a situation where 'the strong do what they have the power to do and the weak accept what they have to accept' (quoted in Bass, 2000: introduction). It has been argued throughout this thesis that the ICTY cannot reverse the consequences of the conflict unless it addresses its causes and this issue was deliberately omitted from the ICTY Statute.

It was demonstrated in Chapter 3 that the establishment of the ICTY was reminiscent of the establishment of the MIT. In the eyes of the supporters of the ICTY, it not only continues the legacy of Nuremberg, but it tries to transcend it by moving beyond 'victor's justice'. Whereas the goal of the MIT was to impose just punishment, the primary objective of the ICTY is to contribute to reconciliation, which is a far more ambitious goal. This chapter has demonstrated that the ICTY has not done that.

It was felt that the way to overcome the criticism of victors' justice was to adopt the notion of 'victims' justice'. The origin of the notion of 'victims' justice' is in the developments within domestic criminal law systems in the countries that have been most influential in setting up and running the ICTY. As Virginia Morris notes:

Victims' interests increasingly are the focus of some solicitude within national justice systems, both for moral and philosophical reasons and also in the recognition of the fact that one function of criminal justice is to avoid victims taking justice into their own hands. This latter, practical reason for taking victims' interests into account is particularly relevant in the context of the most serious international crimes that so often involve societal cycles of violence and revenge (Morris, 1999: 7).

As shown earlier, the idea of 'victims' justice' has been eagerly embraced by the theorists and practitioners of IHL alike and has become a touchstone for everybody working in the field. The Chief Prosecutor of the ICTY Carla del Ponte said: 'Not to forget the victims, that's the important thing. In these trials, we focus so much on the people who have been charged. I want to be a voice for the victims, so they can see justice being done' (The Observer, 17/02/2002).

This chapter has argued that the notion of 'victims' justice' has been deliberately adopted to impose the arbitrary opinion on the causes of the Yugoslav conflict. As Robert H. Jackson has argued, the conflict in the former Yugoslavia has been interpreted, on the one hand, as popular war of self-determination, and on the other, as armed struggle among ambitious and cynical war lords with utter disregard for human life who preyed on innocent people. 'Those who called for international intervention in the Balkans conflicts on humanitarian grounds were more inclined to locate responsibility with the warlords... The latter view conceives of the Balkan

peoples not as responsible parties to the conflict, but, rather, as innocent victims of them' (Lyons and Mastanduno, 1995: 73-4).

The degree to which the interests of the victims are given prominence in the context of international judicial intervention is best illustrated by the insistence of Madeleine Albright that because of the gravity of the crimes committed iduring the conflict in Yugoslavia only God and the victims have the standing to forgive. Sometimes, forgiving and forgetting are thought of as synonymous, but they are not because to forgive means to give up revenge. As Pope John Paul II said in Zagreb, Croatia, on 11 September 1994 in his message to Catholic Croats: '...be courageous by forgiving and accepting your neighbour'. At the same time he said: '...personal forgiving does not mean not prosecuting crimes, on the contrary, not to prosecute crimes is a *prima facia* case of absence of the state, anarchy' (Slobodna Dalmacija, 10/06/00).

Therefore, what informs the idea that justice for victims is the precondition for peace is that unless victims' desire for justice is satisfied, they will take justice into their own hands, which would then lead to renewal of violence. In this context, the form of justice required to prevent victims' revenge is the retributive form of justice. In the case of ICTY, retribution, defined as 'vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights', is intended to reassert the truth of the victim's value by inflicting a publicly visible defeat of the wrongdoer' (Minow, 1998: 12). As far as reconciliation is

concerned, Minow writes that 'reconciliation is not the goal of criminal trials, except in the most abstract sense' (Ibid: 26).

It is important to recognise in Minow's argument that legally prescribed retribution is different from vengeance in two main ways- firstly, it is proportionate to the gravity of the crime, which means not one-sided and excessive, and secondly, the sanction for the crime is not carried out by the victim. The ICTY has to balance between just retribution under IHL and vengeance. It is essential for the ICTY not to go down the vengeance route because as Richard Goldstone, former Chief Prosecutor at the ICTY said 'revenge is crime, too' (Vecernji list, 19/10/02).

One similarity between the ICTY and the IMT (International Military Tribunal) at Nuremberg is that both use criminal law as an instrument of policy. In general, all laws have their social purpose. Laws either prescribe socially desirable behaviour or proscribe socially undesirable behaviour. Criminal law has a particularly important role in regulating the use of force and preserving order. Policy objectives in modern domestic criminal law systems can be reduced to retribution, deterrence and reform. The difference between the ICTY and domestic criminal justice systems is that in the case of the ICTY criminal justice is used to create, not preserve order. It is argued in this chapter that the ICTY is not independently creating a new order but legitimising the order that has been created partly through the use of force and partly through negotiations.

It is evident that the theorists of criminal law recognise that the interests of victims and the society at large are not necessarily in harmony, that is, they can be in conflict. The question is what to do when they are in conflict? Morris writes: 'In national jurisdictions, courts and prosecutors are bound to serve the interests of society in general and, to some ambiguous and debatable degree, the interests of victims' (Morris, 1999). A number of groups representing victims of Srebrenica, including the Association of Women of Srebrenica, the Visegrad 1992 Association, Mothers of Srebrenica and Podrinje recently issued a statement rejecting the guilty plea of Biljana Plavsic as a means to achieve reconciliation, arguing that the admission of one Serb for the deaths of thousands of Muslims is not enough. Instead, they demanded that the number of Serbs punished should correspond to the number of Muslims killed, which is a thinly veiled call for revenge[48].

As has already been argued in the previous chapters, to achieve its objective, the ICTY has to individualise the responsibility. The particular problem is that the media has already attached the 'guilty label' on the Serbs in general. Therefore, to achieve its objective, the ICTY must reject media reporting as the main source of information. The extent to which the ICTY succeeds in rejecting the media picture of the conflict will determine its success or failure. This is also important for the important principled reason of giving the defendant the benefit of the doubt, the principle of presumption of innocence. If the proceedings are seen to be unfair in this important sense, there is a real possibility that instead of condemnation the proceedings may actually provoke sympathy for the defendants. This was the danger

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[48] Available at www.b92.net.

the Prosecutors at Nuremberg were well aware of. Justice Robert Jackson said: 'Despite the fact that the public opinion already condemns their acts, we agree that here they must be given a presumption of innocence, and we accept the burden of proving criminal acts and the responsibility of these defendants for their commission.' Jackson quoted in Minow, 1998: 32). If it is to contribute to the development of the rule of law in international relations, the ICTY has to uphold the principle of presumption of innocence. Writing on the issue, Canadian law professor Michael Mandel wrote: 'Mr. Milosevic has about as much chance of getting a fair trial from this court as he had of defeating NATO in an air war' (Toronto Globe and Mail, 06/07/02).

As argued earlier, the idea of international judicial intervention, on which the ICTY is based, is inspired by the wider notion of peace-building, which is different from traditional approaches to international disputes in that it attempts to 'address the root causes of conflict within societies' (Cockell in Pugh, 2000: 16). Cockell argues that peace-building is different from intervention in that it involves cooperation with local actors whereas intervention does not. The stated purpose of building is 'the creation of structures for the institutionalisation of peace' (UN Doc. A/50/60-S/1995/1, 3 January 1995, para 49).

It has been argued in this chapter that the establishment and operation of the ICTY and thus its contribution to the restoration of peace and security in the FY ought not to be understood simply in terms of it being a reaction to the violations of IHL in the Yugoslav conflict. In other words, it also reflects the developments within the

international community that have nothing to do with the Yugoslav conflict itself. In establishing the ICTY, the international community also sought to use the ICTY to reform the international security system and create an international criminal justice system. It is argued in this chapter that these important goals have often taken precedence over the best course of action towards the Yugoslav conflict.

The ability of the ICTY to significantly contribute to the restoration of peace and security in the former Yugoslavia is not in its arms because it has none, but rather in the strength of its arguments. The ICTY is intended to contribute to the restoration of peace not through the force of arms but through persuasion and inspiration of those who have the capacity to contribute to that end, in particularly the civil society, both within and outside the former Yugoslavia. Are people who can have impact on the situation in FY inspired by the ICTY or are they cynical about it? Michael Scharf, Attorney-Advisor with the US State Department, who drafted the Statute of the ICTY testifies to the cynicism within the US administration at the time when the idea of establishing the ICTY was first mentioned:

> '...the Tribunal was widely perceived within the government as little more than a public relations device and as a potentially useful policy tool... Indictments would also serve to isolate offending leaders diplomatically, strengthen the hand of their domestic rivals and fortify the international political will to employ economic sanctions or use force' (Washington Post, 3/10/99).
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> David Scheffer described the ICC and in particular the ICTY as 'the shining new hammer in the civilised world's box of foreign policy tools' (Scheffer, 1996: 51).

In theory, the ICTY should serve as a catalyst, a focal point for individual and group efforts and initiatives coming from the civil society. 'As Weber recognised, an order that is seen as legitimate is far more likely to be obeyed than one that appeals only to self-interest or habit' (Baldwin, 1993: 152). Dahl and Lindblom also argue that 'a sense of legitimacy is essential to the maintenance of any order' (Ibid: 152). Edward Hallet Carr argued that those who do not believe in the existence of international community necessarily do not exist in international morality (Carr, 1939: 205). It is noticeable that one of the most fervent advocates of the ICTY, Paul Williams, argues that 'international community' does not exist. Instead, he calls it a 'a gang of seven', who are completely selfish in pursuit of their interests and their policies have nothing to do with principles or protection of Muslims from genocide (Williams and Scharf, 2002: 291).

That prosecution of violations of IHL in the former Yugoslavia has importance that goes beyond the borders of the former Yugoslavia is evident in the report of the US Institute for Peace published in September 1997. The report says that the 'war crimes issue not only was important to the success of Dayton, but had larger implications for the standing of international law and US leadership in the world'. The Report identifies US interests regarding the war crimes issue: effectiveness of NATO, US moral and political leadership in the world, and global support for the norms and principles of international law[49].

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[49] Available at www.usip.org.

This chapter has argued that the ICTY cannot contribute to the restoration of peace and security unless it explicitly addresses the issue of the cause of the war. The problem is that the ICTY's Statute does not provide for the ICTY to address this question explicitly. As Gilgan argues: 'A focus on the irrationality and destructiveness of conflict often leads to condemnation which prevents further analysis and efforts to understand and explain. In this sense a moral condemnation relieves the observer of the obligation to explore and come to grips with the nature of the conflict' (Gilgan, 2001).

In analysing the effectiveness of the ICTY in helping to restore peace and security in the FY, it needs to be remembered that the ICTY is a means and imposing a solution on the political and military leaders of the warring parties, not on the populations whom they represent. The justification for preferring an imposed solution to a solution achieved at the negotiating table was that the international community was driven not by some selfish interest but by a genuine desire to protect the civilian victims.

Like other policies used during the Yugoslav conflict, the idea of ICTY was hastily adopted. This can be illustrated by the way the international community decided to become involved in the conflict. The argument used was essentially based on the lesson of the WW1, namely, that wars have their inner logic and unless they are put under control they can escalate, dragging in more and more states. For this reason, it was imperative that the international community acted collectively. The problem

with this approach is that it stifled any critical examination and reassessment of the direction and likely result of the policy.

The shift in international security studies from how war in general could be eradicated to the management of particular instances of war resonated with the shift in international law from legally proscribing war to using criminal law as an instrument of protection of civilians in intra-state wars. It needs to be remembered that the ICTY was established in the midst of the conflict with a view of putting the conflict under control by threatening political and military leaders with prosecution. The case of Slobodan Milosevic proves that in this objective it failed miserably.

Despite the shift in International Relations from positivism to normativism, methodological individualism remains the lasting legacy of positivism. This has also led to normative individualism (see Teson: 1997) and combined with the trend away from structure to agency in explaining the causes of conflict, this has ultimately led to the idea that prosecution of individuals can contribute to international peace and security. In this context, the ineffectiveness of the ICTY results partly from the inherent inadequacy of law to deal with a security problem. International law, or more precisely, IHL cannot be a substitute for politics. The operationalisation of the notion of 'victims' justice' espoused by the ICTY is a combination of legal and psychosocial approaches to peace-building, but it does not have a purchase in terms of peace-making or conflict management, where different forms of intervention are more prominent.

As argued earlier, the role of criminal law is simultaneously cohesive and divisive. On the one hand, it unites society in condemning the wrongdoers and on the other, it separates the wrongdoer from the rest of the society (Durkheim, 1964:72). The ICTY has particularly failed to inspire and encourage ordinary Serbs, Croats, and Muslims to come forward and testify against their fellow Serbs, Croats and Muslims who committed violations of IHL during the conflict. The full truth about violations of IHL cannot emerge without testimonies coming from the witnesses of the same ethnicity as the perpetrators. At the moment, witnesses and perpetrators are always of different ethnicity. In a small number of cases where witnesses came from the same ethnicity it is obvious that their motives are selfish and have nothing to do with reconciliation. The best example is Milan Babic, the most hawkish among the political leadership of Krajina Serbs, who testified against Slobodan Milosevic in December 2002[50]. To talk about individualisation of responsibility without separating the criminals from the innocent within ethnic groups and bringing the innocent together against the criminals across ethnic groups is completely misplaced[51]. As a report on the ICTY by the Institute for Peace has argued: 'Until citizens accept and actively participate in the justice process, a groundswell of domestic support for social justice and reconciliation will not occur.'[52].

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[50] Milan Babic, the most hawkish among the leaders of the Krajina Serbs during the conflict with Croatia, testified against Slobodan Milosevic in December 2002. However, reaction of both Serbs and Croats to his testimony were negative, that is, neither side saw his motives as honourable.

[51] One exception occurred in the case of Neven Drpa, a Serb from Knin, who was suspected of committing a war crime by killing a Croat, Josko Cacic, in April 1991. Drpa was arrested by Croatian authorities in October 2002 but was soon released after eyewitnesses of Croatian ethnicity provided him with an alibi despite the fact that they knew he took part in the police operation in which Cacic was killed. Interviewed by the author in December 2002.

[52] Available at www.usip.org.

Analysing the perceptions of the ICTY among the relevant actors within Yugoslavia and beyond, focusing in particular on their cooperation with the ICTY, this chapter demonstrated that the ICTY has not fulfilled its mandate. It has argued that one of the main reasons for the ineffectiveness of the ICTY has been the uncritical support it received from the supporters of the ICC. The following chapter seeks to describe and analyse that support by contextualising it within the process of institutionalisation of ICJS in the 1990s.

Chapter 5

Institutionalisation of the International Criminal Justice System in the 1990s and the Significance of the International Criminal Tribunal for the Former Yugoslavia (ICTY) for the Creation of the International Criminal Court (ICC)

Introduction

Whilst chapter 4 was focused on the impact of the ICTY in the territory of the former Yugoslavia, and in particular its contribution to the restoration of international peace and security there, the aim of this chapter is to analyse the impact of the ICTY beyond the borders of the former Yugoslavia, and in particular its role in the process of institutionalisation of international criminal justice system (ICJS), which culminated in the adoption of the Rome Statute in July 1998[1] and the establishment of the ICC in July 2002[2]. Many observers agree that the ICTY has played and continues to play an important role in galvanising international support for the ICC (see, for example, Bass and Goldstone in Keysen and Sewall, 2000; Muller, 1999). As Roman Kolodkin argues: 'The creation of the ICTY is a significant event in and of itself and certainly represents a considerable step towards the establishment of an international criminal justice regime' (Kolodkin in Clarke and Sann, 1996: 166). Similarly, in his first annual report to the UN Security Council the President of the ICTY expressed his hopes: 'If the Tribunal proves that it can work in an effective and dispassionate way and the necessary cooperation of states is forthcoming, it may open a new path towards the realisation of true international justice, and hence of peace, in the world

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[1] For the ICC Statute, ratification and other matters, visit www.un.org/law/icc/statute/romefra.htm.
[2] For an update of the activities related to the ICC, visit www.icc-cpi.int/index.php.

community'[3]. Agreeing with the prevailing opinion that the ICTY played an indispensable role in mobilising international support for the establishment of the ICC, this chapter argues that both institutions are part of the same process, identified here as institutionalisation of ICJS. In describing and analysing this process, this chapter is particularly concerned with the implications of the process on the existing international security system (ISS) and the international legal system (ILS). In other words, this chapter analyses the significance of the institutionalisation of ICJS for international peace and security and the rule of law in international relations.

The argument is structured as follows: the first section provides a descriptive account of the process of institutionalisation of ICJS identifying its origins and implications. The second section provides justification for the selection of an interdisciplinary approach involving International Relations and International Law to the study of the process and gives an overview of the relevant literature. The third section is concerned with linking the process of institutionalisation of ICJS with the ISS. The fourth section examines the effect of the process of institutionalisation of ICJS on the ILS, and in particular on the branch of international law governing the use of force. The fifth section examines to what extent the ICC is typical of the new international institutions of the 21st century. The sixth section explores the possible effects of the changes within the ISS and ILS resulting from the process of institutionalisation of ICJS on the emerging system of global governance.

In July 1998, 120 governments signed up to the Statute of the ICC. Notably, the Rome Treaty was not signed by some of the most powerful states, including the

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[3] The First Annual Report of the ICTY, A/49/342; S/1994/1007.

USA, Russia, and China, as well as some of the other 'usual suspects' like Libya, Iraq, Iran, and Israel. The fundamental question is why did 120 states voluntarily agree to constrain their ability to use force? Abbot et al (2000) have attributed this to the fact that governments are influenced by the process of legalisation of international relations. They define legalisation as a particular form of institutionalisation, referring to the imposition of legal constraints on governments (Abbot et al, 2000: 386). In analysing the causes of legalisation of international relations, they write:

> We view law as deeply imbedded in politics: affected by political interests, power and institutions. As generations of international lawyers and political scientists have observed, international law cannot be understood in isolation from politics. Conversely, law and legalisation affect political processes and political outcomes. The relationship between law and politics is reciprocal, mediated by politics (Ibid: 387).

Institutionalisation of ICJS

Robert Keohane argues that the degree of institutionalisation of actors refers to the degree to which actors internalise institutional norms and principles and to what degree they are reflected in their behaviour (Keohane, 1989). To determine the degree of institutionalisation, actors are classified according to their interests and expectations (degree of commonality), the degree to which their interests and expectations are reflected in rules (degree of specificity), and their subordinate position in relation to institutions (degree of autonomy). These are the indicators of the institutional strength or weakness of a regime.

The beginning of the current trend of institutionalisation of ICJS is taken by some authors to be the initiative for the establishment of an international criminal court by a group of 16 Caribbean states, led by Trinidad and Tobago, in 1989[4]. The initiative was motivated by the inability of the states in the Caribbean region, all of which had had traditionally weak criminal justice systems, to deal effectively with powerful South American drug cartels which used their territories to export cocaine into the United States. Faced with pressure from abroad, and in particular from the US which declared a 'war on drugs' in the 1980s, these states argued that the only way they could confront the problem was to establish an international criminal court. However, the argument that the Trinidad and Tobago initiative set in motion a series of inter-related events that eventually led to the signing of the Rome Treaty and the establishment of the ICC is not convincing because the nature of crimes over which the ICC proposed by Trinidad and Tobago would have had jurisdiction had nothing to do with war crimes and IHL. It is more credible to suggest that the idea for the establishment of an ICC originated in the US and was linked with the US invasion of Panama in December 1988 and the subsequent arrest of Panama's ruler, General Manuel Noriega in January 1990. Noriega was charged with criminal offences related to drugs trafficking and later convicted in a Florida court. General Manuel Norriega was the first foreign head of state ever to be indicted in the US. In 1990, the idea of charging leaders of regimes hostile to the US resurfaced in relation to Iraq. Christopher Black argues that the idea to indict Saddam Hussein and other leading members of his regime during the Gulf War in 1991 came from military lawyers

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[4] For the Trinidad and Tobago initiative see Summary Records of the Forty Second Session, Yearbook of International Law Commission 1, UN Doc. A/CN.4/SER.A/1990, 39,24; and International Criminal Responsibility of Individuals and Entities engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over such Crimes, General Assembly Resolution 44/39, A/44/49 (1989).

working in the US Defence Department. In this context, the significance of the ICTY

for the process of institutionalisation of ICJS and for the creation of the ICC is that it

played a decisive role in directing the process towards IHL and 'new wars'[5].

After the initial period in which the idea of establishing an ICC explored, the

process of institutionalisation of ICJS rapidly accelerated after the establishment of

the ICTY and the number of international tribunals responsible for enforcing IHL

mushroomed. In addition to the ICTY, the 1990s witnessed the establishment of the

International Criminal Tribunal for Rwanda (ICTR)[6], as well as a series of special

international tribunals dealing with violations of IHL in East Timor, Cambodia[7],

Sierra Leone[8], and Kosovo[9]. In addition to these institutional developments, the 1990s

also witnessed an increase in the number of trials for violations of IHL before national

courts[10]. Although all these tribunals and courts are somewhat different in terms of

their composition and jurisdiction, what they have in common is that they were

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[5] This process began in early 1993 with the International Law Commission's (ILC) work on a draft statute of an ICC and continued through the completion of the ILC Draft, the Ad Hoc Committee of 1995, the Preparatory Committee in 1996-1998, th eRome Conference, and the Preparatory Commission of 1999-2000. See Report of the International Law Commission on the Work of the Forty Sixth Session, UN GAOR, 49th Session, Supplement No. 10, UN Doc. A/49/10 (1994). See generally Preparatory Commission for the International Criminal Court at http://www.un.org/law/icc/index.html.

[6] For general information on the ICTR, visit its website at www.ictr.org

[7] A good source of information on the special court for Cambodia is the Cambodia Genocide Project, available at www.yale.edu/cgp.

[8] See www.sc-sl.org.

[9] For brief general information on these tribunals, visit the website of the Coalition for International Justice at www.cij.org. However, the best source of information on all the tribunals as well as the ICC is the website of the Coalition for International Criminal Court (CICC), an international coalition of over 1,000 NGOs, available at www.cicc.org.

[10] For the Pinochet case, see R. v. Bow Street Metropolitan Stipendiary Magistrate, exparte Pinochet Ugarte [2000] 1 Ac 61 (House of Lords, Judgement, November 1998). For the Sharon case, see The Complaint Against Ariel Sharon, Cour d'Appeal do Bruxelles, Chambre des Mises en Accusation, Pen. 1632/01, judgement of 26 June 2002. For the Gadaffi case, see Salvatore Zappela (2001) Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gadaffi Case Before the French Cour De Cassation, 12 European Journal of International Law, pp. 595-612. For the Lockerbie case, see Her Majesty's Advocate v. Megrahi, No. 1475/99, High Court of Justiciary at Camp Zeist (Kamp van Zeist), 31 January 2001, available at www.scotcourts.gov.uk/index1.asp. Also, for the Lockerbie case, see Murphy, S.D. (2001) Contemporary Practice of the United States Relating to International Law: Verdict in the Trial of the Lockerbie Bombing Suspects, American Journal of International Law, 405-7.

established in response to internal conflicts and also that they involve a smaller or larger participation of the international community. Whereas the ICTY and ICTR are completely international in their composition, other tribunals represent attempts to combine elements of international and domestic criminal justice systems.

An analysis of the process leading to the establishment of a criminal court dealing with the violations of IHL committed in Cambodia during Pol Pot's regime in the 1970s reveals similarities with the ICTY. On 30 April 1994 the US Congress passed the Cambodian Genocide Act, the significance of which was that it established a legal responsibility on the US authorities to punish those responsible for the genocide in Cambodia. On 11 April 1997 the UN Human Rights Commission adopted resolution 1997/49 calling for the accountability of those responsible for violations of IHL in Cambodia, thus internationalising the issue. On 31 July 1998 the UN established a group of experts to investigate the facts and examined the applicability of relevant law. The report of the experts pursuant to resolution 52/135 of the UN General Assembly recommended a tribunal and a truth and reconciliation commission. Subsequently, the methods used in making the Cambodian tribunal operational were similar to the methods used to secure cooperation of the Serbian authorities in arresting and extraditing Slobodan Milosevic in 2001. In 2001 economic pressure was applied on Cambodia to accept the establishment of the tribunal before an international donor conference on Cambodia in Tokyo in June 2001. Another similarity is the involvement of scholars and NGOs in the process. In 2001 Stephen Heder and Brian Tittmore of the War Crimes Research Office of the American University published a report making a case for individual criminal responsibility of

leading members of the Khmer Rouge regime[11]. Again, as in Milosevic's case, funding came from the Open Society Institute of the Soros Foundation.

What is noticeable in the analysis of the process of institutionalisation of ICJS in the 1990s is that the previous customary system for the enforcement of IHL that exclusively relied on states and their voluntary cooperation has transformed into a coercive centralised system with non-state actors playing a leading role. This role is particularly important in legitimising the creation and operation of this new ICJS. In this way, states, previously the leading actors in the enforcement of IHL, were relegated to a secondary position. This is an important change because traditionally, in agreeing to put limits on the means and methods of warfare, states acted out of self-interest. In other words, their motivation for developing IHL were primarily pragmatic, not ethical. The whole purpose of IHL was to delegitimise the use of force for private purpose. Those using force for private purpose had no standing under IHL and were not intended to benefit from the protections offered by it. Explaining why devastation of enemy territory and population was not in the interest of the conqueror and was even couter-productive, French diplomat Gerard de Renevel wrote in 1792: '...devastation of enemy territory may be and often is more dangerous than it is worth; it is sure to exasperate the enemy; it makes him thirsty for revenge' (quoted in Best, 1983: 53).

Although one of the oldest and most distinctive branches of international law, IHL was in a stagnant stage in terms of new developments in the areas of codification and institutionalisation before 1990s. In the period before 1990s, the development and

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[11] The report is available at the website of the Cambodian Genocide Project of the School of Law of Yale University at www.yale.edu/cgp.

popularisation of IHL was exclusively in the hands of International Committee of the Red Cross (ICRC) and its enforcement was in the hands of military authorities of individual states. However, after the establishment of the ICTY in 1993 the situation changed rapidly. Professor James Crawford of the Oxford University, who chaired the ILC's Prepratory Committee on ICC in 1994, testifies about the sudden interest for the ICC, which was particularly noticeable among NGOs, previously almost completely uninterested in IHL. The prospect of establishment of an ICC which the ICTY opened spurred a surge of interest in IHL and ICC and the ICC became a matter of great interest among both scholars[12] and practitioners. While for many years after the end of the Second World War the ICRC was the only NGO interested in IHL, the 1990s witnessed a phenomenon which could be properly described as emergence of an IHL industry.

The fact that under the old system states entered into these arrangements voluntarily meant that they were willing to see them enforced. The old system relied on numerous international conventions which define certain offences and require states to criminalise conduct, prosecute or extradite transgressors, and cooperate with other states for the effective implementation of these duties. Examples of these offences include piracy, hijacking, slavery and torture. In short, the old system was created by states and for states, whereas the new emerging system is being created by a variety of different state and non-state actors, and is not intended that states would be the primary beneficiary. Under the new system for the enforcement of IHL

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[12] Generally on the Rome Statute, see Schabas, W.A. (2001) Introduction to the International Criminal Court, Cambridge, Cambridge University Press; Cassess, A., Gaeta, P. and Jones, J.R.W.D. (eds.) (2002) The Rome Statute of the International Criminal Court: a Commentary, Oxford, Oxford University Press; Politi, M. and Nessi, G. (eds.) (2001) Rome Statute of the International Criminal Court: A Challenge to Impunity, Ashgate, Aldershot; Saddat, L.N. (2002) The International Criminal Court and the Transformation of International Law: Justice for the New Millennium, Ardsley, N.Y.

international institutions are not expected simply to implement law created by states-rather institutions play a significant legislative role. In other words, the new tribunals for the enforcement of IHL are not expected simply to regulate means and methods of warfare used by states, they are also expected to significantly influence and alter the reasons for which they are employed. New international institutions are increasingly playing both an enabling and a restraining role vis-à-vis states and international tribunals and the newly created ICC are increasingly expected to play a significant role in managing the use of force in international relations, in particular in intra-state conflicts.

To understand the enabling and constraining role of ICTY and ICC in the management of the Yugoslav conflict and other similar conflicts, it is necessary to recognise the conceptual difference between the rationalist conception of international cooperation, which views international agreements as contracts, and the idealist conception, which sees international agreements primarily as statements of aspirations. Under the rationalist conception, international law is instrumentalised by the most powerful states pursuing their own self-interest, typically material in nature (although ideational interests are not excluded). Under this conception, rules emerge spontaneously and are codified voluntarily by interacting units and for this reason they are both effective and legitimate. They are legitimate because they are not imposed on states, thus upholding the principle of preserving their autonomy. They are also effective because they are self-sustaining, which is particularly important for international law because they do not require a third party to enforce them.

Transnational Publishers; Shelton, D. (ed.) (2000) International Crimes, Peace and Human Rights: the Role of the International Criminal Court, Ardsley, N.Y., Transnational Publishers.

Having said that the ICC has potential for both an enabling and a restraining role vis-a-vis states, it is important to point out that generally rules can play either a more limited role, the so-called regulative role, or one that is more extensive, the so-called constitutive role. The traditional role of IHL was intended to regulate the conduct of states in war in accordance with the principles of necessity, where force is used only if all other means have been tried first; proportionality, where the benefits of the use of force outweigh the costs; discrimination, where non-combatants are not deliberately targeted; and humanity, where the intention is to minimise human suffering. This chapter argues that the rules of warfare to be applied by the ICC are intended to be both regulative and constitutive. The implications of this argument are particularly important for the structure of the ISS, and in particular for its normative aspect. As mentioned earlier, the focus of this chapter is on the potential contribution of the ICC to international peace and security and the rule of law in international relations[13].

The discussion on the implications of the ICC for the rule of law in international relations have been dominated by analysts coming from the international law perspective and supported by human rights campaigners. In this sense, this discussion has been dominated by utopian thought where teleology is prioritised over analysis. Indeed, whether the ICC is going to eradicate or at least reduce international crimes and thus have a significant impact on the rule of law in international relations is a pertinent and important question. However, what has been largely neglected in the literature on the ICC is the potential impact of the ICC on the ISS. In arguing that the

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[13] The rule of law is understood in the sense used by Rousseau and Habermas, among others. According to Habermas, law is only legitimate and justifiable if it is created with the consent of those to whom it applies. Habermas argues that only regulations 'that can claim legitimacy are those to which all who are possibly affected could assent as participants in rational discourses' (Habermas, 1996: 458).

ICC may have a significant impact for the ISS, this chapter argues that the process of institutionalisation of ICJS is consistent with related developments within the ISS and is an important part of the emerging new post-Cold War ISS. William Nash points out that the ICC is the first international security institution with global significance after the establishment of the UN in 1945 (Nash in Keysen and Sewall, 2000: 156).

Stressing the implications of the ICC for the ISS is particularly important because the future development of the ICC depends on the expectations associated with it. For this reason, this chapter and thesis as a whole seek to contribute to the debate about the ICC by pointing to the security implications of the ICC. Expanding the terms of the discussion on the ICC to its security implications is particularly important in the contemporary world, which is characterised by the increasing difficulty of separating observers and participants of political and other developments of public interest. The extent to which this argument applies to the creation and operation of ICTY and ICC is best illustrated by the role of the media and campaigning scholarship. Commenting on the uncritical calls for the development of IHL and institutionalisation of ICJS, Joschnik and Norman write: '...succeeding generations continue to call for more laws, without examining, or even understanding, the nature of the legal structure upon which they place their humanitarian hopes' (Joschnik and Norman, 1994: 55). They also argue that, contrary to common wisdom, the institutionalisation of ICJS and the creation of ICC actually legitimises violence, putting principles of military necessity above principles of humanity.

How can this be explained? Reactions to and expectations from the institutionalisation of ICJS are typical for the development of any other area of

international law. Given the history of international law, where it oscillated between utopia and apology, it may be said two kinds of expectations have developed in relations to the potential role of international law in international relations, which could be described as idealistic and realistic. The former is often called in the literature legalistic. In analysing the history of previous international war crimes tribunals, Gary Bass argues that the establishment of all previous international war crimes tribunals can be attributed to legalistic beliefs of political leaders of liberal democracies (Bass, 2000: 7). Describing the legalistic position, Richard Falk writes: 'The legalists argue that world peace depends on enlarging the scope and range of legal rules, the growth of habitual respect for law and the creation of international institutions capable of interpreting and enforcing the law' (Falk, 1975: 29). Realists, on the other hand, are completely dismissive of the role of international law and institutions. Stephen Krasner's position is typical: 'International rules and institutions are mere window-dressing; their creation and decline, and the degree to which the states respect them, depend solely on the current power realities' (Krasner, 1982: 190-191).

The key expectation from the ICC is that it will help deter violations of IHL and thus make future wars more humane. Realists are sceptical about the transformative potential of international institutions. Martin Wight argues that 'while in domestic politics the struggle for power is governed and circumscribed by the framework of law and institutions, in international politics law and institutions are governed and circumscribed by the struggle for power' (Wight, 1979: 102). Institutionalists disagree with this view, arguing that 'institutions do not merely reflect the preferences and power of the units constituting them; the institutions themselves

shape those preferences and that power' (Goldstein and Keohane, 1993). Institutionalists are also more optimistic about the potential of international institutions to 'eradicate' international anarchy because they consider ideas, and not just material capabilities, to be a source of power. In the current US literature, there is consensus that the precondition for effective international institutions is the existence of a hegemon or common interest (Baldwin, 1993: 285). Generally speaking, those who believe in transformative power of international institutions believe in the power of reason and progress, holding the view that human nature is not predetermined and static but that human beings are reflective and capable of learning from experience[14].

In explaining the reasons for the institutionalisation of ICJS in the 1990s this chapter argues that the development of IHL and creation of ICC represents a compromise between idealist and realist expectations in relation to international law. To understand why IHL, a branch of *jus in bello*, was chosen, it is necessary to point out to the limitations of international law in relation to the use of force in international relations in general. Drawing from the lessons of the Nuremberg Trials, legal scholars have generally accepted that *jus ad bellum* is not a justiciable matter[15], because in order to pass a judgement on the legality of state's decision to use force, like for example, whether a particular state acted in self-defence or whether alleged motives for a particular intervention are humanitarian or not, the state in question must be

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[14] Theorists of learning distinguish between complex learning and adaptation (Allan and Goldman, 1995: 139), where the former involves changing both the environment and oneself, and the latter involves only changing of oneself. For significance of learning in international relations, see Haas, 1990 and Haas, 1992.

[15] Reacting to accusations that Britain violated international law by planting mines in the territorial waters of the neutral Norway in order to prevent Swedish ore reaching Germany in 1939, Winston Churchill said: 'The letter of law must not in supreme emergency obstruct those who are charged with its preservation and enforcement' (quoted in Ziegler, 1987: 156). Similarly, reacting to questions about the legality of US threat of force at the time of Cuban missile crisis, US Secretary of State Dean Acheson said: 'The power, position, and prestige of the United States had been challenged by another

defeated in war first. The necessity of military dominance for passing a judgement of this sort in turn questions the legitimacy of such judgement because only the victorious states can pass such a judgement. James Crawford, who was in charge of drafting the ICC Statute, argues that the issue of conduct of war, i.e. passing judgement on the selection of means and methods of warfare, is as controversial as establishing who is responsible for the eruption of hostilities and liable to the same accusations of 'victor's justice' (Crawford, in Sands, 2003). Pointing to the complexity and uniqueness of every war, he argues that drawing a line between civilians and combatants in 'new wars', or more generally between legitimate and illegitimate behaviour in war is not something that criminal law can deal with on a regular, routine basis.

The limitations of international law in relation to the states' discretion to choose when to use force are also evident in relation to their freedom to choose means and methods of warfare. The opposition to the ICC, which is concerned only with limiting the latter, are particularly evident in the US, and there is a virtual consensus on this issue between the Pentagon and civil society in the US[16]. Carl Keysen and Sarah Sewall have argued that investigations, whether internal or by the ICC, into the actions of US forces would be demoralising both for the military personnel and for the public supporting them. At the strategic level, such actions would undermine the basis of domestic support for US foreign policy and at the operational level 'constant investigations would be perceived as second-guessing of military decisions, which

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state; and law simply does not deal with such questions of ultimate power... No law can destroy the state creating the law. The survival of states is not a matter of law.' (Ibid: 157).

[16] This consensus was evident to the author when attending a conference in Washington, D.C. in September 2000.

would undermine the confidence in individual operational decisions- a particular strength of the US armed forces' (Keysen and Sewall, 2000: 18).

In analysing the process of institutionalisation of ICJS it is necessary to contextualise it within wider developments that made it possible. This is also important in order to explore its wider implications. In analysing the conditions that made institutionalisation of ICJS possible, this chapter identifies material and ideational changes which followed the end of the Cold War as crucial environmental factors which made it possible. These changes can be reduced down to two: the emergence of the US as the dominant military force in the world and the ideological triumph of liberalism. It is important, however, to point out the interdependence of these two sets of factors because ideational changes (e.g. increasing support for universal human rights) in themselves cannot explain the establishment of the ICC. Material changes, and in particular, the 'information revolution' which dramatically increased the military capability of the US[17], have to be taken into account.

To argue that both material and ideational factors have contributed to the process of institutionalisation of ICJS is to recognise the fact that historically the instances of codification of IHL (the Genocide Convention of 1948 and the Geneva Conventions of 1949 followed the WW2, and Additional Protocols to Geneva Conventions in 1966 and 1977 followed wars of decolonisation) have followed previous wars, or have tried to incorporate the experience of previous wars. It is

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[17] According to George Stein of the US Air Force Air War College, the term 'information warfare' refers to a variety of techniques, ranging from the interception of enemy communication to psychological operations, all of which are aimed at achieving military objectives through persuasion, without the use of violent means (Stein, 1995).

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argued here that the Yugoslav conflict played a similar paradigmatic role in the development of IHL in the 1990s.

Probable the single greatest legacy of the ICTY is that it helped to mobilise and sustain international support for the creation of the ICC. In analysing the reasons why the ICTY, unlike the IMT at Nuremberg, succeeded in this it should be remembered that both tribunals were established as ad hoc tribunals in response to particular conflicts with a view of helping to establish a permanent ICC. The key difference between the two tribunals and the reason why the ICTY succeeded is that its overall aims and objectives were more modest. Whereas the IMT attempted to criminalise certain military and political objectives, the ICTY only criminalises certain methods and means of warfare, regardless of the military and political objectives for which they are purportedly employed. 'Clearly, the logic of Nuremberg rests on a moral order in which ends of a policy are crucial, and in which means are assessed according to their intrinsic character as well as their proportionate relationship to ends' (Falk, 1975: 133).

Another significant difference between the IMT on the one hand and the ICTY and ICC on the other is that whereas the coalition sitting in judgement in Nuremberg was formed in the battlefield, the international community sitting in judgement in The Hague is being created as the proceedings unfold. Recognising that military victory has to be transformed into a moral one if its effects are going to last, Geoffrey Robertson, one of the key supporters of the ICC, argues: 'We have to win wars not just in the battlefield but in the courtroom'[18].

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[18] Speaking on the Today programme, BBC Radio 4, 27/03/02.

Any analysis of the institutionalisation of ICJS must include domestic forces and in particular the interactions between governments and non-state actors contributing to the processes at the international level (Slaughter, 1993; Moravscik, 1997). Institutionalisation basically involves patternisation and coordination of behaviour, as opposed to voluntarism and unilateralism (Ruggie, 1998). Theorists of legalisation of international politics have pointed out that it is possible to distinguish between degrees of institutionalisation (Abbot et al, 2000). Institutionalisation is generally welcomed because it reduces uncertainty and risk, by discouraging unilateralism and promoting cooperation.

Historically, in relation to the realities of power international law has moved within the continuum between apology and utopia, that is, between positivism and naturalism. In other words, in some periods international law tended to express power relations and interests of the most powerful, and at others it gave a platform to idealistic aspirations of internationalists. As Martin Wight argues, 'international law seems to follow an inverse movement to that of international politics. When diplomacy is violent unscrupulous, international law soars into the region of natural law; when diplomacy acquires a certain habit of cooperation, international law crawls into the mud of legal positivism' (Wight, 1966: 29). This insight into the history of international law is useful in understanding the development of IHL in the 1990s. What we have seen in the 1990s is the latest attempt to make the development of international law congruent with the developments in international politics, so that normative developments match developments in the material sphere. The developments in IHL reflect both the influence of human rights as well as

technological advances in weaponry. Burtham has argued that 'aerial bombardment has become an integral part of American foreign policy' (quoted in Laughland, 2002). Keegan has argued that the development of IHL is not unrelated to the technological developments that have changed the means of warfare. He argues that 'technology and international morality now march hand in hand' (Keegan in Laughland, 2002).

Theoretical Framework for the Analysis of Institutionalisation of ICJS

Given the overall objectives of this thesis and this chapter in particular, and given the recent revival of interest in interdisciplinary research involving International Relations (IR) and International Law (IL), it is logical to explore the possibility of building a theoretical framework for the analysis of institutionalisation of ICJS using these two disciplines. Martin Wight points out that International Law was the oldest tradition of speculating about the international system (Wight in Butterfield and Wight, 1966). Stanley Hoffmann also argues that 'international law is the oldest attempt to make the 'state of war' less antisocial and to make war itself less necessary, less savage, or less possible' (Hoffmann, 1965: viii). However, during the Cold War these two disciplines became rather estranged. Realism, as the dominant school of thought at the time, considered IL to be irrelevant for the study of how states actually behave in international affairs. The two disciplines became particularly estranged in the 1960s, which was the result of the behavioural revolution in social science which led IR scholars, particularly in the US[19], to embrace positivist methodologies used in natural sciences. An important consequence of this and the insistence on the 'factualisation of behaviour' was that normative theories were neglected.

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[19] It should be noted that IR has been and continues to be predominately a US discipline (see Hoffmann, 1960 and Weaver, 1998).

Behaviouralists considered normative theories 'expressions of various opinions but an approach incapable of providing evidence to resolve a matter of dispute' (Marsh and Stoker, 1995: 9). Nevertheless, a number of scholars tried to maintain links and collaboration between two disciplines (Deutch and Hoffmann, 1968; Henkin, 1968; Falk, 1975). The most recent episode in the mutual cooperation between IR and IL started in the late 1980s and continued throughout the 1990s (Abbot, 1989; Abbot et al, 2000; Slaughter-Burley, 1993; Beck et al, 1996; Falk, 1999).

The collaboration between the two disciplines in the 1990s had been made possible by developments within each discipline in the 1970s and 1980s. In the 1970s IR witnessed the emergence of theories which challenged the dominant realist theory centred around the concept of international anarchy. The most influential among them was the theory of interdependence (Keohane and Nye, 1977). Regime theories of the 1980s built upon this, emphasising principles, norms, and procedures of international cooperation, which offered the possibility of reintegrating the two disciplines. The emergence of alternatives to neo-Realism in the 1990s also meant a shift in the focus of study of the international system from structure to process. At the same time, IR has moved from the positivist legacy of behavioural revolution embracing new normative approaches[20] (see Brown, 1992; Ruggie, 1998; Wendt, 1996; Wheeler 1996). Normative approaches are generally more receptive to International Law which further facilitated the reaproachment between the two disciplines in the 1990s.

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[20] In the US, post-positivist approaches international politics are known under the banner of constructivism. For an overview of how constructivist approaches differ from the mainstream rationalist ones in the US IR literature, see Katzenstein, Krasner and Keohane, 1998. In the UK, proponents of normative thought in IR are known as post-positivists or critical English School thinkers.

What made the collaboration between IR and IL possible is that both disciplines have moved towards a process-based conception of law and politics. One consequence of the shared process-based conception of law and politics is that the traditional line separating the two disciplines has become blurred, which has led Kenneth Abbot to conclude that 'law is a continuation of political intercourse, with the addition of other means' (Abbot et al, 2000: 419). Within IL, the factor that particularly contributed to collaboration between IR and IL was the establishment of the New Haven School (NHS)[21] as the dominant approach among international lawyers. Although the NHS had been dominant in the US for many years, its spread beyond the US in the 1990s is particularly important for the institutionalisation of ICJS. For the proponents of NHS, the unit of analysis is the individual and the level of analysis is global. The purpose of international law is to achieve a world order based on respect for fundamental human dignity. For NHS theorists, 'law is a complex process of authoritative decision-making' (Beck et al, 1996: 13). Lasswell and McDougal view the legal process as a 'succession of claims and authoritative decisions about those claims. Accumulated over time, these decisions, provided they are authoritative and effective, represent law' (quoted in Ibid: 15).

Methodologically, NHS sought to expand the scope of legal enquiry beyond textual analysis to include the analysis of the decision-making process. In opposition to the natural law position which argues that law is discovered from nature, the NHS position is that law is socially constructed to give effect to the goals of the political community it serves (Beck et al, 1996: 111) Beck argues that in studying the arena in which authoritative decision-making process takes place, the NHS scholars had long

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[21] For an introduction to the NHS, see: McDougal, 1960a; McDougal, 1960b; Lasswell and Reisman, 1968; McDougal and Reisman, 1981; Reisman and Weston, 1976.

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performed an analysis very similar to that which institutionalists now utilise in the study of international regimes and institutions (Beck et al: 112).

Commenting on the shift in understanding of international law brought about by NHS (from text to process), Ann-Marie Slaughter-Burley argues that this increased the number of functions that law performed from guidance and regulation to communication, reassurance, monitoring, and routinisation (Slaughter-Burley, 1993: 209). The liberal theory of international law and politics complements the process-based conception of law advocated by NHS scholars. The process-based conception of international law is evident in the following words of Slaughter Burley:

> Realists, as I will call the largely American schismatics, see explicit and implicit agreements, formal texts, and state behaviour as being in a condition of effervescent interaction, unceasingly creating, modifying and replacing norms. Texts themselves are but one among a large number of means for ascertaining original intention. Moreover, realists postulate an accelerating contraction in the capacity and the authority of original intention to govern state behaviour. Indeed, original intention does not govern at any point in time. For original intention has no intrinsic authority. The past is relevant only to the extent that it helps us to identify currently prevailing attitudes about the propriety of government's acts and omissions (Slaughter-Burley in Damrosch and Scheffer, 1991: 186).

In addition to the changes within, what made collaboration between the two disciplines possible in the 1990s is the fact that both disciplines have become more receptive to the changes in the 'real' world. Both disciplines were quick in seizing the

opportunities offered by the end of the Cold War by exploiting the changes in the material structure of the international security system and the ideational changes underpinning it. This is particularly evident in the development of IHL and institutionalisation of ICJS, which resulted partly from the technological changes associated with the 'information revolution' that fundamentally changes the dominant methods of warfare.

To understand the collaboration between IR and IL in the 1990s, and in particular why an interdiscipinary approach using these two disciplines is appropriate for the study of institutionalisation of ICJS, one needs to understand the difference between the nature and origin of rules that limit the use of force in international relations. One kind of rules is reflective of the actual behaviour of combatants in war. Another kind of rules contains rules that are specifically designed to prevent certain kind of behaviour that is deemed to be undesirable. It is important to recognise that these two kinds of rules coexist at all times. During the Cold War, the dominant rules were those that reflected the reality of the military balance of power and although they were not codified, their effect on the behaviour of combatants was evident. An example of how actors followed these rules is the rules governing the relations between superpowers, sometimes euphemistically called 'rules of the game'. They imposed limits on the use of force by the superpowers as well as their allies. In the Third World, many conflicts were limited in terms of the military and political objectives as well as methods and means of warfare of their protagonists by the fear that their escalation would lead to nuclear confrontation between the two superpowers. The existence of the bipolar world enabled superpowers to exert control of their allies, and the end of the Cold War represented a loss of this control. It needs

to be remembered that throughout the duration of the Cold War, the 'rules of the game' coexisted with the rules governing the use of force in the UN Charter. Evidently, 'rules of the game' were more effective in affecting the actual conduct of states regarding the use of force during the Cold War. Louis Henkin argued that much of law, and in particular the effective law, is actually a codification of existing norms of how people behave, and to that extent law reflects rather than imposes the existing order (Henkin, 1968: 89). In general, compliance with law, as well as violations of it, is either habitual, that is, unintentional and customary in origin, or consensual and intentional, that is, based on some form of rational assessment of costs and benefits associated with compliance or violations of law[22].

In the context of the preceding discussion, which emphasised the difference between reality and aspirations, it is important to distinguish between rules of behaviour from rules for behaviour. The difference between rules of and rules for behaviour and the gap between the two is the subject matter of all jurisprudence, including international law. The analogy in political theory is the difference between empirical and normative theories. The purpose of normative theories is to prescribe behaviour- they state what ought to be. On the other hand, the purpose of empirical theories is to explain the world as it is – they state what is. Reflecting on the dichotomy between rules of and rules for behaviour, Stanley Hoffmann argues: '...any legal system, while reflecting either a general consensus about reality or the law-maker's image of reality, also tries to a varying extent to change reality in such a way as to produce the minimum discrepancy between rules of and rules for behaviour through a transformation of the former' (Deutch and Hoffmann, 1968: 22). Depending

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[22] Henkin warns that despite seeming obvious, cost-benefit analysis is actually very hard to conduct.

on the degree to which rules of and rules for behaviour correspond, laws have transformative potential. In other words, if the two kinds of rules are unrelated, then the law will not play a significant transformative social role. Similarly, political theories that are not based on sound empirical basis will not significantly change the reality they are addressing.

Beck et al distinguish between empiricist and critical approaches to the study of international law and rules in general (Beck et al, 1996). Similarly, Keohane distinguishes between instrumentalist and reflectivist approaches to international law and rules (Keohane, 1998). The aim of the former is to derive causal explanations for rule-oriented outcomes and events. They are not concerned with the meaning of the outcomes for the actors. Critical studies, on the other hand, aim to understand the nature and origin of rules and what they represent. According to them, the New Stream scholars of international law and constructivists within IR share a common ontology of the 'web of intersubjective meaning that constitute human consciousness'. Constructivist explanations of institutionalisation of ICJS are likely to hinge less on functionalist and interest-driven accounts and more on historically contingent narratives regarding the emergence of a particular legal understanding (Sikkink and Finnemore, 1998).

In conducting a historically contingent analysis of any kind of rules, the following questions need to be asked: What is the origin of the rules, i.e. who, if anybody, made the rules? What purpose are the rules intended to serve? It is argued in this chapter that the institutionalisation of ICJS, as a form of instrumentalisation of IHL, is designed to impose limits on the ability of some states to use force for any

purpose, including self-defence. This means, in effect, that their observance might lead to the destruction of those states. This is not the traditional purpose of IHL and represents a significant change. Traditionally, IHL was created by states and enforced by states for their own benefit because states had their own interests in observing the limits imposed by the IHL. Even Nazi Germany, a state which epitomises lack of any moral limits, refrained from using chemical weapons during the Second World War.

In the 1990s the number of articles dealing with law and politics in international relations increased, and this applies to the most influential journals like the American Journal of International Law and the European Journal of International Law. In 2002, the American Society of International Law hosted an annual meeting entitled "The Legalisation of International Relations/The Internationalisation of Legal Relations". The majority of contributors on the IR side came form the neo-institutionalist school of thought. It has been pointed out by critical legal scholars that the collaboration between the two disciplines is actually limited to a fairly small number of scholars[23].

Historically, both disciplines have been state-centric. Traditional international public law is exclusively concerned with states (see Oppenheim, 1955; Brierly, 1944). At the same time, the realist tradition within IR was primarily or exclusively concerned with states' military and economic power (Morgenthau, 1949). In the 1990s, both disciplines were faced with a challenge of providing an account of law without government or 'governance without government' (Falk, 1999). As a phenomenon which is taking place in the context of absence of global government,

the institutionalisation of ICJS has been studied primarily by international lawyers. The relative lack of IR analyses is worrying because of the significance of the process for the ISS. In the 1990s, both disciplines shifted away from statism and towards taking the individual human being as unit of their analysis.

In analysing factors that make collaboration between IR and IL possible, it is important to emphasise the fact that in the 1990s both disciplines adopted the process-based conception of politics and law. In IR this shift is evident in the move away from the traditional institutionalist approach[24] and towards neo-institutionalism (e.g. Keohane, 1993; Young, 1994; Ruggie, 1998). The study of institutions, including the international ones, now includes more than the formal institutions of government. The focus of study has now moved towards other actors outside formal institutions whose actions affect the process of governance. In IL the shift towards a process-based conception of law has meant that the traditional textual analysis was replaced by the so-called configurative jurisprudence introduced by the HNS as the dominant methodological approach.

It has been pointed out that the explanation for institutionalisation of ICJS lies in the changes in the material and ideational realms following the end of the Cold War. The question is what is the relative part played by each of them. What is particularly important to note is the inclusion of constructivism into mainstream IR theory in the 1990s. Constructivism in the more recent IR literature originates primarily from the writings of Anthony Giddens and Nicolas Onuf (Giddens, 1981;

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[23] Simpson, G. (2000) The Situation on the International Legal Theory Front, 11 European Journal of International Law; Kennedy, D. (1999) The Disciplines of International Law and Policy, 12 Leiden Journal of International LAw

Onuf, 1989). The key argument advanced by constructivists is that the environment in which the actions of individual actors take place consists not only of material things but also of ideas. Constructivists reject the representational view of the relationship between ideas and material things which postulates that ideas and words correspond to the pre-existing things in the material world. 'A constructivist view denies that world and words are independent; it sees them as mutually constitutive' (Onuf, 1989: 94). David Campbell criticises what he calls epistemic realism whereby the world comprises of objects whose existence is independent of ideas and beliefs about them and that there are material causes to which events and actions can be reduced (Campbell, 1998). Onuf argues that human action cannot be explained solely by referring to material things as explanation. 'Resources are nothing until mobilised through rules, rules are nothing until matched to resources to effectuate the rule (Ibid: 64).

Within IR, realists have traditionally tried to find explanations of the behaviour of states in the material world. John Mearsheimer argues that 'state behaviour is largely shaped by the material structure of the international system. The distribution of capabilities among states is the key factor for understanding world politics' (Mearsheimer, 1995: 91). On the other hand, constructivists have argued that possession of material capabilities is not sufficient for understanding world politics. Alexander Wendt argues that 'material capabilities as such explain nothing; their effects presuppose structures of shared knowledge, which vary and are not reducible to capabilities' (Wendt, 1995: 73).

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[24] For a brief introduction to traditional institutionalist approach to the study of politics, see Marsh and Stoker, 1995.

Constructivists reject the realist premise that material capabilities determine intentions of states. They also reject the argument of structural realists (Waltz, 1979) that, because of the conditions of international anarchy, states have no choice but to act opportunistically, that is, as predators, in the international system. In other words, they argue that structure determines processes within the international system. Alexander Wendt rejects this by arguing:

> There is no 'logic' of anarchy apart from the practices that create and instantiate one structure of identities and interests rather than another; structure has no existence or casual powers apart from the process. Self-help and power politics are institutions, not essential features of anarchy. Anarchy is what states make of it... (Wendt in Kratochwil, 1994: 74).

Constructivism represents an intellectual step forward in relation to structural realism because it explores what realism assumes, which makes constructivism particularly well suited to deal with the issue of change and transformation of international system at the present time. Constructivists criticise rationalists for dealing with actors' identities by simply assuming them, providing no account of how their identity was created in the first place or how it might change in the future. This is particularly significant for its failure to provide an account of how the spread of ideas affect the creation of new political communities. Constructivists like Adler and Barnet use the concept of security community, first used by Karl Deutch in the 1950s, to study the process of community formation at national and international level, highlighting the importance of identity formation measured by social transactions and communications among the members of the community. Generally, political communities are characterised by the commitments of their members to peaceful

methods of settling their differences. In international relations, the emergence of communities is attributable to the identification of shared interest of their members in preserving their security and prosperity and values like human rights and democracy. Adler and Barnett argue that the recognition of long-term interest borders on altruism (Adler and Barnett, 1998: 31).

What is crucial for understanding of how international security communities are created and sustained and how these oases of peace can affect the rest of the international system is the process of learning and internalisation of rules. Learning is an 'active process of redefinition and reinterpretation of reality on the basis of new causal and normative knowledge' (Adler and Barnett, 1998: 401). Learning promotes mutual trust and shape identities of actors. The functions of learning include the diffusion of norms across countries, promotion of new definition of security, development of new collective identities, and redefinition of regions.

Constructivist insistence that the structure of international relations is socially constructed and not given by nature is also important because it rejects the rationalist logic by which realists explain state behaviour. This logic can be reduced to the assertion that states are trying, at minimum, to survive, and at maximum, to establish dominance over other states. Given the ultimate goals, the analysis focuses on the strategies which include selection of means and methods to achieve them. Kratochwil and Mansfield criticise this orientation on the study of means rather than ends by arguing: 'Instead of deliberating and reflecting on the goals as well as means of action, modern political theory views the interests and goals as given by assumption, and it explains the choices of actors in terms of instrumental and strategic rationality'

(Kratochwil and Mansfield, 1994: 43). The constructivist conception of process is important for the understanding of the changes within the structure because they 'share a cognitive, intersubjective conception of process in which identities and interests are endogenous to interaction, rather than a rationalist-behaviour one in which they are exogenous' (Goldstein and Keohane, 1993: 5). This is particularly important for IHL, which is traditionally concerned with means and methods of warfare, not the ends for which they are employed. Constructivists argue that norms and rules shape both the goals of states and their perception of what constitute their best interest and the means they use to achieve those goals (Florini, 1997). Neuman and Weaver argue that identities and interests are not predetermined and atemporal but susceptible to change and historical (Neuman and Weaver, 1997).

Constructivists also emphasise the role of intergovernmental and non-governmental actors in the process of creation and transformation of the international system and this is particularly important for the understanding of the process of institutionalisation of ICJS. Non-state actors are qualitatively different from states because they are said to be primarily concerned with moral as opposed to material interests. For this reason, they view international agreements as embodiments of shared norms and beliefs. As Keohane points out, reflectivists focus on beliefs to analyse 'how knowledgeable practices constitute subjects' (Goldstein and Keohane, 1993: 3).

What is significant to point out in relation to the process of institutionalisation of ICJS, and in particular to the academic writings on it, is that the literature is dominated by enthusiastic supporters of human rights who typically ignore the

material factors behind the process. In this way, campaigning comes before analysis. As E.H. Carr argued sixty years ago commenting on the prevalence of utopian as opposed to mature thought in IR: 'Immature thought is predominately purposive and utopian. Thought which rejects purpose altogether is the thought of the old age. Mature thought combines purpose with obligation and analysis. Utopia and reality are thus two facets of political science' (Carr, 1939: 15).

In advocating a new role of international law in the US foreign policy, Keohane argues that contemporary IR has moved away from legalism (belief that international peace and security can be achieved through the development of international law and international institutions, regardless of the political conditions for their operation; link with Churchill, Acheson, etc.) and idealism which typified the field's origins.

Another crucial point to recognise is the dominance of a particular conception of customary law, associated with H.L.A. Hart, which maintains that international law exists even in the absence of a global sovereign (Hart, 1961). Recently, Abbot has advocated a managerial conception of law (as opposed to 'order backed by threats' of Austin) (Abbot, 2000). The constructivist conception of law fits with this conception because constructivists emphasise non-coercive sources of legal obligation. They insist on legitimacy (Franck, 1990; Hurd, 1999). Generally speaking, both political and legal theory are concerned with the question of why actors conform to rules. The focus of empirical research is why states and individuals actually respect rules, and in general they offer two kinds of reasons. One explanation is that people obey rules because they fear the consequences of not doing so, and the other is that they do so

because they realise that doing so is in their interest. In the former case, we talk about the imposition of rules and in the latter we say that rules have been internalised. The point that norms guide behaviour even in the absence of coercive mechanisms has been noted by many authors.

Institutionalisation of ICJS and ISS

It was argued in the previous section that because the process of institutionalisation of ICJS has been studied primarily by international lawyers and human rights campaigners the implications of the ICC for the ISS and particularly the ability of states to use force for any reason, including self-defence, has been largely overlooked.

How is the ICC going to affect the existing ISS? Is the ISS going to impose new limits on the use of force in international relations? Is the ICC going to strengthen the existing ISS? Many commentators have pointed out that the ICC is going to undermine the effectiveness of the military forces of the most powerful military forces in the world, including that of the US and the UK[25].

Since the Peace of Westphalia, the key actors making the difference between peace and war in international relations have been states. The institutionalisation of the collective security systems in the twentieth century and the creation of the League of Nations and the Organisation of United Nations did not change that- states remained exclusive guarantors of international peace and security. The organisational

structure and decision-making mechanisms of both the League of Nations and the United Nations incorporated both the realities of power, which was recognised in giving the most powerful members of the organisation greatest say in maintaining international peace and security, as well as pacifist aspirations for the future. These aspirations were recognised in the principle of equality of preserving the existence of all states, small and large. It needs to be said that particular alliances, including bilateral treaties and collective regional security arrangements, which co-existed alongside the League and the UN were consistent with these broad principles. NATO and the Warsaw Pact, for example, were established under the principle of collective self-defence where members pledged their commitment to defend each other against an external attack.

What has changed in the post-Cold War era, and this can be attributed to the influence of liberalism on all international institutions and arrangements is that the ultimate objective of the ISS is no longer the security of states but people. This trend, identified as 'individualisation of security' puts individuals, rather than states as the ultimate value that the ISS should seek to preserve. Michael Klare and Daniel Thomas argue that in the post-Cold War world it is necessary to reconceptualise security[26]. Instead of international security with states as central actors, they argue for 'world security'. The notion of world security is consistent with the long-standing argument that peace is indivisible, which states that both costs and benefits of maintaining international peace and security should be borne by all states.

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[25] Michael Reisman of the Yale School of Law argued that the ICC would undermine the ability of the US top defend the ISS. Sir Richard Guthrie, former Chief of Defence Staff of the UK armed forces, also argued that the ICC would undermine the fighting capability of the UK armed forces.

[26] See Klare and Thomas, 1991. The consequences of the call for reconceptualisation of security, or indeed any other issue, are not purely academic as one might instinctively think because ways of thinking about issues affect ways of dealing with them.

The world security concept is theoretically informed by a range of theories that emphasise the growth of global interdependence and the possibility of international cooperation. These theories view world politics not as a historically frozen realm of power-hungry states, but rather as a dynamic process of interaction among individuals, groups, states, and international institutions, all of which are capable of adopting their sense of self-interest in response to new information and changing circumstances (Klare and Thomas, 1991: 3).

Another factor contributing to the process of institutionalisation of ICJS and the creation of ICC is the change in the conception of justified international intervention aimed at restoring peace and security in any given state. The emphasis is that military force alone cannot produce a lasting peace. Thomas Franck, for example, calls for a holistic approach to international interventions in intra-state conflicts, combining security restoring and peace-building activities (Franck in Doyle and Ottune, 1998). This approach to intervention, conducive to the concept of international judicial intervention, includes an active role for both civilian and military actors. Unlike the traditional peace-keeping, the objective of the holistic approach is not just to stop the fighting but to reconstruct the state (Franck in Otunn and Doyle, 1998: 275). Michael Pugh argues that peace-building includes facilitating elements of human security, demilitarisation, justice, good governance, accountability, national reconciliation, and social development (Pugh, 2000: 11).

The concept of 'societal security' as opposed to 'state security', which became very popular after the end of the Cold War is echoed in the Agenda for Peace (Ghali,

1992). It argues that peace and security, previously exclusively the concern of states, are legitimate concerns not just of statesmen but of people at large. In this context, it is possible to talk about the popularisation and privatisation of security. Following the conceptual shift from understanding international peace and security as the absence of conflict between states to the absence of conflict among individuals, the Report of the Commission for Global Governance in 1995 proposed amendments to the Genocide Convention and the UN Charter to allow for non-state actors to bring 'threats to the security of the people' to the Security Council's attention and allowed the Council to intervene in states' internal affairs in 'cases that constitute a violations of the security of people so gross and extreme that it requires an international response on humanitarian grounds' (UN Report, 1995: 130).

The previous section argued that for understanding of the process of institutionalisation of ICJS it is necessary to provide an account of both the material and ideational changes after the end of the Cold War that made the creation of ICC possible. Among the first type of changes the most significant one has been the end of the bipolar system with two superpowers counterbalancing each other's nuclear capabilities and the emergence of the US as the only superpower capable of projecting its military power anywhere in the world. The gap between the US and its potential (not actual) rivals is already huge and is actually increasing following its declaration of the war on terrorism. The military spending of the US is greater than the sum of that of the fifteen next states, some of which are its closest allies, taken together.

The dominant position of the US in terms of its capability is particularly evident in the area of information technology. The application of the latest

developments in communication and information technology has dramatically increased the military capability of the US in the area of air power and intelligence gathering. Satellite-guided missiles and 'smart bombs' have made aerial bombing, previously considered as an indiscriminate method of warfare and thus prohibited under the Hague Conventions of 1907, 'surgically' precise (apparently). The application of information technology in 'precision bombing' has also enabled the US forces to inflict devastating damage on their opponents without risking lives of their personnel. In a country where memories of 50,000 dead Americans in Vietnam stifled the US from using its military power in pursuit of its foreign policy objectives more often, this was particularly significant because it enabled US political and military leaders to use force without fear of adverse reaction from the US public.

Ideational changes which contributed to the creation of the ICC are related to the process of creation of an international security community. Clark has argued that the US has played the central role in the creation of such a community since the end of the WW2 and particularly after the end of the Cold War. 'Part of the key leadership role played by the US within this system is as the sponsor of a set of core values that would be collectively embraced. Indeed, the function of the regulative peace was to set out the basic principles to which states would be invited to subscribe, as part of their admission to the extended security community of the West' (Clark, 2001: 212). Martin Shaw has argued that a gigantic security community stretching geographically from the North America to Asia is already emerging today (Shaw, 1994).

To maintain its leading position within the post-Cold War ISS, the US has to retain its freedom to use military force in accordance with its own judgement. In other

words, in pursuing a higher objective like the preservation of international peace and security, the US needs to be able to freely choose means to do it. In some circumstances, this means that the preservation of international peace and security may require violations of IHL[27]. Anticipating circumstances in which UN forces might be engaged in humanitarian interventions in the post-Cold War era, David Scheffer, one of the key architects of international judicial intervention[28] argued in 1991:

> ...higher moral objective of a collective security action, for example, to restore international peace and security, and eliminate threat of the aggressive use of nuclear, chemical, and biological weapons or other threats of future aggression- might permit a larger degree of collateral civilian casualties and property damage and the use of certain highly destructive weaponry that would otherwise be prohibited by the laws of war (Scheffer in Damrosch and Scheffer, 1991: 103).

Changes in the normative aspect of the ISS, and the shift from the state-centred to human-centred approach to security[29] has challenged the principle of equality of states because it did not recognise the internal differences as a source of their moral worth. Liberal theorists of IR argue that the principle of sovereign equality allows states that violate human rights of their citizens to survive by protecting them from international intervention. States that violate human rights are routinely declared as outcasts or rogue states and military and political leaders are described as criminals

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[27] The issue of whether the US as the de-facto guardian of international peace and security should be exempted from the obligations to comply with the provisions of IHL is reminiscent of the discussion whether the UN forces conducting peace-keeping operations should respect IHL. The basic argument is that in pursuit of a higher moral objective like international peace and security violations of IHL should be allowed. This is consistent with the traditional understanding of the role of IHL in allowing only states to use force in international relations.

under international law. As such, they do not deserve the protection of the principle non-intervention. What we have witnessed in the post-Cold War era can be described as differentiation within the ISS where some states have lost their legal status and the benefits that go with it. In the circumstances where their leaders are described as criminals these states are clearly not immune from international intervention and calls for intervention against these states came from both state and non-state actors.

What is the consequence of the shift in priorities from protecting international peace and security to protecting human rights as the primary purpose of the international security and legal system? The key difference is that the preservation of international peace and security does not require any action on the part of the members of the system- it simply requires states to refrain from aggression against other states. The latter objective- protection of human rights- requires states to take active steps against those who violate human rights. It resembles the difference between positive and negative liberties.

This shift also changes the conception of military objectives in military interventions motivated by humanitarian reasons. When the overall political and military objective of an intervention is to restore a state's sovereignty (e.g. restoration of Kuwait's sovereignty after it was invaded by Iraq in 1991) then the objective is to restore the state of affairs as it existed before peace was violated. With humanitarian intervention, military objectives are not as clear cut, because one cannot restore something that never existed. For example, the ICTY is not restoring the pre-existing order in the territory of the former Yugoslavia- it is creating a new order there. This is

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[28] See Chapter 3.
[29] See UN Secretary General Millennium Report, UN, 2000: 43).

why peace-building is an integral part of humanitarian interventions. The practical implication of these changes in the military objectives of humanitarian intervention is that intervention is carried out by both soldiers and civilians. NGOs are now not on the fringes of humanitarian intervention- they are right at the heart of it, almost completely integrated with the military. This explains their vociferous support for humanitarian interventions in Kosovo in 1999, Afganistan in 2001, and Iraq in 2003. By supporting the institutionalisation of ICJS and the use of force in the enforcement of IHL, NGOs have transformed from opponents of militarism into one of its most vocal supporters, given the right conditions.

It should be noted that the further consequence of prioritising protection of human rights over prevention of aggression among states and the rejection of self-defence as legitimate justification for the use of force by states and the elevation of humanitarian motives at the top of legitimate reasons for the use of force in international relations is that states conducting humanitarian interventions are not subject to the same limitations regarding the means and methods of warfare as the states acting in self-defence. In other words, IHL applies to states acting in self-defence but it does not apply to states engaged in humanitarian interventions.

It needs to be recognised that there has been a shift in understanding of what constitutes a threat to international peace and security in the 1990s. Whereas during the Cold War the emphasis in assessing a threat was on the capacity of a state to inflict harm on others, now it is the intention, regardless of the capacity, which constitutes a threat. Also, threat is no longer considered to be necessarily linked with a state- terrorist groups are currently seen as one of the main threats to international

security. Speaking on 23 April 1999 in Chicago, British Prime Minister Tony Blair said:

> No longer is our existence as states under threat. Now our actions are guided by a more subtle blend of mutual self-interest and moral purpose in defending the values we cherish. In the end values and interests merge. If we can establish and spread the values of liberty, the rule of law, human rights and an open society then that is in our national interest too. The spread of our values makes us safer[30].

This chapter argues that the process of institutionalisation of ICJS cannot be properly understood without examining the changes in the ISS. Whilst arguing that the process of institutionalisation of ICJS is a consequence of the changes in the ISS, this chapter has also argued that the process of institutionalisation of ICJS has a feedback effect on the ISS itself. It also argues that the creation of the ICC is an important pillar in the new global security system built under the supervision and overall control of the US.

Reconceptualisation of security has also led to reconceptualisation of war and conflict. Whereas the traditional understanding of war emphasised conflict between sovereign states where the aim was to compel the opponent to one's will, 'new wars' have been described as massive and systematic violations of human rights (Snow, 1996; Kaldor, 1999). So, whereas traditional analysis of wars were concerned with what happens with states in war[31], new analyses are concerned with the 'human cost' of war. This shift also calls for alternative strategies in dealing with the consequences

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[30] Available at www.number-10.gov.uk.
[31] Charles Tilly wrote: States made war and war made states (Tilly, 1984: 264).

of 'new wars', as Mary Kaldor argues: 'The analysis of new wars suggests that what is needed is not peacekeeping but enforcement of cosmopolitan norms, i.e. enforcement of international humanitarian and human rights law... it ought to be possible to devise strategies for the protection of civilians and the capture of war criminals' (Kaldor, 1999: 125). Identifying the peculiarities of 'new wars', Kaldor proposes a comprehensive strategy for dealing with them:

> What is needed is an alliance between local defenders of civility and transnational institutions which would guide a strategy aimed at controlling violence. It would operate within the framework of international law, based on that body of international law that comprises both the laws of warfare and human rights, which could perhaps be termed cosmopolitan law. In this concept, peace-keeping could be reconceptualised as cosmopolitan law-enforcement. Since the new wars are a mixture of war, crime, and human rights violations, so the agents of cosmopolitan law-enforcement have to be a mixture of soldiers and policemen (Kaldor, 1999: 10-11).

Institutionalisation of ICJS and ILS

> Human rights is the idea of our time, the only political-moral idea that has received universal acceptance (Henkin, 1990: ix).

It has been noted that the process of institutionalisation and legalisation of international relations has intensified after the end of the Cold War and this trend is observable in many areas, from international trade to human rights. However, the area

where legalisation and institutionalisation are most problematic and most difficult to achieve is security. Writing at the dawn of the new world order emerging after the end of the Cold War, Damrosch and Scheffer recognised that the greatest challenge in the creation of a liberal international security system, that is, an international community based on the rule of law, remained how to regulate the use of force (Damrosch and Scheffer, 1991: ix).

The idea of universal human rights, which arises from the Kantian conception of international relations, implies the necessity of outside intervention, either dictatorial or coercive, into the internal affairs of a state if a state is responsible, either through commission or omission, for widespread or systematic violations of human rights. Fernando Teson, one of the proponents of liberal international order based on Kant's ideas argues: 'The Kantian thesis, then, can be summarised as follows: observance of human rights is a primary requirement to join the community of civilised nations under international law' (Teson, 1998: 7). By implication, states that do not observe human rights of their nationals are not supposed to be protected by the principle of non-intervention under Article 2(7) of the UN Charter.

Systematic or large-scale violations of human rights, which testifies to state's unwillingness or inability to protect them, renders such states liable to intervention by outsiders. In other words, even if a state does not threaten other states, that is, even if it observes its contractual obligation not to violate the sovereignty of other states, violations of human rights of its own citizens does not protect it from an outside protection. Teson argues that 'a state is entitled to the complete protection of state sovereignty afforded by international law when it is founded open a legitimate

horizontal contract and a legitimate vertical contract' (Teson, 1998: 52). Hersch Lauterpacht, one of the most prominent advocates of human rights in international law wrote:

> There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible (Lauterpacht, 1955: 312).

It should be noted that one of the reasons why protection of human rights became accepted as the *ultima ratio* of the state is partly in reaction to the previously predominant view in the US that the primary role of the state is to protect the property rights of its citizens. Teson argues that

> because the ultimate justification for the existence of states is the protection and enforcement of natural rights [human rights] of the citizens, a government that engages in substantive violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well (Teson, 1997: 15-16).

One effect of the increased importance of human rights in international politics is that the principle of state sovereignty under international law is no longer sacrosanct. Writing at the end of the Cold War, Thomas Franck wrote: '...this may be

the time for the law to give formal recognition to legal inequality, in the sense of different entitlements to benefits, between democratic and totalitarian regimes' (Franck in Damrosch and Scheffer, 1991: 164).

Normative individualism is characterised by insistence that the ultimate value to be protected by all law, including international law, is human life. 'States are not sources of ends in the same sense as are persons. Indeed, they are systems of shared practices and institutions within which communities of persons establish and advance their ends' (Beitz, 1979: 180).

In 1993, the Vienna Conference on Human Rights[32] established that protection of human rights is 'the first responsibility of governments' and 'a legitimate concern of the international community'.

Given the shift in the perception of threat from capacity to intention and prioritising of protection of human rights over international peace and security, enforcement of IHL has become an important part of the ISS. As Tony Blair said: 'We cannot turn our backs on conflicts and the violations of human rights in other countries if we want still to be secure. On the eve of the Millennium we are now in a new world. We need new rules for international cooperation and new ways of organising our international institutions'[33].

The inclusion of human rights in international law has had an impact on both *jus ad bellum* and *jus in bello*. On the one hand, the inclusion of the protection of

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[32] See Vienna Declaration and Programme of Action, A/CONF. 157/23.
[33] Available at www.number-10.gov.uk.

human rights of nationals of other countries on the list of reasons for which states can use force has extended the right to use force to include humanitarian intervention. On the other hand, the rise of human rights within international law has also affected IHL, as Barnhoorn and Wellens note: '...the strong drive to prominence of the protection of human rights in general international law did not leave the laws of armed conflict untouched: humanitarian principles were to apply also if war was not declared or even if armed conflict was non-international' (Barnhorn and Wellens, 1995: 90).

Whereas the previous section emphasised changes in the ISS as a contributing factor, this section identifies the rise of human rights movement as another key factor making institutionalisation of ICJS possible. 'Human rights are ordinarily understood as the rights one has simply because one is human being. They are held equally by all human beings, irrespective of any rights or duties individuals may (or may not) have as citizens, members of families, or parts of any public or private organisation or association' (Donnelly in Lyons and Mastanduno, 1995: 116).

In recent years, the principle of state sovereignty has come under sustained attack from the theoretical point of view. Martin Shaw represents the critical strand of the English School, which emerged in opposition to the tradition established primarily by Hedley Bull and Martin Wight, and its emphasis on the need to preserve order over demands for the reform of the international system. Shaw argues: 'The critical issue, then, is to face up to the necessity which enforcing these principles [of human rights] would impose to breach systematically the principles of sovereignty and non-intervention... The global society perspective, therefore, has an ideological

significance which is ultimately opposed to that of international society' (Shaw, 1994: 134-5). Clearly, cosmopolitan principles and the principle of state sovereignty are simply incompatible. Andrew Linklater argues that 'to respect state sovereignty is to be complicitous in human rights violations' (quoted in Chandler, 2002: 129). Also, Geoffrey Robertson argues that the 'movement for global justice' is a 'struggle against sovereignty' (Robertson, 1999: xviii).

In relation to peace and human rights, there is a long-standing debate over which one should take precedence over the other and the tension between the two is also evident in the UN Charter[34]. Traditional international law privileges the preservation of international peace and security above all other moral ends, including protection of human rights. Indeed, protection of human rights has been traditionally seen as detrimental to the maintenance of international peace and security. Henkin argues that the UN Charter 'declares peace as the supreme value, to secure not only state autonomy, but fundamental order for all. It declares peace to be more compelling than inter-state justice, more compelling even than human rights or other human values' (Henkin, 1995: 113). Nigel Dower argues that international order and preservation of peace are only of value if they are an effective means for realising universal human rights (Dower, 1997: 108).

The concept of universal human rights has fundamentally affected the notions of autonomy of states and individuals and duty of care for others. A recent report of the International Commission on Intervention and State Responsibility concluded that the international community has the moral duty to protect individuals from violent

attacks on their human rights, and the principle of state sovereignty cannot be used as a justification for non-intervention in these circumstances. 'Where a population is suffering a serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to international responsibility to act' [35]. The shift in international morality towards intervention and protection of human rights is the consequence of the surplus capability that has been made available to some states after the end of the Cold War. In short, those with the capacity to act are now expected to act and protect human rights of others. As Sands points out, 'those with power, whether in the public or the private sector, have a duty to react to human rights violations where these fall within their 'sphere of influence' (Sands, 2003: 62).

The extension of the moral duty to protect universal human rights to all those with power to do so has created an atmosphere of an imperative to intervene which could develop into legal responsibility in the future. Complicity is associated with inaction and silence. Sands argues that '...not only is it legitimate for governments to choose and protest, but they also have the duty to act. Not only do states have obligation to their nationals under international law, but governments also have duties towards people in other countries' (Sands, 2003: 60). The logical follow-up of this principle[36] is the establishment of complicit-based criminal responsibility of political

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[34] Authors who think that peace is more important than protection of human rights include Charney, 1999: 835 and Mullerson, 1997: 5. Those who insist that human rights are more important than peace include Buergental, 1997: 706; Dunne and Wheeler, 1999: 1; and Meyers, 1997: 912.

[35] The Report is available at www.ciise-iciss.gc.ca/Report/English.asp.

[36] For a discussion of how the principle of complicity relates to IHL, see Schabas, W. (2001) Enforcing International Humanitarian Law: Catching the Accomplices, Review of the International Committee of the Red Cross, 83, pp. 439-459. For a discussion on how the concept of complicity extends to the depletion of rainforests, see Kutz, C. (2000) Complicity: Ethics and Law for a Collective Age, Cambridge, Cambridge University Press

and military leaders of states with the means to intervene in 'new wars' which choose not to intervene[37].

The idea that political and military leaders can be tried in an international court and held individually responsible for violations of IHL fundamentally challenges the principle of state sovereignty. It needs to be said that the precise content and limits of sovereignty have always been and continue to be contested and in this sense the challenge to sovereignty posed by the institutionalisation of ICJS is not an unprecedented phenomenon. Fixdel and Smith argue that it is a 'mistake to think that there has been any period in the past five centuries when it [sovereignty] has not been limited' (Fixdel and Smith, 1998: 289). Joining the chorus demanding the redefinition of sovereignty in the post-Cold War era, Boutros Boutros Ghali has argued: 'Time of absolute and exclusive sovereignty... has passed: its theory was never matched by reality. It is the task of the leaders of states today to understand this and to find a balance between the need for good internal governance and the requirements of an ever more interdependent world' (Ghali, 1995: 13).

The principle of state sovereignty is derived from a realist conception of the international system which postulates that states, regardless of whether they are democracies or autocracies, liberal or illiberal, behave in the same basic way because they are equally exposed to the conditions of international anarchy. 'So democracies and dictatorship alike do what they need to do to survive' (Bass, 2000: 16). In this account of state behaviour in international relations, value systems of political leaders

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[37] In 2000, Francis Boyle, representing the Mothers of Srebrenica and Podrinje, an association of mothers whose sons have been killed in Srebrenica, demanded from the ICTY that criminal charges be brought against 21 political and military leaders, including Koffi Annan, Bill Clinton, John Major, Jack Shirack, and others.

are irrelevant. Liberal theorists of international relations have challenged this view, arguing that internal structure of states, rather than international anarchy, determines state behaviour (Moravscik, 1997). Moravscik argues that in liberal states foreign policy is determined by a particular segment of society. This is particularly pertinent to the institutionalisation of ICJS where international lawyers, and especially those with expertise in IHL[38] were given opportunity to crucially influence US policy towards the ICTY and other international tribunals.

The significance of the abandonment of the strict principle of state sovereignty within the international legal system is that states are no longer equal in the eyes of international law. The repercussion of this on the ISS are serious because it also signals the end of the principle of peaceful co-existence between states with different internal structures and unequal power. Current examples are supplied by the USA'a account of nations that comprise the 'axis of evil'[39].

The shift away from state-centrism within the ILS also signals the demise of the principle of self-defence as the most uncontroversial justification for the use of force under international law. During the Cold War, only the most extreme pacifist were opposed to the principle of self-defence. Today, this previously unconditional right of states, powerful and less powerful, liberal and illiberal, has been made conditional on the observance of IHL. Under the logic of the doctrine of self-defence, all means are justified in a struggle against aggression. Under the contemporary international customary law, in the hierarchy of reasons for which states are allowed to use force, self-defence has been replaced by protection of human rights. It should

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[38] It needs to be said that most of the experts on IHL had military background. The largest contingent of legal experts seconded to the ICTY by the US came from the US Defence Department.

be particularly emphasised that the consequence of prioritising human rights over state sovereignty and the demise of self-defence as the legitimate justification for the use of force by states and the elevation of humanitarian intervention to the top of the list of legitimate reasons for the use of force in international relations is that states engaged in humanitarian interventions are not subject to the same constraints as states acting in self-defence. In other words, states acting in self-defence are subject to IHL but at the same time IHL does not apply to states engaged in humanitarian operations.

The consequence on the process of institutionalisation of ICJS and the development of international criminal law on the ILS is that it deepens and solidifies the divisions between liberal states, which enjoy full legal status within the system and the illiberal states, which are made outlaws and branded 'rogue'. Designating a state as rogue in fact criminalises it. At the same time, institutionalisation of ICJS also deepens the divisions between powerful and less powerful or 'failed' states, which are unable to prevent or punish violations of IHL. The concept of legitimate and illegitimate enemy under traditional IHL is illuminating in relation to the difference between legitimate and illegitimate (rogue) states. It needs to be remembered that traditional IHL was designed by and for the states only and illegitimate combatants who used violence for private gain were not intended to benefit from it. Pirates are an example of an illegitimate enemy. At the present time, pirates have been replaced by ethnic cleansers, genocidaires, and terrorists[40]. Somewhat prophetically, Slovenian Foreign Minister wrote in 1994:

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[39] State of the Union address by President George W. Bush in 2002.
[40] Following their invasion of Afganistan in 2001, US forces captured several hundred enemy combatants to whom they denied PoW status arguing that because they are terrorists they are not protected by the Geneva Conventions or other instruments of IHL.

...we are confronted with the ultimate criterion of the modern political division: respect versus disregard of a universally adopted and sanctioned set of rules. The division is between those who respect the rules and those who do not. It resembles the difference between the law-abiding citizens and the criminals (Rupel, 1994: 183)

What is important to recognise in relation to the changes in the perceived threats to international security in the post-Cold War era is that these changes are the consequence of the changes in international morality and the shift from the ethics of consequences to deontological ethics (Sandel, 1982). Whereas the ethics of consequences assessed the morality of action in terms of its utility from the point of view of national interest, i.e. whether it was detrimental or advantageous to national interest, deontological ethics is concerned with the motives of action, regardless of the consequences. In other words, the morality of action is assessed not in accordance with its consequences but in accordance with the motives for which it is taken.

Institutionalisation of ICJS and new International Institutions

Is the institutionalisation of ICJS evidence of the existence of an international community where states and non-state actors cooperate on the basis of shared values, or is the ICC an institution established by the only superpower in the world, the US, to legalise its military preponderance? This section will argue that the study of institutionalisation of ICJS and the establishment of the ICC in particular is important because it offers an insight into how the new international institutions of the 21st century might look like. Reflecting on the threats and opportunities of the post-Cold

War era and the responses of the liberal camp to them, Tony Blair said on 23 April 1999: 'On the eve of the new Millennium we are now in a different world. We need new rules for international cooperation and the new ways of organising our international institutions'[41]. For traditional liberal institutionalists, creation of international institutions capable of interpreting and enforcing international law in crucial in creating and maintaining international peace and security (Falk, 1975: 29). Historically, one of the main reasons for international anarchy and the lack of rule of law in international relations has been the inability of international law and institutions to reform themselves in accordance with new reality. The incrementalist approach to the reform and transformation of international institutions introduced by the NHS and new institutionalism has marked a significant break with the idealistic and legalistic tradition[42] of revolutionary change in the past.

The focus of the students of institutionalisation of international relations, a general process through which international relations are becoming less conflictual and more cooperative, is on the way the units in the international system are constituted and how their interactions are institutionalised (Kratochwil and Mansfield, 1994). In other words, their focus is on the process of international governance, i.e. how the international society or international community governs itself. In general, two traditions of study can be identified: rationalist studies are concerned with how actors get more of what they want through international institutions, and constructivist studies are focused on how institutions can alter what states actually want. In other words, while rationalists are concerned with quantitative choices of actors,

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[41] Available in the collection of Tony Blair's speeches at www.number-10.gov.uk.
[42] In arguing for the inclusion of a new form of liberal internationalism into the formulation of US foreign policy, Robert Keohane says 'the new research on international institutions broke decisively

constructivists are concerned also with their qualitative choices. This difference is based on their different conception of the relationship between structure and agency[43].

The difference between rationalist and constructivist approach to the study of international institutions is that rationalist use structure to explain actual behaviour whereas constructivist argue that 'structure alone explains only the possibility of action' (Dessler in Kratochwil and Mansfield, 1994: 331). Dessler argues that rationalist and constructivist explanations are based on different ontological positions, where rationalism is based on positional and constructivism on transformative ontology. Key difference between positional and transformative ontology is in the conception of structure and rules. In the former, they are fixed, unintentional in origin, reproduced, and constraining. For constructivists, rules are reproduced as well as transformed by actors, possibly intentionally. Dessler argues: 'Action is constrained and enabled by rules; the rules are the outcome as well as the medium of that action' (Ibid: 339).

Analysing the process of institutionalisation of ICJS and the establishment of the ICC it can be noted that the new international institutions in the area of security, in comparison to the institutions established in the 1940s, are different in that their purpose is to enable, as opposed to constrain action. Whereas the purpose of the United Nations was to prevent war, the purpose of the ICC is not to prevent but to manage 'new wars' by regulating means and methods of warfare. In constraining

with legalism- the view that law can be effective regardless of political conditions- as well as with idealism associated with the field's origin' (Keohane, 1998: 86).
[43] One of the sources of constructivism can be found in the theory of 'structuration' explanation of which can be found in the writing on Giddens, 1981.

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some states, by imposing limits on their ability to fight a war, the ICC will also give advantages to other states.

The analysis of the process of institutionalisation of ICJS also points to the important role played by non-state actors. This is significant because it is the states, not the non-state actors, that are going to be affected by the ICC. As Slaughter and Abrams argue, the contemporary international institutions are supranational as well as intergovernmental and 'universal and legislative rather than voluntary and contractual' (Chayes and Slaughter in Keysen and Sewall, 2000: 245).

Given that the driving forces behind the ICTY and the process of institutionalisation of ICJS come from the US and given that the US government refuses to sign up to the Rome Treaty, it should be noted that the prevailing attitude within the US policy-making community, which includes NGOs and academia, towards international institutions and international law is instrumental in relation to the realisation of US national interest. Anticipating the break-up of many conflicts in the post-Cold War era in which the US may or may not chose to intervene, the Carnegie Endowment report says: 'The US should seek to build a consensus within regional and international organisations for its positions, but should not sacrifice its own judgement and principles if such a consensus fails to materialise' (quoted in Hammon and Herman, 2000: 12).

The unwillingness of the US to accept any constraints on its own discretion to use military force whenever it chooses is evident in the following words of the US Assistant Secretary of State Strobe Talbott: 'We must be careful not to subordinate

Nato to any other international body or compromise the integrity of its command structure. We will try to act in concert with other organisations, and with respect for their principles and purposes. But the Alliance must reserve the right and freedom to act when its members, by consensus, deem it necessary' (quoted in Chandler, 2002: 132).

Institutionalisation of ICJS and Global Governance

This section will argue that the process of institutionalisation of ICJS is an integral and important part of creating a new world order emerging after the end of the Cold War. In this context, the establishment of the ICC and the enforcement of IHL represent parts of the effort to create a global system of governance. The emergence of this system of governance is sporadic and uneven across issue areas[44] and institutionalisation of ICJS is just one element of it. The challenge for both IR and IL is in providing an account of this process of legalisation in the absence of a global government or 'governance without government' (Falk, 1999).

Today, there is a widespread perception that a process described as globalisation is taking place, affecting and transforming many social relations, including international relations. Although opinions about globalisation and its significance differ, most commentators agree that globalisation has brought about increased interconnectedness on a global level. In other words, actions and thoughts of people increasingly have an impact on the actions and thought of other people who are separated from them by international boundaries. Increased interconnectedness

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[44] See Abbot et all, 2000.

creates possibilities which previously did not exist- people across the world increasingly feel that their security and prosperity is affected by other people over whom they have little or no influence. Oran Young has noted that 'governance arises as a social or societal concern whenever the members of a group find that they are interdependent in the sense that the actions of each impinge on the welfare of the others' (Young, 1994: 15). He argues that governance involves 'the establishment and operation of social institutions (in the sense of the rules of the game that serve to define social practices, assign roles, and guide interactions among the occupants fo those roles) capable of resolving conflict, facilitating cooperation, or, more generally, alleviating collective-action problems in a world of interdependent actors' (Ibid: 15). Following Kant, Andrew Linklater has argued that whenever there is a situation were people depend on each other's actions they should form a political community (Linklater, 1999). Richard Falk argues that the concept of governance is particularly well suited to situations characterised by the absence of formal institutions but the existence of a political process[45].

The term governance entered the vocabulary of political scientists in response to the changes in the legitimacy and effectiveness of modern state in post-modern international system. Wallace argues that post-modern states find themselves in a multi-level governance environment where 'they operate within a much more complex, cross-cutting network of governance, based upon the breakdown of the distinction between domestic and foreign affairs, on mutual interference in each other's internal affairs, on increasing mutual transparency, and on the emergence of a

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[45] See Falk, 1995.

sufficiently strong sense of community to guarantee mutual security' (Wallace, 1999: 519).

Governance, unlike government, does not refer to hierarchical structures but horizontal networks[46] of equal actors, consulting and interacting on an equal basis. In this context, the role of NGOs within governance becomes particularly important. The increasing prominence of NGOs in the context of global governance is related to the wider phenomenon of discontent with representative democracy at the domestic level. NGOs are more direct forms of participation in the political process the aim of which is to balance against the democratic deficit of state institutions. Cynthia de Alcentara argues that governance represents an attempt to shift power from public to private sectors, reducing the role of the state and increasing that of the civil society (de Alcentara, 1998: 111). NGOs contribute to good governance by introducing networks to hierarchical structures of governments and markets. Taken together, they form governing structures for authoritatively allocating resources and exercising control and coordination.

Today, requirement for 'good' governance has increasingly becoming a condition of international legitimacy and inclusion into the international system. The notion of good governance includes demands for both effectiveness and legitimacy of institutions of government. Good governance involves: 'an efficient public service, an independent judicial system and legal framework to enforce contracts; the accountable administration of public funds; an independent public auditor, responsible to a

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[46] R.A.W. Rhodes summarises governance as 'management of networks' (Rhodes, 1996: 658).

representative legislature; respect for the law and human rights at all levels of government; a pluralistic institutional structure, and a free press' (Rhodes, 1996: 652).

Rosenau argues that governance without government exists where there are 'regulatory mechanisms in a sphere of activity which function effectively even though they are not endowed with formal authority' (quoted in Chandler, 2002). As noted earlier, governance emerges as a social problem in response to globalisation, which causes shifts of power at all levels, including regional, national and international. 'Changing the boundaries of the state meant that the boundaries between between public, private, and voluntary sector became shifting and opaque' (Rhodes, 1996: 660). Rhodes also argues that focusing on governance 'can blur, even dissolve the distinction between state and civil society' (Ibid: 665). This is particularly relevant for understanding the process of institutionalisation of ICJS and the support for it from both state and non-state actors in some states, and in particular in the US. The relationship between state and civil society in powerful states is important because civil society is supposed to play a restraining role, particularly in times of war. Without civil society, the influence of the military on domestic society in generating support for everything it does in war, including violations of IHL, leading to total militarisation of society. By supporting institutionalisation of ICJS as an instrument for the management (not prevention) of 'new wars', traditionally pacifist NGOs have accepted the premise that war is inevitable and thus have sided themselves with the military. The consequence of this collusion between military and civilian sectors vis-à-vis institutionalisation of ICJS is that civil society has renounced its restraining role on the military.

Given the increasing importance of civil society in the context of peace-building after intra-state conflicts in particular in creating a culture of peace, it could be argued that one of the fundamental aims of the institutionalisation of ICJS within the context of global governance is the creation of an international security community. Security community is defined as an alliance whose relations 'exhibit dependable expectations of political change, that is, the assurance that members will not fight each other physically, but will settle their differences in some other way' (Deutsch, 1957: 5).

Having examined the contribution of the ICTY to the creation of the ICC within the context of institutionalisation of ICJS in the 1990s, two questions are particularly important to answer. Has the ICTY, and the process of institutionalisation of ICJS more generally, contributed to the creation of an international security community where disputes are resolved exclusively by peaceful means, and in particular through law? Given the experience of the ICTY, is it realistic to expect that the ICC will bring this dream of successive generations of international liberals closer to realisation? Answers to these questions found in the course of this study will be summarised in the last chapter.

Chapter 6

Conclusions

Introduction

In summarising the results of the research conducted in the course of this study, it needs to be repeated that the overall purpose of the study has been to examine, firstly, whether the ICTY has contributed to the restoration of peace and security in the territory of the former Yugoslavia, and secondly, whether, using the experience of the ICTY, it is reasonable to expect that the ICC will make a similar contribution to international peace and security and the rule of law in international relations more generally.

In the context of the analysis of the impact of the ICTY on the peace and security in the former Yugoslavia, the thesis has examined whether the ICTY has dispensed justice on which a stable peace within and among the successor states of the former Yugoslavia can take hold. Starting from the premise that in order to contribute to the restoration of peace and security in the former Yugoslavia, the ICTY has to produce an authoritative account of who did what to whom and why during the Yugoslav conflict, the thesis has examined whether this account has been accepted by a majority of people in the former Yugoslavia and beyond.

On the other hand, the thesis also explored the significance of the ICTY that goes beyond the borders of the former Yugoslavia, focusing in particular on whether IHL could be effective in the management of similar conflicts in the future. At the same time, the thesis has examined whether the ICTY has contributed to the creation of a global civil society, which could make a significant contribution to the elimination of the use of force and strengthen the

rule of law in international relations. The thesis therefore attempted to use the lessons about

the effectiveness of ICTY to explore whether the ICC is likely to contribute to the observance

of IHL in new wars. It needs to be remembered that the extent to which any lessons about the

ICTY and Yugoslav conflict can be used in relation to the ICC and other conflicts depends on

the extent to which the Yugoslav conflict is typical of new wars.

Broadly speaking, the thesis has attempted to use lessons from the past to explain the

present and to make reasoned speculation about the future[1]. This has been done by

contextualising the policy of international judicial intervention within the history of similar

attempts, primarily in the twentieth century, to use international law and international

institutions to strengthen international peace and security and create an international

community based on the rule of law. In doing this, the aim has been to identify the

similarities and differences between the ICTY and the previous attempts to use international

law to prohibit and/or regulate the use of force in international relations. At the same time,

particular emphasis has been given to the comparison between the ICTY and the IMT at

Nuremberg on the one hand, and the ICC on the other. By identifying the changes in the

direction and speed of the development of the international criminal justice regime that the

ICTY espoused the thesis has attempted to provide a reasoned argument on which

expectations towards the ICC should be made. Therefore, the thesis has situated the ICTY

and the ICC in the context of the history of the development of the international security

system and the international legal system. By situating the ICTY within the history of

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[1] As argued in Introduction, reasoned speculation should not be confused with prediction in the sense used in natural sciences. The historical approach used in answering the research question has been chosen simply because of the social nature of the research subject. In other words, the ICTY is based on the idea of an international law of war, whose origin can be traced back several centuries. As Van Creveld argues 'like all human creations [IHL] is rooted in history, and hence liable to change. While no one can foresee the future, it is at least possible to indicate a few of the directions that the change is likely to take' (Van Creveld, 1991: 198).

attempts to use international law to prohibit or at least regulate the use of force in international relations, the thesis has sought to find both the historical origins and future implications of the ICTY.

The overall conclusion of this study is that the ICTY has not contributed to the restoration of peace and security in the former Yugoslavia. In searching for the answer to the question of why the ICTY has not fulfilled its mission, the author adopted the position that in order to do that it is necessary to analyse the process through which the Yugoslav conflict became internationalised and criminalised. In analysing the factors that contributed to the internationalisation and criminalisation of the Yugoslav conflict, particular emphasis has been given to the interaction of actors and forces within and outside the former Yugoslavia.

The main problem impeding the efforts of the international community to restore peace and security in the former Yugoslavia stem from its lack of understanding of the nature and the origins of the Yugoslav conflict (Woodward, 1995: 3). The reasons for this misunderstanding about the nature of the Yugoslav conflict lies both within and outside Yugoslavia. On the one hand, warring parties deliberately misrepresented their own positions and those of their enemies, which is inevitable in any war. However, these efforts of the warring parties would not have produced the result that they did without the assistance from outside. Here, particularly important roles were played by the media, which created an atmosphere of urgency and outrage, which clouded rather than fostered a reasoned debate. By focusing almost exclusively on the conduct of war, and in particular on selected violations of IHL, without dealing with the wider issues, the media propagated emotionalism at the expense of understanding. As a consequence, the causes of the conflict were assumed rather than analysed. As the conflict got more internationalised, that is, as the role of the

international community in the conflict became more significant, the consequences of this failure became more serious. This point is crucially important for understanding the reasons for the failure of the ICTY to contribute to the peace and security in the former Yugoslavia.

The failure to properly understand the political and military objectives of the warring sides led to misunderstanding of the nature of the violations of IHL committed during the conflict. The thesis has argued that violations of IHL committed in the Yugoslav war were not part of a systematic policy. To talk about systematic policy in a situation where state institutions are collapsing or have collapsed is self-contradictory. Instead of attributing violations of IHL solely to unscrupulous political and military leaders, the thesis has argued that the violations of IHL were also the result of the disintegration of the Yugoslav state institutions and social institutions in general which internationalisation of the conflict only exacerbated. Therefore, the thesis has argued that addressing the structural causes of the violations of IHL instead of focusing exclusively on the individual criminal responsibility of political and military leaders would be more effective in contributing to peace and security in the former Yugoslavia.

The thesis has argued that the particular interpretation of the Yugoslav conflict that led to its internationalisation and criminalisation reflects the changes in the general conception of threat that new conflicts pose to international security in the post-Cold War world. While during the Cold War, threat was clearly defined and was relatively stable over many years, threat in the post-Cold War is not clearly defined (Toffler and Toffler, 1994). Nowadays, new threats change at the top of the international security agenda quickly which does not allow enough time to security experts, let alone the general public, to learn about

them. In these circumstances of imperfect knowledge, successful international intervention into new wars becomes highly improbable.

The thesis has argued that the degree and kind of internationalisation of the Yugoslav conflict cannot be explained without understanding the material and ideational changes in the international security system after the end of the Cold War, and in particular the changes in the perception of threat to international security. Whereas during the Cold War what constituted threat to international security was the capacity of states to inflict harm on others, in the post-Cold War the emphasis has been put on their intentions. The most important among these changes are the emergence of the US as the dominant military power and the redefinition of security more in line with the human rights agenda. This position of military preponderance, combined with its superiority in information and communication technology, also enabled the US impose its perception of threat as dominant among other states' perceptions[2].

The most significant element of the paradigm of new wars that contributed to the criminalisation of the Yugoslav conflict is the argument that the causes of new wars are to be found in intentions of evil political and military leaders. The consequence of this assertion is that international intervention in new wars should be specifically targeted at these individuals, and criminal law offered itself as a perfect solution. The thesis has criticised the paradigm of new wars, arguing that by locating the responsibility for new wars exclusively or even predominately with individuals and sidelining or even ignoring the role of structures,

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[2] This ability of the US to project its own perception of threat has been amply demonstrated since the terrorist attacks in New York and Washington on 11 September 2001 when the US started its campaign against global terrorist networks. .

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both domestic and international, it does not provide an explanatory model on the basis of which solutions to new wars can be found.

One of the most important lessons from the analysis of the Yugoslav conflict and the process of its internationalisation that could be used in the analysis of similar conflicts in the future is that new wars are fought not just on the ground, they are also fought in the realm of ideas or images. Therefore, it is not just arms that determine the course and outcome of new wars, it is also the strength of emotions among observers that warring sides manage to generate. So, the participants in new wars are not limited to the territory in the former Yugoslavia, and they are not limited to combatants carrying arms. In this context, the notion of intervention has completely new significance.

In discussing the policy objectives of the international community behind the international intervention in the Yugoslav conflict, it has been emphasised that in the selection of means and methods of intervention, the priority of the international community has been to create and preserve the unity of action among its members, not the events on the ground. However, within the framework of international institutions views of the most powerful members were particularly influential in shaping the policy. In other words, policy choices were more reflective of the developments and debates in Washington than in Yugoslavia.

It has been argued in this thesis that the establishment and operation of the ICTY and thus its contribution to the restoration of peace and security in the FY ought not to be understood simply in terms of it being a reaction to the violations of IHL in the Yugoslav conflict. In other words, it also reflects the developments within the international community

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that have nothing to do with the Yugoslav conflict itself. In establishing the ICTY, the international community also sought to use the ICTY to reform the international security system and create an international criminal justice system. It is argued in this chapter that these important goals have often taken precedence over the best course of action towards the Yugoslav conflict.

The idea that an international criminal tribunal could contribute to the restoration and maintenance of peace and security during and after an armed conflict was appealing to many scholars and policy makers when it emerged in the early 1990s. The actors involved in seeking for the solution for the Yugoslav conflict welcomed it because it was morally and politically an easier option in relation to the use of force, especially the use of ground troops.

Ideally, the ICTY should have separated the criminals from the innocent within each of the former warring sides. At the same time, it should have fostered the establishment of links between members of different ethnic groups, mobilising them against criminals within their own ethnic groups. To this effectively, it should provide an authoritative account of who did what to whom and why. Only by providing an answer to this question which would be accepted by majority of all ethnic groups within Yugoslavia could the ICTY fulfilled its mission and contribute to the restoration of peace and security there. At the moment, there is no evidence that the ICTY has succeeded in this. Establishing who did what is not just a moral debt of the living to the dead but also a pragmatic policy of preventing future conflict.

Having argued that the reasons for the establishment of the ICTY lie both within and outside Yugoslavia, the thesis has also argued that the ICTY has had an impact both on the situation within the former Yugoslavia and on the international system, and in particular on

the international security system and the international legal system. The thesis has argued that through the ICTY the international community not only tried to restore peace and security in Yugoslavia - it also tried to reform or even transform two important pillars on which international peace and security rest.

While arguing that the establishment of the ICTY reflected developments outside Yugoslavia, the thesis has also argued the Yugoslav conflict has had a systemic impact at the international level. This impact is evident in the changes it generated in the international legal and political systems. Through the establishment of the ICTY, the Yugoslav conflict had an impact on the international legal system by helping to create an international criminal justice system and helping to direct in a particular direction. At the same time, through the creation of international criminal justice system, the ICTY also initiated a fundamental change within the existing international security system. Although the full extent of this change is not yet clear, it can be described not just as a reform but a transformation of the existing international security system.

After the end of the Cold War, international legal system has been fundamentally affected by the HR revolution. Whereas traditional law is primarily concerned with external relations between states, contemporary international law is increasingly concerned with the protection of the rights of individuals. At the same time, the emergence of international criminal law testifies to the increasing importance being given to the punishment of individuals in situations where state authorities are either unwilling or unable to do so.

In analysing the role of the ICTY in the development of the international criminal justice system and its contribution to international peace and security, the thesis distinguishes

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between the effects on the level of the international system, states, and sub-state level. The analysis of the significance of the ICTY beyond Yugoslav borders conducted in this study includes the analysis of the developments both within liberal states, that is, the relationships between the governments and non-governmental organisations and the media there, as well as the relationships between liberal and non-liberal states.

The establishment and operation of the ICTY is particularly reflective of the discussions among and between security experts and international lawyers. While international lawyers of humanitarian provenance, consistent with their pacifist agenda, have hoped to push the development of IHL towards *jus ad bellum*, security experts, particularly in the US, in accordance with their military instincts, have been determined to instrumentalise IHL to complement rather than constrain their military strategies.

In taking part in the development of IHL, international lawyers effectively abandoned their pacifist agenda. The shift from prohibition to regulation of the use of force as the priority of international law of war among international lawyers can be understood as their acceptance that the direction of the development of international law has to be consistent with the security policy of the most powerful states. The significance of the Yugoslav conflict is that it helped to shift the balance of power within liberal states between realists and liberals in the creation of foreign policy. It helped the liberals in creating popular support for military and other forms of intervention in conflicts without clear national interest expressed in terms of security and economic interests. Protection of human rights of peoples in other countries has become an almost universally accepted reason for the use of force in internal discussions in liberal states concerning decisions to intervene militarily abroad, as is evident in the level of European support for Nato' Kosovo campaign in 1999 as compared to Iraq in 2003. What

is crucial to note in relation to the international intervention in the Yugoslav conflict is that it helped to move the general discussion about intervention away from the issue whether it was justified to intervene to the issue of what means are the most appropriate for a particular situation. In other words, ends for which interventions are taken are no longer discussed, they are assumed to be humanitarian, the discussion is all about the most effective means of intervention in any given situation.

Looking from the point of view of IHL and its use in the management of new wars in the future, one of the most significant repercussions of the Yugoslav conflict has been the shift in the relationship between the state and non-state actors. At the same time, support for the ICTY also illustrated a compromise between governments and non-governmental organisations and the media within liberal states. Whereas in the past the role of non-state actors vis-à-vis their own governments was primarily to act as guardians of morality in the formulation of national policy, today they are increasingly becoming apologetic towards governments. Instead of confronting their own governments, they are increasingly using their pressure exclusively against weak states. At the same time, they are playing disproportionately significant role both within and around international institutions. In this way, both powerful governments and bureaucratic international organisations remain beyond the reach of criticism and proper accountability.

The analysis of the role of the non-state actors in the establishment and operation of the ICTY and more generally within the process of institutionalisation if ICJS was aimed at drawing lessons which could be used in similar processes in other issue areas in international

relations[3]. The sidelining of the ICRC and its methods and principles of neutrality and impartiality, debates within the NGO sector and the emergence of non-state actors like the Coalition for International Criminal Court (CICC) with its methods of operation, working along side governments is illustrative of the direction in which the relationship between liberal states and their civil societies is likely to develop in the future.

During the Cold War, it was inconceivable that a conflict like Yugoslav would have been internationalised in the way it did and that international lawyers would have played such a prominent role in dealing with it. The thesis demonstrated how this happened by arguing that the situation after the end of the Cold War and the fact that it ended without actual use of force, created opportunity for many previously marginalised ideas and actors to enter the mainstream of international politics. In many liberal states this led to the inclusion of the advocates of these ideas into the policy-making process. Nowhere was this was more evident than in the US, and given the relative importance of these actors on the creation of international policy towards the Yugoslav conflict, these developments have been given particular attention here[4].

The thesis has argued that the process of institutionalisation of ICJS reflects the compromise between traditional idealists, whose efforts have been focused on eliminating war altogether from international relations, and realists, who argued that this goal in unattainable and thus detrimental to other peace strategies. This compromise is evident in the

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[3] It needs to be stressed that the analysis of the role of non-state actors in the politics of institutionalisation of ICJS is not intended to serve as a basis for making predictions in the scientific sense. It is merely meant to inform speculation about the future with lessons from the past.
[4] The relationship between representatives of government and non-government actors in the formulation of the US policy towards the ICTY and the ICC, and the degree of inclusion of the non-governmental organisations, academia, and the media into the policy-making process was particularly revealing to the author during a

fact that the traditionalist liberals have given their support to IHL, the very idea of which is based on the belief that war is inevitable. On the other hand, traditional realists have accepted that in dealing with 'new wars' in which protagonists are non-state actors non-violent means may be as effective or even more effective that the military force itself.

Drawing on the history of attempts to use international law and institutions as an instrument of peace and justice, particularly in the 20th century, the thesis has argued that the ICTY cannot be considered as a development consistent with the ideal of creating an international community based on the rule of law. The reason for this is that the ICTY has abandoned the attempt to make aggression illegal, it does not attempt to criminalise the use of certain weapons, like chemical, nuclear and biological, and most significantly the use of air power against civilian targets. Today, IHL is intended to target only combatants in new wars, which means it is not universal. In addition, the actual record of the ICTY in achieving all the objectives that the ICC is expected to achieve does not give reason to believe that the world will be safer and more just as a consequence of the developments in the 1990s.

Although it was not the first international tribunal in history, the ICTY represented one of the greatest experiments of the international community at the end of the 20th century, and its creation raised a lot of expectations. The empirical argument advanced in this study is that after ten years of its operation, it can be said that it has not delivered on its promises. The overall thrust of this study has been to argue that the failure of the ICTY to contribute to the restoration and maintenance of peace and security in the former Yugoslavia should be exposed and analysed instead of denied. There is no reason to believe that the ICC will be

conference entitled US National Security and the International Criminal Court in Washington in September 2000.

more successful unless the reasons for the failure of the ICTY are documented and analysed, and this is what this thesis has attempted to do.

The thesis has argued that the institutionalisation of ICJS represents not just reform but transformation of the previous system of international cooperation in dealing with violations of IHL. The new system has replaced voluntary, reciprocal cooperation between sovereign states into centralised coercive system where non-state actors play a central role, particularly in legitimising the process. It is argued that the recent development of IHL represents a significant change because traditionally it reflected the pragmatic self-interest of states, whereas today it represents the interests of the militarily most powerful states.

Clearly, states that do not depend for their very survival on the international community, such as the US, do not have to compromise their security by observing norms of IHL, but weak states which owe their very existence to the international community like Bosnia are forced to do that. This thesis has pointed that this is not a matter of choice for Bosnia because Bosnia was recognised as a state at the time when it did not meet any of the criteria for recognition. In return for the international recognition, at the initiative of the US, Bosnia has had to support the process of institutionalisation of ICJS, agreeing, for example, to sign a bilateral agreement with the US giving immunity to its personnel and officials from the ICC[5]. Acting in this way, Bosnia and other weak states have helped the US to shape the ISS and ILS in accordance with its own needs.

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[5] It is interesting to note that the Rambouillet 'agreement', or rather, ultimatum, that preceded Nato's military intervention against FR Yugoslavia in 1999 states: 'Nato shall be immune from all legal processes, whether civil, administrative or criminal' (Section 6 (a)). It also states: 'Nato personnel under all circumstances and at all times, shall be immune from the Parties' jurisdiction in respect of any civil, administrative, criminal or

The thesis pointed to the seemingly paradoxical fact the imposition of international limits on the discretion of states to use force brought about by the establishment of the ICTY and the ICC coincided with the widening of that discretion evident in the emergence of the doctrine and practice of coercive humanitarian intervention. The thesis has argued that the imposition of limits on the use of force by the international community has a specific purpose- it is meant to apply only to states deemed to be illiberal and to conflicts not involving liberal states. In other words, while on the one hand the proponents of international judicial intervention argue that illegal means of warfare should be criminalised regardless of the ends for which they are used, on the other hand, they support the use of force for humanitarian reasons and do not think that violations of IHL committed in the course of such actions should be criminalised[6].

The moral responsibility for allowing the most powerful state to use IHL in the 1990s in this way to extend their own interests lies with non-state actors. The thesis has argued that the reason for the apologetic attitude of the non-state actors is their desperation not to antagonise them, because they knew that without states there would be no ICTY or ICC. It can be said that non-state actors, particularly NGOs and the media, were used by the US to legitimise changes of the international security system which it sought to achieve through the creation of the ICC. In playing their subservient role towards the US, NGOs also damaged the cause of the rule of law because they lent their support to a system of law where the US is above the law that it imposes on others. Using the notion of complicity, the charge of responsibility for allowing the US to get away with their own violations of IHL committed

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disciplinary offences which may be committed by them in the FRY' (Section 6 (b)). For further discussion of the Rambouillet agreement, see Thomas, 2003: 178).
[6] Supporting the bombing of Yugoslavia over Kosovo in 1999 Anthony Lewis of the New York Times wrote that killing civilians 'is a price that has to be paid if a nation falls in behind a criminal leader' (NYT, 29/05/99)

during the bombing of Yugoslavia, Afghanistan, Iraq in recent years could also be extended to the general public in the US, UK and other liberal democracies.

The thesis has argued that the ICTY has not contributed to the rule of law understood in conventional sense and in fact represents a step backwards in the development of an international community based on the rule of law. The process of internationalisation of ICJS effectively abandons the universal conception of international law and establishes a two-tier system creating a division between the so-called liberal and non-liberal states reminiscent of the division between civilised and non-civilised states[7].

Following the example of the ICTY, the message that the ICC will try to send to the political and military leaders and more generally to the people affected by new wars, is that they must obey the rules of IHL even if that leads to their loss of statehood. The research conducted in the course of this study shows that the peoples of the former Yugoslavia are not willing to give up their statehood, however imagined it may be, for principles of IHL. And indeed, it is difficult to see how anybody would compromise their existence for observance of the principle not to use excessive force. In their fight against terrorism, the people in the US have supported their President in his position that all means necessary should be used against their enemies, including the withdrawal of some of the basic rights to those accused of terrorist acts against the US[8].

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[7] This shift away from the universal conception of international law in the 1990s is well illustrated when compared to the position of the US Chief Prosecutor at IMT Robert H. Jackson in 1945: 'If certain acts in violations of treaties are crimes, they are crimes whether the United States does them of whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us' (quoted in Franck, 1975: 133).

[8] Significantly, the US prisoners from the war in Afganistan held at Guantanamo Bay in Cuba are not treated as prisoners of war but as 'unlawful combatants', which is a deliberate attempt to limit their rights to a proper trial.

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The idea behind the institutionalisation of ICJS is that it imposes conditions on the warring sides in new wars for their inclusion into the international community of liberal states. In this way, IHL becomes fundamental criterion for the inclusion into the community of civilised nations in the 21st century. Those who disobey these laws are treated as criminals because through their actions they become *hostis hurnani generis*, that is, enemies of all humankind. This puts Bosnian Serbs, Talibans, and other criminalised groups together with pirates and slave traders in traditional international law.

Traditional international law of war accepted the principle of self-defence unconditionally[9]. That meant that states were allowed to use all means at their disposal in self-defence. In other words, just ends justified all means. By prohibiting certain means and methods of warfare, which are the only means of self-defence available to weak states, the ICC shifts this balance. Whereas the traditional international law considered the preservation of all states, small and strong, equally worth, it allowed states discretion in choosing means of defence. Today, the ultimate value IHL seeks to protect is not the state, or more precisely, the preservation of not all states can justify all means. Only preservation of liberal states and the international community of liberal states justifies the use of all means (bombing of Yugoslavia, chapter 5). Therefore, the latest developments of international law of war are consistent with the strategy to create an alliance of liberal states based on the rule of law. Creation of this community has become the ultimate end that justifies the use of force in the contemporary world, and the principle of sovereignty of states has been replaced with the principle of the sovereignty of the international community.

They are being held without being formally indicted, and it is planned that they are going to be tried by a military commission, not a civilian court.

[9] Article 51 of the UN Charter.

The thesis has argued that the idea of international judicial intervention could not have been institutionalised without the consensus about it between realists and liberals within the most powerful liberal states. In describing and analysing how and why this consensus was forged, the thesis has focused on the developments within the US. It has been argued here that the impact of the US government, as well as the US based non-state actors, in the establishment and operation of the ICTY has been greater than the impact of all other actors taking part in the process put together. Both the US government and its civil society played a hegemonic role in the process of institutionalisation of ICJS in the 1990s. The thesis has argued that the policy of international judicial intervention was legitimised internationally by US-based civil society and that in doing so they were probably more successful than anybody could imagine in the early 1990s[10].

This study has addressed some of the questions that IR scholars have dealt with, more or less systematically over the last two thousand years, namely the causes of war and conflict and possibilities of cooperation (Keohane, 1989: 3). The aim of this study has not been to resolve the controversy concerning how a more secure and just world could be achieved, because that would go well beyond the scope of this particular study. Nor has it attempted to resolve the debate between the supporters and opponents of the ICTY and ICC. Instead it has tried to highlight some questions arising from the experience of the ICTY which are relevant for the ICC, indicating areas where further research is needed.

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[10] However, there are signs that the rise of importance of non-state actors in the 1990s is now coming to an end. Kenneth Anderson argues that the role of non-state actors in the development of IHL should be reduced: 'NGOs are indispensable in advancing the cause of humanitarianism in war. But the pendulum shift towards them has gone further than is useful, and the ownership of the laws of war needs to give much greater weight to the state practices of leading countries.' This does not mean that all state practice matters 'but it does mean that the state practice of democratic sovereigns that actually fight wars should be ascendant in shaping the law. This includes shaping the standards of the laws of war to reflect, for example, advances in technology and precision weapons, standards that should be become the norm for leading militaries, first for Nato and then beyond.' (http://www.crimesofwar.org/special/Iraq/news-iraq6.html).

While supporting the general idea of prosecuting persons most responsible for the violations of IHL during the Yugoslav conflict could contribute to the restoration and maintenance of peace and security in the territory of the former Yugoslavia, the overall conclusion of this thesis is that, unfortunately, the ICTY has not done this. Arguing that one of the main reasons for this failure of the ICTY is the lack of criticism towards its own record, motivated by the fear that it would jeopardise the prospects of establishing the ICC, the thesis concludes that rather than promoting the noble causes of justice and peace in international relations, the uncritical support accompanying the ICTY and the ICC will, in fact, damage these causes in the long term.

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The Statute of the ICTY

The ICTY's Statute, the Rules of Evidence and Procedure and other documents relating to ICTY's work are available at the ICTY's official site at: www.un.org/icty

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The Dayton Peace Agreement which ended the war in Bosnia was initiated at Wright-Patterson Air Force Base in Dayton, Ohio on November 21, 1995 and signed in Paris on December 14, 1995.

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