

Introduction

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The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were the first modern-day ad hoc international criminal tribunals. Both were created through United Nations Security Council resolutions, with specific mandates to prosecute those responsible for serious violations of international humanitarian law in the former Yugoslavia and in Rwanda, respectively. The tribunals were not meant to exist forever, and after two decades, the ICTR has completed its work and has shut its doors completely, while the ICTY is concluding its last two cases. With the closing of these ad hoc tribunals, an important chapter in international criminal law has come to an end. The ICTY and the ICTR played crucial roles in the development of international criminal law five decades post-Nuremberg. They reignited the development of this field of law, and their case law contributed toward the fine-tuning of complex legal doctrines, such as genocide, accomplice liability, the definition of international armed conflict, the prosecution of crimes of sexual violence. This book addresses the legacy of the ICTY and the ICTR through a series of chapters written by leading authorities in the field that each discuss an important aspect of the tribunals' accomplishments. It is this book's aim to provide a comprehensive overview of the impact and lasting role of these ad hoc tribunals within the field of international criminal law.

BACKGROUND: THE CREATION OF THE AD HOC TRIBUNALS

History's first international criminal tribunal was the Nuremberg Tribunal, set up by the victorious allies after World War II to prosecute Nazi atrocities. Although many States and commentators hoped there would be a permanent war crimes tribunal created in the aftermath of the Nuremberg trial, it would be nearly fifty years before events on the ground and international political currents would align to enable the international community to establish another international war crimes tribunal. Just a few months after the break-up of the Soviet Union, genocide returned to Europe for the first time since Nazi Germany. The location was Bosnia-Herzegovina, which

had recently declared its independence from what was left of the former Yugoslavia (Serbia and Montenegro).

Prior to its dissolution in 1991–92, Yugoslavia was not so much an ethnic melting pot as a boiling cauldron of ethnic tension with deep historic roots. The ascent of a hardline Serbian nationalist government in Serbia headed by Slobodan Milosevic prompted Croatia and Slovenia to declare their independence on June 25, 1991, with Bosnia following suit on March 1, 1992. The Bosnian Serbs, under the leadership of their self-styled president, Radovan Karadzic, and military leader, Ratko Mladic, immediately launched attacks against the Croatian and Muslim populations in northeast and southern Bosnia, with the goal of connecting Serb-populated regions in north and west Bosnia to Serbia in the east. Within a few months, the Serbs had expelled, killed, or imprisoned 90 percent of the 1.7 million non-Serbs who once lived in Serbian-held areas of Bosnia.¹

With Russia's assumption of the permanent seat and veto of the Soviet Union in the Security Council in December 1991,² the Security Council emerged from the Cold War paralysis of the previous forty years and was experiencing a rare (though short-lived) era of cooperation. The first test for the reinvigorated Council was the deepening crisis in the Balkans. The Security Council adopted a series of measures aimed at restoring peace and halting the bloodshed, including imposing economic sanctions on Serbia, establishing a no-fly zone, creating safe areas, authorizing force to ensure the delivery of humanitarian aid, and excluding Serbia from participating in the General Assembly.³ Finally, on May 25, 1993, the Security Council adopted Resolution 827, establishing "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991."⁴ Within two years, the Tribunal had been set up at The Hague, its eleven judges had been elected by the General Assembly, its Chief Prosecutor had been selected by the Security Council, and its first trial was ready to begin.

While the ICTY was preparing its first case, a genocidal conflagration was ignited in the small African nation of Rwanda by the death of its Hutu president when his plane was shot down by a surface-to-air missile on April 6, 1994.⁵ Nearly 800,000 people (mostly of the minority Tutsi tribe) were slaughtered during the next hundred days at a rate nearly three times greater than the rate of the loss of Jewish lives during the Holocaust.⁶ When the massacres began in Rwanda, the Security

¹ MICHAEL P. SCHARF, *BALKAN JUSTICE, THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 21–8 (1997).

² Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 *CORNELL INTERNATIONAL LAW JOURNAL* 29, 46–7 (1995).

³ SCHARF, *supra* note 1, at 33–5.

⁴ SC Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827 (May 25, 1993).

⁵ VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 47 (1998).

⁶ *Id.*

Council's first reaction was to withdraw nearly all the United Nations peacekeeping troops from the country for their safety. In July 1994, the Security Council established a Commission of Experts, which issued a report on October 2, 1994, confirming that genocide had been committed by the Hutus against the Tutsis and recommending the establishment of an International Criminal Tribunal to prosecute the perpetrators. A month later, on November 8, 1994, the Security Council adopted Resolution 955, providing for the establishment of a second ad hoc tribunal for Rwanda, which would have its own trial chambers to be headquartered in Arusha, Tanzania, but share the Prosecutor and the Appeals Chamber of the ICTY.⁷

Since their establishment, the ICTY has indicted 161 individuals (ranging from common soldiers to generals all the way to prime ministers), of whom 83 were ultimately convicted; and the ICTR has indicted 95 individuals (ranging from media personalities to heads of corporations to high level officials), of whom 61 were convicted. But the legacy of these unique institutions cannot be measured simply in the number of defendants or conviction rates.

ASSESSING THE LEGACY OF THE TRIBUNALS

In the context of international criminal tribunals, scholars have defined “legacy” to mean a lasting impact, most notably on bolstering the rule of law in a particular society by conducting effective trials while also strengthening domestic capacity to do so. Legacy, in this context, implies the extent to which a particular court has had a significant effect by modeling best practices in handling the individual cases and compiling a historical record of the conflict. Legacy also means laying the groundwork for future efforts to prevent a recurrence of crimes by offering precedents for legal reform, building faith in judicial processes, and promoting greater civic engagement on issues of accountability and justice. This type of legacy is supposed to be long-lasting and continue to have an impact even after the work of the tribunal is completed. A 2008 United Nations High Commissioner's Report on maximizing the legacy of hybrid courts asserted that the need for such tribunals to leave a legacy is firmly accepted as part of United Nations policy.⁸

In addition to the above view of legal legacy and impact, tribunals can have other types of roles which can meaningfully affect the pursuit of justice and human rights. Professors King and Meernik have described the core missions of the ICTY's mandate (to bring to justice those responsible for serious violations of international humanitarian law) as follows: (1) developing the Tribunals' functional and institutional capacities; (2) interpreting, applying, and developing international humanitarian and criminal law; (3) attending to and interacting with the various

⁷ *Id.* at 72.

⁸ Office of the UN High Comm'r for Hum. Rts., Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts, at 4–5, UN Doc. HR/PUB/08/2, UN Doc. No. E.08.XIV.2 (2008).

stakeholders who have vested interests; and (4) promoting deterrence and fostering peace-building to prevent future aggression and conflict.⁹ This framework is also applicable to the ICTR, as this tribunal was charged with the same mandate as the ICTY, with the addition of promoting national reconciliation in Rwanda. In light of the above, “legacy” can be defined more broadly as the enduring influence of the tribunals’ work and processes on the ideals, conceptions, and instrumentalities of international criminal law, justice, and human rights. This book takes on a more specific approach to discussing legacy issues regarding the ad hoc tribunals (ICTY and ICTR): it assesses the legacy in the field of international criminal law. While the tribunals’ legacy is equally important in the development of domestic justice as well as human rights more broadly, this book adopts a more singular approach and focuses on the field of international criminal law. In this manner, this book aims to provide a comprehensive overview of the significance, impact, and legacy of the ad hoc tribunals through the lens of international criminal law. In addition to its value to scholars, this book serves as a guide and tool to practitioners in the area, as well as to those considering the creation and establishment of new ad hoc tribunals in the future, such as government officials, United Nations specialists, NGOs, and academics. In addition, this book may be of use to those who work with the International Criminal Court (ICC), as much of the ad hoc tribunals’ case law has served and will serve as important precedent within the ICC, and as the ICC will most likely continue to enhance the same international criminal law principles and doctrines which the ad hoc tribunals have developed.

Other studies of the ad hoc tribunals’ legacy thus far have addressed other issues, such as the effect and impact of tribunals on the people in the affected areas (i.e., Yugoslavia and Rwanda), the role that the tribunals have played in establishing restorative justice, the obstacles and challenges that the tribunals have faced, the role that the tribunals have played in ending domestic/regional cultures of impunity, the tribunals’ deterrence effects, and their potential contributions to building lasting peace. This book tangentially addresses some of these issues, but it does so through an international criminal law focus and specific discussion of some of the key legal developments and contributions of the ICTY and the ICTR.

This book focuses on three different aspects of “legacy.” In Part I, it discusses legacy in the general sense, by focusing on the overall legacy of the ICTY and ICTR on the development of international criminal law and their contribution to the field of human rights law, as well as on benchmarks necessary in order to determine the existence of such a legacy. In Part II, this book focuses on the most important aspects of the tribunals’ normative and operational legacy. In Part III, the book looks forward

⁹ Kimi L. King & James D. Meemik, *Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice*, in *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 7, 8 (Bert Swart et al. eds., 2011).

to the impact of the ICTY and the ICTR on the International Criminal Court and on the future of global peace and justice.

In Part I, Milena Sterio's Chapter 1 on "The Yugoslavia and Rwanda Tribunals: A Legacy of Human Rights Protection and Contribution to International Criminal Justice" assesses the legacy and impact of the ICTY and the ICTR in the development of human rights norms, as well as their contribution to the field of international criminal justice. According to Sterio, "the ICTY and the ICTR have significantly contributed toward the development of the field of international criminal law and toward the protection of human rights, by sending a message of impunity and holding those responsible for serious human rights violations criminally accountable, as well as by protecting defense rights on an individual level."¹⁰ Jennifer Trahan's Chapter 2 on "Examining the Benchmarks by Which to Evaluate the ICTY's Legacy" distinguishes between the ICTY's legacy in the judicial and prosecutorial sense, where the tribunal has achieved significant successes, and the ICTY's contribution toward broader socio-transformative goals, where the tribunal has been much less impactful. Trahan concludes that "[w]hile tribunals may be able to make certain contributions to broader transformative goals (and the ICTY has arguably made inroads here as well), such work is often better done by other actors and should not be expected of tribunals."¹¹

In Part II, authors discuss various normative and operational legacies of the ICTY and ICTR. Michael Scharf's Chapter 3 on "How the *Tadic* Appeals Chamber Decision Fundamentally Altered Customary International Law" discusses the landmark *Tadic* decision of the ICTY Appeals Chamber, which held that the same principles of liability which apply to international armed conflict also pertain to internal armed conflict, and thus contributed to the normative legacy of the Yugoslavia tribunal. According to Scharf, the *Tadic* decision was not only transformative, but it also constituted a "Grotian Moment" – a period of accelerated formation of customary law norms. The *Tadic* decision thus resulted in a significant change in international criminal law, as "much of the conduct prohibited by treaties governing international armed conflicts now constitutes prosecutable war crimes when committed in internal armed conflicts."¹² Chapter 4, which is a transcript of a roundtable discussion held at International Law Weekend 2016, featuring Milena Sterio, Michael Scharf, Margaret deGuzman, Jenia Iontcheva Turner, Beth Van Schaack, and Paul Williams as panelists, focuses on the *Karadzic* case in the ICTY, and the tribunal's decision to convict a defendant on genocide charges. This chapter discusses the Yugoslavia tribunal's contribution to

¹⁰ Milena Sterio, *The Yugoslavia and Rwanda Tribunals: A Legacy of Human Rights Protection and Contribution to International Criminal Justice* [11].

¹¹ Jennifer Trahan, *Examining the Benchmarks by Which to Evaluate the ICTY's Legacy* [25].

¹² Michael P. Scharf, *How the Tadic Appeals Chamber Decision Fundamentally Altered Customary International Law* [59].

the development of jurisprudence on genocide in the normative sense, as well as in the operational sense – the Karadzic case may serve as prosecutorial and operational precedent to future tribunals handling complex genocide prosecutions.¹³ In Chapter 5, “Atrocity Speech Law Comes of Age: The Good, the Bad and the Ugly of the International Speech Crimes Jurisprudence at the Ad Hoc Tribunals,” Gregory Gordon discusses the development of the “speech crimes” jurisprudence at the ICTY and the ICTR. Gordon concludes that although this type of jurisprudence will likely necessitate future elaboration and development, the tribunals have contributed significantly to its initiation. “[D]evelopment [of speech crimes jurisprudence] at the ad hoc tribunals will be looked on by history as likely its most formative phase – the period when atrocity speech law came of age.”¹⁴ In Chapter 6, Michael Scharf addresses “The Once and Future Doctrine of Joint Criminal Enterprise.” In this chapter, Scharf focuses on the development of the joint criminal enterprise mode of liability at the ICTY and ICTR, as well as at other ad hoc tribunals, including the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. Scharf concludes that through the case law of these ad hoc tribunals, more aggressive forms of joint criminal enterprise, such as “JCE III,” “had fully ripened into a customary international law doctrine, and will undoubtedly be applied by many tribunals and domestic courts in the future.”¹⁵ In Chapter 7, Yvonne McDermott discusses “The Tribunals’ Fact-Finding Legacy.” McDermott argues that the Yugoslavia and Rwanda tribunals have left behind an important fact-finding legacy regarding the standard of proof in evidentiary as well as conviction matters, regarding the role of witness testimony, as well as regarding the length and accessibility of judgments.¹⁶ In Chapter 8, entitled “The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence,” Valerie Oosterveld explains how the ICTY and the ICTR have contributed to the prosecution of sexual and gender-based violence crimes.¹⁷ According to Oosterveld, the ICTY and the ICTR’s work was “pioneering,” in light of the fact that prior tribunals had paid very little attention to the investigation and prosecution of sexual and gender-based violence crimes. Oosterveld thus concludes that the ICTY and the ICTR have been “courts of ‘firsts.’” Chapter 9, entitled “The Defense of Duress to Killing Innocents: Assessing the Mixed Legacy of the ICTY and the ICTR,” focuses on defense-based legacies of the ICTY and the ICTR. Jonathan Witmer-Rich argues in this chapter that the case law

¹³ A Roundtable on the Legacy of the Karadzic Trial at the International Criminal Tribunal for the Former Yugoslavia (International Law Weekend 2016 Panel, featuring Milena Sterio, Michael P. Scharf, Margaret deGuzman, Jenia Iontcheva Turner, Beth Van Schaack, and Paul Williams) [73].

¹⁴ Gregory S. Gordon, *Atrocity Speech Law Comes of Age: The Good, the Bad and the Ugly of the International Speech Crimes Jurisprudence at the Ad Hoc Tribunals* [104].

¹⁵ Michael P. Scharf, *The Once and Future Doctrine of Joint Criminal Enterprise* [161].

¹⁶ Yvonne McDermott, *The Tribunals’ Fact-Finding Legacy* [180].

¹⁷ Valerie Oosterveld, *The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence* [197].

of the ICTY and ICTR, and in particular the *Erdemovic* case in the ICTY, contributed significantly to the development of duress as a defense to charges of war crimes and crimes against. In addition, Witmer-Rich criticizes the *Erdemovic* decision and proposes a novel way to conceptualize the defense of duress in international criminal law.¹⁸ Chapters 10 and 11 focus on the sentencing legacy of the Yugoslavia and Rwanda tribunals. Yvonne Dutton, in Chapter 10, discusses “Sentencing Policies of the Ad Hoc Tribunals.” Dutton concludes that the ICTY and the ICTR have “contributed a legacy toward a uniform and coherent sentencing approach in the field of international criminal law.”¹⁹ Moreover, Dutton argues that although the length of particular sentences may vary from one tribunal to the other, both the ICTY and the ICTR have applied a consistent sentencing framework in light of the gravity of the offense which they sought to punish. In Chapter 11, “Mixed Messages: The Sentencing Legacy of the Ad Hoc Tribunals,” Margaret deGuzman approaches the tribunals’ sentencing legacy from a different aspect. deGuzman argues that a particular aspect of the tribunals’ sentencing practice “undermined their normative and sociological legacies: their failure to clarify whether and when the tribunals apply and ought to apply global sentencing norms and when the application of local norms is more appropriate.”²⁰ deGuzman thus concludes that the tribunals’ sentencing legacy contributes less than it could have to international criminal law, because of the tribunals’ mixed sentencing messages, which did not appropriately reconcile global and local sentencing norms. In Chapter 12, on “Combatting Chaos in the Courtroom: Lessons from the ICTY and ICTR for the Control of Future War Crimes Trials,” Michael Scharf addresses one of the operational legacies of the ICTY and ICTR – the management of cases within courtrooms at international criminal tribunals.²¹ Scharf examines how the ICTY, ICTR, and other modern war crimes trials have grappled with the challenges of maintaining control of the courtroom, especially in the context of self-represented defendants. Scharf considers various ways of limiting the defendant’s right to self-representation in the context of international criminal trials, while balancing such limitations both with the defendant’s due process rights and with global interests of justice, necessitating open, expeditious, and fair trials.

Part III of the book focuses on the future. In this part, authors discuss the impact of the ICTY and ICTR on future international criminal trials, as well as on the International Criminal Court, and the tribunals’ contribution to the future of international peace and justice. In Chapter 13, Stuart Ford discusses “The Impact of the Ad Hoc Tribunals on the International Criminal Court.” Ford focuses on two

¹⁸ Jonathan Witmer-Rich, *The Defense of Duress to Killing Innocents: Assessing the Mixed Legacy of the ICTY and the ICTR* [221].

¹⁹ Yvonne M. Dutton, *The Sentencing Legacies of the Ad Hoc Tribunals* [249].

²⁰ Margaret M. deGuzman, *Mixed Messages: The Sentencing Legacy of the Ad Hoc Tribunals* [269].

²¹ Michael P. Scharf, *Combatting Chaos in the Courtroom: Lessons from the ICTY and ICTR for the Control of Future War Crimes Trials* [286].

ideas: how the International Criminal Court has been “indebted” to the ICTY and the ICTR, and how the International Criminal Court has been a reaction to the ad hoc tribunals. Ford thus concludes that an important legacy of the ICTY and the ICTR has been their contribution to the very formation of the International Criminal Court, but that, at the same time, “the ICC was also an opportunity for the drafters to fix some of the perceived flaws in the ad hoc tribunals.”²² In Chapter 14, entitled “Twenty-Four Years On: The Yugoslavia and Rwanda Tribunals’ Contributions to Durable Peace,” Paul Williams and Kimberly Larkin discuss the ICTY’s and the ICTR’s contributions to global peace and justice. Williams and Larkin argue that the ICTY and the ICTR have inspired a culture of international criminal justice, by professionalizing atrocity documentation and prosecution while creating a near-universal expectation of justice-based accountability for crimes against humanity.²³ According to Williams and Larkin, this contribution by the ICTY and the ICTR has been particularly valuable, because it has enabled current regional and international mechanisms to address crimes against humanity more agilely and assertively than their predecessors.

In sum, this book will address the ICTY’s and ICTR’s normative and operational legacy by discussing the tribunals’ legacy on a general level, and by focusing on their specific contribution to the development of the field of international criminal law. In addition, this book will assess the tribunals’ legacy on future international criminal justice and peace efforts, including on the International Criminal Court. While the ad hoc tribunals’ legacy, as discussed throughout this book, is comprised of both negative and positive aspects, it is this book’s overall theme and ultimate conclusion that the ICTY and the ICTR have had a positive impact on the development of international criminal law, and that their legacy will contribute toward the advancement of this field.

²² Stuart Ford, *The Impact of the Ad Hoc Tribunals on the International Criminal Court* [307].

²³ Paul R. Williams & Kimberly Larkin, *Twenty-Four Years On: The Yugoslavia and Rwanda Tribunals’ Contributions to Durable Peace* [326].