Roadblocks of Retribution: The Problems with Internationalized Criminal Tribunals as a Mechanism for Reconciliation

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Mechanism for Reconciliation

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December 16 2020

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Abstract

Since their inception, scholars have questioned the efficacy of internationalized criminal tribunals, or ICTs. ICTs are a tool for the international community to deal with and punish perpetrators of atrocities. More recent ad hoc (or ‘as needed’) tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) also stated goals beyond the retributive justice of punishment; they sought to promote reconciliation. I examined why these courts were ultimately unable to promote reconciliation. Through an analysis of the histories, formation, and implementation of the ICTY and SCSL, I found that these tribunals were limited in their capacity to promote reconciliation because of their commitment to norms of retributive justice. Despite expressly stating goals of reconciliation, neither tribunal was able to make a discernible impact on reconciliation in the Balkans or in Sierra Leone. Instead, ICTs are a way for the international community to further their normative notions of justice without promoting reconciliation for the civilian populations harmed in violent conflict.
Introduction

Internationalized criminal tribunals (ICTs) are a mechanism the international community has relied on in order to manage the aftermath of atrocities. They are said to have the potential to advance peace and reconciliation processes (Kazi 2018; Roth 2005). However, this potential has not been weighed with consideration to an ICTs commitment to the norms of retributive justice. In this context, reconciliation would consist of addressing harm committed against a civilian population, material reparations or immaterial redress for victims, and truth-seeking efforts. Retribution refers to the goal of punishment of perpetrators to achieve justice (International Center for Transitional Justice 2020). Even with an explicitly stated commitment toward reconciliation, the origins and structure of the internationalized criminal tribunal inhibits reconciliation. I directly compare the stated expectations and implicit goals of internationalized criminal tribunals with their outcomes and how those outcomes are perceived in domestic contexts. After analyzing the formation and implementation of the International Criminal Tribunal for former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), there is no evidence to suggest reconciliation was furthered by prosecution through criminal tribunals. In fact, in both contexts the criminal tribunals created barriers to the possibility of reconciliation. Ultimately, the tribunals served as a mechanism for the international community to further the norms of justice set out at the inception of the criminal tribunal, instead of promoting reconciliation for the civilian populations who were harmed in violent conflict.
Case Study Selection

The ICTY was the first *ad hoc* criminal tribunal established since the military tribunals following WWII (*ad hoc* meaning ‘as needed’). Prosecution through the ICTY modeled the modern legal standards that the tribunals following it would take into consideration. However, being the first internationalized criminal tribunal in decades, one might expect that the mechanisms for the ICTY were not yet fully fleshed out. Or, at the very least, one could expect that a court operating in unprecedented circumstances might not be able to fulfill their mandate in regards to reconciliation. This case, then, would more obviously affirm that ICTs fail to facilitate reconciliation. The Special Court for Sierra Leone, however, was established nearly a decade after the ICTY was. Having the lessons from former Yugoslavia, the SCSL should have had an easier time fulfilling a mandate that similarly called for reconciliation. In addition, the SCSL was formed concurrently with a functioning Truth and Reconciliation Commission. Despite these factors, the case of the SCSL proves that a criminal tribunal’s commitment to retribution overrides their stated goal of reconciliation. Where this tribunal should have had an easier time meeting the goals of its mandate, it could not overcome the barriers that retributive norms of justice place on reconciliation (Schabas 2006).

Section Overview

First, the literature review examines existing scholarship in international legal studies on the topic of *ad hoc* tribunals, and tracks the major arguments for and against their efficacy as a mechanism for justice. A brief discussion of the theoretical frameworks of justice, retribution, and reconciliation that this thesis operates with
precedes the historical background of *ad hoc* tribunals. Specifically, I examine the establishment of the International Military Tribunal (IMT) following the atrocities committed in the European theater of WWII. The formation and mandate of the IMT laid the groundwork for the *ad hoc* tribunals that followed in the 1990s and early 2000s. After contextualizing the norms of international criminal prosecution as set out by the IMT, I elaborate on the particular histories related to the establishment of my case studies. This consists of a brief conflict overview in both former Yugoslavia and Sierra Leone, followed by details regarding the mandates and establishment of the ICTY and SCSL. I examine the trial proceedings themselves in conjunction with the domestic reactions to those proceedings in their respective regions. Lastly, I analyze the tribunals and their outcomes in light of some of the arguments presented in the literature review and the goals set out by the mandates of the tribunals. In the conclusion I explain how the retributive framework backing the internationalized criminal tribunals results in the failure of each tribunal to meaningfully contribute to reconciliation efforts in each region.

**Literature Review**

Scholarship surrounding ICTs and international law in general is relatively new. In fact, legal education in the United States on the subject only began within the last few decades. Up until the 1970s, only three people were teaching international criminal law. Now, the topic of international law and in turn international criminal tribunals has been well documented and studied by legal scholars globally (Bassiouni 2008). New scholarship was especially common in the wake of the International Criminal Tribunal
for former Yugoslavia and the International Criminal Tribunal for Rwanda (ICTR). The explosion of scholarship in the early 2000s paid attention to the structures and immediate outcomes of those ICTs, and argued largely over the question of whether or not ICTs are a useful mechanism for post-conflict reconciliation (Knoops 2014; Nouwen 2017).

On the question of the efficacy of *ad hoc* internationalized criminal trials, there are two consensuses that prevail; one body of scholarship addresses the successes of ICTs, and claims that, though imperfect, they produce positive outcomes for peace processes, while the other is concerned with their failures, making the claim that the effects of ICTs are negative or at least do not impact the ends of peace seeking. One author who has written extensively about the foundations and discernible merits of ICTs is Geert-Jan Alexander Knoops. Knoops, who had first hand involvement in the tribunals for Yugoslavia, Rwanda, and Sierra Leone, is a tentative proponent of the value of ICTs. He explains, “*ad hoc* ICT in specific regions of conflict, such as the UN Special Court for Sierra Leone, can prove to be effective mechanisms of international criminal law” (Knoops 2014). While acknowledging that hasty development of international law could jeopardize its validity by creating conflicting case law and differences in jurisprudence, Knoops affirms that ICTs can contribute to the interests of peace and security within a given nation. Despite a lack of evidence given on that matter, Knoops does briefly give an account of some of the main arguments used by advocates of ICTs. These are:

a) ICTs are a deterrent to major human rights violations,

b) peace is furthered by the punishment of perpetrators, and

c) ICTs give victims redress for the wrongs committed against them.
Put another way by director of Human Rights Watch Kenneth Roth, “Bringing to justice those who commit atrocities has obvious appeal. It provides redress for victims and their families, punishes perpetrators, and deters others from replicating their crimes” (Roth 2005). Generally, adversaries to the notion of ICTs as an effective mechanism cite a lack of evidence in support of that conclusion, and in some cases, evidence that refutes it all together. Here, we will examine some primary objections to each argument in conversation with their proponents.

“International Criminal Tribunals are an effective deterrent against atrocities”

In a study done on the deterrent effect of international criminal tribunals, the authors found a number of conclusions about deterrence and retribution that call into question the extent to which ICTs can function as a deterrent to human rights violations. The authors explain that in many case studies, the threat of prosecution leads to cover-ups from high ranking officials as opposed to actual deterrence. They conclude, “It is, thus, problematic to attempt to measure or correlate deterrence with the work of international criminal courts. At best, it is possible to document parallel events, either a decrease or an increase in violence, but there are too many actors and too many variables to find a direct or even an indirect effect conclusively” (Schense and Carter 2017). They also note the importance of perception in evaluating deterrence, claiming that evaluations of deterrence, in place of actual evidence, is a direct byproduct of selectivity or politicization of the conflicts and resulting tribunals. That is to say, without definitive evidence that at least points toward ICTs acting as a legitimate deterrence mechanism, it is not possible to impartially reach a conclusion about deterrence (Schense and Carter 2017).
“Peace processes are furthered by ICTs”

The argument commonly put forth by scholars in support of ICTs as a mechanism for peace processes is that while ICTs are clearly not a mode of negotiation or reconciliation, they nevertheless promote norms of peace and justice in societies affected by atrocities. Greenwalt explains this view, writing, “By revealing the truth about atrocities, satisfying victim demands for justice, and emphasizing individual over collective responsibility, the hope is that tribunals will help break cycles of violence, delegitimize criminal regimes, and promote transitions to peaceful liberal societies rooted in the rule of law” (Greenwalt 2014). As was the case with the deterrence argument, there is little evidence that supports that conclusion (Meernick 2005). Some of the strongest arguments in favor of this interpretation of ICTs rely on the hope that the norms advanced in prosecuting atrocities will further moral ends and in turn transform behavior (Akhavan 2001). Nearly 80 years after the first internationalized tribunal, there is still no empirical evidence to advance the theory that moral transformation is a reliable product of prosecution through ICTs.

While ICTs may bring about outcomes that conform with a retributive notion of justice, it has not yet been demonstrated that ICTs aid the ends of peace processes such as negotiation. Additionally, many scholars claim that the threat of prosecution on the international stage fails to ease tensions between warring parties. Nouwen explains how the implementation of ICTs relates to this argument, “The prosecution takes place in far away courtrooms, in which the key actors are lawyers not familiar with the conflict and culture in which the crimes have been committed. Consequently, many of
the potentially positive effects that trials can have on the society concerned do not reach the affected society” (Nouwen 2017). The nature of *ad hoc* tribunals that follow this format is an impediment to reconciliation, for they distance a potential mechanism for peace and justice from the society that needs it.

“ICTs provide redress for victims of human rights violations”

The third leading argument advanced in defense of ICTs is that prosecution of war crimes creates a unique opportunity for victims to legitimize their experiences and achieve a sense of closure. Dorjee Kazi, in an article about the possible connections between criminal tribunals and truth-seeking processes argues, “Criminal courts and tribunals provide the victims with an indispensable component in overcoming their demons and moving on– that is closure. Without retribution (justice), the entire concept of modern democratic society is intrinsically dismantled” (Kazi 2018). This argument in particular is contentious on multiple grounds. It equates justice with retribution, and it claims that tribunals are a crucial component of seeking closure after violent conflict. Neither claim is supported by empirical evidence. The latter claim, in fact, has been refuted by a number of scholars.

In a study of the role of victims in the Nuremberg and Tokyo Trials following WWII, Luke Moffet comments, “... justice for victims was simply for the retributive purpose of punishing the defendants. Victims were just used to rationalize and license the punishment of defendants without obtaining a more tangible form of justice, such as reparations” (Moffet 2012). Victim support does not play a key role in international criminal proceedings as they might in other conflict resolution efforts. Rather, the
structure of an internationalized criminal tribunal and the nature of trial proceedings as modeled after western frameworks of criminal law necessitates that the role of a victim is that of aiding or complicating the prosecutor’s goal of proving guilt beyond a reasonable doubt. Richard Wilson (2011) puts it this way: “Many international tribunal judgements steer a careful course between legal minimalism on the one hand and nationalist dramaturgy on the other hand”. That is to say, a tribunal toes the line between utility and performativity in a courtroom setting. Neither expressly benefits victims of violent conflict either materially or otherwise.

Scholarship cites a lack of evidence supporting a conclusion that ICTs can effectively support peace processes. This thesis, as opposed to echoing these scholars, aims to explain the conceptual gap between the goals stated by ICTs and the norms they are committed to maintaining. As opposed to restating that ICTs have not contributed to reconciliation, I answer the question, why can’t they fulfill that goal? Ad hoc tribunals are framed as a mechanism for peace and justice, and while many scholars acknowledge and explore weaknesses in ICTs, few examine the conceptual discrepancies between the established goals of ICTs and their execution. To rectify this, this thesis puts the stated and implied expectations of ICTs in direct comparison with the outcomes the tribunals following the Yugoslav wars and the Sierra Leonean Civil War produced.

Further, most literature that concerns flaws in ad hoc tribunals pay attention chiefly to the trials for former Yugoslavia and Rwanda. The establishment of norms at Nuremberg and their application are not examined through a critical analysis of its
stated goals and outcomes. The tribunal for Sierra Leone is scarcely discussed in literature surrounding ICTs at all. While I will be drawing on former Yugoslavia as one of the better documented case studies in my thesis, I shed more light on how the failures identified at Yugoslavia are rooted in Nuremberg and also manifested in Sierra Leone. These failures persist despite innovations introduced at Sierra Leone (namely the concurrent establishment of a Truth and Reconciliation Commission and the appreciable contribution to the establishment of the tribunal by the Sierra Leonean state). By analyzing these case studies in such a manner, the aforementioned conceptual discrepancies within ICTs as a mechanism are demonstrated and can in turn be related to the conclusions of other scholars that question the efficacy of internationalized criminal tribunals.

**Theoretical Frameworks of Justice**

Throughout this thesis, I feature an extensive comparison of the norms of retributive justice to the norms of reconciliation. While there are numerous interpretations of what constitutes retributive justice and what constitutes reconciliatory justice, we will be moving forward with the definitions provided by the International Center for Transitional Justice.

Retributive justice focuses on the pursuit of justice through the punishment of offenders as opposed to the rehabilitation of offenders. Criminal prosecution through ICTs follows the adversarial format; witnesses are directed and cross examined by opposing sides, and the opposing sides go head to head advancing their own narrative based on evidence presented at trial. This adversarial format is conducive to retributive
justice. Adversarial trials, beyond trying to establish a record, are pursuing guilt of the accused. Retribution seeks the punishment of those found guilty.

Reconciliation, on the other hand, is a key component of transitional justice that focuses on accountability and redress for victims as opposed to punishment. The ICTJ notes that reconciliation is the ultimate goal of a society dealing with the aftermath of violent conflict. It is a process that often involves truth-seeking, reparations, and public recognition of harm. While many ICTs came to establish reconciliation as one of their goals, the first manifestation of an internationalized tribunal did not expressly deal with the prospect of reconciliation (International Center for Transitional Justice 2020).

**The Legal Basis of ICTs**

*Legacy of Nuremberg*

The internationalized criminal tribunal is a recent innovation in the legal realm, only implemented in the wake of atrocities committed during the second world war. The first ever internationalized tribunal was the International Military Tribunal at Nuremberg, or the IMT. The IMT was founded in 1945, six months after Germany surrendered and two years after the Moscow Declaration, where the allied powers established that atrocities perpetrated by the Third Reich would not be left unpunished. The charter for the IMT was drafted with the consideration that the crimes had no strict geographic designation, and that the crimes committed were done by people, not the abstract entity of ‘the state’ (Heller 2011).

The establishment of the IMT raised questions about the legitimacy of an internationalized court. Namely, can an international mechanism enforce *ex-post facto*
(or, retroactive) laws? The short answer is yes. The argument used to warrant such punishment can be put as simply as, “you know a war crime when you see one.” That is, even without a codified domestic or international law that bars one from committing war crimes, reasonable people would agree on what constitutes a violation of human rights. The European Human Rights Convention of 1950 (EHRC) affirmed this reasoning, “This Article shall not prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations” (European Human Rights Convention of 1950, Article 7). Though not explicitly stated as criminal, prosecutors at Nuremberg appealed to a deeply felt revulsion to acts perpetrated by Nazi leadership. The “general principles of law” the EHRC refers to appeals to the same thing. Tomushat explains, “There cannot be the slightest doubt that all the offences set out under the title ‘crimes against humanity’ are not only morally objectionable, but deserve to be punished and must be punished because of their abhorrent character if peaceful coexistence in human society is to be maintained” (Tomuschat 2006). The question before internationalized tribunals is not if punishment is justified, but how to maintain the peaceful coexistence of society through a mechanism that is focused on punishment and guilt.

The charter for the IMT set forth the basis for the future charters of other international tribunals. It outlined the definition of offenses tried in the court, as well as established the jurisdiction of a court that is trying crimes across a wide geographic and temporal range (specifically, anywhere in the European Axis countries for the entire span of WWII and the time leading up to it). The 1945 Charter of the International
Military Tribunal specifically outlined the charges of 1) Crimes against peace, 2) War crimes, and 3) Crimes against humanity (United Nations 1945, Article 6). Since the IMT codified these offenses, future tribunals would not encounter the questions of *ex-post facto* punishment; the charters of the ICTY and the SCSL utilize these specific charges and their definitions. The official classification of these violations of human rights made establishing later courts easier. The structure of the IMT also contributed to the structure of subsequent tribunals; it set the precedent for internationalized trials to include actors from multiple states, to be tried in front of multiple judges, and to use translators.

The atrocities tried at the IMT were codified at the fourth Geneva Convention (1949). In a departure from the first three Geneva Conventions (which were concerned with the protection of sick or wounded military personnel and prisoners of war), the fourth Geneva Convention expanded existing articles to extend to a civilian population, as well as adding provisions to that effect. This convention was adopted specifically in reaction to WWII and the IMT. It outlined that parties may bring persons alleged to have committed ‘grave breaches’ to their own courts or hand them over to other courts (United Nations 1949, Article 146). The convention defines grave breaches as the “willful killing, torture, or inhuman treatment... of a protected person,” among many other specifications on what constitutes unlawful actions in war time (United Nations 1949, Article 147).

The IMT did not, however clearly define the charge of genocide. The charge of genocide had not yet been clearly defined at this point in international legal history. In
fact, it was a misconception of mine that the IMT was trying and punishing individuals for their participation in genocide. While the international community recognizes a genocide took place, neither the charter for the IMT nor the Geneva Convention dealt with genocide. The UN Genocide Convention in 1948 still did not develop a strict definition of what constitutes genocide. Rather, that convention created a minimal formula so that future courts could try individuals for genocide in a way that the IMT was not able to (Knoops 2014).

*Introducing Retribution to International Criminal Law*

The IMT’s stated goal from the beginning was to punish the aggressors of WWII, to “pursue them to the ends of the earth” (Moscow Declaration of 1943). It sought individual responsibility, and it sought retribution (Tomuschat 2006). Robert Jackson, prosecutor for the United States, said in his closing statement, “If you were to say of these men that they are not guilty, it would be true to say there has been no war, there are no slain, and there has been no crime” (Nuremberg, July 26, 1946). Jackson’s appeal here emphasizes the symbolic importance of tribunals and the precedent that was set out at the IMT. The process of seeking justice in a way that punishes those who are imputed with blame while simultaneously making moral judgements is unique to a retributive framework of justice. Jackson particularly appeals to establishing an irrefutable record of the atrocities that took place and the defendant’s role(s) in such atrocities.

Nowhere in the documents relating to the IMT, between the Moscow Declaration, the Nuremberg Charter, or the records from the trials, is there a stated
commitment toward reconciliation or peace-making. As Schabas puts it, “the word ‘reconciliation’, so fashionable today, never figured in this first experiment with international justice” (Schabas 2006). The commitment toward retribution made by the IMT is echoed in the charters of the ICTY and the SCSL, but both of these tribunals also state goals of reconciliation. Still, the IMT allowed for other tribunals to connect the international community’s notion of justice with their ability to enforce the law, even if the law is not strictly codified in a domestic context. Jackson explained in his closing argument of the IMT, “...it rises above the provincial and transient and seeks guidance not only from international law but also from the basic principles of jurisprudence which are assumptions of civilization and which long have found embodiment in the codes of all nations” (Nuremberg, July 26, 1946). Internationalized tribunals all appeal to the ‘assumptions of civilization’ that call for the prosecution of war crimes; they share the desire to punish, and through punishment, find ‘justice’.

Case Study Backgrounds

The Yugoslav Wars

The International Court for former Yugoslavia was established in reaction to a series of conflicts, insurgencies, and wars for independence that took place between 1991-2002 in the former Yugoslavia. Yugoslavia was a federation of states made up of Bosnia and Herzegovina, Croatia, Montenegro, Macedonia, Serbia, and Slovenia created in the aftermath of WWII. The federation represented a wide range of ethnic groups and religious convictions. Ethnic tensions were invigorated in former Yugoslavia after the death of President Josip Broz Tito in 1980, as communism collapsed in the region and
nationalism surged in Eastern Europe. In the wake of economic and political uncertainty, political leaders relied on nationalist rhetoric to sow distrust between ethnic groups, degrade a common Yugoslav identity, and advocate for independence for the distinct republic in the federation (International Residual Mechanism for Criminal Tribunals 2017; Judah 2011).

The deadliest of the conflicts that make up the Yugoslav wars was the conflict in Bosnia and Herzegovina lasting between 1992-1995. The dispute over territorial control between Bosnian Serbs (with backing from Serbia and JNA), the Bosnian Croats, and the Bosnian government resulted in the deaths of over 140,000 people, and the displacement of over half the population of Bosnia and Herzegovina (approximately 2 million people). According to the International Center for Transitional Justice, civilians from every ethnicity became victims of war crimes and widespread attacks, thousands of Bosnian women were raped systematically, and detention centers were set up by all sides of the conflict (International Center for Transitional Justice 2011).

In the summer of 1995, Bosnian Serb commander Ratko Mladic led forces to attack Srebrenica, a Bosnian town declared a safe area by the United Nations. During this attack, over 8,000 Bosnian Muslim men and boys were executed by Serb forces, and the women and children of the town were driven out. Many were raped and brutalized in the process. This conflict, referred to as the Bosnian Genocide, is the first European crime to be classified as genocidal since WWII. Before the official cessation of the conflict in 1993, the ICTY was established (International Residual Mechanism for Criminal Tribunals 2017).
Sierra Leonean Civil War

The Special Court for Sierra Leone was created in the wake of the Sierra Leonean Civil War that waged between 1991-2002. On March 23rd, 1991, the Revolutionary United Front (RUF) and the National Patriotic Front of Liberia (NPFL) led by Charles Taylor attempted to overthrow the incumbent President of Sierra Leone Joseph Momah. This kicked off a decade of armed conflict in Sierra Leone. Both the RUF and the Sierra Leone government were financed by funds generated by the requisition and sale of “blood diamonds”. The term blood diamonds refer to alluvial diamonds mined using forced labor to fund insurgent activity. Alluvial diamonds are easily accessed in certain districts in Sierra Leone, and have been critical in perpetuating the cycle of corruption in Sierra Leone (Gberie 2005; Momodu 2017).

This civil war is not only characterized as a fight over resources, but as a stage for widespread atrocities over the course of a decade. It’s estimated that between 1991-2002, Sierra Leone suffered around 70,000 casualties and 2.6 million displaced people. Almost all parties in the conflict, including but not limited to RUF rebels, ECOMOG, Sierra Leone Army, and the police are considered culpable for abuses of human rights. These abuses included rape and sexual assault, use of child combatants, massacres, and other forms of brutality (Residual Special Court for Sierra Leone n.d.; Kaldor and Vincent 2006). The SCSL was established after the cessation of conflict in 2002.

Objectives and Expectations
As previously mentioned, the tribunals for former Yugoslavia and Sierra Leone share all of the normative objectives of the International Military Tribunal. These are objectives related to establishing responsibility, punishing perpetrators, deterring future atrocities, and fulfilling a desire to render justice in the face of human rights violations (Schabas 2006). However, the ICTY and SCSL attempted to innovate the role of a tribunal in international conflict resolution. They aimed to incorporate goals of reconciliation into a retributive legal framework, “the idea is that holding perpetrators accountable will contribute to reviving the rule of law for sustainable peace in post-conflict situations” (Nkansah 2014). The aim was that retribution through criminal prosecution can positively contribute to the ends of maintaining peace and promoting restoration of society in conflict-ridden regions.

**International Criminal Tribunal for former Yugoslavia**

The key objectives are stated by the legacy website for the ICTY, “by bringing perpetrators to trial, the ICTY aims to deter future crimes and render justice to thousands of victims and their families, thus contributing to a lasting peace in the former Yugoslavia” (International Residual Mechanism for Criminal Tribunals 2017). Individual accountability as a feature of the criminal justice system is utilized by ICTs to shift the blame away from entire groups (religious, ethnic, political) whose members may be innocent or even victims of atrocities themselves.

Though not explicitly mentioned in the establishing charter for the ICTY, the first annual report for the ICTY clarifies the desired role of the tribunal as a mechanism for reconciliation and a means at promoting internationally accepted norms of peace. Despite following the same retributive framework as the IMT, the First Annual Report
for the ICTY claims, “Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace” (UN General Assembly Security Council 1994, Article 17). The report’s expectations for the tribunal’s contribution to peace are high, “the establishment of the Tribunal should undoubtedly be regarded as a measure designed to promote peace by meting out justice in a manner conducive to the full establishment of healthy and cooperative relations among the various national and ethnic groups in the former Yugoslavia” (UN General Assembly Security Council 1994, Article 17). The tribunal hoped to go beyond the typical scope of criminal prosecution that is concerned with proving guilt. The idea is that by proving guilt, the tribunal will enable reconciliation processes that involve truth-seeking and healing (Schabas 2006).

Special Court for Sierra Leone

The UN Security Council, in establishing the SCSL, affirmed that the international community would stand behind every effort toward achieving justice. In fact, the resolution that called for the establishment of the court claims, “a credible system of justice and accountability for the very serious crimes committed [in Sierra Leone] would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace” (UN Security Council 2000). A stated aim was to pursue the punishment of perpetrators who have inhibited or threatened the establishment of peace processes in Sierra Leone (Nkansah 2014).

Truth and Reconciliation Commissions

However, the SCSL did not stand alone as a mechanism toward reconciliation. The court was established concurrently with a Truth and Reconciliation Commission
(TRC), whose goal was to pursue reconciliation without being concerned with the punishment of perpetrators and retribution (First Annual Report for the Special Court for Sierra Leone 2002). There was a Commission for Truth and Reconciliation established in Yugoslavia in March 2001, but the commission dissolved when Yugoslavia dissolved into Serbia and Montenegro in early 2003. This commission never actually conducted any interviews, filed any reports, or held any hearings. Nobody was even hired to work for the commission until six months after its inception. Effectively, there was no TRC for the Yugoslav Wars. In contrast, the TRC for Sierra Leone was able to produce reports, collect data, and even impart recommendations to the Sierra Leonean government on how to further the ends of reconciliation (Hayner 2011). Though the TRC for Sierra Leone was not a body of the SCSL, the SCSL ought to have a better shot than the ICTY at making a distinguishable impact on the advancement of reconciliatory goals toward peace in Sierra Leone.

**Establishment of the Courts**

*International Criminal Tribunal for former Yugoslavia*

The establishment of the ICTY marked the first internationalized criminal tribunal since the Nuremberg Trials. This tribunal was proposed by German foreign minister Klaus Kinkel in an effort to control the unrest in the Balkans. After attempts from the international community to pressure Yugoslavian leaders to refrain from conflict through diplomatic, economic, and political means, the ICTY was unanimously adopted by the UN Security Council with Resolution 827 (Hazan 2004).

*Charter*
The charter for the ICTY is comparable to the 1945 UN Charter for the IMT in regard to its structure and some of its stated goals. But, the ICTY charter further refines the scope of an ICT in a conflict that, while international in character, is localized to a particular region. Unlike the IMT, the ICTY’s jurisdiction was restricted geographically to the land, airspace, and waters of the former Socialist Federal Republic of Yugoslavia. Its temporal jurisdiction had no set end date, but the tribunal could try crimes that occurred on January 1, 1991 onward (United Nations 1993). Article 9 of the charter clarifies that the ICTY had primacy over national courts, and the tribunal could ask national courts to refer competence to the ICTY at any time. This charter, for the first time, affirmatively defined the offense of genocide. This definition encompasses a variety of acts committed with, “the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group…” (United Nations 1993, Article 4). The charter also defined the structure of the tribunal. The tribunal featured the following organs; the Chambers (consisting of three Trial Chambers and an Appeals Chamber), the Office of the Prosecutor, and a Registry that served both the Chambers and the Prosecutor. The Chambers would consist of a maximum of 16 permanent judges deemed to be, “of high moral character, impartiality, and integrity”. No two judges could be nationals of the same state. These judges were elected from nominations of States Members of the UN and non-member states that maintained permanent missions at the UN Headquarters (United Nations 1993, Articles 11, 12, 13, 13 bis).

**Indictments**

A total of 161 people were indicted by the ICTY, and all had been apprehended as of 2011. The majority of those indicted were Serbs. Of the 161 accused, 90 were
sentenced and only 18 were acquitted. Slobodan Milošević, former President of Serbia, faced 66 charges and was the first ever sitting head of state to face prosecution by an international tribunal. President of Croatian Serb administration Milan Martić, President of Bosnian Serbs Radovan Karadžić, and commander of the Bosnian Serb army Ratko Mladić are among the other 161 people indicted for violations of international law (International Residual Mechanism for Criminal Tribunals 2017; UN General Assembly Security Council 1994).

**Special Court for Sierra Leone**

While the ICTY was a product of the international community’s effort to promote peace in the Balkans, the SCSL was formed out of a demand for justice within Sierra Leone. The resolution that formed the SCSL, Resolution 1315, was only adopted by the UN Security Council at the request of then President of Sierra Leone Ahmad Tejan Kabbah. He appealed directly to the then UN Secretary General Kofi Annan to have the international community try war crimes committed in Sierra Leone (Kabbah 2000). Unlike the ICTY, the SCSL was established after the cessation of conflict.

**Charter**

The scope of this charter is limited in its jurisdiction compared to the ICTY, but has broader powers in terms of what crimes the prosecutors could pursue indictments for. Though the SCSL was established after the cessation of conflict, its temporal jurisdiction was limited to crimes that occurred from November 30, 1996 and onward, over five years after the conflict began. This court was granted the power to “prosecute persons who bear the greatest responsibility for serious violations of international
human rights law and Sierra Leonean law” (United Nations and the Government of Sierra Leone 2000). That meant they could indict those suspected of violating the Geneva Conventions and its protocols, committing crimes against humanity, violations of international humanitarian law (notably conscripting children under the age of 15 as combatants), along with violations of Sierra Leonean law, particularly sexual violence against young girls pursuant to the Prevention of Cruelty to Children Act of 1926 and destruction of property prohibited by the Malicious Damage Act of 1861.

This tribunal’s establishment is also distinct from the ICTY in that the majority of the trials took place within Sierra Leone, as opposed to The Hague. Sentences were also carried out in Sierra Leone. The SCSL statute followed the same structure of the ICTY (Trial Chamber, Appeals Chamber, Prosecutor, and Registry), but had different requirements for the number and selection of judges. The tribunal was to have between 8-11 independent judges, three of whom would serve in the Trial Chamber and five of whom would serve in the Appeals Chamber. One of the judges appointed to the Trial chamber would be selected by the government of Sierra Leone, and two would be appointed by the UN Secretary General. In the Appeals Chamber, two would be appointed by the government of Sierra Leone, and three would be appointed by the Secretary General. Regardless of who appointed them, these judges should also be persons of “high moral character, impartiality, and integrity,” language borrowed directly from the ICTY statute (United Nations and the Government of Sierra Leone, Articles 12, 13).

*Indictments*
Though the purview of prosecution was broad, only 13 people were indicted. One individual, Johnny Paul Koroma, has not yet been apprehended, although it is suspected that he may be deceased. Indictments were delivered to leaders of the Civil Defense forces, the RUF, the ARFC, as well as Charles Taylor (Dittrich 2014).

Budget Constraints

While the literature does not formally establish exactly why the indictments for the SCSL were much more limited than those for the ICTY despite a broad prosecutorial mandate, it is likely the tribunal was inhibited by a lack of resources. The cost of operations for the ICTY was over $1.2 billion over 10 years (Skilbeck 2008). The SCSL operated on a budget of $222 million. The SCSL relied on funding solely from voluntary donations (Dittrich 2014).

The Trials

International Criminal Tribunal for former Yugoslavia

Before any indictments were brought before the court, the Office of The Prosecutor (OTP) had to obtain cooperation between states and build credibility. This was initially a challenge to the court’s investigations, as some leaders in former Yugoslavia outright denied the legitimacy of the court imposed on their territory. This resulted in their refusal to work with the courts. The territories involved had no legal mechanisms in place to deal with international prosecutors and investigators. To circumvent these issues, the OTP developed a strategy that involved issuing the early indictments to low-intermediate level perpetrators who were identified by eyewitnesses
as committing crimes that violated the statute. This approach meant the OTP could build its capacity, while simultaneously building cases against higher level offenders that were ultimately deemed, “the main architects of the crimes” (International Residual Mechanism for Criminal Tribunals 2017). Whenever possible, the ICTY was charged with pursuing convictions for those deemed most responsible for the crimes that occurred during the Yugoslav wars.

Of the cases tried before the ICTY, there are a few that are considered landmark cases. The ICTY affirmed for the first time a conviction of genocide. This established what some consider an undisputable record of the genocide committed against the Bosnians from Srebrenica. The ICTY also resulted in innovations on the international prosecution of sex crimes. The court not only dealt with sexual violence perpetrated against men, but held that rape constitutes a grave breach of the Geneva Conventions and a violation of the laws and customs of war. Sexual enslavement was deemed a crime against humanity (International Residual Mechanism for Criminal Tribunals 2017).

Evidence

The OTP was able to gather evidence despite Serbian and other authorities' denial of any crimes having taken place. Tribunal investigators relied on satellite photography, archaeologists, anthropologists, and other specialized experts along with the testimony of survivors to establish a record of the crimes that took place and produce forensic evidence to that fact. In gathering evidence, the Tribunal located thousands of missing persons through the exhumation of mass graves (Rudic, et al.)
Witnesses that presented evidence at the tribunal were victims, survivors, experts, internationals, and insiders. Despite the evidence and increasing number of convictions brought about by the tribunal, Serbian and Croatian authorities continually accused the tribunal of undue bias, asserted denial in the face of certain charges, and claimed that the tribunal failed to recognize suffering on all sides of the conflict (Hodžić 2011).

As of July 2011, the multitude of cases presented before the ICTY resulted in 90 convictions, 19 acquittals, and 37 proceedings terminated. Punishments for the successful convictions ranged from two years to life in prison, depending on the severity of the charge. The court relied on more than 4,650 witnesses and produced over 2.5 million pages of transcripts over the 10,800 trial days (International Residual Mechanism for Criminal Tribunals 2017).

**Special Court for Sierra Leone**

The SCSL benefitted not only from the precedents set by the ICTY, but from the Sierra Leonean state’s involvement in the formation and implementation of the tribunal. Some even consider the SCSL to be a ‘mixed’ or ‘hybrid’ tribunal, defined by the UN as tribunals that are, “committed to ensuring that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law” (United Nations n.d). However, some refute this designation. Schabas argues that while it has the features of a hybrid tribunal, ultimately the SCSL is a product of international law, and not domestic law,
thereby classifying it as a true *ad hoc* tribunal. The court also did not pursue indictments for violations of Sierra Leonean law, even though they had the right to as dictated by the statute. Still, the cooperation between national and international systems was expected to make proceedings easier on the OTP. The trials and sentences were also carried out for the most part in Sierra Leone.

*Evidence*

Witness testimony was also an important feature of the evidence presented at the SCSL. The rules of this court actually enabled the OTP to compel witnesses to testify at risk of self-incrimination. If the tribunal did rely on self-incriminating testimony, that testimony could not be used in a subsequent prosecution against the witness for any offence other than false testimony. Protection of witnesses, punishment of false testimony, and a dedication to the Rules of Procedure rendered the tribunal with a high degree of credibility. The fact that the Sierra Leonean government was instrumental in procuring such evidence (as opposed to the governments of former Yugoslavia that resisted the ICTY’s efforts) meant that obtaining reliable information corroborated by forensic evidence was not a major challenge faced by the SCSL (Dittrich 2014).

*Truth and Reconciliation Commission (TRC)*

The Truth and Reconciliation Commission, though established concurrently with the SCSL, did not interact with it very often. While both the TRC and SCSL were concerned with establishing a reliable and thorough historical record, in the interest of preserving the investigations they launched the SCSL often had to deny or postpone the TRC’s requests for witness testimony or information (First Annual Report 2002). Further, the pursuit of factual truth was hampered by the nature of trial proceedings.
For example, the rights of the accused prevented a judgement being rendered in three cases presented before the SCSL (Dittrich 2014).

The 13 indictments rendered by the OTP resulted in eight convictions across three separate trials. The trials were grouped according to the suspect’s affiliation. Punishment for the convictions ranged from probation and parole to over 50 years of imprisonment. With only one suspect unaccounted for, the court has no further matters to pursue.

Reactions

International Criminal Tribunal for former Yugoslavia

The tribunal was met with varied reactions among Yugoslavian nationals. A major challenge toward the perceived success of the tribunal was the influence of Yugoslavian political leaders on the public’s interpretation of both the conflict and the role of the tribunal. Hodžić reveals that, “over the years, the Tribunal was accused of everything from persecuting innocent heroes for crimes that were never committed to torturing and killing defenseless martyrs…” (Hodžić 2011). This is a substantial hindrance toward the goal of uniting a public divided along deeply ingrained ethnic and national lines, considering a 2014 survey conducted in Bosnia and Herzegovina confirmed that over 70% of those polled relied on politicians for information on war crimes. Because of this, public opinion in the wake of the ICTY did not laud the ‘success’ of the tribunal in prosecuting perpetrators, but instead questioned its validity all together. Despite the evidence produced by the tribunal, there was a widespread denial of crimes committed against members of ‘the other side’, or of crimes perpetrated
within one’s own ethnic group (Hodžić 2011). As a result, victims of the Yugoslav wars found themselves disappointed by the outcomes of the ICTY (Ramulić 2011).

*Special Court for Sierra Leone*

The domestic reaction of the SCSL was also varied. Sierra Leoneans were not divided on who they viewed as the perpetrators of atrocities during the civil war, but rather they were skeptical of the mandate of the court and its scope. Nkansah describes a disconnect between who Sierra Leoneans saw bearing responsibility for offenses of human rights and the statute set out to prosecute. This is only exacerbated by the small number of indictments pursued by the SCSL. The mandate was viewed as too narrow, and “failure to meet these expectations affected people’s confidence in the entire process” (Nkansah 2014).

Sierra Leonean officials were said to have viewed the SCSL with suspicion. Some saw the government’s request to prosecute via an internationalized court was a political move to get rid of the RUF, which had developed into a political party in Sierra Leone. One official of the Truth and Reconciliation Commission said of the tribunal, “The greatest hypocrisy is injustice or abuse of human rights or pursuit of political ends under the disguise of justice” (Nkansah 2014). Some even claimed that the international community’s involvement in the SCSL was with the agenda of testing out a new mode of criminal justice. Under this view, Sierra Leone became a guinea pig to test the internationalized criminal tribunal alongside a Truth and Reconciliation Commission. Though there are reports of some Sierra Leoneans being satisfied with the justice
produced by the SCSL, the tribunal bred more doubt and dissatisfaction than anticipated (Hayner 2011).

Analysis

With the stated goals of the ICTY and the SCSL in mind, we can evaluate the extent to which these tribunals fulfilled their mandates and met the theoretical expectations for what the functions of ICTs are.

Punishment of Perpetrators

While perpetrators were indeed prosecuted by the tribunals, that does not necessarily mean that the punishments rendered by the ICTs were meaningful in the way it was intended or that they could address the totality of the harm suffered by civilians in conflict. Hodžić explains that in the case of the ICTY, victims looked directly at sentences delivered by the court as a way to measure the justice being served. Many victims recognize that there is no adequate way to punish the perpetrators of atrocities, but beyond that the sentences delivered were viewed as inadequate and inconsistent particularly in regard to the notion of deterring future atrocities (Hodžić 2011).

For the Sierra Leonean public, there was a disconnect between local notions of justice compared to the SCSL’s mandate to only prosecute those who bore the greatest responsibility for the atrocities. This meant that the few indictments the SCSL did pursue were only for high level political leaders, not the commanders or foot soldiers who committed violent acts. Just because someone was not in a position of power did not mean they were absolved of violence in the Sierra Leonean view. Further,
combatants or leaders on the side of the government were not prosecuted by the SCSL, despite civilian recognition that violence came from all sides of the conflict, not just the side that wasn’t cooperating with government efforts to prosecute war crimes (Nkansah 2014). Across both tribunals, it is not clear whether perpetrators were punished in a way that would fulfill the goals of ending impunity or finding justice through punishment. Since in both cases those punished did not align with the view of who constitutes a ‘perpetrator’, the ICTs then could not serve as a public acknowledgement of the harm suffered throughout each conflict.

Redress for Victims

In the cases of both the ICTY and the SCSL, the function and operations of the tribunals were not accessible to victims or civilians. The trials for the ICTY were held in the Netherlands at The Hague, which meant that any victim or civilian who wanted to see the trial of their oppressor would have to travel to the Netherlands. This is logistically challenging, beyond being simply unrealistic in a region where conflict was still intensifying. The SCSL, in theory, should have had an easier time allowing access for civilians and victims to the trials themselves, as all but one prosecution occurred in Freetown, Sierra Leone. This was not the case. The operations of the SCSL, as they mirrored those of the ICTY, appealed to the international community’s understanding of how justice should be rendered, but not the Sierra Leonean’s understanding. Even with direct contributions to the court by the Sierra Leonean government, the civilian population was not considered for the operations of the tribunal. Additionally, there were issues regarding the physical access to trial proceedings. For example, security protocol at the SCSL required that all entrants to the court present an ID; most civilians
couldn’t even see the trial proceedings because they did not have an ID. Neither tribunal was established in a way that was accessible to the victims they claimed to serve (Nkansah 2014).

Victim testimony was a feature of each tribunal, which allowed for victims to face their oppressors and make their stories known in a public forum. The court officially acknowledging the harm suffered by victims can be interpreted as a form of social reparation in the interest of healing (Cobban 2006). But, the tribunals did not provide a mechanism for material reparations. It is important to note that the mandates of the ICTY and SCSL did not set out a goal of providing material reparations for victims. However, there is evidence to suggest that the cost of operations detracted from the possibility of providing reparations. Cobban contrasts the cost of South Africa’s truth commission following the apartheid regime with the cost of operations for the International Criminal Tribunal for Rwanda. We can draw the same comparison to ICTY and SCSL. The South African Truth Commission spent less than $4,300 per case, while the ICTY spent over $10,000,000 per accused, and the SCSL spent over $23,000,000 per accused (Skilbeck 2008). The international community focused on funding the operations of the tribunals instead of programs that could materially support victims. This is especially obvious for the SCSL, which relied on voluntary donations to function. Though the courts did not aim to provide material reparations to victims, they also impeded the possibility that reparations could be delivered to the victims of atrocities.

*Establishing the Truth*
While establishing an evidence based record is a key element of any criminal proceeding, the way in which these trials had to operate inhibited the goal of establishing the most complete and accurate historical record possible (as is desired by both these tribunals and truth-seeking methods of reconciliation). The adversarial trial at its core is driven by two sets of competing narratives. The prosecution advances a theory of guilt, while the defense has to fulfill their duty to protect their client; this often means excluding relevant evidence that may violate the Rules of Evidence and Procedure. In the interest of trying to avoid punishment themselves, the accused have no incentive to speak truthfully about the full extent of their role in perpetrating atrocities. This furthers the divide between the victim and the perpetrator; since the perpetrator must take a defensive stance, the encounter between victims and perpetrators is not entirely honest. If the alleged perpetrator pleads guilty, the encounter doesn’t happen at all. The adversarial trial also prescribes only two outcomes; acquittal or conviction (Wilson 2011).

In former Yugoslavia, the adversarial trial did nothing to prevent the outright denial of atrocities from the defendants and their supporters. As we saw the tribunal faced unfounded allegations of bias and prejudice toward certain perpetrators over others. In fact, the trial of former President Slobodan Milošević before his demise was an opportunity for Milosevic to draw out proceedings and perpetuate hatred felt among many Serbs. The evidence collected by the OTP was not a determining factor in how officials chose to portray the functions and outcomes of the ICTY. While the official record might be clear about what happened and who perpetrated violence, the
perception among the civilian population was not. ‘Truth’, then, was not effectively established by the ICTY (Cobban 2006; Hodžić 2011).

Even in Sierra Leone, where a concurrent Truth and Reconciliation Commission was established, the slim mandate of the SCSL that prevented many perpetrators from being tried meant those narratives could not be accounted for in the record the court was establishing. The limited temporal jurisdiction of the tribunal further restricted its contribution to forensic or social truth (Dittrich 2014). Evidence of violence that took place in and around Sierra Leone before 1996 was not brought before the tribunal. The problem of the potential holes in the record is only exacerbated by the mixed reactions that tribunal received by Sierra Leonean officials and the public alike.

Despite the in-depth investigations conducted by the OTP’s for the ICTY and SCSL, the trial format was not able to maintain a single, ‘accurate’ narrative, nor was it able to account for the totality of the circumstances that brought about the need for internationalized tribunals in the first place.

Conclusion

Ad hoc international criminal tribunals are a mechanism for the international community to handle and punish atrocities. In the cases of the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone, ICTs were also meant to be a mechanism for reconciliation for former Yugoslavia and Sierra Leone respectively. I examined why these courts were unable to function as proponents of reconciliation by looking at the forms reconciliation can take; these are the acknowledgement of harm done, redress for victims (material and immaterial), and
establishing a full and accurate historical record. I found that both the ICTY and the SCSL were limited by the norms of retribution that undergirded the establishment of internationalized tribunals at large. Despite their stated commitments in the interest of reconciliation, neither tribunal produced results that made a discernible impact on reconciliation in the Balkans or in Sierra Leone.

Instead of serving the suffering populations in former Yugoslavia and Sierra Leone, the tribunals were a platform for the international community. The international community could further their normative notions of justice, removed from the regional and cultural contexts of the civilian populations they were meant to be answering to. This means that the results of the tribunals are not only removed from local notions of justice, but from the expectations of transitional justice and reconciliation. The heavy reliance on retributive justice as an established feature of international criminal proceedings, “does not bring about the profound social transformation that countries coming out of violent conflict require” (Subotic 2009). For this reason, even the last chief prosecutor for the ICTY Serge Brammertz acknowledges that the tribunal was unable to bring about an acceptance of wrongdoing in former Yugoslavia, which in turn meant reconciliation was not furthered by the tribunal (Rudic, et al. 2017). For the same reason, Sierra Leoneans lost confidence in the entire process of the tribunal as it failed to meet their conception of justice, which did not further reconciliation between the warring parties.

These findings suggest that the international community’s response to atrocities needs to look beyond the norms of retributive justice that were so influential in the
formation of the internationalized criminal tribunal. I do not advocate for the removal of criminal prosecutions as a mechanism for the international community to rely upon in the face of grave atrocities. Rather, the international community needs to recognize that ICTs are a retributive tool and not one that affects reconciliation. With this realization, bodies such as the United Nations should look critically at how international legal mechanisms function, what ends they serve, and where funding ought to be allocated in the interest of their broader goals of establishing peace, justice, and strong institutions (United Nations 2020). If the limitations of retributive justice on reconciliation efforts are acknowledged, then the international community will have made room for conflict resolution efforts that do have a reconciliatory character. So long as states and international institutions claim this is a goal they share, then they must be interested not only in indicting perpetrators of atrocities, but in critically examining the role of retribution in conflict resolution and reconciliation.
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