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The International Criminal Tribunal for the former Yugoslavia – Towards a More Just Order?

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ABSTRACT

This paper analyses the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in light of its potential for creating and institutionalising justice norms in the international society. The analysis is mainly based on the English School of International Relations (IR) and specifically its central debate on how to resolve the conflict between order and justice in international relations. This paper analyses various documents issued by different states surrounding the tribunal's creation and also looks at a challenge to the ICTY's jurisdiction through the perspective of the '*Prosecutor vs. Tadić'* decision that challenged the primacy of the ICTY over national courts. This paper argues that establishing the ICTY, despite a number of problems attached to it, provides an important precedent and step towards institutionalising respect for the rule of law and the general principles of international human rights into the international society. It thereby deters the recurrence of such crimes and contributes to the institutionalisation of human rights norms to build a more *just* order – the ultimate aim of a solidarist international society.

INTRODUCTION

The ICTY was established through a UN Security Council Resolution in 1993 and is an important case in which the struggle between order and justice in international law and politics becomes apparent: the former Yugoslavia's sovereign right to exercise territorial jurisdiction was compromised in favour of an international mechanism for enforcing justice principles. This paper aims to assess the extent of solidarity between states with regards to the enforcement of human rights by analysing the establishment of the ICTY. It explores how pluralist and solidarist views can be applied to this case as a specific example of an attempt to provide individual justice in the frame of international order. The analysis focuses on how order and justice are deliberated in the argumentation surrounding the institution's establishment, how they are included

in the ultimate decisions to create it, and what the effects for the international society as a whole are.

The paper argues that the establishment of the ICTY constitutes an important precedent for multilateral action by states in international society to enforce principles of justice. This also suggests that these norms are being taken increasingly seriously and are given priority over fundamental principles of order (sovereignty and non-intervention). The paper also argues, however, that the way the ICTY was set up and its limited, *ad hoc* nature make it a rather problematic international institution with a number of serious shortfalls. Nevertheless, its establishment still constitutes an important development and precedent in international politics and law and gives renewed impetus to the establishment of the International Criminal Court (ICC) as a permanent justice enforcement mechanism.

The paper starts with short outline of the theoretical background for the analysis, followed by a very short outline of the historical and political background to the decision to establish the ICTY. It then analyses various documents issued by different states surrounding the tribunal's creation. Studying justifications and public reasoning processes of the actors involved provides the basis for an analysis of underlying norm developments; in this context the progression of human rights and justice norms and states' compliance with them.[2] This paper also looks at a challenge to the ICTY's jurisdiction through the perspective of the '*Prosecutor vs. Tadić'* decision that challenged the primacy of the ICTY over national courts, which further illustrates the conflict between order and justice (sovereignty to exercise criminal jurisdiction vs. justice established in Geneva conventions). It concludes by assessing how the ICTY's creation has affected the further institutionalisation of new norms that eventually contributed to the establishment of the ICC. The conflict between order and justice is a central theme throughout the analysis.

1. THEORETICAL BACKGROUND

The English School approach to IR is built on ideas of classical realism and liberalism: it includes the realists' notion of power and sovereign states and the liberal idea of cooperation and international law. According to this view, the context in which states act is an anarchical society of sovereign states. The main focus of the English School is the concept of international society, which exists "when a group of states, conscious of certain common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions"[3]. The concept of international society is seen as the basis of international order. The maintenance of international order assumes that states have a sense of common interests in the elementary goals of social life, which are the limitation of violence, the stability of possession and the honouring of promises and agreements.[4] Rules provide guidance as to what behaviour is consistent with these goals; they may have the status of international law, moral rules, and customs or established practices. However, order is not the only value in international politics; states are also concerned with achieving justice. 'Justice' is a subjective concept, because no single definition exists that is recognised in every culture. Bull, for instance argues that "ideas about justice belong to the class of moral ideas, ideas which treat human actions as right in themselves and not merely hypothetically imperative."[5] Justice is a normative phenomenon and in the context of this paper is understood as the enforcement of international human rights laws[6] and norms aimed at holding perpetrators accountable for their actions to end the culture of impunity. English School theorists have long been concerned with the

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[2]Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000), p. 9-14.
[3]Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Basingstoke, London: MacMillan, 1995), p. 13.
[4]Ibid. pp. 4-5.
[5]Ibid. p. 75.
[6]International human rights laws entail "a set of rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments. Human rights are inherent entitlements which belong to every person as a consequence of being human." International Committee of the Red Cross, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JR8L/$FILE/IHL_and_IHRL.pdf?OpenElement Unlike international humanitarian law that applies in situations of armed conflict, international human rights law protects individuals at all times.

conflict between the order provided by the society of states and the various aspirations for justice and they are split into two different positions on how to resolve this tension: the pluralist and the solidarist view.

Pluralists argue that order is always prior to justice and that there will also be a permanent tension between the two. They focus on the rules in international society that uphold international order among states that share different conceptions of justice. Pluralists argue that because the international society cannot agree on what individual justice entails, pursuing it would undermine international order.[7] For pluralists, justice is therefore only possible within the context of order but never at the price of order. Pluralists favour order over justice, because they believe that there is not enough solidarity among humankind to provide for the latter and are concerned that pursuing justice would undermine the existing international order.[8]

Solidarists, in contrast, look at the possibility of overcoming this conflict by recognising the mutual interdependence of the two concepts. Their main focus is on individuals as principal holders of rights and duties in international relations and the realisation of individual justice. Individual justice entails "the moral rules conferring rights and duties upon individual human beings."[9] Solidarists believe that agreement among states and collective action for the cause of individual justice are possible and that the ultimate aim is to achieve a more *just* international order that can accommodate individual justice; i.e. perceiving human rights and justice as integral parts of international order. "Solidarism agrees with realism that state leaders have a responsibility to protect the security and well-being of their citizens, but it parts company with it on the question of whether this obligation exhausts obligations to non-citizens."[10] Solidarists argue that order and justice are inextricably linked, and that it is therefore important to reconcile the two values, because an unjust world will eventually lead to a breakdown of order.[11]

[7]Ibid. p. 85.
[8]R. John Vincent, *Nonintervention and International Order* (Princeton: Princeton University Press, 1974), p. 308.
[9]Hedley Bull, *The Anarchical Society,* p. 79.
[10]Nicholas J. Wheeler, *Saving Strangers,* p. 49.

In this analysis, the concepts 'solidarism' and 'solidarity between states' are used in a very limited sense - as a particular strand of the English School of IR theory. In this context, order and justice are seen as two competing values which are not in a stark contrast, but can be reconciled in a more or less limited way. Solidarity (in this limited sense) between states is expressed in states' willingness, supported by norms and civil society, to consider procedures about how to deal with the most severe international crimes against human rights and to provide individual justice.

2. BACKGROUND TO THE ICTY'S CREATION[12]

The end of the Cold War resulted in Yugoslavia falling apart and the onset of yet another violent conflict in the area. Serbian leader Slobodan Milosevic encouraged Serb nationalism through his vision of the 'Great Serbian Project' aimed at creating an ethically homogenous Serbian state. In 1991, he attacked Slovenia and Croatia after they had declared their independence, followed in 1992 by a similar offensive against Bosnia with devastating 'ethnic cleansing' of Bosnian Muslims and Croats.[13] Despite widespread reports of grave human rights abuses and of Serb-run concentration camps, the international community was reluctant to act decisively and deploy troops to end the violence. However, high media pressure and lobbying from various NGOs made it increasingly difficult to ignore the conflict and states in the international community were pressured 'to do something' to stop the conflict. The UN decided to establish the UN Protection Force (UNPROFOR) which was initially deployed in areas of conflict inside Croatia as an interim measure with a restricted mandate to act as a peacekeeping force. The mandate was extended during the conflict in Bosnia to protect the delivery of humanitarian aid, but states were reluctant to expand it further to allow action to put an end to the fighting, as this would have

[11]Ibid. p. 301.
[12]The history and the origins of the conflict in the former Yugoslavia are very complex and it is not the intention of this paper to explore them in great detail. Only a very brief summary is given to provide the context for the subsequent analysis.
[13]Even though most of the atrocities were being committed by Serb forces, it is important to note that Croats and Bosnian Serbs also committed war crime and that "all parties to the conflict had committed abuses against other ethnic groups." (Virgina Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis* (Irvington-on-Hudson, New York: Transnational Publishers, 1995), p. 22)

meant taking sides and putting their soldiers' lives at risk. However this also meant a continued deterioration of the human rights situation.

On 6 October 1992 the UN Security Council unanimously adopted Resolution 780 which called for the establishment of an impartial 'Commission of Experts' to examine and analyse information related to "the violations of humanitarian law, including grave breaches of the Geneva Conventions being committed in the territory of the former Yugoslavia." The Commission faced a number of difficulties including lack of funding and states' reluctance to co-operate, but it nevertheless produced a report outlining the situation in the region, in which it "concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, "ethnic cleansing", mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests."[14] The Commission also suggested the establishment of an *ad hoc* international tribunal to deal with these crimes, arguing that "such a decision would be consistent with the direction of its work."[15] The Commission argued that jurisdiction for war crimes was governed by the universality principle[16] which could also be applied to genocide and crimes against humanity and that they could therefore be governed by the international community. It conferred the responsibility for setting up a tribunal to the Security Council. This echoed similar recommendations made by various other bodies, such as the UN Human Rights Commission and the CSCE.[17]

The end of the Cold War meant that the UN Security Council was not paralysed by Great Power rivalry anymore and that there was "new willpower, as well as the ability

[14]Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993*)
[15]Commission of Experts' Report at 74.
[16]The 'universality principle' or 'principle of universal jurisdiction' gives states the right to exercise national jurisdiction over a criminal act regardless of the nationalities of victims or perpetrators or where the crime took place.
[17]Virgina Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia,* p. 29.

to effect political change."[18] The end of the Cold War also led to a renewed discussion of the responsibilities of the international community as well as the role of the UN in matters of serious human rights violations. The Security Council may also have hoped to deflect criticism for its reluctance to get involved militarily to end the bloodshed[19] and it eventually opted for a non-military intervention based on established international legal norms. On 22 February 1993, the Security Council unanimously adopted Resolution 808, deciding in principle to establish the ICTY. The Resolution requested the Secretary-General to report on all aspects relating to this matter and to take into account suggestions put forward by member states to this effect. On 25 May 1993, Resolution 827, which contained the ICTY's Statute, was adopted unanimously. The Statute grants the ICTY subject matter jurisdiction over genocide, crimes against humanity and war crimes. In considering the establishment of the ICTY, the Security Council had to make the difficult choice between upholding the inviolability of state sovereignty (even if that meant risking leaving crimes to go unpunished) or it could risk undermining sovereignty by creating an international tribunal to pursue justice.[20] It decided to do the latter. It can be argued that this judicial intervention was based on already existing international laws that incorporate already agreed upon norms of human rights.

3. ISSUES ARISING FROM THE PROCESS OF THE ICTY'S ESTABLISHMENT

Before the ICTY was fully established, a number of different states issued letters, reports and statements addressed to the UN to outline their opinions and suggestions on the proposed tribunal. In a number of these statements the struggle between order and justice becomes apparent in considerations of how the sovereignty of states might be affected by enforcing justice principles through international judicial intervention. The majority of states were very supportive of the establishment of the court, stressing the need for the UN to act in the face of alleged violations of human rights in the

[18]Anne Bodley, "Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the former Yugoslavia", *New York University Journal of Law and Politics*, 31 (1999), p. 431.
[19]Jackson Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (Boulder: Lynne Rienner, 2004), p. 143-144.

territory of the former Yugoslavia. Brazil, for instance, condemned the crimes against human rights that were allegedly committed and argued that these acts "call for strong action by the international community, including through the United Nations, to uphold the fundamental values of justice and the dignity of the human person."[21] A number of states acknowledged the possibility that the ICTY could lead to a permanent court, but argued that this would need to be established by means other than through Security Council resolution.[22] Some states even advocated General Assembly involvement in the setting up of the ICTY, arguing that this would ensure that the international community acted as a whole, in order to take "the rights and legitimate aspirations of the entire international community into account."[23] States placed great importance on the multilateral and international nature of the ICTY, asserting that offences included in the Statute should be defined and interpreted in accordance with international conventions and customs "as evidence of a general practice accepted as law and the general principles of law recognized by civilized nations."[24] The majority of the states agreed that the ICTY and the way it was being set up affected state sovereignty "very closely"[25] and that criminal jurisdiction could only exist in "very special" circumstances, when conferred upon an international body by the states concerned. States therefore agreed that even though compromising state sovereignty was not a matter of course, it was nevertheless necessary in this particular context in order to proceed swiftly and to uphold principles of justice. The majority of states stressed the importance of limiting the Security Council's powers to this

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[20]Ibid. p. 155.
[21]Letter Dated 6 April 1993 From the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General. In V. Morris, and M.P. Scharf (Eds.), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis*. Vol. 2. Irvington-on-Hudson, New York: Transnational Publishers, 1995), p. 435.
[22]Establishing the ICTY through a Security Council resolution meant that it was automatically binding on all UN member states. A number of states preferred a treaty-based approach instead in which the ICTY and its Statute could have been negotiated between all states involved.
[23]Note Verbale Dated 12 March 1993 From the Permanent Mission of Mexico to the United Nations Addressed to the Secretary-General. In V. Morris, and M.P. Scharf (Eds.), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis*. Vol. 2. (Irvington-on-Hudson, New York: Transnational Publishers, 1995), p. 388.
[24]Letter Dated 13 April 1993 From the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General. In V. Morris, and M.P. Scharf (Eds.), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis*. Vol. 2. (Irvington-on-Hudson, New York: Transnational Publishers, 1995), 460.
[25] Letter Dated 10 February 1993 From the Permanent Representative of France to the United Nations Addressed to the Secretary-General. In V. Morris, and M.P. Scharf (Eds.), *An Insider's Guide to the*

particular conflict and to remain within the provisions of its powers stipulated in Chapter VII of the UN Charter, i.e. to react to the threat to international peace and security in the former Yugoslavia. States agreed that it was important to stress the *ad hoc* nature of the ICTY and that the way it was set up could not and should not be seen as a precedent which could lead to similar action in other situations and conflicts.

Resolution 827 that fully established the ICTY's Statute was adopted unanimously on 25 May 1993 and it reveals further the underlying struggle between order and justice states faced. Even though the resolution was adopted unanimously, a number of the states present in the Security Council made statements to outline their reservations to certain aspects of the tribunal. The UK called the ICTY "an exceptional step needed to deal with exceptional circumstances."[26] States argued that this meant that the ICTY did not establish new norms or precedents of international law and "simply applies existing international humanitarian law."[27] Spain argued that the Council was trying to "reaffirm the faith in fundamental human rights, in the dignity and worth of the human person, and indeed to establish conditions for the maintenance of justice and respect for international law"[28] conditions, Spain argued, which were already set out in the UN Charter. States therefore argued that infringing a state's sovereignty could only be justified for universally agreed principles and not to enforce 'new' ones externally. Even though states were very supportive of the ICTY, a number of them were nevertheless dissatisfied with the use of a Security Council resolution to establish the ICTY on the grounds that this interfered with the former Yugoslavia's sovereign rights. They were concerned that establishing a precedent could lead to abuse of Chapter VII provisions, and therefore argued for the necessity of a prudent approach. All in all, however, states were very supportive of the ICTY and saw it as "an instrument of justice which is called upon to restore international legality and the faith of the world community in the triumph of justice and reason."[29] Creating it

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International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis. Vol. 2. (Irvington-on-Hudson, New York: Transnational Publishers, 1995), p. 333.

[26]'Provisional Verbatim of the Three Thousand One Hundred and Seventh Meeting; Held at Headquarters, New York. In V. Morris, and M.P. Scharf (Eds.), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis*. Vol. 2. (Irvington-on-Hudson, New York: Transnational Publishers, 1995), p. 189

[27]Ibid. p. 182.

[28]Ibid. p. 204.

[29]Provisional Verbatim Record of the 3207th Meeting of the UN Security Council, p. 206.

through a Security Council resolution meant that it was binding to all member states and that they all needed to co-operate to ensure the ICTY could function, "even if this obliges them to amend certain provisions of their domestic laws."[30] States thereby conceded that the Security Council was compromising states' sovereignty, but that this was necessary in this particular situation for a greater good of the international community, i.e. enforcement of human rights principles that concern humanity as a whole.

Not surprisingly, the government of *Yugoslavia* (Serbia and Montenegro) did not support the establishment of an *ad hoc* tribunal concerning crimes committed on its territory. It argued that alleged perpetrators should be prosecuted by national courts and under national laws that were harmonised with international laws. Yugoslavia made it clear that it supported the idea of a permanent tribunal, but that this should be established with "respect for the principle of equality of States and universality and [Yugoslavia] considers, therefore, the attempts to establish an ad hoc tribunal discriminatory."[31] It argued that crimes against international humanitarian law were committed in a number of other states as well, but that the international community did not interfere there with equal measures, "so that the selective approach to the former Yugoslavia is all the more difficult to understand and is contrary to the principle of universality."[32] It doubted that the tribunal could be impartial and also questioned the legal basis for its establishment. It argued that the Security Council acted *ultra vires*[33], because it did not have the powers to establish a court under the UN Charter. Yugoslavia argued the international tribunal was based on political motivations rather than international legal practice and that the "proposed statute of the international tribunal is inconsistent and replete with legal lacunae to the extent that it makes it unacceptable to any State cherishing its sovereignty and dignity."[34]

Yugoslavia's position also highlights the underlying order and justice conflict, but unlike the other states that outlined their positions towards the ICTY, it comes to a

[30]Ibid. p. 185.
[31]Ibid. p. 479.
[32]Ibid. p. 480.
[33]Ultra vires (Latin: "beyond powers") refers to conduct by officials that exceeds powers granted to them by law.

different solution of the struggle: that the UN had no right to intervene in its internal affairs. It argued that it already subscribed to and had incorporated international justice principles into its national laws and that it was therefore not justifiable to infringe its sovereign right to exercise jurisdiction over the alleged perpetrators itself. Interestingly, the government linked its concerns of 'sovereignty' with 'dignity', arguing that infringing a state's sovereignty has far reaching effects on the state. In contrast, Brazil and Spain had noted in their submissions to the Security Council that the ICTY was necessary in order to restore the 'dignity' of human beings. It is therefore evident that Yugoslavia placed more emphasis on the importance of the rights of the state rather than those of human beings, in line with a pluralist view of trying to uphold the existing international order and the principle of sovereignty regardless of calls to enforce international human rights on an international basis.

Assessment

The main difficulty states faced in their struggle between order and justice lay in trying to reconcile two different values incorporated into the international order that they saw as irreconcilable and incommensurable. On the one hand, states were concerned about the value of the former Yugoslavia's sovereignty and its right to non-intervention as fundamental principles of the existing order. On the other, they were concerned about upholding legally codified human rights norms that were also part of the international order, but had not been given priority over other (more fundamental) order principles in the past. States struggled to agree with the external interference by a small number of states in the Security Council to uphold universal norms of justice. They solved this dilemma by stressing the 'extraordinary' and 'unique' nature of the situation and also by emphasising the importance of staying within existing international legal provisions regarding the ICTY's subject matter jurisdiction. Theses values were seen as not only important as norms of international law, but "quite simply our human concepts of morality and humanity."[35] The primary emphasis is therefore not on states' interests, but the interests of humanity as a whole. States offered support for existing international, universally recognised justice norms and

[34]Provisional Verbatim Record of the 3207th Meeting of the UN Security Council, p. 480.

argue that this compromise of some order principles was in line with other principles incorporated into the existing international order; it meant emphasising one value of order over another. By signing the UN Charter, states had agreed that the Security Council could act on behalf of the entire international community in cases it regards as threats to international peace and security. This compromising of state sovereignty was therefore seen as within the scope of the existing international order. States were clearly concerned about the possibility that the ICTY would set a precedent and that the Security Council might decide to intervene in similar situations in other states and repeatedly emphasised that the ICTY was an *ad hoc* court established in an extraordinary situation. This begs the question of how serious states' ambitions were for a more 'just' order in which human rights violations that 'shock the conscience of mankind' are not left unpunished. The fact that states emphasised the *ad hoc* and unique nature of the ICTY seems to suggest that they are ready to accept the compromise of another state's sovereignty, but are very protective of their own. The arguments put forward by states, based on an emphasis on the extraordinary nature of the conflict, represent an attempt to rationalise the tension between order and justice, but it is nevertheless problematic. The very function of law (that is being applied by states here) is to institutionalise ideas and norms into order to make the 'extraordinary' ordinary. A situation in which international law is applied cannot stay 'extraordinary', this would be unjustifiable and unworkable. It can therefore be argued that the ICTY did have the potential of creating a powerful precedent which could be invoked in comparable situations by other states. A number of states offered support for a permanent international criminal court, but emphasised that this can only be established through negotiations, i.e. not without expressed state consent, not imposed externally by other states through an international organisation. Even though states used solidarist rhetoric in favour of enforcing justice at the cost of order, it is questionable whether they would do so if it was their own sovereignty that was at stake.[36] The *ad hoc* nature of the ICTY made it appear arbitrary and selective, as

[35]Provisional Verbatim Record of the 3207th Meeting of the UN Security Council, p. 206.
[36]The reluctance to concede parts of their own sovereignty is evidenced by the lengthy negotiations for the ICC. States were not willing to readily accept the interference, but because they eventually agreed to it (Rome Statute), it can be argued that this can be seen as evidence of new norms emerging and not just rhetoric.

Yugoslavia rightly points out, the question remains why the Security Council decided to act in this particular conflict and not in others.

4. CHALLENGE TO THE ICTY'S JURISDICTION – THE TADIĆ CASE

The first case that was tried before the ICTY was that of Dusko Tadić, who was initially arrested by German authorities in 1994 on suspicion of having committed offences that constituted crimes under German law. Following a formal request for deferral, Tadić was transferred to the ICTY's detention unit in The Hague in 1995, where he was charged (together with a co-accused) with numerous counts of human rights abuses involving grave breaches of the Geneva Conventions, violations of the law or customs of war, and crimes against humanity. The Indictment alleged that between late May 1992 and 31 December 1992, Dusko Tadić participated in attacks on and the seizure, murder and maltreatment of Bosnian Muslims and Croats in the Prijedor municipality, both within and outside a number of prison camps.[37]

This case is important in the overall context of this analysis because Tadić argued in favour of upholding the principle of state sovereignty - most importantly expressed in his challenge to the ICTY's jurisdiction and also its primacy over national courts. Tadić challenged the jurisdiction of the ICTY on three grounds: "the alleged improper establishment of the International Tribunal; the improper grant of primacy to the International Tribunal; and (…) the subject-matter jurisdiction."[38] The case was dismissed by the ICTY Trial Chamber and also its Appeals Chamber.

Trial Chamber Decision

The Defence for Tadić argued that the Security Council acted beyond its powers and that the ICTY should have been created either by treaty or by amendment of the UN

[37]On 7 May 1997, Tadić was found guilty on 11 of 31 counts and on 14 July 1997 sentenced to 20 years prison.

Charter, not by Security Council resolution. It argued that such powers were never intended in the UN Charter and that the Security Council therefore acted *ultra vires*. It also argued that the Security Council acted inconsistently and selectively in focussing on the former Yugoslavia and not on other conflicts occurring at the same time but in other parts of the world. The defence also argued that the primacy of the ICTY over national courts was "inherently wrong".

In its judgement, the ICTY Trial Chamber countered that the ICTY was established within the scope of Chapter VII and that the competence of the tribunal was clearly defined with spatial and temporal limits based on existing international humanitarian law. It argued that the Security Council did not act arbitrarily, but that it had recognised the violations of international humanitarian law that were occurring in the former Yugoslavia as threats to international peace and security, therefore acting in accordance with Article 39 of the UN Charter. The Trial Chamber argued the judgement as to whether an emergency situation existed in former Yugoslavia was a political decision, not a justiciable one and therefore within the powers of the Security Council. It maintained that the fact that the ICTY was the first of its kind did not warrant the accusation that the Security Council had acted inconsistently and this claim could not be relevant in determining the legality of its action. The Trial Chamber conceded that Security Council action under Chapter VII, by imposing its response on the former Yugoslavia, meant "some surrender of sovereignty by the member nations of the United Nations but that [this was] precisely what was achieved by the adoption of the Charter."[39]

Exploring the challenge to its primacy, the Court argued that Tadić – as an individual rather than a state – was not entitled to raise this issue, which "involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from that State."[40] Similar to the various states' statements analysed in the previous section, the Trial Chamber outlined that the crimes Tadić was accused of formed part of customary international

[38] *Prosecutor v. Dusko Tadic A/K/A "Dule" - Decision on the Defence Motion on Jurisdiction,* Trial Chamber of the ICTY, 1995
[39] *Prosecutor v. Dusko Tadic,* Trial Chamber at 37.

law that existed before the establishment of the ICTY and reflected universal values of mankind as a whole. The Chamber did not agree that the ICTY's primacy over national courts in this case constituted an interference into a state's jurisdiction, because "they were never crimes within the exclusive jurisdiction of any individual State."[41] The judgement further set out that "assuming *arguendo*[42] that there is no clear obligation to punish or extradite violators of non-grave breach provisions of the Geneva Conventions, such as common Article 3, all States have the right to punish those violators."[43]

The struggle between order and justice is apparent in the Trial Chamber's judgement through the notion of "sovereign rights of states" versus crimes that "affect the whole of mankind and shock the conscience of all nations of the world." The Chamber recognised that the *nature* of the crimes Tadić was accused of was important and because they attracted universal jurisdiction, they were the responsibility of the international community as a whole and not just one individual state. It argued that multilateral action through an international institution like the UN Security Council was justified and necessary in such cases. The judgement argued that the Security Council acted within the scope of UN Charter provisions and did so in a deliberate and measured way without haste. It further argued that member states of the UN signed up to the provisions of the UN Charter which include empowering the Security Council to act with regards to issues of international peace and security. The Chamber argued from a solidarist point of view that state sovereignty could not and should not take precedence over the protection of human rights, especially when it is related to serious international crimes that affect humanity as a whole. This places greater importance on human rights and justice rather than the necessity to maintain the rights of sovereign states to deal with these crimes on a national basis.

Appeals Chamber Decision

[40]Ibid. at 41.
[41]Ibid. at 44.
[42]'For the sake of argument'
[43]*Prosecutor v. Dusko Tadic,* Trial Chamber at 71.

The Appeals Chamber in its decision dealt mainly with the issue of primacy of the ICTY over national courts. The defence alleged in its appeal that the "[The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected."[44] It further argued that the UN was based on the principles of "sovereign equality of all its Members" and that therefore "no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest justified by a treaty or customary international law or an *opinio juris* on the issue."[45] Tadić's defence countered that based on this proposition the same requirements should apply to the establishment of an "international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated."[46]

The Appeals Chamber disagreed with the Trial Chamber that Tadić - as an individual rather than a state – did not have *locus standi*[47] to raise the issue of primacy. It argued that the Trial Chamber had based its decision on unsuitable case law, "dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute to statehood, this concept recently suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights."[48] By giving Tadić the opportunity to appeal, the Appeals Chamber confirms its underlying view that international law has moved away from a purely state-centred approach to a more human-being centred one. It still rejected Tadić's challenge to the ICTY's primacy because it considered the crimes he was accused of as internationally significant, "offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind."[49] The Appeals Chamber argued that some principles of justice were so important that it was sometimes necessary to compromise principles of order to protect them. It argued against using the principles of non-intervention and sovereignty as 'shields' behind which states could hide whenever

[44] *Prosecutor v. Dusko Tadic A/K/A "Dule" - Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Appeals Chamber of the ICTY, 1995, at 50.
[45] Ibid. at 55.
[46] Ibid. at 55.
[47] 'The right of a litigant to act or be heard'
[48] *Prosecutor v. Dusko Tadic,* Appeals Chamber at 55.
[49] Ibid. at 57.

issues of justice are at stake. The Appeals Chamber gave a solidarist view of the order and justice conflict, calling the failure to give priority to justice over order in such cases a "travesty of law" and a "betrayal of the universal need for justice".

Challenge to the ICTY's jurisdiction

The Tadić case is problematic on a more fundamental level because it raises the question of how the Court can make sense of its own jurisdiction. The Trial Chamber argued that the ICTY was not a constitutional court set up to scrutinise actions of UN organs, but that it was a criminal tribunal with clearly defined powers.[50] It had specific and limited criminal jurisdiction and was not authorised to investigate the legality of its own creation. The Appeals Chamber, on the other hand, argued that it did have powers to determine its own jurisdiction, because as an international tribunal it constituted a 'self-contained' system, independent from the Security Council.[51] Both Chambers maintained that the Security Council had the right (within the UN Charter provisions) to determine a threat to international peace and security and decide on the appropriate reaction. They both argued that this was a political decision, not a judicial one. The fact that Tadić could only challenge the ICTY about its own jurisdiction through its own Appeals Chamber (and not leave the decision to a third, independent, party) is problematic because it represents the "limits of legal possibility: to challenge the jurisdiction of the court challenges its ability to pronounce judgment and thus say anything at all about the challenge itself, in the same way that to challenge the constitutional process challenges the capacity of the system to express the 'will of the people' since that will is bound – constitutively – to the process that yield it."[52] Even though it is necessary to reduce the complexity of the legal process by establishing codified rules and norms, this process by its very nature can have serious costs in terms of what is contestable, the result is a "silencing that finds no representation in law."[53] It is therefore difficult to determine whether the ICTY did have jurisdiction in this case to decide on its own jurisdiction.

[50]*Prosecutor v. Dusko Tadic,* Trial Chamber at 5.
[51]*Prosecutor v. Dusko Tadic,* Appeals Chamber at 10,11,12,14,18.
[52]Emilios A. Christodoulidis, 'The Objection that Cannot be Heard: Communication and Legitimacy in the Courtroom'. In A. Duff (Ed.), *The Trial on Trial*. (Oxford; Portland: Hart Publishing, 2004), p. 201.
[53]Ibid. p. 186.

It can be argued that one aim of criminal tribunals is to uncover 'truth' and establish an accurate historical record of conflict necessary to enable victims to start their healing process.[54] The ICTY, however, already embodies a certain understanding of the 'truth', because it is based on one understanding of the Yugoslav conflict in which it was established. The tribunal assumes universal legitimacy of the international community as a whole whereas in fact it was imposed externally by only a few states in the Security Council. This makes the Tadić decision that much more difficult to justify, because the judges were part of the very context he challenged. As Koskenniemi rightly argues: "To accept the terms in which the trial is conducted – what deeds are singled out, who is being accused – is already to accept one interpretation of the context among those between which the political struggle has been waged."[55] At the beginning of his trial in 2001, Slobodan Milosević similarly challenged the trial's jurisdiction: "I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to illegal organ."[56] And further: "I don't see why I have to defend myself in front of false Tribunal from false indictments."[57] It is difficult to see how the aims of the international criminal tribunal can be accomplished if the accused does not recognise the validity of it. The accused should be given an opportunity to challenge the very context that provides the basis for the tribunal. "If individual criminality always presumes some context, and it is the context which is at dispute, than it is necessary for an accused such as Milosevic to attack the context his adversaries offer to him. (…) The fact the Milosevic is on trial, and not Western leaders, presumes the correctness of the Western view of the political

[54]See for instance Goldstone and Bass who argue that participants of war crimes tribunals often express their desire for the trial to provide a full historical record of the atrocities committed. For instance, Robert Jackson, chief prosecutor of the Nuremberg tribunals, "wanted the evidence prepared for the trials to stand as a massive documentary record of Nazi criminality." Goldstone, Richard J., and Bass, Gary J., 'Lessons from the International Criminal Tribunals'. In S.B. Sewall, and C. Kaysen (Eds.), *The United States and the International Criminal Court: National Security and International Law* (Oxford: Rowman & Littlefield, 2000), p. 54.
[55]Martti Koskenniemi, 'Between Impunity and Show Trials'. In J.A. Frowein, and R. Wolfrum (Eds.), *Max Planck Yearbook of United Nations Law*. Vol. 6. (Kluwer Law International, 2002), p. 17.
[56]Transcript of Proceedings at the International Criminal Tribunal for the former Yugoslavia on 3 July 2001, http://www.un.org/icty/transe54/010703IA.htm, p.2 at 3-6.
[57]Transcript, p.20 at 23-25.

and historical context."[58] [59] This means that the ICTY runs the danger of becoming a 'show trial', in which the accused is being silenced, thereby not fulfilling its goals of enforcing universal justice principles in the international order. This is a major shortcoming resulting from the way the ICTY had been set up and also from its *ad hoc* nature. Despite these limitations, however, the ICTY nevertheless constitutes a valuable precedent for the ICC because it highlighted the problems attached to enforcing international criminal justice on a universal level.

5. CONCLUSIONS

The ICTY was borne out of a desire to 'do something' in reaction to the human rights violations taking place in the former Yugoslavia. Despite the number of problems associated with the ICTY and the way it was established, the tribunal has great importance for the creation and institutionalisation of norms in the international society in the long term. It can be argued that the ICTY is a norm entrepreneur, a means rather than an end in itself, making the enforcement of justice norms possible on an international basis. This reflects a general trend of increased human rights recognition in international relations and international law. Similar to UN-led humanitarian interventions, this judicial intervention constituted external, multilateral interference through an international institution into the internal affairs of a state. Article 2 (7) of the UN Charter sets out the principle of non-intervention in internal affairs, but this principle has become more and more qualified by increasingly declaring human rights abuses 'threats to international peace and security', enabling the Security Council to act in accordance with Chapter VII of the Charter. The establishment of the ICTY brought up the struggle between two competing values of the existing international order: a fundamental and state-centred one (sovereignty; non-intervention) *versus* a human-being, justice based one (human rights laws; 'beyond doubt' part of customary law). Enforcement of the latter became a possibility through declaring the human rights violations a threat to international peace and

[58] Martti Koskenniemi, *Between Impunity and Show Trials,* p. 17.
[59] This is also evidenced by the fact that the ICTY decided against prosecuting NATO soldiers for war crimes and crimes against humanity. An initial investigation was conducted, but an Expert Commission's report led the Prosecutor's decision not to further investigate claims against NATO soldiers for war crimes and crimes against humanity.

security. The protection of human rights is becoming increasingly recognised as constituting a responsibility of the international community as a whole if the state in question is unwilling or unable to protect its own people. This is an important aspect that is also taken up in the final report of the International Commission on Intervention and State Sovereignty (ICISS),[60] which argues that if a state is unable or unwilling to stop serious harm of its population, the "principle of non-intervention yields to international responsibility to protect."[61] This does not mean that states in the international society have an automatic right to intervene, but much rather that they have a responsibility to act to protect individual justice. It does also not mean a change to Article 2(7) of the UN Charter, but it "offers an implicit agreement: the norm of non-intervention generally applied in the relations to states, but where states refuse or are incapable of meeting their sovereign responsibilities to protect their populations, then other states may intervene subject to authorization of an international body."[62] This discussion of humanitarian intervention and the attempt to find an agreement on general principles is important here as it involves the same underlying issues as those faced by the establishment of the ICTY as a form of non-military, judicial intervention. The issue of intervention is still problematic and no clear guidelines have emerged, but changes have nevertheless taken place in the post-Cold War world. Most importantly, specific human rights, such as genocide, crimes against humanity and war crimes, have been codified in international law, leading to the increasing qualification of the non-intervention norm, i.e. and understanding that the principle of sovereignty includes notions of justice. Also, the increasing practice of declaring human rights abuses 'threats to international peace and security' could become a "*de facto* norm that trumps Article 2(7) in certain circumstances."[63] This can be seen as a development towards a solidarist, more just order that incorporates fundamental principles of justice. It can be argued that states' reluctance to oppose the

[60]Commission of Experts established by the General Assembly in 2000 in response to "the increasing number of systematic abuse of populations by their governments (…) to weigh the alternatives among the competing views about the limits of sovereignty." (K.J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge: Cambridge University Press, 2004), p. 158)
[61]ICISS, *The Responsibility to Protect* (Ottawa: International Commission on Intervention and State Sovereignty, 2001), p. xi.
[62]K.J. Holsti, *Taming the Sovereigns*, p. 159.
[63]Ibid. p. 160.

ICTY is an indicator of changing norms; human rights' enforcement is being incorporated more fully into the international society.

The establishment of the ICTY constituted an important step towards the development of the permanent International Criminal Court (ICC) that was established through the Rome Statute in 1998. The ICC seeks to overcome problems associated with the ICTY as a limited, *ad hoc* measure by building on its positive achievements of enforcing international human rights norms and establishing new case law. Most importantly, the ICC was established through negotiations (treaty-based approach) and was not imposed externally by a few states that were members of the Security Council. It was not created as a response to a particular conflict and does therefore not include an understanding of what the 'truth' in individual cases entails. The Statute is based on a more objective context and does not include notions of 'victors' justice', but is based on universally accepted human rights norms. The ICC does not have primacy over national courts, but works under the principle of 'complementarity', which means that states are given the opportunity to administer justice nationally in the first instance; the ICC is only allowed to act if the state is genuinely unwilling or unable to do so. The ICC is an independent and permanent international institution, not bound to the UN, but dependent on its member states' cooperation. Sure, the ICC still has a long way to go to overcome all its problems and the fierce resistance it faces from some states (first and foremost the US), but it is nevertheless an important development in international relations. Human rights norms are being institutionalised into the international society through this institution and are thereby incorporated further and increasingly part of this society. This will eventually lead to more *just* order in the solidarist sense and despite its problems, the ICTY was an important step along that road.

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