
**UNIVERSITY OF THE WESTERN CAPE**
**UNIVERSITEIT VAN WES-KAAPLAND**

# From Yugoslavia to Sierra Leone: Advantages and Shortcomings of the Ad-hoc Tribunals and the Hybrid Courts

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## Abstract

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In this minithesis, I compare the advantages of the hybrid courts with the international ad-hoc tribunals, arguing that the potential of the hybrid courts to work successfully is much greater than that of the ad-hoc tribunals. I present five case studies and provide an overview over the historical background as well as the legal framework for the respective courts. These case studies are the two international ad-hoc tribunals, the International Tribunal for the former Yugoslavia (ICTY) and the one for Rwanda (ICTR), and three hybrid court models, the Special Panels in East Timor, the Special Court in Sierra Leone and the Extraordinary Chambers in Cambodia.

I measure the ad-hoc tribunals against their goals in order to evaluate their success and to compare them with the work of the hybrid courts.

My findings are that the international ad-hoc tribunals failed to reach their goals of ensuring prosecution and promoting reconciliation (both ICTY and ICTR) and establishing regional stability (ICTR only). I discuss the term "reconciliation" and develop a five-tier model in order to measure whether and to what extent reconciliation has been reached. This model includes a sociological, political, economic and demographic approach as well as an assessment of how the respective societies reckon with their past. I apply this model to the work of the ICTY and the ICTR and state that they were not successful in promoting reconciliation.

Furthermore, I describe the contributions of the ICTY and the ICTR to the field of international criminal law and show some legal problems regarding the work of the two tribunals.

Regarding the three hybrid courts, of which two (East Timor and Sierra Leone) are currently operating and one (Cambodia) is yet to be established, I analyze their potential and the problematic aspects.

Examining the potential, I enumerate the geographical proximity of the hybrid court, its possibility to contribute to the process of capacity-building for both legal and administrative staff and the chance of increasing the acceptance of international criminal law norms and human rights as well as the trust in the rule of law within the local population.

Regarding problematic aspects, I discuss the international perception and legitimacy of the hybrid courts as well as their possibility of contributing to international criminal law. I show the problematic funding of the hybrid courts, the struggle to win over the local population, as well as the need for support from both the UN and the national government. I look at the role that hybrid courts can play in future, considering the establishment of the International Criminal Court and how the two bodies could cooperate.

I describe the concepts of retributive and restorative justice with the model of a truth commission and how a society which has to deal with massive human rights violations can benefit from the ideas of restorative justice and the combined use of a hybrid court and a truth commission. I conclude the minithesis with an outlook of when and how hybrid courts are a suitable measure for a society to reckon with its past.

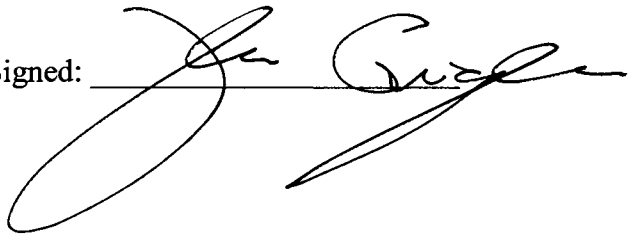
November 2004

## Declaration

I declare that *From Yugoslavia to Sierra Leone: Advantages and Shortcomings of the Ad-hoc Tribunals and the Hybrid Courts* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Jan Geigenmüller

November 2004

Signed: 

# Contents


**KEYWORDS** ..... I

**ABSTRACT** ..... II

**DECLARATION** ..... IV

**CONTENTS** ..... V

**INTRODUCTION** ..... 1

**CHAPTER 1: THE AD-HOC TRIBUNALS** ..... 8

**1.1 The Historical Background** ..... 8
1.1.1 The International Criminal Tribunal for (the former) Yugoslavia (ICTY) ..... 8
1.1.2 The International Criminal Tribunal for Rwanda (ICTR) ..... 10

**1.2 The Legal Framework for the Ad-hoc Tribunals** ..... 12
1.2.1 The Statute of the International Criminal Tribunal for (the former) Yugoslavia ..... 13
1.2.2 The Statute of the International Criminal Tribunal for Rwanda ..... 14
1.2.3 Legal Problems regarding the Statutes ..... 15
1.2.3.1 The ICTY Statute and Legal Problems ..... 15
1.2.3.2 The Rwandan Statute, Genocide, and the Problem of Ex Post Facto Law ..... 16

**CHAPTER 2: THE HYBRID COURTS** ..... 18

**2.1 The Special Court in Sierra Leone** ..... 18
2.1.1 The Historical Background ..... 18
2.1.2 The Legal Framework for the Special Court ..... 20
2.1.3 The Legal Framework for Sierra Leone's Truth and Reconciliation Commission ..... 24

**2.2 The Special Panels for Serious Crimes in East Timor** ..... 26
2.2.1 The Historical Background ..... 26
2.2.2 The Legal Framework for the Special Panel for Serious Crimes ..... 28

**2.3 The Extraordinary Chambers in Cambodia** ..... 32
2.3.1 The Historical Background ..... 32
2.3.2 The Legal Framework ..... 36

**CHAPTER 3: EVALUATION** ..... 40

**3.1 The International Criminal Tribunal for (the former) Yugoslavia** ..... 42
3.1.1 The Goals of the ICTY ..... 43
3.1.1.1 The Goal of Prosecution ..... 43
3.1.1.2 The Goal of Rendering Justice to the Victims ..... 45
3.1.1.3 Deterring Future Perpetrators ..... 47
3.1.1.4 Promoting Reconciliation in the Former Yugoslavia ..... 48
3.1.1.4.1 Defining Reconciliation ..... 48
3.1.1.4.2 Measuring Reconciliation – Proposition of a Model ..... 50
3.1.1.4.3 Progress of Reconciliation in the Former Yugoslavia ..... 52
3.1.2 Critical Voices in the Literature ..... 54
3.1.3 ICTY Goals not reached ..... 56

**3.2 The International Criminal Tribunal for Rwanda** ..... **57**
3.2.1 The Goals of the ICTR ..... 57
3.2.1.1 The Goal of Ensuring Prosecution ..... 57
3.2.1.1.1 Prosecution by the ICTR ..... 58
3.2.1.1.2 Prosecution by the Rwandan Courts ..... 60
3.2.1.1.3 Prosecution by the Gacaca Courts ..... 61
3.2.1.1.4 Prosecution Not Ensured ..... 62
3.2.1.2 The Goal of Promoting Reconciliation ..... 63
3.2.1.3 Establishing Regional Stability ..... 67
3.2.2 The ICTR could not reach its Goals ..... 70

**3.3 Contributions of the Ad-hoc Tribunals to International Criminal Law** ..... **70**
3.3.1 Contributions of the ICTY ..... 70
3.3.1.1 War Crimes and the Definition of an Armed Conflict ..... 70
3.3.1.2 Crimes against Humanity ..... 72
3.3.1.3 Genocide ..... 73
3.3.2 Contributions of the ICTR ..... 75
3.3.2.1 Defining the Term "Group" for the Crime of Genocide ..... 75
3.3.2.2 Rape included in the Crime of Genocide ..... 78
3.3.2.3 Crimes against Humanity ..... 78
3.3.2.4 Criminal Responsibility ..... 79

**3.4 The Special Court for Sierra Leone** ..... **80**
3.4.1 Perception and Acceptance by the Local Population ..... 81
3.4.2 International Legitimacy, Perception and Funding ..... 83
3.4.3 Training the Local Jurisprudence and the Relation between Domestic and International Law ..... 86
3.4.4 Cooperation with the Truth and Reconciliation Commission ..... 88
3.4.5 Success of the Special Court ..... 91

**3.5 The Special Panels in East Timor** ..... **93**
3.5.1 Progress of Work ..... 93
3.5.2 Problems encountered by the Special Panels ..... 94
3.5.3 Success of the Special Panels ..... 96

**3.6 The Extraordinary Chambers in Cambodia** ..... **97**
3.6.1 Problematic Points of the Projected Extraordinary Chambers ..... 97
3.6.2 The Extraordinary Chambers at a Crossroads ..... 100

**3.7 The Hybrid Courts and the International Criminal Court** ..... **101**

**CHAPTER 4: USE OF ELEMENTS OF RESTORATIVE JUSTICE** ..... **104**

**4.1 Retributive and Restorative Justice: Two different concepts** ..... **104**

**4.2 Alternative or Cumulative Option to a Criminal Tribunal: A Truth Commission** ..... **106**

**CHAPTER 5: OUTLOOK** ..... **109**

**CHAPTER 6: CONCLUSION** ..... **112**

**BIBLIOGRAPHY** ..... **119**

# Introduction

In the 20th century, the world faced horrific crimes that became more and more to be seen as crimes against the international community. After World War II, some of the main perpetrators were sentenced at the Nürnberg Trials, but soon after these trials the beginning of the Cold War stalled the prosecution of many other dictators and their henchmen, as many of them enjoyed the protection of either superpower.

In the era of the stalemate between the Soviet Union and the USA, not much progress was made in the field of international criminal law, although there were some 250 conflicts in various regions of the world.[1] But after the end of the Cold War in the 1990s, the situation of international human rights improved by a quantum leap with the instalment of the ad-hoc tribunals for Yugoslavia and for Rwanda. Since the UN Security council was not stalled by the face-off between the two superpowers anymore, the international community responded to the horrible crimes committed in Yugoslavia and Rwanda with the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

The tribunals' main goal is to ensure prosecution of the perpetrators who seriously violated international human rights,[2] but for example the ICTR also focuses on promoting reconciliation and regional stability.[3]

The tribunals have to work under different circumstances: While the new government of Rwanda originally asked for the instalment of an international tribunal after the genocide of 1994[4], the Yugoslav and then Serbian government was very unwilling to work with the ICTY – especially when asked to extradite Serbian nationals or Bosnian Serbs.[5]

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[1] M. Cherif Bassouni, Preface, in: Geert-Jan Alexander Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003), Ardsley: Transnational Publishers, p. XXV.
[2] Cf. ICTR website, http://www.ictr.org/default.htm, accessed on 21/09/2004, and ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 21/09/2004.
[3] ICTR website, http://www.ictr.org/default.htm, accessed on 21/09/2004.
[4] Yacob Haile-Mariam, The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court, in: *Hastings International and Comparative Law Review* 22, 4 (Summer 1999), p. 667, p. 696.
[5] Human Rights Watch 1998 report on the Federal Republic of Yugoslavia, on website http://www.hrw.org/worldreport/Helsinki-12.htm#P595_146794, accessed on 21/09/2004.

The ICTY and the ICTR, which are both staffed by international judges only and are located outside the country in which the crimes were committed, have been criticised for slow procedure, for spending too much money, and for not being locally rooted.

As criticism of the proceedings of the tribunals grew, a new model to deal with grave violations of international human rights was introduced: The mixed or hybrid courts.
This model includes both national and international elements in the organization, structure and functioning of the judicial system.[6] Through the employment of judges with the nationality of the country where the crimes were committed, this model might be able to increase the acceptance of the judicial process with the local population since local expertise is included.

Furthermore, hybrid courts might be able to provide legal training as well as overall job opportunities that are desperately needed in countries often devastated by long and brutal internal or cross-border conflicts.

I will try to assess the potential advantages of the hybrid court system in comparison to the model of the ad-hoc tribunals, while not denying its shortcomings and potential trap-falls. The fact that the ad-hoc tribunals are much longer in operation than the hybrid courts has to be taken into account. The ad-hoc tribunals have been much more closely examined and evaluated than the hybrid courts, since for example the Special War Crimes Court in Sierra Leone has only gone into operation in March 2004,[7] while the ICTY for Yugoslavia has been established in 1993.[8]

One way to compare the two models is to examine different country studies in which one of the models has been applied. Two country studies for the model of the ad-hoc tribunal, Yugoslavia and Rwanda, will be examined.

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[6] Kai Ambos/Mohamed Othman, Introduction, in: Kai Ambos, Mohamed Othman (eds.), *New Approaches in International Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003), Freiburg im Breisgau: Edition Iuscrim, p.4.
[7] Article on CNN website, "S. Leone war crimes court opens", dated 10/03/2004, http://www.cnn.com/2004/WORLD/africa/03/10/sleone.tribunal/index.html, accessed on 22/07/2004.
[8] ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 23/07/2004.

For the other model, the hybrid courts, two cases where the model has gone into operation will be evaluated: The Special Panels in East Timor[9] and the War Crimes Court in Sierra Leone.[10]

Finally, a country study where the hybrid court model has been the subject of negotiations for a long time but has not yet been established will be assessed: Cambodia which faces the question of how to deal with the crimes of the Khmer Rouge.[11]

In order to be able to conduct the country studies, it will be necessary to give a brief historical background of each of the countries concerned. The historical context is especially important in order to be able to assess the impact of the respective model on the political, sociological, economical, judicial and psychological situation (to name some of the relevant fields) of the society in which grave violations of human rights have been committed.

By taking into account the historical background, it will be easier to establish the success of the various tribunals in the different countries. Nonetheless, the examination of the different models in the country studies, which is a central part of the paper, will be difficult to undertake. How can the success of the tribunals and the hybrid courts be measured, since they are working with volatile transitional societies and are still in operation, while their full success – or their failure - may only be visible in the years to come?

One possible method is to measure the tribunals and the courts against their goals, which have for example been stated in the statutes of the ad-hoc tribunals.[12] But by doing this, new questions may arise while old ones might be answered. For example, all of the tribunals and hybrid courts are established to prosecute criminal offenders, but some have others goals as well. The goals of the ICTR include promoting reconciliation[13] and to ensuring regional stability.[14]

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[9] Susanne Katzenstein, Hybrid Tribunals: Searching for Justice in East Timor, in: *Harvard Human Rights Journal* 16 (2003), p. 245, p. 249.
[10] John Cerone, The Special Court for Sierra Leone: Establishing a new Approach to International Criminal Justice, in: *ILSA Journal of International and Comparative Law* 8 (2002), p.379, p. 383.
[11] Theresa Klosterman, The Feasibility and Propriety of a Truth Commission in Cambodia: Too little? Too late?, in: *Arizona Journal of International and Comparative Law* 15 (1998), p. 833, p. 846.
[12] ICTR website, http://www.ictr.org/default.htm, accessed on 21/09/2004, and ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 21/09/2004.
[13] Website of the ICTR, http://www.ictr.org/default.htm, accessed on 21/09/2004.

These goals might be difficult to examine, since the extent to which a country has been reconciled is hard to put down in numbers, not to speak of the various and differing definitions of the word "reconciliation".[15]

When measuring and examining the success, one might encounter various difficulties, especially when it comes to goals such as reconciliation. How does one measure reconciliation when even the definition of the term to be examined differs enormously from author to author? I will try to show instruments to measure the success, without denying that these instruments are by no means perfect and remain open for discussion and improvement.

The different institutions do not operate in a vacuum but in a context where their goals are not reached through a single cause such as a tribunal or a hybrid court, but through a variety of factors and circumstances.[16] It may not be easy to establish whether a tribunal or a hybrid court was successful in reaching its goals and what amount of success or failure may be due to circumstances that are not within the reach of the court, such as a destabilizing war in a neighbouring country.

For example, a core goal of all of the examined institutions is to prosecute the perpetrators who have committed grave violations of international human rights. One obvious indicator to establish whether a court or tribunal was successful would be to examine how many individuals were indicted and how many of these were tried over a set period of time. But while one court may operate in a favourable setting where the accused are readily brought to court, another one – such as the ICTY – may have difficulties in arresting the alleged perpetrators because they are protected by the government of their own or a foreign country. This is equally valid for the hybrid courts, as the case of the former Liberian dictator Charles Taylor shows. The warlord has enjoyed the hospitality of the Nigerian government since he fled his country, although the War Crimes Court in Sierra Leone has repeatedly asked the Nigerian government for his extradition.[17]

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[14] UN Security resolution 955 of 1994, on ICTR website, http://www.ictr.org/ENGLISH/Resolutions/955e.htm, accessed on 21/09/2004.
[15] Erin Daly, Transformative Justice: Charting a Path to Reconciliation, in: *International Legal Perspective* 12 (2001/2002), p. 73, p. 86.
[16] Erin Daly, Transformative Justice: Charting a Path to Reconciliation, in: *International Legal Perspective* 12 (2001/2002), p. 73, p. 77.
[17] Article on CNN website, "S. Leone War Crime Court opens", dated 10/03/2004, on website http://www.cnn.com/2004/WORLD/africa/03/10/sleone.tribunal/index.html, accessed on 21/09/2004.

Recently, the idea and models of restorative justice have had more and more proponents, especially since South Africa installed its Truth and Reconciliation Commission. Restorative justice focuses on promoting reconciliation between victim and perpetrator rather than prosecution of the perpetrator by the state, which often leaves the victim behind to deal with his or her experiences alone.[18]

Ad-hoc tribunals and hybrid courts, on the other hand, are instruments of retributive justice. In the system of retributive justice, which is the main idea in criminal law in most countries, one of the main goals is deterrence. But in transitional societies, criminal prosecution might not be able to fulfil the goal of deterrence[19] for reasons that will be discussed below.

Since the establishment of the ICTY did not deter the perpetrators in Rwanda, Sierra Leone, Kosovo and East Timor from committing the same crimes as in Yugoslavia again and again, the argument that it is more important to promote reconciliation than to prosecute in order to aid the process of democratization gained more weight than before in the eyes of many.

Therefore, the prospects of combining elements of retributive justice – such as a hybrid court or an ad-hoc tribunal – with elements of restorative justice such as a truth commission will be explored in this paper. The possibility of combining elements of both schools might lead to better results in form of stable, democratic societies than the utilization of elements of only restorative or retributive justice.

Another field that will be examined is the development of international criminal law in such fields as violence against women,[20] crimes against humanity[21] and genocide[22] through the rulings of the two ad-hoc tribunals for Yugoslavia and Rwanda.

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[18] Mark Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, in: *New York University Law Review* 75, 5 (2000), p.1221, p. 1255.
[19] Erin Daly, Transformative Justice: Charting a Path to Reconciliation, in: *International Legal Perspective* 12 (2001/2002), p. 73, p. 106.
[20] Cf. Alexandra A. Miller, From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to include Rape, in: *Penn State Law Review* 108 (2003), p. 349 – 373.
[21] Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003), Ardsley/USA: Transnational Publishers, p. 32.
[22] Arguing against the ICTR's findings in *Prosecutor v. Akayesu* is William A. Schabas, Groups protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, in: *ILSA Journal of International and Comparative Law* 6 (2000), p. 375, p. 378.

The question whether hybrid courts are able to contribute similarly to international criminal law remains to be seen in the future. Nonetheless, by showing what important improvements have been made through the rulings of the ad-hoc tribunals, the vital role such rulings played and continue to play in the long dormant field of international criminal law can be understood.

As has already been said, neither the ad-hoc tribunals nor the hybrid courts operate in a vacuum, but in a complex environment where legal questions sometimes are the smallest problems that the courts have to deal with. But from a legal point of view, there is one important factor that cannot be left out when examining the future role of the ad-hoc tribunals and the hybrid courts: The International Criminal Court (ICC) in The Hague. After coming into operation on July 1st 2002,[23] the court has taken up its work and is presently preparing its first hearings.[24]

This has changed the prospects of future perpetrators to escape prosecution dramatically. Although not signed by all nations of the world -one of the most prominent persistent objectors to the authority of the ICC are the United States under its present government[25] - the ICC statute has reduced the chance of dictators and warlords all around the world to get away with their crimes as happened so often in the past century, when enough states were willing to provide a safe haven for dictators and their entourage.

The fully operational ICC poses the question whether – after a transitional period – there will be a need for ad-hoc tribunals or hybrid courts. Why should money be spent on temporary courts, which need time to be set up and may not function well because of domestic problems, insufficient financial or political support or the judges' inadequate legal expertise? On the other hand, the ICC might not be designed for nor capable of dealing with thousands of alleged perpetrators, which would be the case if grave violations of international human rights in present conflicts such as the war in the Democratic Republic of Congo[26] or in southern Sudan[27] were prosecuted in a courtroom.

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[23] International Criminal Court website, http://www.icc-cpi.int/ataglance/whatistheicc/history.html, accessed on 23/07/2004.
[24] Website of the International Criminal Court, http://www.icc-cpi.int/newspoint/latest.html, accessed on 21/09/2004.
[25] BBC, article on website, dated 16/07/2004, "Court boycott hits US aid budget", on website http://news.bbc.co.uk/1/hi/world/americas/3899825.stm, accessed on 21/09/2004.
[26] Article on CNN website, "Annan: More troops needed for DRC", dated 16/08//2004, on website http://www.cnn.com/2004/WORLD/africa/08/16/un.congo/index.html , accessed on 21/09/2004.
[27] Article on CNN website, "UN says Darfur clashes hinder access to refugees, dated 20/09/2004, on website http://www.cnn.com/2004/WORLD/africa/09/20/sudan.darfur.reut/index.html, accessed on 21/09/2004.

Hopefully, it will be possible to evaluate whether the relatively new model of the hybrid court is better suited than the much criticized model of the ad-hoc tribunal to deal with future serious violations of international criminal law. Although some questions may remain unanswered and there may be room for improvement when measuring the success of the different models, one certainty unfortunately remains: It will be necessary in the future to deal with grave violations of international human rights. By examining the alternatives, I will try to develop a model that might be able to contribute to the prevention of serious human rights violations in future.

## Chapter 1: The Ad-hoc Tribunals

In this chapter, the historical background, the basic legal framework and the actual work of the ad-hoc tribunals will be described, while the same will be done for the hybrid courts in chapter number two.

### 1.1 The Historical Background

#### 1.1.1 The International Criminal Tribunal for (the former) Yugoslavia (ICTY)

After the breakdown of the Soviet Union in 1991, its former satellites and allies were freed from ideological pressure from Moscow, but also left without economic and military support. In Yugoslavia which had pursued independent politics since the 1960s, this newly acquired freedom led to the disclosure of strong national sentiments that had been carefully suppressed under the decade-long rule of Jozip Tito.[28]

Often, these national sentiments were incited and increased by members of the former communist parties who saw the sign of the times and therefore quickly learned to play a nationalist tune. In countries with multiple ethnicities, such as Yugoslavia, this proved to be fatal. In the Yugoslav republic of Serbia, Slobodan Milosevic, a former communist party member who had started his new nationalist career in the late 1980s, led his country into brutal wars against the dissident Yugoslav republics of Slovenia, Croatia and Bosnia-Herzegovina.[29]

From 1990 until the Peace Agreements of Dayton[30] in 1995, hundreds of thousands of people were killed, raped, tortured, held in concentration camps or forcibly driven from their homeland, a procedure that came to be known as "ethnic cleansing".[31] While most of the

[28] Article on BBC website, "Country Profile: Serbia and Montenegro", dated 14/07/2004, http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1039269.stm, accessed on 21/09/2004.
[29] Article on BBC website, "Country Profile: Serbia and Montenegro", dated 14/07/2004, http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1039269.stm, accessed on 21/09/2004.
[30] Article on BBC website, "Over a million Bosnians back home", dated 21/09/2004, http://news.bbc.co.uk/1/hi/world/europe/3675968.stm, accessed on 21/09/2004.
[31] Article on BBC website, "Kosovo clashes ethnic cleansing", dated 20/03/2004, on website http://news.bbc.co.uk/2/hi/europe/3551571.stm, accessed on 21/09/2004.

victims were Croatians or especially Bosnian Muslims, Serbians also had to endure crimes committed by Croatians or Bosnian Croats or Muslims.[32]

The international community has long refrained from actively preventing the massive human rights violations in Yugoslavia and only issued toothless protests. One of the worst tragedies of this conflict was the fall the Muslim enclave of Srebrenica, where UN peace-enforcing troops did nothing to prevent the murder of 7000 Bosnian Muslims by Bosnian-Serb militias.[33]

Facing mounting pressure by the public, the UN Security Council established the International Criminal Tribunal for Yugoslavia with Security Council Resolution 827 in 1993 in order to prosecute the massive human rights violations committed during the conflict.[34]

After wreaking havoc in Slovenia, Croatia and the worst in Bosnia-Herzegovina, Slobodan Milosevic went against the Albanian population in Serbian province of Kosovo, which led to massive bombings by NATO forces in 1998.[35] Milosevic managed to hold on to power until May 2000. The new Serbian government was much more cooperative in dealing with the ICTY. In June 2001, the Serb authorities surrendered him to the International Criminal Tribunal for the former Yugoslavia.[36] Nonetheless, such key figures as the former President of the Republika Srpska (the Serbian part of Bosnia-Herzegovina) Radovan Karadzic and his military commander Goran Mladic still seem to be hiding in Serbia, enjoying protection by at least parts of the authorities.[37]

Croatia – although progress has been made in 2004[38] - and especially the Croat part of Bosnia-Herzegovina as well as the Bosnian Muslims were not open to prosecute crimes committed by their combatants, since particularly the Bosnian Muslims saw themselves as

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[32] Article on BBC website, "Timeline: Bosnia-Herzegovina", dated 23/07/2004, http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1066981.stm, accessed on 21/09/2004.
[33] Article on BBC website, "Srebrenica Timeline", dated 20/02/2003, http://news.bbc.co.uk/1/hi/world/europe/675945.stm, accessed on 21/09/2004.
[34] ICTY website, http://www.un.org/icty/glance/index.htm, accessed on 28/07/2004.
[35] Article on CNN website, "NATO rushes troops to Kosovo", dated 18/03/2004, http://www.cnn.com/2004/WORLD/europe/03/18/kosovo.violence/index.html, accessed on 10/09/2004.
[36] Claire De Than/Edwin Shorts, *International Criminal Law and Human Rights* (2003), London: Sweet and Maxwell, p. 289.
[37] Article on CNN website, "Karadzic fans taunt NATO", dated 14/01/2004, http://www.cnn.com/2004/WORLD/europe/01/14/bosnia.karadzic/index.html, accessed on 23/08/2004.
[38] Amnesty 2004 report on Croatia, on website http://web.amnesty.org/report2004/hrv-summary-eng, accessed on 21/09/2004.