VICTIMS’ ACCESS AND COMPENSATION
BEFORE INTERNATIONAL CRIMINAL COURTS

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ABSTRACT

This thesis examines the issues of victim access to, and potential compensation by, international criminal tribunals in the past, present and future. Traditionally, international criminal tribunals have been primarily characterized by their *ad hoc* and punitive nature as well as by their apparent neglect of the rights of victims and, in particular, of victims’ entitlement to compensation. The International Criminal Tribunal for the former Yugoslavia (ICTY) is critically analyzed as an exemplar of this traditional approach.

The creation of the permanent International Criminal Court (ICC) has provided an opportunity for a greater recognition of the rights of victims to participate in court hearings and to receive compensation. The thesis compares the new victim provisions introduced by the ICC with the inadequate and arbitrary treatment of victims by the ICTY and makes recommendations for the enhancement of victims’ rights in proceedings conducted by the ICC in the future.
DEDICATION

This thesis is dedicated to my beloved father, Gliso (1932-2003) from whom I received unconditional love, strength, protection and inspiration...

And to my mother Angelina who continues to support me and helps me to honour the loving memory of my father.
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INTRODUCTION

The objective of this thesis is to examine the status of victims before international criminal tribunals, in particular the International Criminal Court - the ICC. More specifically, the main focus of inquiry will be directed towards the topic of victims’ access to international criminal tribunals - in the past, present and future - as well as possible compensation and reparation to victims of international crimes. For pragmatic purposes, the approach taken by the International Criminal Tribunal for the former Yugoslavia - the ICTY - shall serve as a keystone for the critical examination of victims’ recognition and their status before international criminal tribunals. When it comes to victims, especially those who were subjected to mass victimization, it is of the utmost importance to recognize the distinct nature of international crimes, such as genocide, war crimes and crimes against humanity, and also, the unique nature of the legal bodies that are responsible for trying these crimes. Victims’ accessibility to international criminal tribunals, reparations and compensation are exceptionally complex issues that are particularly challenging in terms of both legal and practical outcomes. For the purpose of this thesis, I shall use the conflicts in Yugoslavia during World War Two (WWII) and in the 1990’s as an example to elaborate on the complexity of victims’ issues and international reactions to mass victimization. In particular, it is necessary to examine the role of the media in the 1990’s Yugoslavian wars with particular attention to coverage of the phenomenon of mass victimization.
Nullum Crimen Sine Lege Nulla Poena Sine Lege

It would be naïve to expect that any international criminal court is, merely by virtue of its existence, fully capable of resolving all aspects of international criminal activities without facing difficulties, both legal and practical. Any simplification and/or neglect of the underlying causes of conflicts that result in mass victimization can easily jeopardize neutrality, impartiality, and even the legality of international criminal tribunals - particularly, the International Criminal Court (ICC). More specifically, international criminal tribunals have been largely characterized by their ad hoc and punitive nature, while issues concerning victims and compensation were left to be resolved by the governments that were involved in the conflict. For example, war reparation negotiations usually take place between states with diminutive or no attention to the victims. In fact, in the past, international criminal tribunals were primarily concerned with the punishment of those individuals who were responsible for war crimes. As far as the victims of war crimes, genocide, and crimes against humanity are concerned, the timeless axiom of justice, that the individuals who have been wronged are entitled to appropriate forms and dimensions of redress, has been immensely ignored. In reality, not even all of those who were responsible for war crimes were brought to trial. Given this situation, it seems appropriate to elaborate on specific examples from WWII and the 1990’s Balkan wars in which culprits were not brought before courts or tribunals in the international and national justice systems. In like manner, I will assert that the International Criminal Tribunal for the former Yugoslavia (ICTY) did not treat or recognize all of the victims and criminals involved in the conflict with the necessary degree of impartiality.

Current developments in human rights and international criminal law are tending to change such practices. For example, the present permanent ICC has established a
Victim's Trust Fund as a way to compensate victims of international crimes. It is also very important to identify the role of politics with respect to the formation of international criminal tribunals and, most importantly, the role of politics in defining, including, and excluding certain categories of people as victims. These issues will be examined from documents and comparative research that are often not represented in the contemporary media. Moreover, the ICTY's archives and observation of its in vivo trials shall serve as invaluable reference to address victims' status and access to international courts. Significant obstacles to conducting such research include the volatile political background and the lack of availability of unprejudiced resources. Effectively, multiple sources of information concerning the same events are often contradictory as a consequence of the political milieu from which they spring. To begin, it is necessary to introduce the relevant historical developments and key issues regarding international crimes, such as genocide, crimes against humanity, war crimes, and aggression. Genocide is the primary focus of the analysis, since it has special legal significance.
CHAPTER ONE:
INTRODUCTION TO INTERNATIONAL CRIMES,
INTERNATIONAL TRIBUNALS AND VICTIMS
OF INTERNATIONAL CRIMES

International Crimes

Historically, there have been many different situations in which genocide, war crimes and crimes against humanity have occurred. These situations have been based on religious, racial and ethnic conflicts, colonization and decolonization and struggles for power in which defenseless civilian groups are often subjected to mass victimization. Whereas in the past, crimes such as genocide, war crimes, and crimes against humanity have been committed mostly on racial and religious grounds, it seems that increasingly these crimes are, and will be, committed mainly on political grounds. For example, the First World War was said to be the war to end all wars but, unfortunately, this was not to be the case (Williams, 2001). WWII also ended with the hope that history would not repeat itself in terms of the genocide, war crimes and crimes against humanity, which characterized it.

Effectively, all international crimes consist of murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations. To some extent, crimes against humanity overlap with genocide and war crimes, but each of these crimes has its distinct characteristics and specific legal nature. For example, crimes against humanity are distinguishable from genocide in that they do
not require intent to "destroy in whole or in part," as cited in the 1948 Genocide Convention, but only target a given group and carry out a policy of "widespread or systematic" violations (Bassiouni, 2005). Crimes against humanity are also distinguishable from war crimes in that they not only apply in the context of war-they apply in times of war and peace (Bassiouni, 2005). However, the most notable characteristic of all international crimes includes a rule of international law that they are subject to universal jurisdiction. More specifically, international criminal law conventions establish three specific duties upon signatory States with respect to international crimes (Yacoubian, 1997). The first obligation is to criminalize the prohibited conduct; the second, to prosecute accused violators or to extradite accused violators to other states desirous of prosecuting them; and the third, to cooperate with other states in the prevention and suppression of such conduct (Yacoubian, 1997). Effectively, the concept of “international crimes” presents a living legal reality, because some sovereign States had become perpetrators of horrifying atrocities against human beings, including their own nationals.

Need for International Criminal Courts

For decades, there has been a broad consensus about the need to prosecute those who are primarily responsible for the most serious international crimes. In effect, it is the scope and nature of international crimes that necessitated the creation of international criminal courts. An independent, impartial, and objective international criminal court, the ICC, is a *sine qua non* to effectively try the most heinous international crimes such as genocide, crimes against humanity, war crimes and aggression. However, consensus on a
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definition of aggression is yet to be reached at the international legal level. Nevertheless, there is a broad international consensus regarding the rest of these crimes, and the establishment of an ICC is not to be understood as a call for mere revenge against perpetrators of these crimes. Rather, an ICC is meant to reflect an international necessity and the desire to advance the rule of law at both the national and international levels (Williams, 2001). The establishment of previous *ad hoc* international criminal tribunals, and, most recently, the first permanent international criminal tribunal, the ICC, reflects the evolution of international community's need for international legal body that is responsible for trials of the most serious international crimes.

**Victims of International Crimes**

Historically, victims of international crimes received insignificant attention before *ad hoc* tribunals, no compensation, and minor assistance from any authorities. It will be asserted that in the past, victims of international crimes, either individually or as a group, had no legal avenues to pursue their rights, and no legal capacity to establish ample legitimate status before *ad hoc* tribunals. Effectively, the status of victims of international crimes before *ad hoc* international tribunals primarily translated into the status of witnesses, whose principal role was to enhance prosecutors' cases. As shall be discussed in the following sections of this thesis, it is the permanent ICC that should bring positive and substantial changes with respect to victims' rights, needs, compensation, and a recognition of their overall status as victims of international crimes.
CHAPTER TWO: GENOCIDE: HISTORICAL DEVELOPMENT AND LEGAL DEFINITION

Effectively, international interventions to prevent and halt possible genocide atrocities have been implemented in United Nations Conventions and have been seen as a desirable and beneficial instrument of the post-WWII world. Genocide was recognized at international levels as an odious scourge that has inflicted devastating losses on humanity throughout all periods of history. Therefore, there was a need for genocide to be legally defined and properly sanctioned in order at least to diminish the danger of it occurring again. Countries that became signatory parties to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide are bound under international law to abide by the terms of the Convention. Kuper (1982:19) quotes the Convention on Genocide, approved by the General Assembly of the United Nations on December 9th 1948, which defines the crime of genocide in the following manner:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

Furthermore, Annett (2001:11) quotes Article III of this Convention, which describes acts that should be punishable with reference to the crimes of genocide as:
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a) Genocide;
b) Conspiracy to commit genocide;
c) Direct and public incitement to commit genocide;
d) Complicity in genocide.

Legal Nature of Genocide

A conceptual and legal definition of genocide is of relatively recent date, and *jus cogens* recognized it only after WWII. From a strictly legal viewpoint, the period of WWII witnessed a crime (Genocide-Holocaust) that did not have a legal name. Such a legalistic conclusion could be derived from the fundamental legal principle that states “*Nullum crimen sine lege, nulla poena sine lege*”. Interestingly, Winston Churchill stated, at the end of the WWII, that: “We are faced with the crime with no name” (Ignjatovic, 1999). In effect, the creator of the legal term, genocide, is Rafael Lemkin, the American professor of Jewish-Polish origin, who combined the Greek word, “*genes*”-tribe, nation, and the Latin word “*occidere*”- to kill, which is analogous to the word homicide and ”*patricid*” -to kill a person, father, or human being (Ignjatovic, 1999). Genocide as a crime is a particularly complex offence the elements of which are transparent in several legal arenas. Genocide is a *sui generis* crime that was first recognized in *jus cogens* and then accepted by various national jurisdictions. Genocide is a criminal offence, the fundamental legal characteristic of which is its cumulative nature. More specifically, the first element of genocide is killing, destruction, and/or extermination, and the second element is the national, racial, and/or religious affiliation of those who are targeted. Without either of these elements, genocide, from a strictly legal point of view, translates into war crimes, crimes against humanity, and/or other crimes. Importantly, *de jure*, genocide is one criminal offence but, *de facto*, genocide consists of a wide spectrum of
measures and criminal activities interconnected in one system (Ignjatovic, 1999). In effect, the \textit{actus reus} element of genocide is relatively simple to prove, while the \textit{mens rea} element is more difficult to establish because it enters the realm of legal complexity.

Mass victimization, as a “natural” outcome of genocide, is highly visible, while war crimes and crimes against humanity are characterized by a sporadic and unsystematic nature and involve far fewer victims than genocide. Genocide is a crime that “depersonalizes” its target-victims, where each victim is a part of a “greater” goal and a “final solution”. Unfortunately, the “final solution” usually translates into extermination in total or in part of a particular group of people. Significantly enough, the manner in which the victims of genocide were executed, the time frame and nature of the torture, as well as the continuance of victimization, were practically neglected, ignored and deemed virtually irrelevant for international criminal tribunals. Historically, the victims’ suffering was used as a justification to punish few of the perpetrators. Ironically, some victims of international crimes were recognized for political purposes, while others were ignored or negated, also for political purposes. Importantly, genocide is considered as a crime that usually cannot be performed and/or executed by one individual: therefore, it is a crime of collective effort. However, criminal responsibility for genocide is twofold- both individual and collective. More specifically, the dilemma regarding the level of responsibility between the conspirators and instigators of genocide, who usually hold political and military power, and the direct executors of atrocities on the terrain, basically reflects the offenders’ attempts to avoid their personal responsibility by hiding behind the shield of command. For example, the world is very familiar with a phrase:” I was only following orders”, as a most commonly used attempt to diminish one’s own
responsibility for criminal actions. In any scenario, those who initiated, and planned, as well as those who executed merciless killings, rape, torture, expulsions, sadistic beatings, and similar war practices in the name of a “higher goal” must be held criminally responsible regardless of their political affiliation, social status, and/or position in the command hierarchy. Simply stated, almost all politicians, generals, soldiers, and those directly involved and responsible for genocide tend to claim “bystander syndrome”, and to blame the command hierarchy and their subordinate status in order to avoid responsibility for genocide. Nevertheless, genocide is characterized by the unequivocal intent to physically and/or biologically, completely or in part, destroy an ethnic, religious, national and/or racial group (Ignjatovic, 1999). Importantly, genocide is a crime that is punishable in both war and peacetime. In effect, killings, exterminations, enslavements, deportations and other heinous forms of crimes, all being parts of genocide, could be executed before, during, and after, a war. In addition, oppression and genocide based on political, racial, ethnic, and/or religious grounds must be recognized as such, regardless of the laws that apply in the jurisdictions in which one or the other form of this crime is committed.

Effectively, the concept and legal definition of genocide created, at times, diverse legal opinions. For example, some legal scholars have expressed the opinion that the term, genocide, is legally precise, while others have adopted the view that it is general enough to cover all other international crimes, such as war crimes and crimes against humanity (Ignjatovic, 1999). However, the argument that genocide as a crime differs from war crimes and crimes against humanity justifiably received its full legal recognition and its distinct position in international criminal law. Clearly, the legal nature
of genocide is reflected in many other crimes, but genocide definitely has its own characteristics and constitutes a distinct crime. The genesis of genocide is extremely complex, its roots reaching far into history, while its legal status is of relatively recent origin and must be considered separately for each region and in accordance to its historical development and political constellation.

**WWII-Genocide**

According to the international legal provisions regarding genocide, it is clear that, during WWII in Nazi Germany and in other parts of occupied Europe, all aspects of genocidal practice were committed against several nations and ethnic groups, particularly Jews, Serbs and Gypsies. Well-preserved documentation from that era reveals horrifying facts through films, photographs, and numerous precise written and oral testimonies describing the planned and deliberate “mission” of the extermination of whole nations.

**Creation of ad hoc International Tribunals- Post WWII period**

As a result of such malignant practices, International Military Tribunals in Nuremberg and Tokyo were established immediately after WWII ended. These two Tribunals were *ad hoc*, temporary military courts. The Nuremberg Tribunal was held from November 1945 to October 1946 to judge the major war criminals of the European Axis, in effect, only Germans. Before this tribunal, 19 individuals were convicted, 12 of whom were put to death by hanging, three received life imprisonment, and four received 10-to-20 years imprisonment terms, while three persons were acquitted of charges (Ignjatovic, 1996). The Tokyo Tribunal was held from May 1946 to November 1948, and was in charge of crimes committed by Japanese individuals. The Tokyo Tribunal
processed 25 accused ministers, diplomats and military officials, of whom five were sentenced to death, 16 to life in prison, and four to prison terms ranging from seven to 20 years (Ignjatovic, 1996). In fact, as ad hoc tribunals, these two courts were established specifically to try three major charges levied during the Nuremberg tribunals: crimes against peace (i.e., waging a "war of aggression"); war crimes; and crimes against humanity (Linder, 2000).

**War Crimes and Crimes Against Humanity**

The first charge was predicated on international agreements. The second charge of "war crimes" was related to atrocities committed by the Nazis. This included "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity" (Linder, 2000). Crimes against humanity were defined in the *Nuremberg Charter* as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" (Linder, 2000, p.4.). In fact, the tribunals in Nuremberg and Tokyo held that aggression was a primary crime that constituted a crime against peace and was defined as such (Ryneveld & Mundis, 2001). There were a number of individuals and organizations that could be held responsible for these crimes, although the number of people actually
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tried, convicted and sentenced was relatively small, especially in proportion to the
estimated 6 million Jews and millions of Allied civilians and soldiers killed during the
course of WWII.

For the first time in history, an international tribunal judged and sentenced high-
level politicians and senior military officers for their responsibility, or complicity, in the
commission of crimes against peace, war crimes, and crimes against humanity.
Nevertheless, since the Nuremberg Trials, it is estimated that close to 100 million people
have died as a result of war crimes, crimes against humanity, and genocide
(Linder, 2000). Clearly, the Nuremberg trials did not fulfill the ideal goal of an
international criminal tribunal, namely to end all future wars of aggression. Furthermore,
genocide, war crimes, and crimes against humanity are with us still. Nonetheless, these
tribunals did have a significant influence on the present, permanent ICC - specifically, its
structure and operation.

Ad hoc International Criminal Courts-1990s

During the 1990s, horrific and systematic atrocities in the former Yugoslavia and
Rwanda were the two most internationally recognized examples of conflicts that resulted
in the mass victimization of civilian populations. The character and magnitude of the
atrocities that occurred in these countries necessitated action by the United Nations
Security Council (UNSC) which established yet another two ad hoc tribunals. More
specifically, in 1993, the UNSC established the International Criminal Tribunal for the
former Yugoslavia (ICTY) and, in 1994, the International Criminal Tribunal for Rwanda
(ICTR). Undoubtedly, the inception of the Nuremberg and Tokyo tribunals at the end of
WWII, and the more recent creation of the ICTY and the ICTR, have played a central role in establishing the legitimacy of the ICC (Prefontaine, 2002). In fact, international law is setting very precise and crucial standards for accountability and consequences with respect to international human rights and what constitutes the violation of these rights. Evidently, since WWII, substantial progress has been made in the articulation of the definitions of crimes against humanity, war crimes, genocide, apartheid and torture. For example, the list of the specific crimes contained within the meaning of crimes against humanity has been expanded to include, in the ICTY and the ICTR, rape and torture (Bassiouni, 2005). Moreover, the ICC statute includes the crimes of enforced disappearance of persons and apartheid as crimes against humanity, and it contains clarifying language with respect to the specific crimes of extermination, enslavement, deportation or forcible transfer of population, torture, and forced pregnancy (Bassiouni, 2005). However, a consensus as to what clearly constitutes other types of crime, such as aggression and terrorism, has yet to be reached at the international level (Williams, 2001).

Effectively, the establishment of different international tribunals has had a significant influence on the emergence of the ICC, including its procedural and evidentiary aspects and future functioning. For example, the procedural jurisprudence of the ICTY has made a significant contribution to the development of an emerging system of international criminal procedure, as well as in the procedural components of the ICC Statute that are reflected in the Rules of Procedure and Evidence for the ICC (Ryneveld, & Mundis, 2001.). In fact, those responsible for drafting ICC rules appear to greatly rely on the evolution and application of the ICTY Rules of Procedure and Evidence. *De facto,*
Nullum Crimen Sine Lege Nulla Poena Sine Lege

the Nuremberg and the ICTY are invariably cited when the issues of international crimes and accountability for these crimes are raised. The ICC will evidently have some similarities with its predecessor tribunals, but most importantly, it will also clearly have distinct and innovative components of its own modus operandi.

One of the most significant issues in the international criminal sphere, which is often overlooked, is victims' compensation. Traditionally, the mere exercise of punitive measures against perpetuators has been almost the entire focus of these tribunals. While the punishment of those responsible for heinous crimes is necessary, there is also the necessity for the victims to be recognized and treated equally. Furthermore, the victims must be recognized regardless of their ethnic, or religious backgrounds, or any other personal characteristics. Ironically, some victims of international crimes were recognized for political purposes, while others were ignored or negated, also for political purposes. In fact, it will be contended that the mass victimization of civilians in the 1990s Balkan wars occurred on all sides of the conflict and that this was not accurately depicted by a majority of the western media. Therefore, this demonstrates the need for international laws to be impartial, and international tribunals to act independently of specific political influences or interests.

Genocide, War Crimes & Crimes Against Humanity in Yugoslavia – WWII

During WWII, Serbs suffered great human losses resisting Nazi forces and their satellites in Yugoslavia. On September 16, 1941, Hitler issued a personally signed Directive, No.31-a, to General Wilhelm List, the Wehrmacht Commander Southeast, in
charge of Serbia and Greece, charging him with the suppression of the insurgency and resistance to Nazi occupation in Serbia (Savich, 2003). In effect, General List ordered General Francz Boehme, of Austrian origin, to implement a strategy of swift and imminent punishment on the Serbs who were seen, besides Jews, as posing a threat to the Nazi occupation of Yugoslavia. Boehme’s appointment resulted in a strict and rigid interpretation of the Hitler-List Directive and massive retaliation against the Serbian civilian population. In essence, the directive translates into the order that for every German soldier or ethnic German outside of the Reich, a (“Volksdeutche”, a specifically-ethnic German living in Serbia), who was killed, a hundred Serbs would be executed, while for every wounded German, fifty Serbs would be executed (Savich, 2003). The magnitude of Serbian victimizations is clearly mirrored in such Nazi officials’ directives and policies that were firmly imposed in practice. In effect, the Nazi directive that was imposed upon the Serbian population reads:

*If losses of German soldiers or Volksdeutche occur, the territorial competent commanders up to the regiment commanders are to decree the shooting of arrestees according to the following quotas:*

(a) *For each killed or murdered German soldier or Volksdeutche (men, women or children) one hundred prisoners or hostages,*

(b) *For each wounded German soldier or Volksdeutche 50 prisoners or hostages.* (Savich, 2003).

In addition, Boehme also ordered that all Jews and Communists were to be arrested as hostages (Savich, 2003).

To some extent, as it may sound confusing and irrational, it was expected by the logic of war that Jews and Serbs would be the primary targets of German Nazi forces in
Yugoslavia. However, what was almost incomprehensible, unexpected, and beyond any humanitarian reasoning, is the fact that the Jews and Serbs suffered great losses by being subjected to extremely brutal and inhumane treatment by Nazi collaboration forces in Yugoslavia. By way of illustration, early in 1941, Sarajevo, the capital of Bosnia, had a Jewish population of eight to nine thousand Sephardim and one thousand Ashkenazim, approximately 10 per cent of the total city population (Encyclopedia of the Holocaust, 1990). Sarajevo Jews suffered severely as a result of the anti-Jewish legislation and anti-Semitic measures of Croatian and Muslim Nazi collaborators, and by early 1942, the Jewish community of Sarajevo had been liquidated (Encyclopedia of the Holocaust, 1990). The deportation of Jews to concentration camps, mostly to Jasenovac, was supervised by Sturmbannführer Alfred Heinrich, the SS representative in Sarajevo, and was carried out under the command of Ustasa security police officer Ivan Tolj (Encyclopedia of the Holocaust, 1990). To this day, Jews and Serbs continue to be haunted by memories of the brutality and torture to which they have been subjected.

Effectively, the first groups to declare separation from Yugoslavia and join Nazi Germany were the Croatians, who called themselves Ustashi and the Bosnian-Muslims, known for their infamous SS “Handzar (Knife-Sword) Division”, which also battled at Stalingrad. Almost simultaneously, in Kosovo and Metohija, Albanians formed the “Skenderbeg” Waffen SS Mounted Division that was responsible for the merciless torture and killing of civilians, and expelling thousands Serbs from their homes (Savich, 2002). Serbs and Jews, as well as Gypsies, stood little chance of survival against the military strength of the Nazis. Nevertheless, Yugoslavia, consisting of a majority of Serbian resistance forces, managed to tie down at least six German divisions, (and at some point
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up to thirty-six), or some 90,000-100,000 German soldiers at a critical time during WWII (Mclean, 1991). In this struggle, the Allied forces contributed substantially to Yugoslavian resistance forces and also suffered major human losses.

Jasenovac- “Industry of Death”

Conversely, the Croatian leadership promptly joined Nazi forces and established the third largest concentration and extermination camp in occupied Europe in 1941. This camp, named Jasenovac, was established in the Nazi-formed “Independent State of Croatia”, known as NDH. Jasenovac was dismantled only in April 1945, one month before German capitulation. This camp was, by many accounts, one of the cruelest concentration camps in occupied Europe and the exact number of Jews and Serbs who perished at this camp may never be known. Estimates of the number of people killed in Jasenovac ranges from 600,000 to over one million, depending on the source. To cite an instance, SS General Fike’s estimate was that 600,000-700,000 civilians perished in Jasenovac, while the German Southeast Commander, Alexander Ler, in April 1943, estimated that 400,000 civilians were murdered in this camp (Jevtic, 1990).

It is obvious that Jasenovac was a site where genocide took place according to its pure legal definition and catharsis. Men were killed and women were sent to force-labour camps in Germany. Children were taken from their mothers, and while some were murdered, others were dispersed into orphanages throughout the occupied country. The atrocities perpetrated in Jasenovac against Jews and Serbs are well-documented and present one of the darkest but most hidden pages in the history of genocide. Indeed, the Encyclopedia of the Holocaust (2002) reveals the names of officials in this camp, as well
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as numerous victims in Jasenovac. Also, the book, “Genocide in Satellite Croatia”,
written by professor Dr. Edmond Paris, describes in specific detail the cruelty of Croatian
Nazis who even competed for the sake of “fun” in the grim task of slaughtering, with
custom-made knives, the largest number of victims in the shortest possible time
(Encyclopedia of the Holocaust, 2002). At one point during the summer of either 1942 or
1943, Jasenovac was the largest concentration camp for children in war-torn Europe. In
fact, in the entire system of the eight camps of Jasenovac, approximately 23,830 children,
including newborn babies and up to 14-year-olds, were mercilessly executed, some in
most brutal ways intended to inflict high levels of suffering (Jevtic, 1990).

I had the opportunity to visit the Memorial site of Jasenovac on many occasions
and saw several original films of these slaughters, as well as a bone-chilling exhibit of
“time-bullet-saving tools” used to torture and kill people. Practically, only a small
fraction of people killed in Jasenovac camps were killed by guns: the majority of victims
were tortured and killed with batons, hammers, axes, swords, and knives. Murder by the
aforementioned tools, as well as by hanging, burning, strangling, starvation, thirst,
poisoning, exposure to cold, tormenting and sadistic beatings, were everyday routines of
the Jasenovac camps (Mirkovic, 2000). In one exhibit, the Jasenovac transcripts from SS
officials who visited Jasenovac during its operation documented the magnitude of cruelty
executed in this camp. In effect, the SS officials formally complained to Berlin about the
cruelty and brutality of the extermination methods to which the prisoners in Jasenovac
were subjected. Nevertheless, sixty years after Jasenovac’s existence, Jewish and Serb
victims and survivors are still haunted by the Jasenovac holocaust and the Croatian
State’s persistent negligence in failing to address this issue.
Avoiding Justice

The systemic atrocities occurred at Jasenovac, but many of those responsible for war crimes and genocide, including senior officials from Jasenovac, were never tried for genocide. This situation may be partially connected to operation “Paperclip” of 1945, and operation “National interest” of 1947, executed by the American government and the Vatican (NIN, 2002). The goal of these two operations was to secretly transfer approximately 1600 Nazis (operation “Paperclip”) from Europe to America, despite the fact that many of them had “bloody hands” (Sullivan, 2004). The reason for this was that some of these war criminals were slated to help America in scientific and military experiments that would occur during the “Cold War” era. The book “Pacovski Kanali Vatikana”, (“Ratlines of Vatican”), reveals that approximately 30,000 Nazi war criminals were helped by America and the Vatican to escape from Europe to North America, Australia, New Zealand and South America.

Among them were Joseph Mengele (the “White Angel”) of Auschwitz, Klaus Barbie (a Gestapo officer also known as the “Butcher of Lyons”), as well as members of the Waffen SS “Galician Division”, (8000 men), who were smuggled to England and given “free settler” status (Levy & Easton, 2002). The Vatican Ratline escape route also gave sanctuary to the notorious war criminal, Ante Pavelic, the leader of the Independent State of Croatia, who died twelve years later in Madrid, Spain, in 1959 (Levy & Easton, 2002). Andrija Artukovic, the Interior Minister of the NDH who personally ordered the extermination of 4,000 Serbs in Croatia, was finally deported from the USA to Yugoslavia in 1986. This deportation was due primarily to the pressure of Jewish
organizations. His trial became a political farce, owing to his feeble condition, and he died in a prison hospital in 1988.

Furthermore, the official Ustashi’s plan for “solving” the Serbian and Jewish “question” was expressed in the activities of Dr. Mile Budak. Budak was an official from the top level of the “Independent State of Croatia” and held the position of minister of “Respect for God and Teaching” (Ristic & Borojevic, 1999). This war criminal and Goebbels-style propagandist, whose signature is on some of the most deadly decrees of the Ustashi regime, explicitly demanded at the Ustashi convention, held on December 3, 1941 in Croatia, that “no Serbian ear may remain in these lands” (Ristic & Borojevic, 1999: 7). The most horrifying statement made by this criminal occurred in July 1941, when he stated that, “One part of Serbs we shall kill, the other part expel, and the third we shall convert into Catholic faith melting them down into Croats” (Ristic & Borojevic, 1999: 8). Significantly, a recently built monument in the city of Sveti Rok, Croatia, honoring Mile Budak, continues to remind Jews and Serbs of the Holocaust. The Simon Wiesenthal Centre, as well as various Serbian representatives, are presently requesting the Croatian government to remove the monument.

This historical perspective serves as a reminder that those responsible for the most heinous crimes against humanity did not always face justice, primarily because the interests of the great political and military powers determined their accountability. In other words, at the Nuremberg Trials of Nazi leaders who were responsible for horrific crimes and the deaths of millions, justice was partially served, but not completely, and not for all war criminals who deserved to be brought to justice. In addition, what is even
more appalling is the unfortunate fact that millions of innocent victims received trivial or no reparation or compensation.

When it comes to the violent disintegration of Yugoslavia in the 1990s, it is fascinating to realize how closely the past and present mirror each other. The basis for the destruction of Yugoslavia is a discord with deep roots stemming from the two world wars (Beric, 1993). All of the wars that Yugoslavia has participated in over the last 90 years belong to a tradition of social, political and religious conflicts. The last war had a religious basis, while different ethnic groups such as the Serbs, Croatians, Muslim-Bosnians, and Kosovo Albanians contended for both territorial gains, and social and political advantages (Beric, 1993). It is extremely important to emphasize that historically rooted ethnic hatred, religious intolerance, and dark virulent nationalism, equally characterized all sides in the latest Balkan tragedy. Powerful governments, such as those of the USA, the Vatican, Great Britain, Germany, and others, amplified the magnitude of the destruction of Yugoslavia by their overt, as well as clandestine, political interests in the events that occurred in the former Yugoslavia. Moreover, these governments largely ignored the critical history of this region and, politely worded, were strangers to truth and honesty. This is clearly recognizable through the manner in which these governments informed and misinformed the world about the underlying causes of, responsibilities for, and dangerous nature of the wars in Yugoslavia. In fact, the media portrayal of the war is as much about what has been left out as about what has been covered. The media portrayal of the war began with inaccurately described “ethnic cleansing” in Croatia, escalated with concentration camps and genocide in Bosnia, and culminated with a mass exodus and genocide in Kosovo.
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At this point, I will only elaborate on a fraction of the media fabrications that were used to mercilessly demonize the Serbs, greatly determining their status as the "savages" and "Nazis" of Yugoslavia. It is important to note that, because of international economic sanctions imposed on Serbia by the UN in 1992, they were ironically barred from hiring a public relations firm. This does not mean that the Serbs did not wage their own propaganda war, since the Serbian president, Slobodan Milosevic, and the media controlled by his flatterers equally participated in a war of manipulating the world. It is important to note that Serbian military forces were not the victimized "angels" in the war, as the Serbian official media machinery preached, but they also committed horrible atrocities and are just as responsible for them as their Croatian, Bosnian and Kosovo Albanian counterparts.
CHAPTER THREE:
THE ROLE OF THE MEDIA
(FACTS VERSUS MYTHS)

In the process of labeling the Serbs as Nazis, the role of the U.S. public relations firm, Ruder-Finn, was crucial. This firm masterfully succeeded in mobilizing the negative public attitude against the Serbs because it managed to move the Jewish opinion to the side of various governments, all intended to fit in with America's foreign policy objectives in the former Yugoslavia. More specifically, the governments of Croatia and Bosnia, as well as Kosovo Albanian separatists hired and paid the Ruder-Finn, public relations firm to establish an image that would distract the worldview from the reality. According to US Justice Department records, the governments of Bosnia and Croatia paid Ruder-Finn more than $10,000 a month plus expenses, "to present a positive image" to members of the U.S. Congress, administration officials, and the news media (Lituchy, 1995). However, the amount of expenses covered was much greater than the disclosed fee. In fact, the cruelty of Croatian and Bosnian Nazi followers during WWII, generally described and known as anti-Semitic, was well documented. Moreover, in his book "Wastelands: Historical Truth", the former president of Croatia, Franjo Tudjman, trivialized and negated the magnitude of the Holocaust, and through the media, repeatedly blessed the fact that his wife was not Jewish or Serb. Tudjman, one of the authors of the "Jasenovac Myth", reduces the number of Jewish victims of the Holocaust from six million to one million, and states that historical data about Jasenovac is
"inflated". He further wrote of the alleged "participation of Jews in the liquidation of Gypsies in Jasenovac," and accused Jews of having taken "the initiative in preparing and provoking not only individual atrocities but also the “mass slaughter of non-Jews, Communists, Partisans and Serbs" (Wiesenthal, 1990). In his book “The Islamic Declaration”, his counterpart, the former president of Bosnia, an open Nazi collaborator during WWII, Alija Izetbegovic (1969), passionately preached for the creation of a fundamentalist Islamic State in Bosnia. He stated:

There can be no peace or co-existence between the Islamic faith and non-Islamic institutions. ... the Islamic movement must and can take power as soon as it is morally and numerically strong enough, not only to destroy the non-Islamic power but to build up a new Islamic one. ... Turkey, as an Islamic country, used to rule the world. Turkey as an imitation of Europe, represents a third-rate country.

There are video clips from 1992-1993 of the Bosnian president, Izetbegovic, visiting and blessing hundreds of “mujahedeens”, “holy” Islamic warriors from various Islamic states, settled in cities and fortified in the mountains of central Bosnia. The infamous “El Mujahedd” military unit, as part of the Bosnian army, expressed a determination to fight and destroy infidels and non-Muslims from that part of Europe. Videos and pictures of decapitated Serbs, the “work” of these Islamic units, are widely available through publications and various Internet pages. In his radical Islamism, Izetbegovic was quite consistent, from his political youth as an activist and admirer, in collaborationist circles in Sarajevo under the Nazi occupation, through several appearances in Yugoslavian courts and prisons, to the bitter end that was the devastating war that he embraced (Stenton, 2003). As a citizen of Sarajevo, I vividly remember when this Islamic fundamentalist and chauvinist publicly stated that he would sacrifice peace
for the sovereignty of Bosnia. In effect, sovereignty was meant to apply only to an
Islamic population. As a result of his radical ideology, which is also deeply rooted in the
Bosnian Muslim population, today’s real Bosnia is swayed by Islamic laws and
politically and financially supported by Islamic states. Bosnia is a devastated
protectorate, a land of graveyards and minefields, with increased ethnic and religious
hatred, dependent on foreign aid-mercy, and misruled by foreign “experts” whose
expertise and knowledge about Bosnia is at the very least, questionable. Significantly, in
1991, Sarajevo had a Serb population of over 180,000 and, by early 2001, the Serb
community of Sarajevo had been reduced to approximately 30,000 (Gutalj, 2001). Most
of these people are elderly retired people, while some Serbs are only formally citizens of
Sarajevo and actually live outside of the city and/or country, trying to save their land,
houses and apartments by holding their names in the city’s lists of inhabitants (Gutalj,
2001). In addition to the early Nazi past and radical Islamic beliefs of Izetbegovic,
professor Lenard Cohen, in his interview to the National Post newspaper, distinctly
recognized and pointed out a connection between the Bosnian government and al-Qaeda
members who received Bosnian passports for their “service” in the Balkan wars against
Serbs (Vincent, 2002).

Mass Victimization by Media

For the public relations firm, Ruder-Finn, these facts presented a delicate problem
because it was logical that intellectuals and Jewish organizations would be hostile toward
the Croatians and Bosnians. However, Ruder-Finn masterfully reversed this attitude,
outwitting several Jewish organizations by presenting them with news of Serb
concentration camps in Bosnia, and suggesting that they organize demonstrations outside the United Nations in New York. The world’s media promptly started using terminology with highly emotional content, such as “ethnic cleansing” and “concentration camps”, which evoked bitter memories of inmates in Nazi Germany and the gas chambers of Auschwitz-Birkenau (Antipas Ministries, 2002). In the interview conducted on French TV2 with James Harff, Director of Ruder-Finn’s Global Public Affairs Section, he admitted that their work, Ruder-Finn’s, was in fact not to verify the credibility or truthfulness of information about the concentration camps allegedly operated by Serbs (Antipas Ministries, 2002). Nevertheless, one of the most shocking parts of the interview was when Mr. Harff was asked if he was aware that he took a grave responsibility for his participation in the events that transpired. His response was: “We are professionals. We had a job to do and we did it. We are not paid to moralize. And when the time comes to start a debate on all of this, we have a clear conscience. For, if you wish to prove that Serbs are in fact poor victims, go ahead, but you will be quite alone” (Antipas Ministries, 2002. Emphasis added). In effect, comparing innocent Jewish victims with Bosnians, Croatians and Kosovo Albanians is historically, politically, and intellectually erroneous. Bosnian Muslims, Croatians and Albanians were well armed and prepared and exercised violent separatism, while during WWII, Jews did not demonstrate any of these actions or intentions, but were in fact mercilessly victimized. It is fundamentally incorrect to compare Jews in WWII with these types of anti-Semitic policies and separatist movements. In effect, inaccurate journalism can prolonge existing tensions among the Balkan region nations.
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The images of concentration camps have had a deep, personal impact on me personally because my grandfather survived a *stalag*, (a working camp in Germany), as well as a forced-labour group in Austria. My grandfather described to me in detail his five-year long struggle for life. For that reason, I carefully examined each media report, and the credibility of the source. The media acted as a catalyst in the promotion of anti-Serbian sentiment, and as a support for military intervention on the side of the Bosnian, Croat and Kosovo Albanian separatist forces. This is also reflected in another media fabrication that presented the Serbs as Nazis, and desecrated the victims of the Holocaust: this fabrication occurred in Penny Marshall’s story of the so-called concentration camp of “Trnopolje”, in Bosnia, allegedly operated by Serbs. “The Picture that Fooled the World” was the image of an emaciated Bosnian Muslim caged behind Serb barbed wire, which became the worldwide symbol of the war in Bosnia (Emperors-clothes, 2002).

This infamous picture was taken from videotape shot on August 5, 1992 by an award-winning British television team led by Penny Marshall from ITN. However, this sensationalistic media report was misleading. In reality, the alleged concentration camp was a collection center for war refugees, many of whom went there seeking safety, and who could leave at any time (Emperors-clothes, 2002). Careful examination of that picture, and the entire horrifying videotape, clearly showed that the barbed wire in the picture was not encircling the Bosnian Muslims; it was around the cameraman and the journalists. Nevertheless, in the eyes of the world, the image of Muslims behind the barbed wire made a significant impact on world opinion, and became indisputable proof of a Nazi-style Holocaust in Bosnia at the hands of the Serbs. This story demonstrates that first impressions in the media are paramount and that the following contrary accounts
have little or no effect. For example, the thirty-minute videotape, “Judgement,” is an eye-opening documentary that demonstrated the truth about the “Picture that Fooled the World” (Emperors-clothes, 2002).

**Facts vs. Myths**

Those who are concerned about the truth of the concentration camps in Bosnia are faced with a very delicate task, because to make a judgement about genocide in Bosnia evidently depends on the sources of information. This especially applies to events and media reports from, in and around Sarajevo, the besieged city that during the war and after the Dayton agreement was reduced by approximately 180,000 of its Serb inhabitants. With twenty-eight thousand UN military personnel under the command of Lieutenant-General Satish Nambiar, and with constant contacts with UNHCR and the International Red Cross officials, Mr. Nambiar and his officers still did not witness anything resembling the genocide of which Serbs were accused (Parenti, 2000). Mr. Nambiar concluded that neither he nor any of his successors and their forces saw anything on the scale claimed by the media and the Bosnian and Western governments. “The moderated truths enunciated by observers like Lieutenant-General Nambiar, US Deputy Commander Boyd, General Morillon, General Rose, negotiator David Owen, and various UN administrators and eyewitnesses went largely unnoticed in the mass of Nazi-imaged, Serb-bashing stories broadcasted unceasingly around the world” (Parenti, 2000: 80.).

Canadian Major-General Lewis MacKenzie skillfully recognized that the daily drama of shelling Sarajevo, sabotages, murders, and shameless propaganda motivated by
ethnic hatred resulted in numerous examples of deviant behaviour, war crimes and crimes against humanity in this city. Based on personal experience and the accounts of people who lived in Sarajevo during that time, I am free to say that Sarajevo was “the siege within the siege” exercised by both Serbian army forces and especially by the Bosnian government. For example, Muslim and Serbian forces, for their own political purposes, in effect, held the population of Sarajevo hostage. Nevertheless, because of Mr. Mackenzie’s high professionalism, experience, and impartiality in presenting the truth about these events and the criminals involved on all sides in the conflict, he was at risk of being labeled as deviant and criminal himself, since his conduct represented a significant departure from the image generated through mainstream politics. As a result, Mr. MacKenzie was even named by Bosnian Muslims as the “Serbian taxi”. In fact, this gentleman was “responsible” for saving numerous civilian lives, regardless of their ethnicity, by transporting those in greatest danger to safe areas. As a humanist and professional soldier, Mr. MacKenzie’s greatest “sin” was that he publicly pointed to Bosnian, and some Western, political and military elite as being exclusively responsible for breaching cease-fires, war laws, and perpetuating civilian suffering to achieve covert political goals (MacKenzie, 1993). Furthermore, Mr. MacKenzie was absolutely aware of the role of the media in constructing and labeling only the Serbian side of the conflict as aggressive war criminals who were almost genetically “genocidal”. Nevertheless, Mr. MacKenzie sent a clear message to hypocrites on all sides by bitterly stating “If I could convince both sides to stop killing their own people for CNN, perhaps we could have a cease-fire” (emphasis in original) (MacKenzie, 1993.). I firmly believe that Mr. MacKenzie was, and still is, a devoted humanist who was not a bystander and was not
fooled by shallow stories about criminals and the “inherent” criminality of one ethnic group in that war.

Lieutenant-General Satish Nambiar, former head of UN forces deployed in Yugoslavia 1992-93, also rejected the simplistic Western media’s picture of “genocidal” Serbs. Mr. Nambiar offered this observation: “Portraying the Serbs as evil and everybody else as good was not only counterproductive but also dishonest, because all sides were guilty but only the Serbs would admit that they were no angels while the others would insist that they were” (Parenti, 2000: 79.). Labeling only the Serbian side as “genocidal” and blaming it for all of the atrocities committed in the war had tremendous implications on the *modus operandi* of the ICTY. Also, some essentially important facts were neglected and left unmentioned. For example, Western leaders argued that Bosnia must remain “multi-ethnic”, while at the same time tirelessly contriving to break up the large, multi-ethnic federation of Yugoslavia, itself a nation of twenty-eight nationalities and form fear-ridden mono-ethnic puppet states (Parenti, 2000). It was the world media in particular, which simplified the exceptionally complex roots and causes of the wars in Yugoslavia, by presenting them as wars launched by “savage” Serbs against all others, and for no apparent reasons but sudden Serbian madness and abhorrence.

**Victims in Numbers**

The media persistently and intentionally manipulated the general public by repeating exaggerated and incorrect information regarding the number of people killed in wars in Yugoslavia. For example, the fraudulent information about 200,000 Muslim civilians being killed by Serbs, known as the “Bosnian genocide”, was launched by the
Bosnian Muslim government at the very beginning of the civil war, and was accepted by the world media without any serious challenge. However, the number of people killed in the war in Bosnia-Herzegovina was, according to the research done by the ICTY, half of previous estimates. In effect, the project conducted by Ewa Tabeau and Jacub Bijak, two population experts who worked for the ICTY prosecution, revealed that the correct number of people killed in Bosnia on all sides is a little over 102,000 (Nilsen, 2004). The report of the ICTY-assigned expert team revealed these facts:

The researchers estimate the number of killed civilian Muslims and Croats to be around 38,000, while the number of killed civilian Serbs was about 16,700. Among military personnel, the researchers think close to 28,000 people were killed in the government army, mostly Bosnian Muslims. On the Serb side, 14,000 soldiers were killed, while a bit over 6,000 Bosnian Croat soldiers lost their lives because of actions of war. (Nilsen, 2004).

Significantly enough, this report was kept under wraps by the ICTY, until recently, when Norwegian media broke the code of silence. Bearing in mind the fact that the fighting in Bosnia was a four-sided civil war (and not unilateral Serbian aggression as preached by politicians and media), between Bosnian Muslims-Izetbegovic followers, Bosnian Muslims-Abdic followers, Croats and Serbs, it is clear that the assertion that “200,000 Muslim civilians killed by Serbs” was undoubtedly a lie, and a number that was exaggerated approximately tenfold. The war in Bosnia, and particularly in Sarajevo, proved that many perpetrators and criminal régimes counted on a peculiar combination of constructive obedience, indifference, political and social chaos, and fear that helped them commit crimes undisturbed and furthermore prevented them from being held accountable (Bar, 1999: 137). Therefore, with the “unselfish” support of the media, “powerful criminals” are more likely to maintain a low visibility and avoid criminal accountability.
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by “transferring” their deviance, and even their responsibility and accountability to those who are less powerful.
CHAPTER FOUR:
KOSOVO AND METOHIJA, 1999-2000

The final chapter of demonization and “Nazification” of the entire Serbian nation occurred in relation to the mass exodus of Kosovo Albanians from that province in Serbia. A decade-long misinformation campaign waged by Western leaders and NATO officials to demonize Serbs, continued to emphasize that “genocide” and “ethnic cleansing” was taking place again, but this time in the Serbian province of Kosovo. The world was saturated with CNN & BBC information, retrieved from “reliable sources”, that Serbs expelled approximately 800,000 Kosovars from that province. At the same time, NATO and the media announced their fear that approximately 200,000 more Kosovars had been killed (Parenti, 2001). Primarily, Christiana Amanpour, and her husband, US Department Spokesman James Rubin, known in Yugoslavia as “Hate Tandem”, insisted on a daily basis that numerous atrocities and genocide were being carried out by the Serbs. As a faithful “spokesperson” for the U.S.A., NATO, and the KLA, Ms. Amanpour violated many principles held to be sacrosanct for objective journalism, and with singular intent, she willfully sold NATO’s war on Serbia (Deliso, 2005). Fabricated images, orchestrated stories from staged refugee camps, and reports implying a Serbian inner genocidal nature, were Amanpour’s common operational course. On a high level, CNN was guilty of gross conflict of interest; Amanpour was its top war correspondent and her US Department Spokesman husband was the official
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liaison to the KLA at the Rambouillet negotiations (Deliso, 2005). The symbiosis of politics and media was transparent to its greatest possible extent.

Nonetheless, satellite images of mass graves, for which vague NATO sources offered little, if any, valid evidence, were “proving” that the estimate of the numbers of killed and expelled Albanians was accurate and that the “humanitarian” bombing of entire Yugoslavia was unavoidable. The anti-Serb war propaganda machinery tirelessly enforced “semantic pirouettes”, exaggerating the number of victims by inventing the “evidence” of the newly discovered mass-graves of innocent Albanian victims. For example, the Spanish pathology team went to Kosovo in August of 1999, and was primed to find contemporary counterparts to Auschwitz, Dachau, Treblinka and/or Mauthausen and mass-graves with an “expected” 44,000 killed Albanians. Still and all, according to members of this team in the interview given to the El País Spanish newspaper, they could not - and did not - find a single mass grave, but instead found a total of just 187 dead bodies (Hammond & Herman, 2000). Rather than the hundreds of thousands of slaughtered victims of Serbian “genocide” that the world was led to believe, experts found that in “liberated” Kosovo, at one time or another, the total number of bodies exhumed was never more than a few thousand, including both Albanians and Serbs (Raimondo, 2004.). Indisputably, the war in Kosovo and Metohija was unnecessary, brutal, and savage, but it was not genocide executed by the Serbs.

In effect, the anti-Serb propaganda established the general public’s opinion that the Serbs developed destructive patterns of mass killing of any non-Serbs in their way and in every corner of former Yugoslavia. After all, what NATO and the media
“innocently” neglected to inform the world was that over 200,000 Muslims, of whom over 50,000 were Albanians, lived and worked in Belgrade, the capital city of Yugoslavia, and in the northern part of Yugoslavia at the time that the alleged exodus and mass killings occurred.

**Racak Massacre**

A specific excuse for bombing Yugoslavia was the so-called “Racak Massacre” where 42 Albanians were killed by the Serbian army. In effect, the prelude to NATO’s war against Serbia in 1999 was yet another stage-managed “massacre”, where the ultimate political benefactors were Kosovo Albanians. William Walker and Madeleine Albright immediately asserted, insisted, and repeatedly informed the general public that these victims were innocent Albanian civilians who were lined-up and brutally executed from point-blank range by Serbs. However, Finnish pathology experts concluded that all of the victims were shot from long distance and from a different angle, and furthermore, that most of them had gunpowder traces on their hands, which inferred that they may have been armed Albanian separatist soldiers (Purkiss, 2001). More specifically, Helena Ranta, the head of the Finish pathologist team which investigated this alleged massacre, criticized the Hague tribunal for not following up on the evidence proving that there was heavy fighting between Serbian forces and Albanian separatists during the night of January 15-16, 1999 in the Racak region (Trifkovic, 2004). According to the findings gathered directly on the terrain by Helena Ranta and her pathologist team, findings which were also available to the Organization for Security and Cooperation in Europe (OSCE), a number of KLA fighters, as well as several Serb regular soldiers, were killed in Racak.
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(Trifkovic, 2004). Interestingly enough, the ICTY’s officials were not “satisfied” with such evidence, and pursued the versions that may blame Serbs only. It took approximately four years for these facts to be published first in the German media, namely the Berliner Zeitung, and then around the world. In effect, Clinton and his administration were taking customary liberties with the truth when confronted with material evidence and indisputable facts that were contrary to their “lecturing”.

Significantly, on March 24, 1999, NATO launched an attack on Yugoslavia, a sovereign state accused of genocide. Yugoslavia was a founding member of the United Nations, and a nation at the forefront of the fight against Nazi Germany and their satellites during WWII (Nambiar, 2003). Nevertheless, in 1999, the entire country of Yugoslavia encountered 78 days of round-the-clock aerial attacks, with cruise missiles and “smart” bombs killing or injuring upwards of six thousand people in the name of humanitarianism (Parenti, 2000).

The CNN, BBC and daily NATO briefings, especially by its official spokesman, Jamie Shea who stated on CNN that: “We, NATO, will bring back Serbia into the Stone Age”, reanimated the injustices and attached a malignant element to that small nation (Parenti, 2000). As a premier fabricator, Jamie Shea resolutely claimed that “100,000 babies” had been born in refugee camps to Albanian women in just two months, implying that most of these births were the result of Serbian mass rapes (Parenti, 2000). However, such a claim, besides being shameless and intellectually shallow, was categorically incorrect simply because it meant that with 200,000 women in the camps, (Shea’s estimate), there was a phenomenal 50 per cent birthrate within a time frame of
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approximately sixty days (Parenti, 2000). Clearly, the alleged rapes would have had to occur just at the time of month when all 100,000 women were fertile, and nine months before-antedating the time when Serbian security forces launched their counterinsurgency into Albanian areas (Parenti, 2000). Calamitously, it is obvious that this type of a malicious media campaign, as well as NATO’s presentation of the war against the Serbs, was a war that justified any means to achieve the goal. As always, in reality the truth was somewhere between the blatant lies of NATO and the lies preached by Serbian authorities.

“Liberation” of Kosovo and Metohija

According to documents, videos, and photo archives of the Orthodox Diocese of Raska (ERP KIM, 2002) the reality is that:

Since the arrival of NATO in Kosovo, over nine hundred Serbs were killed by Albanians, more than 1200 were kidnapped and are still missing, 127 churches were destroyed, robbed and seriously damaged (in Kosovo alone), numerous Serbian graveyards were desecrated and destroyed, and around 200,000 non-Albanians escaped from Kosovo Albanian terror, all despite a presence of 40,000 NATO troops.

As a striking reminder of these facts, one has only to look at recent events in March 2004 in Kosovo and Metohija indicating that “ethnic cleansing” of non-Albanians is still in full force in spite of NATO-proclaimed peace in that Serbian province. BBC Internet News on March 18th 2004, reacted and judiciously presented under the title, “In Picture: Kosovo Burns,” the horrific magnitude of the devastation of the Christian Serbian cultural heritage. The authentic magnitude of crimes against humanity in
Kosovo, including killings of civilians, kidnapings, and “cultural genocide”, flooded numerous Internet sites.

Among many, ERP KIM Info-Service, and www.kosovo.com/pogrom presented authentic pictures taken by the very Kosovo Albanians who depicted the uncivilized destruction of Christian cultural heritage. The source from above indicates that, since March 17, rioting Albanians killed over thirty Serbs in Kosovo, hundreds were wounded, and thousands expelled from their homes. In many cases, their homes were set on fire, their livestock destroyed, and their property looted. Two-dozen ancient Christian churches and monasteries were also gutted or dynamited, thus nearly completing the work started in the immediate aftermath of NATO’s occupation in 1999 when over one hundred shrines were destroyed. “Kristallnacht is under way in Kosovo,” an official of the United Nations Interim Administration Mission to Kosovo (UNMIK) says, “a pogrom against Serbs: churches are on fire and people are being attacked for no other reason than their ethnic background” (Trifkovic, 2004). Things must be out of control if even UN administrators and NATO officers, who usually deny or minimize Albanian crimes, now admit that we are witnessing a coordinated, premeditated campaign of ethnic cleansing (Trifkovic, 2004.). In effect, Kosovo and Metohija were, and more often than not, are, in flames. The ancient Orthodox Christian churches are obscenely ruined and looted, while the population, exclusively non-Albanians, are beaten, murdered, tortured, and ethnically cleansed from their homes. This is neither happening accidentally, nor is the Albanian violence and terror in Kosovo a new phenomenon, since the Albanian terrorist and separatist *modus operandi* on the territory of Serbia is not much different from the Al Quaeda *modus operandi* all over the world. According to Gregory Johnson, commander
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of the NATO Southern Wing, the violence in Kosovo was ethnic cleansing and the
violence of the Albanian mob and criminals was orchestrated (Fleming, 2004). Jonathan
Eyal, Director of the Royal Institute of Armed Forces in London, shares the opinion that
Albanian violence was orchestrated, since the Albanian separatists counted on Western
preoccupation with other world spots of crisis that arose after NATO’s bombing of
Yugoslavia (Fleming, 2004).

Significantly, none of these crimes and, surprisingly, no antecedent war crimes,
crimes against humanity, or genocidal tactics and practices that were perpetrated by
Kosovo Albanian terrorists were sufficient enough or of evidentiary significance for the
ICTY prosecution team. In fact, there was not a single indictment against any top Kosovo
Albanian political and/or military officials, until March of 2005, and the indictment of
Ramush Haradinaj, an Albanian terrorist who was at the time Prime Minister of Kosovo.
However, Haradinaj is approximately 14th on the list of top-ranking Albanian officials in
Kosovo. According to James Bissett, former Canadian ambassador to Yugoslavia, a
large proportion of the Kosovo Liberation Army, KLA, were trained in terrorist camps in
Afghanistan (Vincent, 2002). These facts represent a significant danger to the credibility
of the ICTY. In order for it to be understood and accepted as an impartial and just
international criminal tribunal, the ICC should at all costs avoid such practices.

"The Anatomy of a Needless War" by Professor Bob Allen, from the University of
British Columbia, a research associate with the Canadian Centre for Policy Alternatives,
gives the reader an impressive degree of insight into the political background of the
NATO bombing campaign against Yugoslavia. Professor Allen named NATO and the

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U.S. as the instigators of the seventy-eight day bombing, and questioned its so-called “humanitarian” character. Professor Allen argued that Americans do not typically intervene to end human catastrophes, but rather, often abet them. For example, Professor Allen argues that the “U.S. support for the Indonesian annexation of East Timor and the deaths of hundreds of thousands of East Timorese is but one example of such support”.

Given the level of intense media coverage, what strikes one most about the Yugoslav conflict is that there is almost a complete absence of any public (not to mention criminal) accountability by any of the national NATO members for missions undertaken in the name of the NATO alliance.

Importantly, NATO and the media’s tendency to equate the events in Kosovo, Croatia, and Bosnia with the Holocaust and to fulfill its political goals is categorically inappropriate. In effect, Nazi policy toward the Jews was not an inquest of territorial gains or geographical expansion. The goal was the mass murder of an entire people, which moved from the concentration of Jews in specified locales, such as ghettos and transit camps, to the killing itself (Berenbaum, 1999). Jews never exercised violence against the people or governments of the states in which they peacefully lived, and importantly Jews never attempted military actions or had any territorial aspirations against such states. To the contrary, Croats, Bosnian Muslims, and particularly Albanians exercised violent separatism and used full military force to create their own ethnically homogeneous states.

For example, today’s Croatia has a Serb population of less than two per cent, compared with 12.8 per cent before the war. In Kosovo almost all non-Albanian groups
are expelled, and those who still reside there live in ghettos under heavy military protection of the KFOR. In his interview to Jared Israel and Nancy Gust, Mr. Prelinchevich, Chief Archivist of Kosovo and leader of the Jewish Community in Pristina, the capital of Kosovo province, described and explained the horrifying position and treatment of non-Albanians in that region during the war and, most importantly, after the Serbian army was forced to leave this province. According to Mr. Prelinchevich, the threats of direct and imminent danger to their lives forced an entire Jewish community, as well as thousands of other non-Albanians, to leave Kosovo for Serbia and Israel, describing the exodus as nothing less than a pogrom against a non-Albanian population all around the Kosovo region (Israel & Gust, 1999). Tragically and sadly, today, the five-century-old Jewish settlement in Kosovo is discontinued and it is only a memory; there are virtually no more Jews in Kosovo. In the former Yugoslavia, conflicts had the character of civil and religious wars where all sides were well armed and tried to expend their territory as well. It appears that many of these issues have not been taken into account by the ICTY. In the next section, I will present some issues regarding the specific practices of the ICTY as well as its contribution to the creation of the ICC.
CHAPTER FIVE:
THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA (ICTY)

There can be no doubt that atrocities on a massive scale have been committed in
the former Yugoslavia, and that as a general rule large numbers of innocent civilians,
regardless of their ethnic background, have been victimized. Ever since the Nuremberg
trials, it has been widely accepted as a principle of *ius cogens* that an individual
committing crimes against peace, war crimes, or crimes against humanity should be held
criminally responsible, even if he/she acted under superior orders or was a Head of State
(Ferencz, 1972). Unfortunately, experience has shown that penal sanctions against
offenders alone offer little solace and, insufficient, if any, assistance to the survivors.

The International Criminal Tribunal for the former Yugoslavia (ICTY) is a body
that the United Nations established to prosecute war crimes committed in the former
Yugoslavia. This tribunal functions as an *ad-hoc* independent court and is located at The
Hague. *Resolution 827* of the UN Security Council, which was passed on May 25, 1993,
established the ICTY. The ICTY has jurisdiction over certain types of crimes committed
in the territory of the former Yugoslavia since 1991, including: grave breaches of the
1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes
against humanity. Furthermore, it can try only individuals, not organizations and/or
governments (ICTY, 2004). The maximum sentence the ICTY can impose is life
imprisonment. Various countries have signed agreements with the UN to carry out
custodial sentences (ICTY, 2004). The Tribunal employs approximately 1,200 staff, and its main organizational components include Chambers, Registry, and the Office of the Prosecutor (OTP). Chambers is comprised of judges, their aides and divisions such as the Victims and Witness Unit, which is responsible for transportation and accommodation of those who appear to testify (ICTY, 2004.). The Tribunal operates three Trial Chambers and one Appeals Chamber, which also functions as the Appeals Chamber for the ICTR. The Presiding Judge of the Appeals Chamber is also the President of the Tribunal as a whole (ICTY, 2004).

The Registry is responsible for handling the administration of the Tribunal; the activities of the registry include keeping court records, translating court documents, operating the Public Information Section, and general duties such as payroll administration, personnel management and procurement (ICTY, 2004). The Office of the Prosecutor (OTP) is responsible for investigating crimes, gathering evidence and prosecuting indictees. The Prosecutor, who also serves as the Prosecutor of the ICTR, heads the OTP. The current Prosecutor is Carla del Ponte, from Switzerland, and she has acted in this position since 1999. Previous Prosecutors included Ramón Escovar-Salom, from Venezuela, 1993-1994; Richard Goldstone from South Africa, 1994-1996; and Louise Arbour from Canada, 1996-1999.

The original eleven ICTY Judges were elected by the General Assembly in September of 1993 and took office on the 17th of November, 1993 and immediately commenced debating and drafting the Rules of Procedure and Evidence, the “RPE” (Ryneveld & Mundis, 2001). According to Ryneveld and Mundis (2001: 53),
"Three overriding principles guided the drafting of the Rules. First, there would be no needless repetition between the Rules and the Statute. Second, the applicable substantive law was not to be introduced into the Rules. Third, the Rules were to be precise, but not intricately detailed."

Nevertheless, these rules during the later trial processes appeared to be less precise, and furthermore, could at times be perceived as a very powerful tool for limiting the procedural options available to the defence. More specifically, Rule 92 bis(D) makes it permissible for the trial chamber to admit a transcript of the previous ICTY testimony of a witness; if the trial chamber does so, it is left to the discretion of the trial chamber to require the proponent of such evidence to produce the witness for cross-examination (Ryneveld, & Mundis, 2001). In effect, this gives an extremely large degree of discretion to the trial judges. For example, the first use of this rule was in the case of Prosecutor v. Sikirica, Dosen and Kolundzija, where the Prosecution sought to admit transcripts of the prior ICTY testimony of six witnesses (Ryneveld & Mundis, 2001). The Defence requested to cross-examine these witnesses and, during a hearing on the motion, Judge Richard May, now deceased, explained to the defence that the purpose of this new rule was:

[T]o try and cut down the lengths of these trials. It is a matter of concern to the international community that these trials have been taking up six months and more each. A large amount of time in this Tribunal has been taken up with pointless (my emphasis) and repetitive cross-examination, and this rule is aimed at dealing with it (Ryneveld, & Mundis, 2001: 55).

With respect to the witnesses, Rule 73bis, (which applies to the Prosecution), and Rule 73ter, (which applies to the Defence), were amended to empower the Trial Chamber to set both the number of witnesses which the parties may call and the length of time available to the parties to conduct their case (Ryneveld, & Mundis, 2001). At this point, it
appears that these rules have great legal-technical value and are of great practical value. More specifically, Milosevic's questions were lengthy, argumentative, naively suggestive, obviously leading, and, from a legal point of view, are not considered questions at all. Oftentimes, he was incapable of developing a point in a short period. Simply stated, Mr. Milosevic undoubtedly proved to be a bad state leader, but he appears even worse as a trial lawyer. It is undoubtedly the judge's duty to ensure that an unrepresented accused is not denied a fair trial; however, this duty does not extend to providing to the accused the kind of advice that counsel would provide (Greenspan, 2002). If he did, the judge would find himself in the difficult position of simultaneously being an advocate and impartial arbiter.

**Treatment of Witnesses at the ICTY**

On June 4, 2002, during the trial against Milosevic, the witness called by the prosecution, addressed as protected witness “K12”, virtually refused to testify against Milosevic (Israel, 2002). This witness claimed that he was under tremendous psychological pressure in the days before the trial and feared that he may go insane from the pressure. It was quite upsetting to see this witness in such a disturbed psychological state caused by the prosecution’s and Judge May’s consistent requests to continue with his testimony. After the witness “K12” firmly stated that he would rather go to jail than continue with his testimony, the character and level of cooperation between Judge May and the prosecution team surfaced in its full extent. What followed was the refusal of “K12” to testify, evidently proving that there was a certain disregard for the rules of law.
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on the part of Judge May and the prosecution. More specifically, instead of ordering the adequate and prompt investigation of what happened to this witness and what caused him evident psychological trauma, Judge May tried to persuade witness to testify and ordered prosecutor Nice to charge the witness with contempt of court (Israel, 2002).

Moreover, it is also very important to reflect on the general credibility of some witnesses called by the prosecution team. Carla del Ponte's team relied on the testimony of some witnesses who were considered by Serbia, as well as some international authorities, as persons with a criminal past, actively engaged in violent separatist movements and even members of terrorist organizations, such as the “ANA”-the Albanian National Army, which is presently active in south Serbia, Kosovo and Metohija. For example, prosecutors Nice and del Ponte relied on Kosovo Albanian witnesses, such as Halit Berani and Sukri Buja, introducing them to the court as “fighters for human rights”, but who were practically commandants of the army wings of the KLA, another terrorist group from Racak, Kosovo (Nezavisna Svetlost, 2004). Significantly enough, after the Albanian rampage and deadly violence in Kosovo in March 2004, these two Albanian militants were arrested by international forces, UNMIK, and accused of instigating, organizing, and executing deadly attacks on Serb enclaves in Kosovo (Nezavisna Svetlost, 2004). It is very unlikely that the prosecution team would not know about the backgrounds, credibility, and activities of such witnesses because they could, and logically should, obtain information about these individuals through cooperation with the international forces situated in Kosovo, and even, more likely, from Serbian authorities. In effect, criminals and members of terrorist organizations should not be introduced to the international criminal court as “freedom fighters” and should not be
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considered as reliable witnesses. Such “mistakes” only serve the accused, in this case Milosevic, to preach his innocence and to continue to play the role of victim before the ICTY and the world. Unfortunately, there are voices in Serbia and in the world who, exactly because of the highly visible animosity of prosecutors against Milosevic, who attempted to present himself as a victim, simultaneously forgot Milosevic’s unscrupulous and direct involvement in the tragic wars in former Yugoslavia. Clearly, the primary focus of the ICTY is to prove the guilt of accused individuals, while numerous victims are left with no legal avenues to pursue and achieve their needs.

It is noteworthy that the prosecution had an unlimited amount of time to open their case, while Milosevic initially was assigned only two hours, subsequently being extended to four hours, to open his defence on August 31, 2004. There are numerous examples at the ICTY trials which many jurists find questionable and suggestive of bias. Some of the key criticisms leveled against the court include:

An apparently disproportionately large number of indictees are Serbs (to the extent that a sizeable portion of the Bosnian Serb and Serbian political and military leaderships have been indicted), whereas there have been very few indictments resulting from crimes committed against Serbs (many Croat indictees were charged with crimes committed against Bosnian Muslims). (ICTY, 2004).

This kind of criticism is well supported by the actual numbers of indictees of Serb origin before this tribunal. From the list of persons accused before the ICTY, I found a very interesting situation. At the time of writing this thesis, the number of accused Serbs is eighty one, Muslim-Bosnians nine, Albanians six, and Croatians twenty-eight – of whom four were acquitted and two were sent to trials before Croatian courts. Interestingly enough, out of twenty-eight Croatians, only four of them were accused of
crimes against Serbs. All together, eighty-one Serbs were accused compared with eighteen others accused of crimes against Serbs. When it comes to convictions and sentencing, members of Serbian community have perception that the ICTY have harsh approach to Serbs, and lenient treatment of others. In effect, at the time of this writing, in March 2005, convicted Serbs received one life sentence and a total of 551 years in prison, while Croatians received zero (nil) years for crimes against Serbs. Bosnian Muslims, for crimes against Serbs, received 42 years, while trials for Albanians are still in progress. Evidently, the fact that Serbs received disproportionately more years in prison, a total of 551 years, while others received a total of 42 years, may create perception of questionable impartiality of the ICTY.

**Recognition of Rape as International Crime**

The most serious criticisms of the ICTY’s work, however, are criticisms related to the ICTY’s judges and prosecution’s manner of interpreting the laws, dealing with evidence, dealing with the accused and the witnesses, and the trials in general. In effect, the prosecution’s consistent intent to present the civil wars in former Yugoslavia simply as wars of brutal aggression waged by Serbs against all others is clearly evident in many ways. There are a significant number of examples where the prosecution pursued accusations against Serbian atrocities rightfully, but simultaneously disregarded similar atrocities committed against Serbs. For example, Mr. Dirk Ryneveld, a senior prosecutor at the ICTY, and Mr. Daryl Mundis, a member of the prosecution team, skillfully and rightfully emphasized and insisted that rape is a crime against humanity. Significantly, both of them, during the “Foca case” trial, understood and interpreted the use of rape as a
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systematic terror tactic committed by Serbs, all in the service of "ethnic cleansing" and the pursuit of a "Greater Serbia" (Hagan, 2003). As Mr. Ryneveld further explained it, the rapes were organized in campaigns over a prolonged period of time as a part of "a policy of ethnic cleansing unleashed by the Bosnian Serb leadership on the non-Serb civilian population" (Hagan, 2003). For better-informed individuals there are a few significant flaws in these claims and interpretations concerning the systemic nature of rape and genocide in Bosnia.

The concept of the "Greater Serbia" is a political invention of the Austro-Hungarian Empire and was used as an excuse to attack Serbia in the last century (Israel, 2001). Numerous historical documents point out that "Greater Serbia" is a political term that belongs to history and the political-military constellation depicting confrontation between the Austro-Hungarian monarchy and Serbia (Israel, 2001). Even the Serb nationalists cannot agree what it specifically means, especially when the prosecution team uses the concept of "Greater Serbia". Second, as one of the most horrific crimes, rape rightfully deserves attention and the action of international and national criminal laws. The truth is that the Bosnian government, through the media, misused rape as a political tool to gain international sympathy and to engage foreign military intervention against the Serbs. In fact, on numerous occasions, the media misinformed the world, stating that thousands of rapes had taken place. At one point, Muhhamad Sacirbej, senior Bosnian representative at the UN, claimed that Serbs raped 80,000 Bosnian women. However, the prosecution was able to find only a few cases of such rape. Importantly, this was an expedient manner in which the court, led by Judge Hunt, and the prosecution, lead by Mr. Ryneveld, decided that the systematic nature of rape was proven beyond a
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reasonable doubt (Hagan, 2003). In effect, Judge Hunt, addressing the prosecution, firmly concluded that, “Article 5 does not require the prosecution to prove that rapes were widespread, it only requires you to prove that the armed conflict against civilian population was widespread” (Hagan, 2003, p.192). Not surprisingly, Mr. Ryneveld promptly concurred with the Judge, describing rape as “one of the constituent ingredients of systematic attack, in this case proven with a very small representative sample” (Hagan, 2003, p.192). Importantly, these conclusions are based solely on a few witnesses’ testimony, with virtually no other corroborating evidence. The rationale, which points to systematic rapes being the official policy of Serbs, required far more evidence than presented by the prosecution in the form of a few witnesses’ testimony. As Julia Gorin emphasized in Jewish Albatross, news magazine, if there was systematic rape by the Serbs, why are there no resulting children, or evidence of mass abortions, since in Nuremberg there was a considerable body of testimony supporting the contention that Jewish women had given birth to Nazi babies (Gorin, 2005)?

Undoubtedly, rapes happened on all sides in the Bosnian wars, but it appears that for the prosecutors at the ICTY, only the rapes of Serbian women were not provable, or perhaps irrelevant. It is beyond comprehension that the prosecution at the ICTY did not have access to the UN’s documents numbered “A/47/813 and “S/24991”, named “Deposition of Serbian women given to the State Commissions for War Crimes”, dated Dec.18, 1992, at the General Assembly, forty-seventh session, Agenda items 97c (Notes of Annex IX, 1992). These documents clearly depict that rapes occurred on all sides in the conflict. According to these official documents from the UN, hundreds of Serbian young girls and women were raped and subjected to extensive physical and psychological
torture by non-Serbs. These publicly accessible documents consist of details about places, towns, regions, and periods in which Serb, Muslim, and Croatian women were raped. These documents also contain the names of alleged perpetrators. Also present in the documents is the evidence of some of the victims, and as well, some of those who committed the rapes. Ignoring these documents exposes the ICTY and its prosecution team to legitimate criticism insofar as taking this course of action suggests that the tribunal have double standards when it comes to the victims in former Yugoslavia. The selective approach to victims of rape, in which the systematic nature of rape is portrayed as an “unique” tactic of the Serbian side and an inseparable part of Serbian warfare, evidently does not represent an impartial and fair exercise of discretion by the prosecution team at the ICTY. In effect, neglect of Serbian victims of rape, may be perceived as constituting a biased approach by the ICTY.

Nevertheless, it is almost impossible to elaborate on each crucial and important issue that is related to the ICTY operation. This was only one angle in the approach reflected on the ICTY. Obviously, the status of victims before the ICTY is one of great neglect and insignificance. The ICTY operation does not include adequate victims’ access to this court, while the issue of compensation to victims is even more remote. In my opinion, the permanent ICC is a promising international body that may avoid the current criticisms of the ICTY, in particular because it is not established in an ad-hoc fashion.
Reflection on Victims’ Participation at the ICTY

Considering the enhanced role accorded to victims and witnesses before the ICC, it is necessary for the Court to be vigilant in taking steps to ensure that victims’ rights are respected and fulfilled in practice. For the purpose of this thesis, a look at some of the negative aspects of the work of the ICTY is necessary in order to identify the specific challenges facing the ICC in the recognition and support of victims’ rights. Unlike the national courts, the international courts are under constant public and professional scrutiny from all over the world. Understandably, any departure from the rules of law and/or a biased, partial or unjust decision, or a selective interpretation of law by international courts almost instantly elicits salvos of reaction. The ICC must uphold its integrity by delivering an effective, fair, just, professional, and confident performance with respect to the victims of international crimes. Failing to do so, the ICC risks degradation of its authority and causes it to be the object of permanent attacks and criticism by legal professionals, various scholars, and the general public, as is partially the case with the ICTY. More specifically, it was precisely the marginal fulfillment of victims’ needs, the total lack of victims’ compensation, the inadequate protection of victims’ identities, and victims’ marginal role that marked the work of previous international criminal tribunals, particularly the ICTY. The final result of the work of the ICTY is more likely to be a negligible number of convicted criminals and a failure to compensate victims.

The ICTY is a court where victims’ participation in their personal capacity, as well as their compensation for suffered harm and/or damages, were issues with no legal entitlement: they were non-existent. Effectively, the punishment of those guilty of serious
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violations of international humanitarian law was the main purpose of *ad hoc* tribunals, while the participation and compensation rights of victims were of minor concern to these courts. This is evident from the wording of *Resolution 827*, 1993, which established the ICTY, and reads that the ICTY was set up “for the sole purpose of prosecuting persons responsible for serious violations of international law” (Swiss association against impunity, 2005). Consequently, it was the prosecution which was given a mandate to represent victims at all stages of the criminal proceedings, which is mainly based on the adversarial system where the victims’ role is merely to appear as a witness for one of the parties to the proceedings (Swiss association against impunity, 2005). Articles 20 (1) of the ICTY Statute and 19 (1) of the ICTR Statute are basically the only means of protection afforded to the victims, ensuring that a trial is fair and expeditious, with “full respect for the rights of the accused and due regard for the protection of victims and witnesses” (Swiss association against impunity, 2005).

**Role of the Witnesses at the ICTY**

Since the punishment of criminals was the only priority, the significantly detectable imbalance between participation of victims and witnesses before the ICTY was not unanticipated. In effect, the number of actual victims before the ICTY was disproportionately outnumbered by scores of witnesses. Both the prosecution and the defence parties relied heavily on witnesses and their evidence in order to enhance their cases. However, for the careful observer of the ICTY’s trials, it was obvious that the presence of a large number of witnesses significantly slowed the trials, and almost all witnesses were perceived as unconvincing and lacking in credibility by the opposing
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sides, depending on whose witnesses were before the trial chamber. It is noteworthy that witnesses are not inevitably the most credible and/or reliable source for establishing the accuracy of the facts alleged in the criminal courts. In addition, the credibility of some witnesses sustained irreversible damage when their motives and backgrounds surfaced. The dubious credibility of witnesses and their politically motivated evidence are factors that are present on both the prosecution and defence sides. For example, Mahmut Bakali, Ante Markovic, Ibrahim Rugova, Wesley Clark, a few of the prosecution’s witnesses, were those who basically gained both financial and political benefits from conflicts in Yugoslavia. Ominously, the prosecution’s witness, Momir Nikolic, as was the case with many similar witnesses, seriously damaged the ICTY prosecutors’ professional image by publicly admitting that he was lying and acting dishonestly owing to the prosecutors’ pressures and plea-bargaining offers in relation to the events at Srebrenica (Stephen, 2003). Milosevic’s witnesses, such as Vladislav Jovanovic, Mihajlo Markovic, Kosta Mihajlovic, and many others, who undoubtedly profited financially and benefited politically from his régime, were not immune to various political pressures as well. Notably, through all of this, the victims and their needs were left aside, and the notion of compensation was commonly ignored by the ICTY.

In effect, the initial stages of the ICC’s operation may have generated a degree of suspicion en route for its competence, integrity, and/or political impartiality. Essentially, the international community’s perception of the ICC, as being one of honour, professionalism, impartiality, compassion, fairness, and respect, would be greater if the ICC were to distance itself from the influences of state politics. The integrity of the ICC must not be jeopardized by either by the overt or by the concealed political aspirations or
influences of any government. The enforcement of international justice, as is the case with the ICTY and ICTR's operations, will be closely monitored, assessed, and scrutinized by all elements of the global society.

The Power of Prosecution at the ICTY - Conception of Crimes and Victimization

Observation of trials before the ICTY creates a compelling impression that the crucial influence on its operation is wielded by the prosecution since it has virtually absolute control over the type of evidence that may be introduced and over the manner in which witnesses may present their testimony to the tribunal. More specifically, the prosecution teams before the ICTY decide which evidence and which witnesses are going to be presented to judges: strictly legally speaking, this is their procedural right. Due to the adversarial nature of the system adopted before the ICTY, the prosecution may failed to present relevant evidence that might be of crucial importance for judges to hear if they are to reach fair decisions and/or to hand down verdicts that might depart in a direction opposite to that desired by the prosecution.

For all intents and purposes, the prosecution at the ICTY is the master of the entire trial process because the judges do not have access to all of the relevant evidence that the prosecution possesses, and are often faced with exceedingly vague charges. The charges frequently contain a broad spectrum of alleged crimes and a variety of dubious criminal intentions. According to Judge Wolfgang Schaumburg, the impression is that the prosecution first accuses, then commands the arrest of the alleged criminals, and then begins collecting evidence against the alleged criminals (Flotau, 2005). Moreover, Judge
Schaumburg claims that, by the power of an imposed adversarial system, the prosecution brings incomplete and confusing charges before the judges, leaving them no legal alternative such as to request supplementary access to evidence and the independent examination of pertinent evidence (Flotau, 2005). Importantly, the victims' impact on ICTY's trials, in the form of statements, providing direct evidence, and other means, is virtually non-existent. Following legal logic, it is realistic to expect that the prosecution at the ICC will be in a position of authority to decide and define potential victims.

Experiences from the ICTY may be of significant value to prosecutors at the ICC who will have to firmly dissociate the noble legal profession from various political influences. In effect, the power of the prosecution at the ICTY is not limited solely to legal matters, legal technicalities and interpretation of the law. It indefensibly exceeds even the limits of its assigned legal mandate. For instance, the prosecutors from the ICTY, almost exclusively chief Prosecutor Carla del Ponte, requested liquidation of any kind of international financial help and/or political support to governments who do not, altogether fulfill the prosecution's demands. Virtually, Carla del Ponte, on numerous occasions, has publicly threatened the government of Serbia that any form of international support is firmly dependent on, and conditioned by, that government's level of cooperation with her team. Evidently, the prosecution at the ICTY, instead of focusing only on legal matters, usurped political power and prescribed itself a right to dictate a political course to de jure independent states. There is no record that the prosecution at the ICTY threatened the Serbian, or any other government, in point of fact, with economically or politically tailored constraints if they did not facilitate or improve the status of victims living under these governments' watch and care. Noticeably, a disregard
for the victims by the ICTY, and its prosecution’s extreme public political exposure, irreversibly damages the integrity of this tribunal and the ICC must resolutely separate itself from such practices. Basically, both the ICTY and the ICTR encountered a significant degree of external political persuasion, which critically restricted their integrity and impartiality. Accordingly, politically influenced operations of these two courts resulted in the prolonged suffering of victims. In effect, it is evident that these Tribunals neglected victims’ needs to the extent that the present status of these victims continues to deteriorate in almost all spheres of social existence. National States of these victims are either unable or unwilling to compensate victims’ losses, or to help these victims with fundamental means for normal existence. Effectively, many of the victims are still in great need of medical assistance, basic housing, and adequate employment. Moreover, ad hoc tribunals’ modus operandi does not imply short or long term medical assistance for victims either. Unfortunately, past and present experience that victims have with international criminal tribunals translates into the absolute absence of the possibility for victims to access these tribunals in order to pursue and achieve their rights.

Numerous attempts to point to the historical and political causes for war, mainly attempts by defendants, failed on the grounds that the prosecutors and judges regarded them as being irrelevant, unseemly, time-consuming, and/or pointless. It is important to note that the ICTY is established to adjudicate criminal acts and not to determine who caused the war. However, without establishing complete picture with respect to the causes and consequences of the wars in the Former Yugoslavia, the ICTY risks to be perceived as non-impartial tribunal. For instance, on many occasions, Judge May, reacting to prosecutors’ complaints, refused to consider evidence, and even to see
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videotapes, or hear about certain events, raised by Milosevic, describing his evidence as irrelevant for the ICTY. Notably, such practices were common in other trials against the Serbs, such as in the “Foca rape camp” trial. Essentially, when the defence team attempted to point to the causes for war and to highlight the ensuing historical grievances of the Serbs in Bosnia, presiding Judge Hunt insisted that: “We are not here to determine who was at fault in starting the conflict” (Hagan, 2003). However, I resolutely believe that it is of utmost legal relevance to acknowledge who started the ethnic and religious killings and massacres in former Yugoslavia. Just for the record, here are few examples of the very first massacres in Bosnia, against Serb civilians: On March 26, 1992, entire Serbian families were massacred in northern Bosnia near Bosanski Brod in the village of Sijekovac; from the 3rd to the 6th of April, in 1992, the Croatian regular army entered into Bosnia and massacred 56 Serb civilians; on April 4, 1992, Muslim forces from Korace killed 117 Serbs, old men, women, and children, who were Serb refugees from Barice and Kostres (Savich, 2004). Evidently, hundreds of Serb civilians were massacred before the war in Bosnia even started.

Seemingly, the ICTY is unconcerned with the questions as to who started the war, how many Serbs were killed, and what crimes were committed against Serbs before they entered into the war and committed crimes on their own account. For example, Serbs were accused and convicted of genocide in Srebrenica, regardless of the fact that over a thousand Serb civilians, approximately 1600, living in close proximity to Srebrenica, were cruelly slaughtered by Muslims from Srebrenica, at a time prior to the Serbian offensive. Evidence of these crimes is readily available to the prosecutors in the forms of eyewitnesses, videotaped, televised and publicly broadcasted reports, press reports,
information on the Internet, and evidence offered by the government of Yugoslavia. In effect, the Serbs overpowered Muslim forces stationed in Srebrenica with the purpose of bringing to an end the continuous massacres of Serb civilians. This conclusion is analogous to the conclusion of French General Philippe Morillon, who personally witnessed the destruction of entire Serbian villages in the Srebrenica pocket, and who personally witnessed the exhumation of evidently tortured and mutilated Serb civilians in that region (Savich, 2004). During his testimony before the ICTY, as a prosecution witness, General Morillon stated that “the fall of Srebrenica in 1995 was the direct reaction to the massacres of Bosnian Serbs by Naser Oric’s Bosnian-Muslim forces in 1992-1993” (Savich, 2004). Significantly, the prosecution selectively decided to investigate and focus solely on Muslim victims and Serbian criminals.

There is a substantial amount of evidence pointing to the Serb forces having committed war crimes during that offensive. Revenge for atrocities and massacres committed by Muslim forces does not justify crimes committed by Serb forces. Most importantly, the legal significance of the Srebrenica case is in its outcome, with long-lasting negative consequences for the entire Serbian nation, since the ICTY documented it as genocide. Effectively, in the Srebrenica case, only victims on the Bosnian-Muslim side were relevant, while a continuous series of gruesome crimes, well-documented and supported by lists of names and photos of actual crimes against Serbs were ignored by the ICTY and the prosecutors. In dramatic fashion, Slobodan Milosevic was accused, on the basis of the doctrine of command responsibility, for the commission of genocide in Srebrenica, while late Bosnian president Alija Izetbegovic, regardless of the transparent evidence pointing to his command responsibility for atrocities against Serbs around
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Srebrenica, was never charged for any crimes committed against Serbs elsewhere with his knowledge, and by forces under his direct command. It is believed that close to 10,000 Serb civilians were killed in Sarajevo alone. The greatest tragedy is that all these victims have been “depersonalized” in a sense that they accessed the ICTY only in the form of numbers.

Importantly, vicious crimes against Serbs in Kosovo were also of partial or no interest to prosecutors at the ICTY. Prosecutors at the ICTY ignored hundreds of Serb civilians tortured and killed by Albanian terrorists. Various forms of evidence supporting this statement are numerous, readily available, and easily accessible on the Internet to anyone interested in finding the complete picture of the war in Kosovo. For example, the KLA members, Fatmir Ljimaj, Isaku Musliju and Hajredin Baljaj, were accused by the prosecution at the ICTY with torture, inhuman treatment, and the murder of nine Serbs, 12 Albanians, and one more citizen of Kosovo – an event which took place in the village of Lapusnik, the municipality Glogovac-Serbian in the province of Kosovo, from May to July of 1998 (Farquhar, 2004). Significantly, prior massacres, rapes of Serbian women and girls, some of whom were only 12-years-old, and the murder of nearly a hundred Serb civilians in 1998, in the village of Klecka, Kosovo, was deemed of no importance by the ICTY’s prosecutors, since they never charged Ljimaj and others for this crime (Srpske Novine, 2005). Evidently, prosecutors ignored the fact that the Albanian separatists and terrorists from KLA, in 1998 - a year before the NATO bombardment of Serbia - kidnapped, tortured, raped, and killed hundreds of Serb civilians in Serbia.

Appalling details of these crimes surfaced at the trial of those accused of these crimes
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held in Nis, Serbia, in 2001, and are available to any person on the Internet Serbian News (Srpske Novine, 2005).

Evidently, the prosecution at the ICTY granted amnesty to a number of Albanian criminals for crimes that constitute international crimes by all accounts, and accused them of far lesser crimes. Failing to thoroughly comprehend the profile of crimes against the Serbs, the ICTY and its prosecutors visibly announced to the public and to legal scholars that not all victims of international crimes are subject to the letter of law before the ICTY. It is remarkable that Serb victims were either not acknowledged as having suffered at all or were considered to have been subjected to a lesser degree of harm than other victims in the Balkan wars. Therefore, the ICC and its practitioners must take professional measures to grant all victims due respect, to provide appropriate legal services, and to detach itself from the aforementioned manipulation of law and abuse of professional discretion.

Nevertheless, the Serbian forces did commit crimes, and all those Serbs who committed crimes must be held responsible for their criminal conduct, regardless of any proceedings undertaken by the ICTY. There is no doubt that Serbian retaliation, at times excessive in its use of army power, revenge, and crimes against innocent civilians occurred and cannot be justified, but it is tenuous to perceive this as an exclusively Serbian characteristic. Therefore, the self-proclaimed professionalism, integrity, and impartiality of the ICTY, practically translates into this court’s discreditable and hypocritical response to victims’ needs and its effective denial of mass victimization of Serbs in Croatia, Bosnia, and Kosovo.
The region of former Yugoslavia today consists of five states that are politically and economically marginal and display a fragmented sovereignty. In effect, these states are almost completely politically and economically self-insufficient, which in turn creates additional torment for the victims of past wars. Significantly, the ICTY’s prosecutors constantly pressure the international community to restrict or deny financial support to those governments, almost exclusively the Serbian government, who decline to unconditionally “cooperate” with this court. Prosecutor Carla del Ponte even demanded of the European Union (EU) that it suspend discussion about Croatia’s possible acceptance into the EU because of Croatian lack of cooperation with her team (Smajlovic, 2004). Unmistakably, del Ponte’s attempts to hold entire nations and the EU as political hostages if her requests for extradition of individuals accused of crimes are not welcomed. The Guardian newspaper publicly reported the German government’s official opinion that the expansion of the EU cannot be the hostage of del Ponte, clearly denying del Ponte the right to draw up the list of the states that can join the EU (Smajlovic, 2004). Political pressure by the ICTY and prosecutors on Serbs is even more evident; it is constant and more far-reaching in consequences. For example, on November 23, 2004, before the UN’s Security Council, Carla del Ponte described the performance of the security and legal system sectors in the Republic of Srpska (RS), the Serb entity in the Bosnian Federation, as organizations with “systematic weaknesses” (Smajlovic, 2004). In effect, del Ponte attacked the constitutional structure of the RS, in an attempt to change and annul the constitutional rights of the Serb nation, which had been given to RS by the Dayton Agreement, in order to control its own sectors of defence and internal
affairs (Smajlovic, 2004). Accordingly, by changing the Constitution of the RS, the Serb entity in Bosnia would be ruled by the Bosnia-Muslim government. Such actions on the part of the ICTY’s prosecutors are plainly of a political nature and reach considerably beyond the mandate given to it - which is to prosecute those responsible for international crimes.

Evidently, the political and economic pressures that have been brought to bear on the ICTY have had a significant impact on the whole Balkan region with continuing legal consequences for its population. However, such pressure has little or no effect on the Balkan’s political elite, who continue to ignore the needs of numerous victims. As a result, the lack of international support, combined with internal political lack of determination, neglect, and the incapacity of such governments to help victims of international crimes, create additional suffering for these victims. Consequently, the definitive harm caused by such pressures is almost exclusively transferred to the victims from the 1990’s wars in that region, regardless of their ethnicity. Unfortunately, the ICTY and its prosecutors, functioning in a semi-overt “political mode”, additionally fragment and divide ethnic groups in the Balkan region, since some groups see them as protectors while others see them as oppressors.

The present political reality in Bosnia, a case in point, implies that the ICTY’s inconsistency, neglect of victims, and arbitrary political comments about that region additionally have caused a deterioration in the already grave status of victims. As a reminder, the nationalistic parties in Bosnia were the first to arm their own people and to persuade them to enter into a civil war. Today, it is evident that these nationalistic parties
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are the last to help the victims of the crimes caused by political dilettantism and their leaders' insatiable hunger for political and financial power. To cite an instance, presently in Bosnia over 25,000 Serb refugees, who legally earned their pension on the territory of today's Bosnian federation, are denied retirement payments from this government simply because of their nationality (Vesti, 2005). This undoubtedly represents secondary victimization and, in legal terms, it is an unconcealed example of national segregation and ethno-economic oppression of one ethnic group on behalf of the Bosnian-Muslim government. Additionally, these refugees, who were forced to escape from Muslim forces, are not recognized as victims by the UN and the ICTY. Ironically, the governments of the Republic of Srpska (RS), Serbia and Monte Negro also perceive these refugees as being more of a burden to society than victims of multiple crimes.

Nationalistic parties, in spite of everything, still enjoy substantial support from their followers; this support is understandably very confusing, if not incomprehensible, for practitioners of the ICTY who lived and worked in societies that are remote from such absurdities. This method of operating the tribunal will not address the needs of the region unless victims' needs are seen as a priority, and the punishment of all those responsible for the crimes is pursued as a natural legal course with fair outcomes regardless of one's ethnicity.

Perhaps, if the resources, knowledge, and legal energy of the ICTY were more directly focused on meeting the needs of direct and indirect victims from that region, rather than issuing threats to a few generals and politicians, it might be possible to reduce the level of animosity that currently exists between ethno-national communities in the Balkan region. Unfortunately, and contrary to its common claims, the ICTY did not
eliminate or even diminish ethno-national territorial homogenization (my definition for ethnic cleansing), because victims and refugees continue to “return” to their homes only to sell them and move into territories dominated by their own particular ethno-national community. The legacy of the ICTY is one of conspicuous neglect of victims and inconsistent verdicts against offenders. An enormous amount of the international community’s resources was spent on the ICTY and its practitioners’ needs, as well as on the accommodation of the accused in the Hague, while the victims on all sides in the Balkans still suffer and struggle for almost basic survival. Tragically, numerous victims had no success in their attempts to access either the ICTY or their national courts. The understanding of this state of affairs concerning the ICTY is necessary in order to ensure that the ICC is perceived as a court with its own integrity, and not as a mere copy of ad hoc tribunals. The experience of the ICTY must be used by the ICC in a most sensitive and critical manner in order to avoid irreversible damage to its integrity. Therefore, establishing a clear distinction, between the ad hoc international tribunals, especially the ICTY, and the permanent ICC’s modus operandi regarding victims’ respect, rights, and needs, is imperative.
CHAPTER SIX:
THE INTERNATIONAL CRIMINAL COURT (ICC)

The International Criminal Court, (ICC), as the new, independent, and permanent institution for the prosecution and impartial adjudication of persons accused of international crimes, represents an international legal response to the magnitude of the threat posed by genocide, crimes against humanity, and war crimes. On July 1, 2002, the Rome Statute of the International Criminal Court (the “Statute”), an international treaty between ninety-seven governments was signed and ratified by another forty-two governments, and the ICC was formally established (Practitioners Guide, 2005). The Statute was adopted earlier in 1998 as a result of regular meetings, negotiations, and agreements between states from every region of the world. A wide range of supplemental documents followed these meetings for the purpose of serving and guiding the ICC in its future *modus operandi*. For example, the Preparatory Commission (“Prepcom”) of the ICC prepared the Court’s “Rules of Procedure and Evidence”, (the “Rules”), “Elements of Crimes”, “Financial Regulations and Rules”, and a spectrum of other important documents and legal recommendations (Practitioner’s Guide, 2005).

Most importantly, the ICC, as a permanent legal institution, placed a new emphasis on the respectful and constructive treatment of victims and witnesses. In September 2002, the Assembly of State Parties decided to create a special unit, the Victims Participation and Reparations Unit (“VPRU”), in order to provide the most
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effective assistance to victims who seek to participate in court proceedings and/or seek reparations (Practitioner's Guide, 2005). As mentioned before, the ICC differs from the prior ad hoc international tribunals with respect to its innovative approach and increasingly extended role for victims and witnesses. The mechanisms and mandates given to the ICC regarding victims' access, their role in future trials and their access to compensation are unprecedented. Consequently, the enhanced role of victims and witnesses may generate a broad spectrum of operational, practical, and legal challenges for practitioners. The broader role of victims will almost certainly create a number of problems for victims and witnesses as well. However, it is important to note that the policies and procedures of the ICC with respect to victims and witnesses is still a work in progress, with the final goal being to provide the optimal legal options and practical avenues to help practitioners, victims, and witnesses. Detailed participatory rights and extended procedural entitlements afforded to victims and witnesses, (more so than was the case in previous international tribunals), constitute an innovative legal move by the ICC.

The task facing the ICC is one of significant difficulty – particularly, in light of elevated public expectations and the likelihood that its work will be subjected to intense scrutiny. In order to better understand the ICC, its rules, future proceedings, and the potential impact of its decisions, it is necessary to reflect on some of the experiences of the previous international tribunals, in this case on the ICTY and its practice. The international tribunal’s operations have an important influence in the legal sphere, where judgments, decisions, and general modus operandi of these courts typically have a significant and long-lasting impact on the entire legal domain, and especially on regions
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for which they have been established. Experience has shown that each international
criminal tribunal relies on experiences from its predecessors and similar international
courts. The ICC is no exception, since its existence and modus operandi already is, and
undoubtedly will be, affected by the work of previous international tribunals.

**Victims’ Role Before the International Criminal Tribunal-ICC**

Traditionally, victims have been the silent partners in the legal process, with no
role other than that of witnesses and at the mercy of litigants (CICC, Victims Rights,
2004). If the ICC is going to fulfill its promise of providing justice for victims of
atrocities and reconciling societies, it must incorporate a process that provides real justice
to the victims. Justice for victims must not be dictated solely by punishment of culprits.
Victims’ needs must be explored to the greatest possible extent and realized in the most
efficient manner. Therefore:

The victim's perspective may be perceived in many societies as a
complication, an inconvenience and a marginal phenomenon. However,
the awareness is growing that redress and reparation for the victims of
gross violations of human rights is an imperative demand of justice and a
Pressing requirement under international law, in particular the law of
human rights. ¹ (CICC, Victims Rights, 2004).

Unfortunately, victimization on a massive scale is an eternal reality and it seems
that no adequate deterrent against the commission of international crimes exists.

Unquestionably, the international community, as well as each national state, accepts and
agrees that genocide should be prevented and halted in its earliest possible stages.

However, experience has shown that when it comes to international crimes, especially

¹ "Theo van Boven, preface to publication of the proceedings of the "Seminar on the Right to Restitution
Compensation and Rehabilitation of Victims of Gross Violations of Human Rights and Fundamental
 Freedoms," held in Maastricht, the Netherlands, 11-15 March 1992
genocide, the international and national responses were protracted and reactive in nature, despite the clear punitive sanctions assigned by criminal laws for those who commit such crimes. For example, the number of civilians who died in Africa in Sudan’s war-ravaged Darfur region is estimated to be as high as 300,000, while approximately another 2.4 million people have been displaced (Hoge, 2005). It is alleged that the Sudanese government supported the Janjaweed Arab militia in its attacks on the Sudanese of African origin: the militia has been accused of mass killings and rapes (CBC News Online, 2005).

Significantly, the reaction of the international community to such horrific crimes was deferred for months. In effect, owing to the reluctance of certain governments to recognize such crimes as international crimes and to disagreement as to which court should deal with such crimes, the mass killings continued for a significant period in that region. It was only recently, April 2005, when the prosecution at the ICC obtained a list of 51 Sudan suspects allegedly responsible for crimes (Hoge, 2005). Obviously, wars create an enormous number of victims, and the focus of international laws and international criminal courts has slightly shifted towards the needs of victims and away from an exclusive concern with the punishment of criminals. In effect, it is the ICC that made a distinctively positive legal move by means of which victims are assigned greater-than-ever-legal rights.
The Distinction Between Victims and Witnesses

Victims

The general approach to victims and the specific definitions of the terms, “victim” and “witness”, are of crucial legal importance since the ICC may encounter victims in the context of the millions of children, women, and men who have suffered atrocities on a large scale. The term “victim” should be neither too narrowly nor too generally defined.

It is of utmost importance to create an accurate definition and to impose a legally balanced term that includes both “primary” (and direct) victims, and “secondary” (or indirect) victims. More specifically, primary victims could be considered as victims who actually suffered physical and/or psychological harm as a result of international crimes.

On the other hand, secondary victims may require a broader definition, and could be considered victims of international crimes by virtue of their significant connections to the primary victims. To illustrate, secondary victimization may occur as a result of a family connection to a primary victim, such as being the son, daughter, spouse, sibling, parent, or other relation of the primary victim (Practitioner’s Guide, 2005).

The effects of international crimes are far-reaching, in both the magnitude of their destruction and their long-term consequences. International crimes also affect the witnesses of crimes, those who are not related directly to victims, as well as many people who are victimized by the destruction of their economic, religious, scientific, education, transportation and health resources and of the various components of the infrastructure that are of vital importance for the normal functioning of a state and its population. On that account, I created the chart, located in Appendix A, which represents the potential scope and nature of the harms and damages that victims of international crimes may sustain. It effectively consists of a variety of multiple causes, effects, directions, and categories of victims, potentially inseparable from the process necessary to legally recognize and define victims of international crimes (see The Appendix).
Various events and situations that are associated with the commission of international crimes will almost certainly produce a large number of victims and the ICC will be expected to provide them with appropriate help and services. However, the incorporation of a large number of victims by the broadening of the definition of "victim", may present a very difficult, but not impossible, challenge for the functioning of the ICC and its practitioners. Consequently, the term “victim” will have to be further defined in light of the criteria for eligibility because the extent to which the term is defined broadly or narrowly directly relates to the nature and quantum of resources which may be allocated to particular victims or classes of victims (Practitioner’s Guide, 2005).

Victims’ access to, and participation in, Court proceedings, as well as possible reparation for victims, are issues that the ICC must be perceived to be addressing with great sensitivity and with considerably more respect than has been the case with preceding international criminal tribunals.

Witnesses

Significantly enough, neither the Statute nor the Rules of Procedure and Evidence of the ICC define the term “witness”, but one may presume that any person who has relevant and probative evidence in relation to a matter in issue could appear before the Court as a witness (Practitioner’s guide, 2005). Importantly, witnesses and victims are not synonyms. In fact, witnesses are not necessarily and/or simultaneously victims too, since they, simply stated, may only witness certain crimes and not be victimized. For example, journalists, aid workers, transients, various government and non-governmental organizations’ (NGO’s) representatives are among many who may be in a position to be
witnesses, but not victims, of certain events that may be deemed international crimes. Conversely, certain victims could appear before court authorities as victims only and/or as both victims and witnesses. For example, some victims were captured, tortured, and held in seclusion by criminals and were physically unable to witness any other crimes. However, some victims, in addition to being personally victimized, also witnessed victimization on a massive scale, and/or crimes against other individuals and groups. This distinction between witnesses and victims is of crucial legal significance. In effect, the strength, admissibility, validity, credibility, mitigating and aggravating circumstances, and the motivation for providing evidence, to mention a few of the many factors, could be determined by distinguishing witnesses' from victim-witnesses' testimony. For example, witnesses who have the same ethnic background and/or close ideological-political affiliations as the perpetrators would almost certainly offer different testimony regarding any particular crime than would the direct victims of that crime.

It remains to be seen how the ICC and its rules and procedures will address, in practical terms, the task of maintaining the dignity of the victims. It will greatly depend on the experience and professionalism of its practitioners and their interpretation of the relevant laws. Significantly enough, current developments in human rights and international criminal law reflect a trend away from the traditional practices of previous ad hoc international criminal tribunals with respect to the roles of both victims and witnesses before international tribunals. The formulation of standards and the implementation of concrete measures that will enhance victims' access to justice and witness protection constitute a necessity at both the national and international legal levels. However, in practice, the swift and effective provision of redress, such as proper
restitution, adequate compensation, all-necessary assistance, and long-term rehabilitation, regarding the harm that victims have suffered is a task that has yet to be accomplished.

Evidently, the issue of protection for witnesses and victims who appear before international tribunals is of significant ethical and legal importance. At the practical and procedural levels, issues relating to the protection of witnesses and/or victims have also been dealt with within the context of the *Statutes and Rules of Procedure and Evidence* in the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda. In effect, the appropriate measures to protect the physical safety, psychological well being, dignity and privacy of the victims and witnesses are of fundamental significance for all parties in the courts' proceedings.

It is noteworthy that, in the case of Slobodan Milosevic before the ICTY, the prosecution team often used the right to protect the identity of its witnesses. However, several of these "protected witnesses", even when the sessions were closed to the public, were immediately recognized by the defendant as well as by members of the general public – a situation which created considerable embarrassment for the prosecution and the ICTY. In fact, some of the prosecution's witnesses, whose identity was allegedly concealed, were almost immediately publicly identified by the Serbian media and publicized through the Internet. For instance, this was the case with such witnesses as Mahmut Bakali and there was an embarrassing degree of confusion regarding the protected status and testimony of Ratomir Tanic as well as the inability of the tribunal to conceal the identity of Milan Babic, initially addressed by Court as Witness C-061 (ICTY-Trial, 2002). The inability of the prosecution team and the ICTY to protect the identity of their witnesses is professionally and legally unacceptable and potentially
dangerous; this is a mistake that must be absolutely avoided by the ICC. The ICC must set high standards in order to help victims and witnesses participate in the judicial process without being traumatized and/or harmed by it.
CHAPTER SEVEN:
VICTIMS’ PARTICIPATION
IN THE PROCEEDINGS OF THE ICC

General Observation

The ICC has adopted a novel approach in relation to the participatory rights of the victims of international crimes: indeed, it has made provision for a comprehensive process for the recognition of victims’ rights and for the ongoing support of victims. Effectively, this presents a truly remarkable move towards more effective protection for the most vulnerable subjects before the courts. Fundamental principles of justice would appear to dictate that victims’ safety, privacy, dignity, and physical and psychological security are “conditions sine qua non” that the ICC must implement and protect in an effective manner. Considering the nature of international crimes, there is a high likelihood that many victims are children, women, and the elderly and an extremely sensitive approach is required for these victims. The impact of crime on such victims is even more damaging if these crimes consist of any elements of a sexual nature, such as rape. In reality, some victims are rendered incapable of testifying to a certain degree by reason of physical or psychological frailty, or both, and are in need of special treatment. Therefore, the ICC must approach all victims with “special needs” in a considerate and fair manner, while simultaneously protecting their security, privacy, confidentiality, and general well being at all times. Undoubtedly, victims have a great sense of vulnerability when faced with those who committed crimes against them; however, this insecurity is
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elevated by virtue of the far-reaching consequences that are integral to the commission of international crimes.

**The Victims and Witnesses Unit-VWU**

Victims, who are positioned to testify before court, are often understandably disinclined to do so. Predictably and unsurprisingly, the trauma caused to victims by international crimes is typically inseparable from their compounded fear of vengeance, particularly when victims and/or witnesses are directly faced with those accused of causing their torment. Correspondingly, the ICC will have a special Victims and Witnesses Unit (VWU), placed in the "neutral" Registry, to provide protective measures and security arrangements, counseling and other appropriate assistance for witnesses and victims (CICC, 2004). In legal and practical terms, victims and witnesses who may appear before the ICC, as well as others who are at risk on account of their testimony, must have a greater degree of protection than has been afforded them by previous international criminal courts, especially the ICTY. Article 68 of the Rome Statute addresses the protection of victims and their participation in the proceedings, while article 75 contains the most important provisions concerning the victims' right to reparations (CICC, 2004). Moreover, Article 79 establishes the first Trust Fund in the history of international jurisdictions for the benefit of victims of crimes (CICC, 2004). These and other norms of the Statute are specified and implemented in plentiful provisions in the draft Rules of Procedure and Evidence, (the “Rules”), approved on June 30, 2000, by the Preparatory Commission for the ICC, and were adopted by the Assembly of the States Parties of the Court (CICC, 2004).
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Importantly, some general principles are affirmed in Article 68 of the Statute and specified in rules 87 and 88 of the Rules of Procedure and Evidence (CICC, 2004). Significant concerns for victims are emphasized in the reference in the Rome Statute to "others who are at risk" and the inclusive language of Article 68, which should ensure that the practice of the Court will include, inter alia, the effective protection of family members and other dependants of victims (CICC, 2004). Traditional victim and witness legal treatment has been revised and significantly improved under the ICC because the VWU will provide services for all witnesses, victims who appear before the court, and others who are at risk on account of testimony given by such witnesses (Practitioners' Guide, 2005). The VWU will provide victims and witnesses with personal and protective support services in a very elaborate manner by identifying explicit duties, responsibilities, and functions directed to assist victims and witnesses. However, since there is no automatic entitlement to security and protection services, the VWU has developed a substantial general draft plan, for the anticipated process for establishing and implanting protection services, which applies to both the prosecution and defence counsel (Practitioners' Guide, 2005).

The VWU will unquestionably encounter substantial difficulties in initiating contact with victims and witnesses, maintaining this contact, and promoting and encouraging cooperation from them. These difficulties may arise from a myriad of reasons, such as: the remoteness and/or arduous accessibility to the regions in which the victims and witnesses live; the cultural, religious and traditional beliefs of victims/witnesses which may affect their willingness to cooperate with VWU staff; unique language/dialects; and the very real threat to life and limb posed by ongoing
hostilities. For practical purposes, the ICC and its VWU acknowledged that it may be necessary to create “mobile” teams of experts and staff to enter local regions in order to provide effective and responsive services to victims and witnesses (Practitioners’ Guide, 2005). In terms of the entry and presence of ICC personnel in regions of conflict, it is vital that they maintain an overriding concern for the lives and safety of victims and potential witnesses, who may be placed in jeopardy by the visibility of their contact with “alien envoys.” Essentially, the VWU is aware that a perfect “guarantee” for the safety of victims and witnesses is impossible, but it will mobilize all possible measures to decrease any potential peril to victims and witnesses. The security and protection of victims and witnesses must be assessed professionally, because the impact of any form of threat to them cannot be underestimated or disregarded in terms of its potential to negatively affect the integrity of their evidence.

Moreover, the general responsibilities of the VWU and its personnel ensure that various issues and situations associated to the needs of victims and witnesses are in accordance with legal principles and with legal procedures at court. For instance, under Rule 18, it is the responsibility of the VWU to maintain an appropriate separation between the services provided to the prosecution and to the defence witnesses (Practitioners’ Guide, 2005). In practical terms, the VWU staff is expected to establish comprehensive and professional cooperation with leading intergovernmental and non-governmental organizations since they present an invaluable source of information and assistance regarding issues that affect both victims and witnesses (Practitioners’ Guide, 2005). Evidently, the ICC and its units are stipulating various situations and tribulations that may possibly arise during its operation that need to be carefully approached.
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Consequently, the ICC contemplates that the VWU will have personnel with ample expertise, experience, and the aptitude to perform professional services in the various areas. For example, the VWU unit anticipates dealing with logistic administration, traumatized children, elderly witnesses, refugees, exile trauma, accommodation of gender and cultural diversity, interpretation and translation services, and many other situations and individuals with physical and emotional traumas who are in need of professional help and protection (Practitioners’ Guide, 2005).

Aside from maintaining a designated sanctuary for victims and witnesses, the VWU personnel and the ICC in general must be able to inform victims and witnesses as precisely as possible about the extent and duration of the services that are provided (Practitioners’ Guide, 2005). An unambiguous perception about the proficiency of protective measures that are furnished is more likely to enhance victims’ and witnesses’ confidence in the ICC’s personnel. Achieving victims’ and witnesses’ compliance with the directives of VWU personnel and other authorities at the ICC is a complex and extremely sensitive endeavour that may be easily jeopardized if victims and/or witnesses perceive that their personal integrity or vital interests are endangered. At this point, it is necessary to point out again the unprofessional treatment of witnesses by the prosecution team before the ICTY. For example, Danica Marinkovic, the Investigating Judge who led the inquiry into events in the Kosovo village of Racak on January 15, 1999, was cross-examined by prosecutor Geoffrey Nice at the ICTY’s trial of Slobodan Milosevic on Wednesday, April 06, 2005 (Milosevic Trial, 2005). Nice conducted his cross-examination on the basis of hearsay “evidence”, arbitrary interpretations of some articles from identified and unidentified Serbian newspapers and magazines, and questioning
Marinkovic about her private life and her family. At one point, Nice firmly claimed, without identifying a single source, that some Serbian police had been ordered directly by witness-Judge Marinkovic to kill an Albanian family - 14 wounded civilians, to be more specific (Wilcoxon, 2005). Evidently, and considering the official rank of the witness, such accusations amount to a charge of war crimes committed under the direct orders and supervision of Marinkovic. Eventually, this custom of maltreatment of witnesses was even rejected by Judge Robinson, who scolded Nice for leveling such serious allegations against a witness, derived from an obviously unreliable source, and asked the prosecutor to provide supporting evidence for such a heinous charge (Wilcoxon, 2005). It was somewhat pathetic to see Nice trying to remove himself from the issue by saying that he “will return to this if he finds a time later” and by explaining that he was “only concerned with the reputation of the witness” (Wilcoxon, 2005). This example of the malicious mistreatment of witnesses enhances their legitimate fear of testifying before the tribunals, where the prosecution has unlimited power and no accountability whatsoever for the unscrupulous and legally unfounded torment of witnesses. In effect, fallacious and malicious accusations are considered as acts against the law, but the ICTY was unwilling to deem Nice as unethical or as a person who may be accountable for deceitful activity that could cause serious harm to witnesses.

**Protection of Victims**

It is important that the ICC authorities recognize and terminate any situation in which there is a real prospect that victims’ interests may yield and/or be subordinated to those of any other individuals or groups. Accordingly, the ICC regulates nascent
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situations where conflicts of interests may arise and accentuates its position that “the VWU personnel shall not benefit, or be perceived by the public to benefit, from their duties or from the use of information acquired by reason of their employment” (Practitioner’s Guide, 2005). In effect, the ICC stipulates that a conflict of interest arises when an employee’s “private affairs, financial interest and/or political inclinations and beliefs are in conflict, or could result in a perception of conflict, with their duties” (Practitioner’s Guide, 2005). Furthermore, conflict of interest situations include:

a) Where staff’s private affairs or financial interests are in conflict with their duties;
b) Where staff’s private affairs could impair their ability to act objectively;
c) Where their actions would compromise or undermine the trust of victims/witnesses, OTP (Office of the Prosecutor) and defence (Practitioners’ Guide, p.72, 2005).

Evidently, the ICC recognizes that conflicts of interest may inflict irreversible damage to its integrity. Political inclinations, ideological predilections, and any type of predisposed and/or affective approach in relation to particular victims, witnesses, and/or defendants must be duly recognized and rapidly neutralized by court officials.

Unavoidably, many practitioners at the ICC will be influenced by the magnitude of the victims’ suffering and have concern for their welfare. However, it is the practitioners’ anticipated professionalism, their duty to reach just and fair decisions, and their legal as well as moral obligations toward the victims that must prevail over private sentiments.

The nature and extent of the security and protection services offered by the ICC to victims and witnesses are not irrevocable because such services may be refined, amended, and extended in the future. Predictably, the ultimate quality of safety-security measures and services in general, granted by the ICC and the VWU to victims and
witnesses, would depend on the quality and quantity of resources that are made available to this court. Nevertheless, the VWU unmistakably presents a significant affirmative repositioning in the international legal arena vis-à-vis the goals of providing safety, respect, and optimal services to the victims and witnesses of international crimes.

Victims Participation at the ICC

Unlike the peculiar concealment of victims’ needs and rights before the previous international criminal tribunals, particularly the ICTY, the primary object for the ICC is to provide victims with the pertinent legal services in a resourceful and highly professional manner. Following basic legal traditions, which are also accepted by different national legal systems, the existing legal framework that underlies the ICC does not assign the same participatory rights to victims and witnesses. In effect, witnesses are not statutorily entitled to legal representation before the ICC. Conversely, victims are entitled to unprecedented statutory rights in the criminal and reparations processes, and most importantly, victims are entitled to legal representation during the ICC process in the form of the Victims Legal Representative (VLR) (Practitioners’ Guide, 2005). In legal processes before the ICC, victims will exceed their traditional role as silent partners and/or responding witnesses who exert only a minor influence on legal procedures by engaging in the ICC processes as legally recognized participants. Practically, the ICC is creating legal avenues for victims to initiate applications, comment on the proceedings and/or evidence, make annotations, question witnesses, and actively interact with different practitioners in the process (Practitioners’ Guide, 2005).
With respect to victims' enhanced rights before the ICC, it is important to note that the Registry of the ICC constitutes a body which has been officially entrusted with the overall statutory responsibilities toward victims and witnesses. The Registry provides services to victims and witnesses, oversees the operations of the VWU and the VPRU, while both the general and specific duties of the Registry also apply to these two units (Practitioners' Guide, 2005). In effect, the Registrar provides victims with the necessary legal assistance at all permitted stages, while the VWU and VPRU carry out the responsibilities of the Registrar to ensure victim participation before the ICC (Practitioners' Guide, 2005). Clearly, the Registrar, the VWU and the VPRU are units whose mutual objectives are all-embracing cooperation, active communication at all stages of processes conducted before the ICC, and a commitment to delivering the most comprehensive and proficient services to victims. The Registrar’s responsibilities regarding victims’ participation are extensive and principally aimed towards providing the crucial means for victims to access opportunities to participate in the court proceedings by providing notification of opportunities, as well as direct assistance (Practitioners’ Guide, 2005). The notifications are extremely valuable means for the provision of immediate, unceasing, and adequate assistance to victims. The Registrar is obligated to assist victims in obtaining legal advice, organizing their legal representation, taking special measures with respect to gender-sensitive victimization, and assisting victims in many other legal issues (Practitioners’ Guide, 2005).

Arguably, there is the potential that some victims may be perplexed by the lack of a clear distinction between all those units that compete to provide them with effective services and to represent their legal interests. Practitioners at the ICC should ensure that
any confusion regarding the boundaries of their responsibilities and duties toward victims are addressed promptly and unambiguously. The Victims Participation and Reparation unit, the VPRU, as a sub-unit of the Registry, will focus solely on the needs of victims who wish to participate in proceedings and those victims who intend to claim and seek reparations (Practitioners’ Guide, 2005). The responsibilities of the VPRU are extensive, and they comprise various aspects and stages of the proceedings both in general terms and in relation to specific stages in the proceedings. Both the VWU and the VPRU are concerned with the legal sanctuary of victims and witnesses, and they are projected to provide them with very similar but not identical services. Practically, the VWU is in charge of the personal welfare and the security of victims, while the VPRU is responsible for endorsing and facilitating the legal interests of victims who wish to participate in the proceedings (Practitioners’ Guide, 2005). Significantly, there is a real potential for overlap and duplication of services between these two units exists, because of the common necessity to interact with and protect the interests of victims. The example of possible overlap and duplication of services in the Practitioners’ Guide, on page 90, reads: “While the VPRU may deal with a child witness who is participating in the proceedings, the VWU will be responsible for assigning a child support person to assist that child”. Nevertheless, it is safe to assume that intensive and methodical cooperation between the Registrar, the VWU, and the VPRU will be in motion, providing highly regarded help for victims.
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Legal Representation for Victims Before the ICC

Subsequent to fulfilling all of the legal-technical requirements and compulsory judicial clarification, victims will be officially allowed to participate in court proceedings at the ICC. Victims’ participation in the proceedings will be incontrovertibly diverse in intensity, attentiveness, duration, and the nature of their responses will depend the particular stage of the proceedings in which they are engaged. Excusably, victims cannot navigate successfully through the court processes on their own, and they must acquire sufficient legal support from individuals and legal professionals to guide their participation in proceedings. Specific and detailed rules regarding requirements for official victims’ participations in proceedings are outlined in the Statute, under the Rules and pursuant to Rules 89-91 and Rule 93 (Practitioners’ Guide, 2005). Nevertheless, once a victim is officially recognized and legally permitted to participate in criminal proceedings, the various issues regarding the victims’ legal representation commonly arise for consideration by the courts.

According to the Practitioners’ Guide, victims may be assisted or represented in the court process by the following actors (p. 98):

1) The victim directly;
2) The party who is calling the victim as witness (representative role);
3) A civilian (i.e. non-legal actor at the ICC level) intermediary or organization (assistant role);
4) The VWU and/or VPRU (representative role); or
5) The VLR (legal representative role).

Considering the magnitude of international crimes, it is reasonable to expect that the ICC will be sufficiently well organized to respond effectively to abundant requests for legal protection by victims who have suffered significant harm. Fundamental legal
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principles dictate that victims should be able to select a legal representative at any time in a criminal proceeding. However, the efficiency of any criminal proceeding is significantly influenced by the volume of work being undertaken by the court at any given time. In order to avoid overwhelming the ICC with an infinite number of legitimate requests from victims, particular rules must be applied to ensure the efficiency and expediency of proceedings. Accordingly, in situations where a significant number of victims, and/or particular groups of victims may simultaneously seek legal remedies before the ICC, some specific rules must apply. In effect, the pertinent ICC personnel may request that all victims, or a specific group of victims, appear before the court and be represented by one or more designated advocates of their choice (Walleyn, 2004). In a scenario where the “victims in question are unable to choose a common legal representative or representatives within a time limit set by the Court, the relevant Chamber may then request the Registrar to choose one or more common legal representatives from a list of qualified counsel that will be maintained by the Registry” (Practitioners’ Guide, 2005). In practical terms, a common advocate for a number of victims, or group of victims, may facilitate the operation of the entire criminal proceedings and mutually benefit both the victims and court practitioners. However, it may also prove to be an extremely delicate task since not all victims who are represented by a common advocate have at all times the same objectives, needs, and perceptions regarding the objective that should be pursued by the court. For example, victims represented by common advocates, either chosen or legally imposed advocates, may be of diverse ethnicity and may have differing religious, moral and political affiliations and inclinations. This potentially complex problem must be given serious consideration by
any court, including the ICC, which is placed in the position of imposing common representatives. Importantly, before the ICC “all VLRs will have to be screened to ensure that the victim(s) are comfortable and have confidence in their counsel to the extent that there are no conflicts on the basis of professional, political, cultural, national, ethnic, gender, sexual orientation, or racial issues” (Practitioners’ Guide, 2005).

Consequently, the avoidance of a possible conflict of interest must also be an issue that requires a thorough screening process for all VLRs, including those who share the same or close political views, religious beliefs and the same culture, language, and/or ethnic background with victims.

Some confusion may arise as to the funding of different kinds of legal representatives for victims who appear before the ICC. The common legal notion that accused individuals, or suspects, are eligible to have free legal representatives, if they do not have sufficient financial means to pay for counsel, is also applicable to the ICC. Interestingly, according to the ICC’s Rules r.90 (5), specific funding from the Registry is only made available for the common legal representatives who have been “chosen” by the Court (Practitioners’ Guide, 2005). Obviously, it would be hypocritical to entitle victims to participate in court proceedings, and yet ignore the reality that most of the victims of international crimes are economically powerless, socially marginalized, and not able to fund their own legal representation. However, the provisions set out in Rule 90(5) do not categorically mean that the Court will financially assist only victims who acquire a common legal representative chosen/imposed by the ICC. According to Rule 16(1)(b), the Registry is required to assist victims in “obtaining legal advice”, organizing victims’ legal representation, and importantly, “providing victims’ legal representatives
with assistance necessary for the direct performance of VLRs duty” (Practitioners’ Guide, 2005). Effectively, the Registrar is “empowered to provide for assistance, including payment assistance, to victims who are unable to fund a common legal representative chosen by the Court” (Practitioners’ Guide, 2005). Considering the Registrar’s power to negotiate agreements on the provision of relocation and “support services” in the territory of a State of victims, the term “support services” may be interpreted as a separate entity from “relocation” and, therefore, it may arguably be expanded to include legal services and the funding for single victims and groups of victims who do not have a Court-appointed common legal representative (Practitioners’ Guide, 2005). However, according to the Practitioners’ Guide, the implication that the arrangement may be made with State agencies or organizations to fund this form of legal representation is controversial.

Therefore, there is a need for some specific arrangements and clarifications regarding rules regulating the funding of legal services for single victims and groups of victims who choose their own common legal representative. The absence of explicit provisions for legal representative funding may potentially result in unacceptable discrimination against victims, especially those with deficient financial means. In effect, the lack of precision and the ambiguity that is manifested in these rules create the conditions for unnecessary legal maneuvering and controversial judicial interpretations. Controversial judicial interpretations may prospectively result in the inconsistent treatment of victims and redundant legal debates among practitioners before the ICC. Thus, the rights of victims to funded legal representation and other services must be more clearly defined in the Rules of the ICC, always taking into account the need to do so in a very sensitive manner.
Initiating the Process Before the ICC

Traditionally, the victims and witnesses of international crimes did not have any explicit right to initiate criminal proceedings, since the prosecutors appointed by the respective tribunals generally performed such an activating role in cooperation with other international agencies. For the victims and witnesses who may apply for justice from the ICC, it is very important for them to be made aware of how an ICC investigation can be commenced, who can initiate the investigation, why some referrals can be deferred, how the initial contacts with the ICC's practitioners can - and should - be made, and many other relevant - and often - complicated issues: fostering such awareness will encourage victims and witnesses to develop realistic expectations of the ICC and its processes.

Indisputably, the legal representatives of victims and witnesses, as well as court practitioners, are among those who have the most comprehensive knowledge of these issues: to the fullest extent possible, they must explain such issues to victims and witnesses.

Referrals for Investigation

Practically, an ICC investigation can be activated by:

a) A referral of a “situation” by the Security Council.
b) A referral of a “situation” by a participant State or any of its organs.
c) The OTP on its own motion (proprio motu) based on “information” received from an NGO or other third party organization or from any individual (subject to approval of the Pre-Trial Chamber) (Practitioners’ Guide, 2005).

In general terms, the referrals that will ultimately be made by the Security Council and by a participant State and/or any of its organs, will reflect the seriousness of the
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"situations" in question and may indicate the implied gravity of the alleged crimes. Under Chapter VII of the UN Charter, the United Nations Security Council is empowered to take measures to restore and maintain international peace and security, which in the past resulted in the establishment of ad hoc international criminal tribunals (Practitioners' Guide, 2005). Presently, the ICC has the power to assume jurisdiction over any "situation" referred to it by the Security Council, and it appears that there is no requirement that the crime must be committed on the territory of a State Party, or by a national of a State Party (Guide, 2005). The referral given by the Security Council, a political institution that represents the interests of the international community, may be of great benefit for the victims of international crimes because it may set in motion the ICC's investigations and proceedings and it means that even the States that are not Parties to the Statute are also obliged to cooperate with the ICC. Considering the political power and importance of the Security Council," it is realistic to expect that, when there is a referral by the Security Council, both the ICC and the OTP will commence the investigative and criminal processes in a timely fashion.

On the other hand, the State Party referrals are only possible when the crimes are related to, and were committed either on the territory of a State Party, or by a national of a State Party. The State Party referrals should provide a range of ways that victims and witnesses, or their representatives may use to interact with the ICC and other authorities in order to protect their interests at the earliest possible opportunity (Practitioners' Guide, 2005). However, victims and witnesses, or their legal representatives, must be aware that information should be provided to national authorities solely on the basis of a guarantee of confidentiality since the Statute does not automatically create an obligation for a State
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Party to keep such information confidential (Practitioners’ Guide, 2005). Evidently, a certain degree of risk for victims and witnesses must be anticipated in the initial process of contacting and providing authorities with information related to international crimes.

**Office of the Prosecutor-OTP**

The role of the OTP and the very nature of the initiation of an investigation by prosecutors may appear as confusing - or even discouraging - to victims and witnesses at first glance. Arguably, prosecutorial initiation may appear as less authoritative or politically robust, because it may create a sense that the international community does not recognize the “situation” in question as a political priority. Nevertheless, when the State Party is unwilling or unable to evaluate indicated crimes as international crimes, it does not mean that victims will have no protection at all; it is the OTP that may initiate proceedings. The prosecutorial initiation of proceedings does not necessarily mean that victims and witnesses will automatically receive a lesser degree of service. On the contrary, as suggested in the Practitioners’ Guide, prosecutorial initiation can be perceived as reassuring because the Prosecutor is willing to pursue the matter in question when the rest of the world is not. However, the Prosecutor has a power and discretionary right to reject and/or defer referrals, and to decide not to pursue prosecution for various reasons. These reasons vary from insufficient evidence, to request for deferrals when the Prosecutor has been able to persuade a particular national court to assume the prosecution (Practitioners’ Guide, 2005). Victims and their legal representatives must be notified in a case when the Prosecutor decides not to initiate an investigation and not to pursue the matter. Importantly for victims and witnesses, when the Prosecutor finds that there is a
reasonable basis for investigation, he or she should take the necessary steps to consult with victims, witnesses, and their representatives before making any decisions that may affect their security (Practitioners’ Guide, 2005).

Nevertheless, the OTP and particular prosecutors may encounter many difficulties in analyzing and evaluating the validity and seriousness of the referrals, which may depend on the inclination of various international/national organizations, and organs that may provide important information about the indicated crimes. Obviously, in a situation where the OTP and the particular State and/or Security Council have full agreement about the alleged crimes, victims may expect expeditious proceedings. Expeditiousness is of the utmost importance for victims, because most of them may still live in turbulent political, military, and social surroundings. Yet, when contemplating the nature of the particular international crimes in question, such factors as political pressures, influences on the OTP or on any particular prosecutor, should not be underestimated and/or taken as a remote possibility. In effect, it is of crucial importance to remember that some very powerful members of the UN Security Council, the USA for example, have strong reservations regarding the authority of the ICC, which realistically may influence the OTP’s evaluation of the “situations” in question.

Victims’ Compensation before the ICC

Traditionally, victims of international crimes were generally denied access to legal mechanisms that would provide them with adequate compensation or restitution for the harm and damages that they had endured. Previous ad hoc international criminal tribunals did not establish any appropriate mechanisms for compensating victims. The
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sole purpose of these tribunals was punishment of those who were responsible for the most heinous crimes. Besides some level of moral satisfaction from witnessing the punishment of criminals, victims did not have any other remedies for the enormous suffering that they had experienced. However, the ICC has achieved a major innovation by developing specific programs and processes of reparation for the benefit of victims and their family members. In effect, the ICC developed a reparation process composed of the VPRU, the VLR, the court hearings, and the Trust Fund (Guide, 2005). According to the Practitioners' Guide, the VPRU is expected to assume the primary responsibility in the operation of the reparation process by actively assessing reparation claims, gathering evidence, and ensuring that victims have formally articulated their intention to seek reparations. It is realistic to expect that the VPRU will maintain ongoing contact and cooperation with victims, inform them of any significant and/or intended actions, and endorse all crucial evidence essential for the evolution of the reparation processes.

Regarding eligibility for reparations, the ICC achieved another positive and much-needed innovation. Effectively, the ICC will recognize two general categories of victims: "natural persons" and their families, and victims in the form of "organizations and/or institutions". The distinction between these two types of victim is derived from the nature of the harm and damages to which one or the other type of victim were subjected to. Yet, in strictly legal terms, this does not constitute an innovation because such a legal distinction already existed in civil law systems; indeed, in Roman Law, individual persons, "personae", and various institutions and organizations, "universitates", were recognized as distinct subjects of law. However, it is important to recognize that, in order to make a claim before the ICC, victims as natural persons only need to have suffered
some type of harm, while the scope and nature of such harm is not limited in any way (Practitioners’ Guide, 2005). Likewise, organizations and institutions are entitled to request reparations if they sustained direct harm/damage to any of their property that is dedicated to religion, education, art, charitable purposes, and/or to their historic monuments, hospitals and other objects for humanitarian purposes (Practitioners’ Guide, 2005). According to the Practitioners’ Guide, the claims by organizational or institutional victims are to be limited to direct physical damage and would not include, for example, purely economic losses. The definition of victims, or natural persons, additionally includes the families of victims.

**Individual vs. Collective Reparation Claims**

Evidently, the expanded role accorded to victims will have a significant impact in the arena of international law. Arguably, some unexpected and legally unregulated issues regarding victims’ reparation may appear before the ICC, despite its colossal effort to balance a wide range of victims’ concerns and long-term interests. For example, difficulties may arise in relation to family members’ claims for reparation because the ICC did not specify the exact scope and nature of the family relationship required in order to support a legitimate claim. Additionally, further complications may arise when different national laws overlap with multiple victims’ claims, since different national family laws and inheritance laws are not homogeneous with respect to the legal rights of the close and/or distant family members of the victims. In addition, the ICC did not specify the nature of the “collective” claims for reparation. In effect Rule 97(1) reads that: “the Court may award reparations on an individualized basis, or, where it deems it
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appropriate, on a collective basis or both” (Practitioners’ Guide, 2005). It appears that the term “collective” is left to legal interpretation, where “collective” presumably means two or more persons. It may even apply to a claim submitted by an organization or institution. According to the Practitioners’ Guide, the ICC apparently does not have the jurisdiction to order the payment of individual claims from the Trust Fund, since individual claims are made directly against a convicted person. On the other hand, the Court has a discretionary right to order reparation from the Trust Fund exclusively where a collective award, as opposed to an individual award, is more appropriate (Practitioners’ Guide, 2005).

It is noteworthy that the ICC took some impressive steps to satisfy the needs of victims but the extent and nature of reparation is an issue where satisfaction is not a certainty. Collective compensation is particularly complicated because not every victim is affected identically by a crime and some victims may be unfairly under-compensated or a convicted individual may be required to pay larger claims than is just. Assessments of claims for reparations are clearly issues that may cause some level of dissension and mistrust in the arena of international justice - either for victims or for convicted persons.

However, it appears that the ICC is clearly aware of such potentially damaging situations and it will take serious precautions to minimize the prospects of unfair treatment for victims and offenders. Theoretically, the ICC and its practitioners will encounter claims and requests for reparations that can be made before, during or after, the commencement of an investigation or a proceeding, and, significantly, before or after a conviction (Practitioners’ Guide, 2005). Such possibilities and legal avenues with
minimal time constraints should greatly enhance the victims' chances to receive fair and adequate compensation because the ICC recognizes that not all victims can advance their claims in a timely fashion and at the outset of legal proceedings. Nevertheless, it is very important that the ICC practitioners elucidate the legal distinction between reparation and compensation.

"Restitutio in Integrum"

Effectively, any form of restitution is derived from the ancient Roman Law's postulate known as "restitutio in integrum" that basically imposes an obligation, whenever possible, to restore victims to their original situation before the violations occurred. Accordingly, restitution may include the restoration of liberty, legal rights, social status, family life and citizenship, return to an original place of residence, restoration of employment, and return of property (Bonneau, 2004). Correspondingly, the compensation for any economically assessable damage may include money for physical and/or mental harm such as pain, suffering, emotional distress; lost opportunities including education; material damages and loss of earnings; harm to reputation or dignity; costs required for legal assistance, medical, psychological and social services (Bonneau, 2004). In addition, the ICC may encounter requests for rehabilitation that include medical and psychological care as well as legal and social services. Evidently, issues of reparation, compensation, and rehabilitation may overlap at times and may significantly influence the likelihood of achieving the victims' satisfaction before the ICC. In effect, to secure victims' satisfaction, the ICC's decisions should include the restoration of dignity, reputation and legal and social rights of the victims, and public
apology-acceptance of responsibility on behalf of perpetrators to all victims (Bonneau, 2004). The effectiveness of the reparation, compensation, and rehabilitation of victims will, undoubtedly, present a challenge and will require the implementation of a highly professional approach by the ICC’s practitioners at all levels.

**Trust Fund**

Article 79 of the *Statute* creates a Trust Fund “for the benefit of victims of crimes within the jurisdiction of the Court, and for the families of victims”, where the Court also enjoys the discretionary power to transfer properties collected through fines or forfeiture to the Trust Fund (Practitioners’ Guide, 2005). The Trust Fund is an additional mechanism for securing sufficient means to help victims of crimes because the Court also has a power to order those found guilty of crimes to pay reparations directly to their victims. Evidently, the ICC must secure significant financial means in order to help victims and their families pay for the rebuilding of their lives and homes. The expenses that victims may face are numerous and they range from medical expenses, short and long-term counseling and therapies that address the physical or psychological harms caused by the offenders, orphans’ needs, education, and many other expenditures that may arise as a consequence of mass victimization. The problems in financing the Trust Fund may arise at any time and at any stage during the tenure of the Court. These problems could be caused by a myriad of factors, for example; political and military turbulence at the global level. Nevertheless, according to the *Practitioners’ Guide*, page 207, the Trust Fund will be financed as follows:
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6) Voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of State Parties;

7) Money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to article 79, paragraph 2, of the Statute;

8) Resources collected through awards for reparations if ordered by the Court pursuant to rule 98 of the Rules of Procedure and Evidence;

9) Such resources, other than assessed contributions, as the Assembly of State Parties may decide to allocate to the Trust Fund (Practitioners’ Guide, 2005).

According to this financing plan, the Court may be in a position to accumulate substantial financial resources that may be of great help to victims. Nevertheless, it can be argued that tracing, protecting, freezing, and securing the assets of individuals accused of crimes is a process of extreme complexity. The assessment and seizure of properties that derive either directly or indirectly from crimes and criminal régimes are processes that must be determined professionally and precisely while simultaneously protecting the rights of the accused individuals. Remnants of the régimes that once were in power covertly obstruct these processes, which in turn may additionally harm victims of such régimes.

However, it is the issue of collective and individual reparation where the potentially unfair decisions may surface because the ICC has a wide discretionary power to decide which form of reparation is more suitable and/or appropriate for victims. Unquestionably, it is impossible to assess harm and to award each and every victim of international crimes on an individual basis. Theoretically, the dilemma may arise because of the very nature of collective reparations, which requires, for practical reasons, that the harm, suffering, and damage of all the victims be evaluated equally. Importantly, the drawback to a collective claim is that they may be paid not to the individuals in a group
but rather to “an intergovernmental, international or national organization approved by the Trust Fund” (Practitioners’ Guide, 2005). The control and actual payment of reparation that has been awarded is clearly more susceptible to mishandling because there is a potential that these “organizations” may “incidentally” and/or “innocently” allocate unbalanced amounts of money to individual victims.

Nevertheless, these are issues that victims must cautiously consider. Victims must take every possible legal precaution to minimize and prevent any possible manipulation of their legitimate rights. The risk that the Court will convert a number of individual claims into a “more appropriate” collective claim is real and it apparently depends on the discretion of the ICC. Collective reparation should not be perceived by victims, nor by the public, as a negative aspect of the ICC simply because victims historically did not have any opportunity to receive collective reparation, let alone individual reparation. Presently, there are still many questions and issues before the ICC regarding the payment of awards to victims; these must be thoroughly studied and appropriate procedural steps must be taken to address them in a satisfactory manner. For example, there is a need for clear guidance and the development of more specific rules that may help establish the criteria by which individual claims will be deemed impossible and/or impractical, as well as a need for more specific criteria that make collective reparations more legitimate than individual ones. Arguably, the translation of collective into individual claims, followed by the identification of the specific victims entitled to reparation, are issues that may create some level of dissatisfaction on the part of certain victims. However, the ICC principles are a positive legal enterprise of great hope and advantage for victims, considering that neither of the previous international criminal tribunals made such
benefits available to victims. In the past, victims could only possibly expect the punishment of a few criminals and a questionable moral satisfaction regarding punishing the perpetrators. Now, for the first time in the history of international criminal tribunals, victims will be able to expect respectful and adequate treatment, with the possibility of appropriate financial compensation.

**Negative Aspects of Material Compensation-Addressing Psychological Trauma**

It is safe to presume that the majority of victims of international crimes encountered both material losses and psychological trauma. On that account, possible financial compensation does not necessarily mean that the victim's needs are absolutely fulfilled. Material reparation is only one, but rather very important, fragment of the victims' compensation. In the absence of principled psychological counseling and emotional healing many victims may not procure long term benefits from material compensation. In fact, experience has shown that very few victims of violent crimes, who received financial compensation, spent it on psychological counseling, which, in many cases, is a *sine qua non* to heal emotional wounds of victimization. If victims do not address psychological trauma appropriately, their judgments, conclusions, and motivation regarding endeavor of awarded financial means may be critically disordered and may ultimately jeopardize their well being. This is particularly applicable to victims of international crimes, since mass victimization is distinctively dangerous and it often creates large numbers of destitute victims. Inevitably some victims became trapped in legal limbo, some in the status of refugees, and some became "professional victims" who, for various reasons, remain abandoned in their victim status. In view of the fact that some
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victims live with unceasing anger, hate, and a virulent urge for vengeance, as their pivotal
course of rationalizing their victimization, it should be anticipated that financial
compensation alone may be insufficient. In addition, mass victimization also creates
victims’ apathy, poor judgements, involuntary PTSD flashbacks, and extant emotional
lethargy. All this may significantly affect some victims’ capability to pragmatically
engage conveyed financial compensation.

In all probability, financial compensation before the ICC is to be in the form of a
specific sum of money. Yet some victims may be in such ambivalent psychological
distress that they may not be able to adequately manage it. Accordingly the ICC must be
acutely circumspect when apportioning direct material compensation to victims who may
experience severe psychological trauma. The prospect of victims’ material compensation,
therefore, reaches beyond its literal denotation, and it may impede its courtly purpose if it
is automatically and/or as a matter of course allocated to victims with potentially severe
psychological trauma. These assertions are yet to be more fully examined, valeat
quantum valere potest, on the account of the ICC’s legal forthcoming eventfulness.
CHAPTER EIGHT:
SYNOPSIS – THE INADEQUACY
OF PENAL SANCTIONS

Experience has shown that penal sanctions against offenders alone, particularly if
dehemed inadequate, offer little solace and insufficient, if any, assistance to the victims of
international crimes. Ever since the Nuremberg trials, and most recently in the case of the
ICTY and ICTR, the world has witnessed the fact that the punishment of a few
perpetrators has little to do with compensation of their victims. In effect to the degree that
the victims of genocide, war crimes, and crimes against humanity are concerned, the
time-honored maxim of fairness - that individuals who have been violated are entitled to
an appropriate measure of redress - has been flagrantly disregarded. Traditionally, the
mere imposition of punitive measures against perpetrators has been almost the unaltered
focus of international criminal tribunals. While punishment of those responsible for
heinous crimes is necessary, there is also the necessity for victims to be recognized and
treated equitably. For example, to the careful observer, it is quite obvious that certain
conflicts monopolize the attention of the international community, while other conflicts
that result in a far greater number of innocent lives being lost, received disproportionately
less attention and international help. In fact, the conflicts and civil wars in the former
Yugoslavia received an excessive degree of global media coverage and precipitated
unprecedented political and military responses from the international community. This
may be compared with the relatively muted response that was elicited by the genocide in
Rwanda. Arguably the number of people that lost their lives in the former Yugoslavia
during the wars did not exceed 200,000, including both military and civilian casualties on all sides of the conflict, while the events in Rwanda claimed as many as 800,000 innocent lives. Yet the ICTY, which appears to be quite overworked and well-financed managed to apprehend almost all war crime indictees, while the ICTR cannot report many successful cases of apprehension and/or trials of those responsible for mass killings. The international community’s lack of interest and lack of any kind of compensation for the victims of the Rwanda genocide is strikingly evident. Numerous victims of international crimes are still in a search for answers and a “normalization” of their lives, with little or no assistance from any given authorities.

**Reconciliation-Restorative Justice Approach**

Traditionally, criminal justice systems are based on retributive principles, where crimes are perceived as acts against the state, and as such approached in an “ex officio” manner. Incarceration of offenders as a form of punishment is the primary outcome of retributive justice leaving no opportunity for the offender to make direct amends to victims and/or their family members. Simultaneously individual victims and groups of victims as well are neglected, their needs are unattended and oftentimes, absolutely ignored. Victims of international crimes are particularly vulnerable because, besides being financially ravaged, an emotional aspect of such victimization frequently translates into extremely deep and prolonged psychological trauma. A retributive approach to criminal justice leaves many victims’ issues undetected and unresolved in spite of direct evidence that a restorative-justice approach should be given more chance than it has received traditionally.
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In effect, as an alternative to the retributive criminal justice system, the restorative justice approach is designed to enhance conflict resolution, provide material reparation to victims, prevent recidivism and diminish the time and costs present in the formal criminal justice process (John Howard Society of Alberta, 1998). Unlike the retributive criminal justice systems, the restorative justice approach is believed to be more effective with respect to deterrence and victims’ psychological recovery and healing. Most importantly, this approach does not create irrational distance between the victim and offender, since it implies as its final goal a mutually satisfactory solution. More specifically, both the victim and offender work together to achieve several mutual benefits. These benefits can simultaneously contribute to the overall peace of the community. Through restorative justice, victims, communities, and offenders are placed in active roles to work together and resolve critical issues. Restorative justice approaches empower victims in their search for closure, impress upon offenders the real human impact of their behaviour, and promote restitution to victims and communities (Center for Restorative Justice & Peacemaking, 2005). It is important to point out that restorative justice processes are based on the voluntary participation of both the offender and the victim. Involvement can also help victims to heal emotionally as well as to lessen their fear of the offender and of being a repeat crime victim (Center for Restorative Justice & Peacemaking, 2005).

Restorative justice requires offenders to recognize the harm they have caused, to accept responsibility for their actions and to be actively involved in improving the situation. Most importantly restorative justice implies that the offender must make reparation to victims, themselves and the community.
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Numerous victims of international crimes need to understand the underlying causes of their victimization. This can be achieved through the restorative approach, where, as a rule, the offender directly provides victims with answers about the offence in question. Conversely, retributive justice systems do not help victims to find the truth and closure for their harm.

However, the restorative justice system is a very promising and positive system that shall also be incorporated in resolving issues with mass victimization. It may be of the greatest value to the numerous victims and different societies that were devastated by actions of war and international crimes. For example, the Balkan region may be a suitable candidate for the restorative justice system approach, since it is evident that retribution and punishment of a few offenders did not halt the mass victimization and hatred in that region.

Perhaps in cases of serious crimes, such as international crimes, the restorative justice system may be able to address the trauma related issues of both victims and offenders more proficiently than the existing international criminal law. Various psychological traumas caused by ethnic violence and international crimes have been traditionally neglected and/or depreciated by existing retributive systems, the recurrence of genocide and other atrocities seems to be inevitable. Arguably, early age victimization is one of the significant predictors of future violent behaviour. Therefore, in cases of mass victimization and psychological traumas, the importance of meeting the victims' needs and treatment of psychological traumas should be of primary concern. For instance, the historical cycle of mass victimization and ethnic violence in the Balkan region was
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traditionally and exclusively addressed by retributive justice norms. The most recent example of this approach is the ICTY and its retributive modus operandi. Numerous victims encountered severe psychological trauma, which consequently, if not addressed will eventually, in my opinion, originate yet another cycle of ethnic religious violence in that region. Psychological trauma issues, such as post traumatic stress disorders (PTSD), and similar disorders, are beyond the scope of this thesis, but warrant further research because, if not addressed effectively it will trigger future violence and mass victimization.

Nevertheless, the process of incorporating the restorative approach to that region will be time consuming, very costly, and may encounter significant resistance by both offenders and victims. In effect, as long as politicians on all sides and the media continue to blame the other side in conflicts for all atrocities and evil, this task will be extremely difficult. Based on personal experience, it is evident that the 1990’s Balkan wars evoke memories about massive atrocities and traumas to people of that region from previous wars. People of the Balkans were, and still are, constantly reminded by politicians and media about the victimization they suffered by the “other side”. Intolerance, religious and ethnic hatred is still very present and persistent among all ethnic and religious groups in this region of the former Yugoslavia. A great difficulty, however, is the fact that a restorative program for the Balkan region will have to contend with numerous victims and a large number of offenders. From a practical aspect it may be very difficult to arrange programs that can involve all victims and offenders that would be willing to participate in such programs (Government of Canada-Restorative Justice, 2005). In effect, large numbers of participants in this type of restorative program may become cost
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prohibitive. Even so, personally, I believe that a restorative justice system must be given a fair chance to succeed and needs to be supported by different ethnic-religious groups, and any given authorities. It shows promise to be a system that could reduce and may have the ability to significantly diminish future conflicts in that region, and to serve as a positive example on how to eradicate centuries old animosities among different ethnic and/or religious groups.
CHAPTER NINE: CONCLUSION

The main purpose of this thesis was to analyze the issue of victims’ access and compensation before international criminal tribunals. The ICTY’s *modus operandi* served as a keystone to depict this issue. Historically, there have been many situations of mass victimization in which genocide, war crimes and crimes against humanity have occurred. A broad international consensus that those responsible for such crimes must be prosecuted resulted in the creation of the international criminal tribunals. International crimes and their victims have received a certain level of legal recognition in the last several decades. The creation of several *ad hoc* international tribunals and one permanent international criminal court represents significant movement in both *ius cogens* and the national laws. Essentially, the creation of international courts has improved the status of victims but much more needs to be done for victims of international crimes. In effect, *ad hoc* tribunals were mainly focused on prosecuting the offenders while the issues of victims’ access and compensation were greatly ignored, neglected, and left unresolved. Victims’ negligible access to, and non-existent compensation before international *ad hoc* tribunals was greatly recognized through the work of the ICTY. Moreover, it was of the utmost importance to emphasize the role of the media and politics as major players in international relationships where the issue was mass victimization.
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Genocide, war crimes and crimes against humanity are crimes with powerful and prolonged tragic consequences for millions of innocent people. The needs of victims can not be met by simply and exclusively punishing the perpetrators of such crimes as was the case with the ad hoc courts' modus operandi. For that reason there is hope that the permanent ICC shall additionally improve victims' access and enhance the possibility for proper compensation for victims of international crimes. Bearing in mind that the ICC will more likely deal with numerous victims, it may be speculated that collective access and compensation for victims shall be the most practical approach. In addition, arguably, many of the numerous victims of international crimes do not necessarily see the punishment of offenders as the ultimate justice and fulfillment of their needs. Besides material compensation and restitution, many victims expect moral and psychological compensation as well. Such satisfaction shall be in the form of the offenders' public admission and recognition of wrongdoing, and/or sincere apology to the victims. The reconciliation and restorative justice model approach to victim-offender relations should be seriously considered as well. Evidently, victims' access and compensation issues before the international criminal tribunals are extremely complex and they must be approached in a most professional manner.

Judged by traditional, legal, and historical standards, a barrage of "facts" designed to glorify the ICTY's integrity, fairness, impartiality, and its legitimacy may appear to many, to be cynically dishonest and a blatant insult to the victims of the wars in the Balkan region. The ICTY proved itself to have abandoned common legal sense, or perhaps it lacked the necessary degree of political independence during its operation to identify and to hold accountable criminals on all sides. In response, ongoing criticism of
its work has been generated, fueled mainly by the Serbian public and increasingly by various legal scholars who were able to follow the trials. However, to ignore this criticism is to ignore the reality that Serbs were victims as well. From the moment of its establishment, throughout its operation and verdicts, the ICTY has managed to divide in peace what was attempted to be divided and destroyed in war, while the deplorable status of numerous victims, generally has not improved. Evidently, all sides in the 1990’s wars suffered great losses, and all of their political and military leaders should be held, if nothing else, equally responsible for these crimes. In fact, each side proclaims its own victimization as ultimate and unprovoked, but the reality is that many of these claims are deceptive because all sides were well armed and organized for the conflict. Most importantly, during the 1990’s wars, there have been numerous victims on all sides in the conflict and they evidently received unequal treatment at the hands of the ICTY. Unfortunately, from the moment that the ICTY attained jurisdiction over crimes committed during the Balkan civil wars, it practically acted as a “Dominus” or ruler of that region. The ICTY bases and derives its decisions, conclusions, and verdicts in the most intricate cases largely on the testimony of witnesses, failing to elaborate on a myriad of complementary, available, valid, and reliable sources of evidence. The ICTY’s modus operandi is characterized by lack of consistency in its application of trial procedures and in its interpretation of the legal rights and obligations of the accused and their legal representatives. This creates an overall impression that the improvisation and arbitrary interpretation of international law are hallmarks of the ICTY. From a legal perspective, its main characteristic is that the Security Council established the ICTY, no
other State ratified its existence, and the right to trial was not ratified by the legislatures of those States whose citizens were on trial before this court.

Drawing an analogy between the ICTY and the Nuremberg trials is historically, legally, morally, and categorically incorrect. Yet, the media, the ICTY’s political mentors and its legal practitioners continue to insist on the aptness of this analogy. In effect, such an utterly incorrect analogy constitutes an insult to millions of innocent Jews, Serbs, and others who perished in death camps during WWII. More specifically, the ICTY was eventually compelled by an increasingly vocal wave of criticism by legal experts from all over the world to recognize that massive crimes were also committed against Serbs and to start trials against non-Serbs. The ICTY reluctantly, and rather selectively, proceeded.

Considering the effects of the ICTY on international law and its future development the historical duty remains on legal experts to conduct an “autopsy de iure” of this court. Experience has shown that historical distance is needed for such an evaluation. On the other hand, it is the ICC that can, and hopefully will, change the perception of international criminal courts as being courts solely established to punish a few criminals, while failing to provide victims with any legal avenues for reparation. The ICC is a court with noble legal postulates and as it is still developing its rules, procedures, and measures, its work is yet to be judged. It is a court upon which, presumably, along with victims, many legal scholars have placed their hopes for a better international future.

Categorically, it is unwise to discount the historical and traditional confrontations that are based on differing principles of political philosophy and that are embodied in the reasoning of the peoples of any region. The Balkan region is an exquisite example for the
purpose of proving this statement. In spite of so-called “humanitarian bombing” and the implementation of a “tomahawk” democracy, the nations of the Balkans are still haunted by the “ghosts of the past”, where the notion of infinite gradation as to who committed more villainous and brutal crimes, if not openly then subliminally, exists in full force. In effect, the media’s simplification and/or political neglect of the underlying causes of conflicts in the Balkan region resulted in a continuing and accelerated mass victimization of its population. The double standards that the “enforcers” of democracy, specifically the Clinton administration, imposed on the peoples of the Balkan region irreversibly resurrected memories of earlier occupations and the oppression of previous “great powers” such as, most notably, Nazi-Germany, Austro-Hungary, and the Ottoman Empire, (five hundred years of occupation of the Balkans alone), in the last seven centuries.

To disregard these historical facts jeopardizes neutrality, impartiality and the objectivity of the ICTY. As an ancient Latin saying reads, “Historia est magistra vita”. More specifically, in order to act as an effective and impartial international criminal tribunal, the ICC must distance itself from the political influences of major world powers, and the uni-dimensional media portrayals of international incidents, in order to establish itself as an independent, international judicial body. While this thesis examines a fraction of both the shortcomings and the positive outcomes of previous attempts at the establishment of international criminal tribunals, it is meant to create a foundation from which future research on the needs of victims and the ICC can be developed.
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It is indisputable that a multitude of factors influences the processes and outcomes of international criminal court tribunals. To cite an instance, politicians and the media plays an extremely important role in the portrayal of the perpetrators and victims of international incidents. Correspondingly the historical roots of conflict and mass victimization, for example, in Yugoslavia, are deeply complex and have never been resolved so they intensify contemporary conflicts and will trigger future wars.

International criminal tribunals and international laws need to be the primary mechanisms that are used to address these types of conflicts, not the mass media and politicians. The letter of the law needs to be followed regardless of one’s political and ethnic background, with emphasis not only on the perpetrators of conflicts but the victims as well. The ICC’s approach to issues of victims is yet to be seen, and future research needs to be undertaken to examine the development of these issues. This thesis illustrates the international community’s failure, especially the ICTY’s defectiveness, in its approach to victims’ access and compensation before international criminal tribunals. However, the main shortcoming of this thesis is its focus on the negative aspects of the ICTY’s *modus operandi*. In essence, this thesis provided specific examples of the ICTY’s inequitable practices and rulings that are rarely, if ever, reported by mainstream media.

Consequently, the ICTY’s tenets and procedures evidently do not benefit numerous victims of international crimes. Inflating casualties on one side in conflicts in the former Yugoslavia and neglecting massive casualties on the other side, serves neither truth, justice, nor possible reconciliation. It can be argued that the ICTY’s *modus operandi* translates into defamatory and visibly unequal treatment of the victims of international crimes in the Balkan region. This particularly critical indictment of the ICTY is
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necessary because it demonstrates that uncaring treatment of victims is often politically motivated. Ergo, recognition of victims, as well as equal and fair treatment of all victims of international crimes should be of paramount importance to the ICC.

This thesis may serve as a foundation and/or it may initiate further analysis, legitimate criticism, and debates with respect to certain procedural aspects in the work of international criminal courts. This research cast light on the punitive nature of international criminal courts, and revealed the inferior status of victims before ad hoc international criminal tribunals. This thesis has attempted to question the myth that the ICTY is impartial, professional, and fair to all parties. Essentially, this thesis departs from the generally accepted position which has been protagonized by the powerful political figures, the media, and so-called “experts” for the Balkans who propagated uni-dimensional delineation of the mass-victimization in this region.

For the time being, the bitter reminder of “justicia universarum” is allegorized in the words of Petar Petrovic Njegos, the great 19th century poet and politician from Montenegro, who wrote:

“The one who keeps the law in the striking hand
Leaves the trace of smelly inhumanity"
REFERENCES


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APPENDIX

Genocide, War Crimes, Crimes against Humanity

VICTIMS OF INTERNATIONAL CRIMES

"Expected" Casualties

Military (Paramilitary)

Police (Militias)

Civilian Casualties
Primary & Secondary Victim

Crimes Against Life, Body, & Health

Murder & Mass killings

Physical & Mental Health Outcomes

Physical incapacitation

Absolute & Permanent

Partial & Temporary

Economic Aspects of Crime
"Universitates de lus"
Organisations & Institutions

**Apatrids Statelessness, legal limbo Individual vs. Collective

Financial System Status of Regime Victims vs. Elite

**PTSD

*** Basic Standard of Living

Savings, Retirements & Investments
Administration of Justice ICTY example

* PTSD- Large spectrum of psychological and emotional harm. Diapason of causes. Rape, forced labour, forced military conscription, loss of family members, propaganda effects. Women, children and elderly exceptionally susceptible to harm. Political, psychological and legal impact of systematic rape. Orphans-nature, magnitude, scope of crimes and consequences.

** Apatrids-Statelessness. Enormous effects, numerous negative consequences: legal limbo, issue of refugees; loss of recognized credentials/professional positions, deviant/criminal behavior as a choice for survival, confusion/aggression/depression, disintegration of family, immobility, alienation etc

*** Destruction of: infrastructure, housing, means of production, live stock, natural resources, communication & transportation. Disintegration of: legal system, market, work opportunities.

*The ICC- Indispensable need for critical approach as to the experience and practices exercised by ad-hoc international criminal tribunals (Nuremberg, ICTY, ICTR) regarding diversity of victims. Issues of victims’ respect, rights, security, victim/witness dual role, legal representation, reparation, and overall treatment.