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“Casting a Shadow Over Ongoing Conflicts: The International Criminal Tribunal for the former Yugoslavia’s Impact on Civilian Violence”

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Dear Comparative Politics Working Group participants: the first two chapters of my dissertation present the best overview of my project and are where I need the most feedback. I am looking forward to and greatly appreciate any and all comments! -Jacqueline

I

Introduction: The International Criminal Tribunal for the former Yugoslavia, On Knife's Edge

“Things being the way they are, would it not be better if our big and small leaders were made to sit in the dock instead of at the negotiating table? And if, with the help of world-famous experts in international laws of war, we had a Nuremberg trial of our own, no matter how small or modest?”

- Mr. Mirko Klarin, “Nuremberg Now!” *Borba*, 16 May 1991

I.I The Flashpoint of Srebrenica

July 11th, 1995 is a date forever seared in the Bosnian memory. It marked the start of the forcible transfer of 25,000 to 30,000 Bosniak women, children, and elderly, along with the murder of over 8,000 men and boys, from the eastern enclave of Srebrenica. The United Nations (UN) Secretary-General would refer to the killings as “the worst on European soil since the Second World War.”¹ Almost two years prior to the Srebrenica massacre, the UN Security Council (UNSC) established the International Criminal Tribunal for the former Yugoslavia (ICTY). Among other things, the Council charged the Tribunal with deterring such atrocities, bringing about justice, and contributing to the restoration and maintenance of peace in a region that had been plagued with war since 1991.² The fact that the ICTY failed to prevent Srebrenica is commonly touted as proof that, in the best-case scenario, it had zero impact on hostilities. And yet, the story of the ICTY's actual role is far more complex, as a closer examination of events proceeding Srebrenica and its aftermath evince.

When the ICTY emerged in May 1993, with few exceptions, the lofty rhetoric concerning what it might accomplish failed to translate into immediate or substantive support.³ Indeed, it would take over a year for the ICTY to gain enough staff and resources to begin its work. Among other things, the Tribunal only opened its offices in 1994. Until then, judges rotated around rented rooms at the Peace Palace in The Hague. Meanwhile, the ICTY's investigators had troubles securing enough funding from the UN to travel for the purposes of evidence collection. Moreover, the Office of the Prosecutor lacked a Chief Prosecutor until late 1994. Shortly thereafter, the ICTY issued its first indictment against Dragan Nikolić, a low-level,

¹ Kofi Annan, 'May We All Learn and Act on the Lessons of Srebrenica', Says Secretary-General, in *Message to Anniversary Ceremony, Press Release Sg/Sm/9993* (New York, N.Y.: 11 July 2005).

² United Nations Security Council, *Resolution S/Res/827* (New York, N.Y.: United Nations Security Council 3217th Meeting, 25 May 1993).

³ For more details, see David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012). Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator, The Castle Lectures in Ethics, Politics, and Economics* (New Haven: Yale University Press, 2000) 82.

Bosnian Serb prison camp commander. Months later, the ICTY asked Germany to defer a case involving Duško Tadić—a minor Bosnian Serb politician—to the competence of the Tribunal. Thus, by early 1995 when Serbian forces were preparing to launch their offensive in Srebrenica, the ICTY had only just begun building cases against a handful of ‘little fish.’ The ICTY, in other words, was essentially a toothless tiger.

Things started to change for the Tribunal after Srebrenica. Within weeks of the massacre, Chief Prosecutor Goldstone issued indictments for Radovan Karadžić, Ratko Mladić, and other top Serb officials. The indictments against Karadžić and Mladić accused them of perpetrating genocide and crimes against humanity throughout the territory of Bosnia. Goldstone would go on to amend their indictments to include specific charges for Srebrenica. Karadžić was then the President of the Bosnian Serb entity, *Republika Srpska*. Mladić was his top general. Both men played a key role in launching the assault on Srebrenica. Specifically, in March 1995, Karadžić issued “Directive 7,” which called for Bosnian Serb forces to “create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica.”⁴ Mladić implemented the Directive, which culminated in the slaughter.

As Chief Prosecutor Goldstone began pursuing such ‘big fish’ as Karadžić and Mladić, the United States launched a concerted diplomatic effort to end the Bosnian War. Despite Karadžić’s indictment before the ICTY, as well as then credible indications of his direct involvement in the recent slaughter at Srebrenica, it appeared that western officials might permit him to participate in negotiations. U.S. officials, for instance, met with both Karadžić and Mladić as part of their efforts to generate support for peace talks. Moreover, top international officials, including UN Secretary-General Boutros Boutros-Ghali, felt that excluding Karadžić from any negotiations would prove damaging for securing a lasting peace agreement.⁵

Recognizing that the fledgling Tribunal’s credibility would greatly suffer if such a notorious indictee faced zero repercussions, Chief Prosecutor Goldstone lobbied western governments to deny Karadžić access to impending talks at Dayton. He even went so far as to threaten his resignation should Karadžić participate. Conceding to Goldstone’s appeals, the U.S. ultimately opted to sideline the Bosnian Serb President from negotiations. They specifically threatened to arrest him should he touch a foot on American soil. Goldstone’s efforts proved invaluable in terms of facilitating talks. Specifically, had Karadžić attended, Bosnian President Alija Izetbegović would have boycotted negotiations, thereby gravely impairing the likelihood of reaching a deal. Among other things, top Bosnian generals were highly reluctant to talk peace at a time when their forces were recapturing large swaths of territory, which Bosnian Serb forces had occupied for much of the War.

The ICTY’s indictments against top Serb officials also provided the U.S. with leverage in terms of co-opting negotiating authority away from Bosnian Serbs. Specifically, U.S. officials insisted that they would not negotiate with anyone that the ICTY indicted. Thus, in order to secure an end to a war that they were increasingly losing, the Bosnian Serb leadership opted to concede negotiating authority to Serbian President Slobodan Milošević, who the U.S. would work with. As former U.S. Ambassador for War Crimes David Scheffer explains, “The indictments were nonnegotiable. In some respects, this situation would prove useful to Milošević, as it gave him the upper hand with respect to his indicted colleagues in representing

⁴ International Criminal Tribunal for the former Yugoslavia (ICTY), “Prosecutor V. Radislav Krstić (It-93-33-a), Judgement,” (ICTY, 19 April 2004), 29.

⁵ Richard Goldstone, “Interview with Author,” (22 June 2009) Goldstone, *For Humanity : Reflections of a War Crimes Investigator*, 155.

Serb interests during the negotiations.”⁶ Countless Dayton insiders have also indicated that the pre-Dayton agreement between Milošević and Bosnian Serb leaders proved critical to securing a final peace deal. Among other things, Bosnian Serbs had repeatedly upended agreements in the past, even in the face of significant pressure from their main ally in Belgrade.

Indeed, the story of the ICTY’s role in the run-up to and aftermath of Srebrenica presents some interesting questions regarding its wartime impact. In particular, what effect did the Tribunal have on civilian violence *throughout* the wars associated with the break-up of Yugoslavia? How did the strategies that ICTY officials pursued specifically affect non-combatant violence in these conflicts? And, when, if ever, did certain efforts serve to escalate, de-escalate, or have no impact violence against civilians?

I.II The Argument in Brief

At various junctures in the Yugoslav Wars, the ICTY was able to de-escalate violence against civilians. Importantly, there were no indications that it escalated civilian violence in any way. In this study, violence against civilians consists of social interactions in which coordination among belligerent parties results in the infliction and attendant reception of severe damage to persons, their rights, and/or objects. The ICTY specifically performed three roles that enabled it to check these social interactions. First, when ICTY officials’ prosecutorial efforts impinged on the ability of spoilers to pursue their immediate interests, they facilitated spoiler marginalization. Spoilers were the actors who played a key role in initiating, committing, and deploying civilian violence as a means of securing their interests throughout the duration of a conflict and into peace negotiations. By sidelining such actors, ICTY officials were able to remove a key catalyst behind non-combatant violence, hindering combatants’ ability to perpetuate violent interactions to the same extent. For instance, the indictments of Radovan Karadžić and other top Serb leaders served to sideline them from playing a central role at Dayton. Consequently, parties were better able to reach a lasting peace agreement that led a substantial decline in civilian violence.

Second, the ICTY served as a control on combatants. Specifically, it created costs for violating international humanitarian law (IHL), including (potential) criminal prosecution, punishment, and/or social stigmatization for being identified as a ‘war criminal.’ The ICTY also extended potential benefits for compliance. Mainly, compliance served as a means for garnering credibility in certain circles. For instance, belligerents recognized that upholding, or at least appearing to uphold IHL was important for maintaining international sympathy and support.

Third, the ICTY extended leverage to the international and domestic actors who were working to halt atrocities. Specifically, these actors were able to use the ICTY’s involvement in a conflict as part of their own efforts to change the calculus of high-level belligerents regarding the utility of civilian violence. The ICTY specifically provided them with both coercive and symbolic forms of pressure. Coercive pressure included the threat of criminal prosecution and/or punishment before the ICTY. Symbolic pressure involved the threat of social stigmatization for being called out as a ‘war criminal’ by the ICTY. For parties seeking membership in the western club of states, such labels were perceived as particularly damaging.

The ICTY was ultimately only able to affect each role, and thereby de-escalate civilian violence, in the presence of two conditions. To begin with, Tribunal officials required tangible support from influential actors in order to carry out any prosecutorial efforts. In particular, the ICTY is dependent on third parties to operate on a day-to-day basis, as well as for securing

⁶ Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*, 105.

access to crime scenes, evidence, and arrests. During various Yugoslav Wars, the backing of influential actors was particularly important in terms of securing such enforcement powers. Influential actors were those parties who had something that a critical mass of political and military elites in a conflict identified with, or needed. In other words, they were in a position to coerce belligerents into providing ICTY investigators with access, evidence, and/or arrests. Occasionally, these actors were also in a direct position to share evidence and/or execute arrests on the ICTY's behalf. The strength of the ICTY's enforcement power depended on the specific types of support that powerful benefactors were provided. Its officials had the greatest enforcement power when a powerful party was willing to execute arrest warrants. Their enforcement power was weakest when such backers provided only cursory support that rendered the ICTY a tribunal in name only. In other words, they provided basic operational support, but not the access, evidence, or arrests that personnel would have needed to follow through on prosecutions. Frequently, the ICTY's enforcement power was mixed, meaning powerful benefactors were willing to support it, short of executing arrests on its behalf. So, for instance, parties would share evidence and/or provide access to crime scenes, but they would not follow through to securing arrests.

Besides the strength of the ICTY's enforcement power, the *ex ante* benefits that belligerent veto players perceived in violating humanitarian norms also mediated its impact on civilian violence. Veto players included the individual and/or collective actors whose agreement was necessary to change the status quo policy regarding the use of force.⁷ Their decisions, in other words, created the opportunity for combatants to either perpetrate and/or cease committing civilian violence. In some cases, veto players either included or contained spoiler(s). Different veto players recognized more or less benefit in violating humanitarian norms. In addition to general societal 'do no harm' mores, there were weighty domestic prohibitions against a range of egregious human rights abuses, war crimes, crimes against humanity, and genocide in the Yugoslav Criminal Code.⁸ These laws and treaty obligations in turn carried over into the criminal codes of emerging states in the region. Veto players in the Yugoslav Wars—which included some of the best-educated elites in society—were broadly aware of these prohibitions.

Ex ante, some of veto players perceived fewer benefits relative to securing their core interests in failing to uphold these norms. In other words, these belligerents had competing core interests for which non-compliance was perceived as potentially damaging to the realization of some of those interests. Based on inferences from top leaders' prior behaviors and statements, these sorts of actors tended to identify strongly with western states, recognizing membership in this club as vital to a future for their country. As such, non-compliance with humanitarian norms was perceived as potentially damaging given that it could threaten such key support. Thus, they had made consistent strides to uphold humanitarian norms in both their rhetoric and policies. For instance, some of them worked to ensure that people were prosecuted for murders, regardless of their ethnicity. More hardline veto players, however, identified higher benefits—in terms of realizing their main interests—in violating humanitarian norms. For these actors, the prize of

⁷ George Tsebelis, *Veto Players* (Princeton: Princeton University Press, 2002).

⁸ For a detailed discussion of parties treaty obligations, refer to Jordan J. Paust, "Applicability of International Criminal Laws to Events in the Former Yugoslavia," *American University International Law Review* 9, no. 2 (1994) United Nations Commission of Experts, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, S/1994/674* (New York: United Nations Security Council, 1994) International Criminal Law Services, *Domestic Application of International Law* (2013 [cited 5 September 2013]); available from http://wcjp.unicri.it/deliverables/docs/Module_5_Domestic_Application_of_International_Law.pdf.

holding onto power and/or securing the mantle of community defender far surpassed non-compliance with humanitarian norms. Pre-conflict, these sorts of veto players tended to ignore and/or perpetuate human rights abuses in their country as a means of maligning opposition forces.

In cases where the ICTY came up against veto players that identified lower benefits in violating humanitarian norms, its personnel—and third parties using the Tribunal's involvement as a source of leverage—had an easier time in de-escalating civilian violence. In particular, even with moderate enforcement power—meaning ICTY personnel were able to pursue investigations, yet were not a position to secure arrests—the ICTY could tip, or serve as a means for tipping veto players' calculus in favor of pursuing more restraint vis-à-vis civilians. Moreover, the ICTY was better able to marginalize spoilers amongst more moderate veto players by elevating the costs of interacting with them. However, when Tribunal officials confronted more hardline veto players, they required high enforcement power (e.g. the ability to secure arrests) to undermine the high benefits that these actors perceived in shirking humanitarian norms and/or in supporting the spoilers touting such policies.

I.III A Note on Research Design, Data, and Methods

The ICTY was the first international criminal tribunal (ICT) to operate amidst war. It in turn paved the way for the permanent International Criminal Court (ICC), the only other ICT whose jurisdiction covers active conflicts. The aim of both tribunals was to prosecute those persons most responsible for war crimes, crimes against humanity, and genocide. In so doing, members of the international community hope they might deter atrocities, as well as facilitate the restoration of peace. However, to this day, we still know very little about either ICT's actual impact on civilian violence.

Two contrasting perspectives have dominated the limited scholarship that addresses ICTs' impact on hostilities. Optimists hope that international criminal prosecution can help diminish atrocities, particularly over time. The assumption underlying this perspective is that the pursuit of justice addresses the underlying causes of violence, by, among other things, removing parties that might destabilize peace agreements and giving victims a peaceful means of addressing their grievances. Pessimists contend that ICT involvement will either escalate, or exercise no effect vis-à-vis hostilities. Within the context of ongoing conflicts—where there has yet to be a decisive victory—political institutions tend to be weak and social groups fractious. It is naïve to believe that tribunals could change behaviors in such settings, especially when they lack coercive enforcement powers. Indeed, trials—if they have any influence at all—undercut tenuous overtures towards peace by alienating key stakeholders and triggering retaliation.

Both optimistic and pessimistic accounts leave one wondering about the effects of wartime ICTs. In large part, the scholarship has failed to explain ICTs' impact because much of it has relied on vague assertions about the ways these institutions may be affecting hostilities. It has also tended to rely on select (hypothetical) incidents and cases,⁹ to make broad claims about

⁹ For literature that addresses specific cases of ICT impact, see Tim Allen, *Trial Justice : The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006) James Meernik, "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia," *Journal of Peace Research* 42, no. 3 (2005) Michael J. Gilligan, "Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime," *International Organization* 60, no. 4 (2006).

what ICTs can and cannot accomplish in ongoing conflicts.¹⁰ *On Knife's Edge* is different in that systematically examines how and when the ICTY actually affected the course of civilian violence across conflicts.

A. Why the ICTY?

The study employs a case-study technique, which is particularly well suited for determining scope conditions and casual mechanisms. As aforementioned, the only ICTs whose jurisdiction covers active conflicts in which civilian violence was/is a factor include the ICTY and ICC. The ICTY intervened in the conflicts in Croatia, Bosnia and Herzegovina, Kosovo, and Macedonia. The ICC, meanwhile, has intervened in situations in Uganda, the Democratic Republic of Congo (DRC), Darfur, the Central African Republic, Libya, Côte d'Ivoire, and Mali.

I used four criteria to select cases from this population. First, I wanted to focus on situations in which there was wide variation in what wartime ICT officials were able to accomplish. At the launch of this study, the ICC had only just begun its first trial related to the situation in the DRC. It was also facing harsh criticism for its general lack of progress. In other words, at the time, there was greater variation in what the ICTY had and had not been able to accomplish on the ground. I was also especially interested in cases where there were control years of non-ICT involvement, or a period where belligerents operated without the shadow of criminal prosecution hanging over their heads. Again, the ICTY cases were particularly useful in this regard. In particular, the ICTY was the first wartime ICT. The UNSC established it midway through the wars in Croatia and Bosnia. Moreover, it was not immediately clear whether the ICTY would become involved in the Macedonian conflict. The ICTY cases, in other words, present us with the best possible natural experiment in that there are important control years, or in the case of the Macedonian conflict, months, of non-ICTY involvement. Third, in order to gain the most leverage initial leverage into ICTs' wartime impact, I wanted to focus on cases where I could evaluate whether individual incidents actually did ported larger trends. Given that the Yugoslav Wars have been over for quite some time, they provided leverage on this score. Finally, I looked for cases where I would be able to best access sufficient data to evaluate an ICT's wartime role. Again, the ICTY cases fit the bill: the wide interest in the Yugoslav conflicts has generated a treasure trove of fairly detailed longitudinal data regarding what actually occurred. Such data does not yet exist for many of the situations before the ICC.

Finally, an added bonus of focusing on the ICTY cases is that its Office of the Prosecutor had less discretion in selecting which situations to intervene in. In other words, because the Tribunal's jurisdiction covered conflicts in the territory of ex-Yugoslavia since 1991, it had to intervene once it became clear that hostilities on the ground were hot. So, for instance, even though there was uncertainty about whether the ICTY would get involved in Macedonia, once it became clear that clashes were constitutive of a larger conflict, the Office of the Prosecutor had little choice but to get involved given its mandate. The ICC Prosecutor, however, has far more discretion in selecting which situations to pursue. For instance, former Prosecutor Luis Moreno Ocampo was notorious for opting to intervene in situations where he felt the Court could have the greatest political impact. This creates an endogeneity problem given that the Court under

¹⁰ For an extended discussion of both critiques, see Mikaela Heikkilä, "The Balanced Scorecard of International Criminal Tribunals," in *The Effectiveness of International Criminal Justice*, ed. Cedric Ryngaert (Oxford: Intersentia, 2009) Cedric Ryngaert, ed., *The Effectiveness of International Criminal Justice* (Oxford: Intersentia, 2009).

Ocampo selected cases on the basis of the potential impact it might have on civilian violence and other political processes.

While the focus on ICTY cases has proven exceedingly valuable in terms of shedding preliminary insight into how and when ICTs might affect civilian violence, it is important to be clear that the theoretical argument that I advance applies under a specific set of circumstances. Among other things, the ICTY intervened in situations where there were distinct veto players that exercised relatively high control over forces. In this sense, there were clear pressure points that ICTY officials and others could target in order to produce meaningful change on the ground. Such might not be the case in situations before the ICC. In addition, the ICTY went after many top leaders towards the end of various wars, and just before foreign military forces arrived on the ground. The ICC, on the other hand, has gone after spoilers in situations where foreign military forces are not always in play, and where combatants are less inclined to end hostilities. In this sense, targeted elites might have more room to lash out or stall efforts to mediate violence. Ultimately, however, the ICTY's experience will prove a useful springboard for evaluating the ICC's effect on these other situations, especially as more accessible and in-depth data on these cases becomes available.

B. Research Data and Methods

This study is based on extensive fieldwork in The Netherlands and Southeast Europe (in particular, in Croatia, Bosnia and Herzegovina, Serbia, Kosovo, and Macedonia) undertaken over a five-year span from 2009 until 2013. During this time, I completed extensive analyses of local and international media reports, UN documents, and archival materials collected in the field (for instance, local NGO press releases, reports, and so forth). In addition, I conducted in-depth, semi-structured interviews with roughly 200 participants. In particular, I interviewed a number of individuals intimately familiar with the work of ICTs, including such figures as Professor M. Cherif Bassiouni. I also interviewed a wide range of court officials from the ICTY and ICC (including former ICTY Chief Prosecutors Richard Goldstone, current President Theodor Meron, and Judge Claude Jorda). Moreover, I conducted interviews with an array of government officials, lawyers, journalists, human rights activists, and former combatants from Southeast Europe. I primarily conducted these interviews in Bosnian-Croatian-Serbian, and then worked with native speakers to transcribe, as well as translate recordings. Interviews lasted anywhere from thirty minutes to two hours. I did re-interview some participants. Finally, wherever possible in the chapters that follow, I identify the name of participants whom I quote or paraphrase. However, given the sensitive nature of the research, many people I interviewed requested that they remain anonymous.

The study employs a combination of comparative case study technique, process tracing, and counterfactual experimentation. Comparative case study technique involves within- and across-case comparisons (or diachronic and synchronic comparisons). Within-case comparisons allow me to determine the causes of changes in civilian violence through before-and-after comparisons within the same case. As aforementioned, the ICTY only intervened in the final years of the wars in Croatia and Bosnia, and it was not immediately apparent that it would become involved in Macedonia. Through within-case comparisons, I can specifically evaluate whether the ICTY's intervention in the midst of these conflicts *per se* impacted civilian violence. Also, I can control for some of the factors besides the ICTY's intervention that could be affecting the course of non-combatant violence. For instance, by the time the ICTY became involved in the Croatian and Bosnian conflicts, there had already been extensive foreign involvement in them, ranging from peace talks to military intervention.

Across-case comparisons, meanwhile, permit one to examine how various factors influenced outcomes. With this approach, I analyze why belligerents adopted significantly different treatments of civilians by controlling for alternative explanatory variables, such as foreign intervention. In turn, I can focus on instances where there was de-escalation in civilian violence and ask if the same factors across cases held to produce such an effect. I can also do the same for non-impact instances. Asking such questions does not produce selection bias.¹¹ Moreover, doing so can prove particularly useful when the number of cases is limited and many causal explanations appear relevant.¹² Indeed, as Alexander George explains such “standardized, general questions” permit the investigator “to identify the variety of different causal patterns that can occur for the phenomenon in question.”¹³

Process tracing is a means for identifying steps in a causal process that produce a particular outcome.¹⁴ For this study, it involved piecing together and triangulating an array of documents—from UN reports to local/international media reports—and interview data to see which factors were relevant to explaining violence against civilians over time. Through process tracing, it is possible to produce a narrative within each case that can serve as a basis for structured, focused comparison. In other words, it provides muscle to the comparative case study technique. Moreover, process tracing helped me to ascertain the perceived humanitarian norm violation benefits of different veto players, prior to various episodes of civilian violence. Specifically, I triangulate a veto player’s prior statements and policies to look for patterns of behavior indicative of how they might perceive the benefits of violating humanitarian norms.

Counterfactual experimentation is the final method I engaged. It involves crafting clear, logical, and substantively complete simulations in which “variables are given a wide range of counterfactual values to determine the sensitivity of the outcome to changes in one or more of them.”¹⁵ The first step in using this method is determining what factors could be influencing a particular outcome at a given moment in time. There are a number of factors besides ICT intervention that could be impacting civilian violence. Through process tracing, I identify these and other variables that are relevant to explaining hostilities. I then use counterfactual thought experiments to assess each factor’s weight vis-à-vis the outcome.

I.IV The Layout of the Dissertation

¹¹ See, in particular, James Mahoney, “Strategies of Causal Assessment in Comparative Historical Analysis,” in *Comparative Historical Analyses in the Social Sciences*, ed. James Mahoney and Dietrich Rueschemeyer (New York: Cambridge University Press, 2003).

¹² See, in particular, Alexander L. George, “Case Studies and Theory Development: The Method of Structured, Focused Comparison,” in *Diplomacy: New Approaches in History, Theory, and Policy*, ed. Paul Lauren (New York: Free Press, 1979) Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2005) Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry* (Princeton: Princeton University Press, 1994). For a practical application (from which I draw inspiration), see Hendrik Spruyt, *Ending Empire: Contested Sovereignty and Territorial Partition* (Ithaca, N.Y.: Cornell University Press, 2005).

¹³ George, “Case Studies and Theory Development: The Method of Structured, Focused Comparison,” 60.

¹⁴ Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences, Bcsia Studies in International Security* (Cambridge Mass: MIT Press, 2005) 176. A similar definition is presented in James Mahoney, “Strategies of Causal Inference in Small-N Analysis,” *Sociological Methods & Research* 28, no. 4 (2000): 412.

¹⁵ Richard Ned Lebow, *Forbidden Fruit: Counterfactuals and International Relations* (Princeton, NJ: Princeton University Press, 2010) 41. See also Philip E. Tetlock and Aaron Belkin, *Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives* (Princeton N J: Princeton University Press, 1996).

This dissertation has two main goals. First, it uses the experience of the first wartime ICT—the ICTY—as a basis for shedding insight into these institutions’ *actual* impact on civilian violence. The ICTY’s record indicates that ICTs can in fact de-escalate civilian violence under certain conditions. Importantly, there was no evidence that the ICTY escalated one-sided violence. Second, it seeks to build on these findings to develop a theoretical argument about how and when ICTs can de-escalate civilian violence.

Chapter II provides a more extensive overview of the literature and policy debates surrounding ICTs’ impact amidst hostilities. In large part, the existing work on ICTs has suffered from a lack of clarity concerning the roles and purpose of these institutions in wartime, and sometimes even the outcomes its authors are evaluating. I draw on the ICTY’s experience to elaborate a theoretical argument for how and when ICTs can specifically de-escalate non-combatant violence.

Each empirical chapter will subsequently discuss in greater detail how and when the ICTY impacted civilian violence in that specific context. Chapter III examines the ICTY’s intervention in the Croatian War, which is the non-impact case. The Tribunal had low to mixed enforcement power in the Croatian theater, meaning it was highly limited in its ability to function given low support from influential actors. In addition, prior to and throughout the conflict, top leaders recognized substantial benefits in violating humanitarian norms as part of their efforts to secure territory for their communities. Consequently, the ICTY faced an uphill battle in targeting any spoilers, or in serving as a control or source of leverage. Key elites simply did not take the ICTY seriously, nor was it in a position to pursue any spoilers.

Chapter IV focuses on the Bosnian War (1992-95). Unlike in Croatia, the ICTY did play a hand in curbing civilian violence. The Tribunal also had low to mixed enforcement power in Bosnia, securing only enough support from key actors to function in the last year of hostilities. However, ICTY officials confronted some more moderate veto players. As the Bosnian Croat ‘war within a war’ came to an end, new veto players emerged who recognized fewer benefits in violating humanitarian norms. Specifically, in the years prior to their ascendancy to veto player status, these individuals had placed a premium on upholding humanitarian norms, both in their rhetoric and policies. In so doing, they aimed to secure vital international support. The fact that the ICTY was an emerging, independent authority on appropriate wartime behaviors concerned them, as any allegations from the Tribunal could curtail key assistance. Consequently, the ICTY served as a reason for these more moderate veto players to crackdown on criminal elements in their forces, as well as enhance military training. It also provided United States officials with leverage for ensuring that prison camps on all sides effectively closed. However, because the ICTY lacked greater enforcement power—at least until the end of hostilities—it was not able to serve as a source of control or leverage vis-à-vis Bosnian Serb hardliners. Nor could it affect spoiler marginalization. It simply lacked the resources and capacity early on to explicitly target top leaders.

Towards the end of the Bosnian War, however, the ICTY secured greater enforcement power. In particular, as a result of ICTY officials’ lobbying efforts, top U.S. diplomats threatened to arrest any indicted officials if they attended peace talks at Dayton. Consequently, a key spoiler who the ICTY had indicted—Bosnian Serb leader Radovan Karadžić—was unable to attend negotiations. Moreover, the ICTY’s indictments of other top Serb officials enabled western and regional leaders (including Serb President Slobodan Milošević) to marginalize Bosnian Serb leaders from a central decision-making role at Dayton. Thus, because the ICTY

had greater enforcement power vis-à-vis hardliners, it was able to play a role in de-escalating civilian violence through spoiler marginalization.

Chapter IV turns to the ICTY's intervention in the Kosovo War (1998-99). The ICTY had a limited de-escalatory impact on civilian violence in the Kosovo War. Throughout the War, the ICTY was restricted in its ability to follow through on prosecutions, securing mixed support from influential actors. So, while western governments provided Tribunal personnel with vital aerial reconnaissance imagery, credible rumors also predominated that top diplomats would not follow through on high-level arrests. At the same time, hardliners dominated the Kosovar Albanian and Federal Republic of Yugoslavia (FRY; Serbia and Montenegro) leaderships. Veto players in both factions had long recognized numerous benefits in terms of using civilian violence to secure Kosovo. Because the ICTY was unable to secure enough evidence and access to arrest anyone, the ICTY did not constitute much of a threat to top Kosovar Albanian and FRY leaders, especially given more immediate considerations. The ICTY, in other words, was circumscribed in its ability to marginalize spoilers, as well as provide a control or source of leverage vis-à-vis leaders in either faction.

The ICTY did, however, serve as somewhat of a control on select figures in the North Atlantic Treaty Organization (NATO) coalition. The coalitions' past statements and behaviors in Bosnia indicated that it saw zero benefit in violating humanitarian norms. The fact that the ICTY's jurisdiction covered Kosovo—meaning it could call out any behaviors it deemed unlawful—provided select officials with an additional reason for exercising extreme caution when evaluating and selecting targets.

Chapter V looks at the 2001 Macedonian conflict, where the ICTY played a definite role in de-escalating civilian violence. Its officials secured moderate enforcement power, meaning they had backing from influential actors that enabled them to follow through on most prosecutorial efforts, excluding arrests. The leadership of ethnic Albanian forces (referred to as the National Liberation Army, or NLA) constituted one main veto player in the conflict. It perceived lower ex ante benefits in violating humanitarian norms. Prior to the outbreak of hostilities, top NLA leaders' claim to fame was fighting for minority rights. Such a campaign was a vehicle for securing power in a country where the ethnic Albanian minority comprised 20 percent of the population. As an independent authority on wartime behaviors, even the threat of criminal prosecution and/or the 'war criminal' label could thus mean trouble for the rights-oriented NLA. Following Chief Prosecutor Carla Del Ponte's local press conference—during which she emphasized that her office was closely monitoring the conflict—the leadership of the NLA made a concerted effort to ensure that rebel forces respected 'The Hague Tribunal and its war rules.' In other words, the ICTY served as a control on their behaviors. In addition, later on, when international officials recognized that the ICTY constituted a viable threat to NLA leaders, the Tribunal additionally served as a source of leverage.

Meanwhile, the National Security Council—the main veto player for Macedonian forces—was divided between leaders who perceived greater and lesser benefits in violating humanitarian norms, relative to their core interests. The Social Democrats perceived few benefits in non-compliance. They had built their record on rallying western values as a means of securing pivotal support organizations—such as NATO—that could protect them against volatile neighbors on all sides. The other central ruling party at the time—the Internal Macedonian Revolutionary Organization-Democratic Party for Macedonian National Unity (VMRO-DPMNE)—had a mixed track record vis-à-vis minority rights. In the decade prior to hostilities, most of them had monopolized on opportunities to marginalize ethnic Albanians. The fact that

the ICTY had enforcement power in Macedonia provided both moderate voices (e.g. mostly Social Democratic officials) and influential western officials with a source of leverage vis-à-vis those favoring a more extreme response to NLA forces (e.g. mostly VMRO-DPMNE officials). Specifically, they were able to co-opt support away from extremists by providing yet another reason for why indiscriminate violence would be costly. Such leverage facilitated moderate and international officials' efforts to get Macedonian forces to stand down and exercise greater caution in their offensives.

Nonetheless, there were other veto players that perceived substantial benefits in violating humanitarian norms. Amongst ethnic Albanians, there were extremist brigades that controlled territory and coercive means. For years prior to the conflict, they had used those means to secure criminal networks and/or a Greater Albania, regardless of the collateral damage. In addition, later in the conflict, the Minister of Interior and members of his nationalistic party developed their own paramilitary forces, which exercised control over specific areas. Long before the outbreak of hostilities, these officials established a reputation for dealing harshly with ethnic Albanians, who they castigated as terrorists and inferior. In so doing, they aimed to capture votes from nationalistic segments of society and/or from struggling Macedonians who were looking for an outlet for their grievances. Without the ability to access or apprehend such hardline veto players amongst both ethnic Albanians and Macedonians, the ICTY had little impact on their behaviors. Both elements were responsible for the civilian violence that did occur after the ICTY intervened.

The conclusion synthesizes the study's findings. It also presents a detailed discussion on how the ICTY's experience extends to the ICC's involvement in current conflicts. Because the theoretical argument I advance applies under a specific set of conditions, I go on to present an agenda for future research. My study on the ICTY not only provides an important springboard for such work, but also constitutes an important step forward in terms of understanding ICTs' wartime impact.

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Working Draft #3**II****Explaining the International Criminal Tribunal for the former Yugoslavia's Impact on Civilian Violence**

“Without it [the ICTY], I think things would have been much worse because one has to have in mind the entire context, not only us here, but also internationally.”

- Sonja Bišerko,
President of the Helsinki Committee for Human Rights, Serbia¹

II.I Introduction

The post-Cold War era has witnessed horrific violence against civilians. The wars associated with the break-up of Yugoslavia were particularly brutal. Graphic images from prison camps in Bosnia, along with the destruction of historic cities throughout the region, grabbed international headlines. Citizens in Sarajevo not only faced a siege that surpassed 1,000 days, but also regular sniper fire from the hills enclosing the city. Sexual violence was rampant. Hundreds of thousands of civilians fled war-torn regions in Croatia, Bosnia, and then Kosovo. For the first time, the term ‘ethnic cleansing’—a literal translation of ‘*etničko čišćenje*’ in Bosnian-Croatian-Serbian—became commonplace in international parlance.

In establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and a subsequent generation of international criminal tribunals (ICTs), members of the international community sought to craft devices that could curb such atrocities and perhaps break the cycles of violence that perpetuate them. And yet, by holding out the threat of criminal prosecution, ICTs could potentially delay the end of hostilities as parties hold out for immunity, or even trigger violent retaliation. Twenty years after the creation of the first post-Cold War ICT, we still know very little about wartime ICTs’ *actual* impact.

The ICTY’s experience sheds key, preliminary insight into how and when ICTs’ affect violence against civilians. Specifically, the Tribunal’s record indicates that wartime ICTs can in fact play an important role in de-escalating civilian violence. In particular, they can marginalize spoilers, serve as a control, and provide useful leverage to international and/or domestic mediators. However, ICTY officials were only able to affect these de-escalatory roles in the presence of two conditions. Mainly, the support they received from influential actors (e.g. their enforcement power), coupled with the *ex ante* benefits that belligerent veto players perceived in violating humanitarian norms, mediated its impact. When ICTY personnel came up against veto players that identified lower advantages in violating humanitarian norms, even with limited enforcement power, the Tribunal was able to play a meaningful role in curbing one-sided violence. However, when ICTY officials primarily confronted veto players that viewed violating humanitarian norms as secondary to the achieving their immediate interests, Tribunal personnel required high enforcement power (e.g. the ability to secure arrests) in order to have any impact.

¹ Sonja Bišerko, *Interview with Author* (26 June 2013).

Working Draft #3

Importantly, the ICTY did not escalate civilian violence during the wars associated with the break-up of Yugoslavia, challenging notions that ICTs prolong or escalate violent processes.

Chapter II goes on to introduce the limited scholarship on ICTs' role in hostilities. It then draws on the experience of the ICTY in order to detail the theoretical argument for how and when wartime ICTs can de-escalate the course of non-combatant violence.

II.II ICTs Impact on Civilian Violence in Ongoing Conflict: The Little That We Know

Three distinct literatures, along with the peace versus justice debate playing out among policy-makers, speak to ICTs' impact on civilian violence. The comparative politics literature on transitional justice examines how different mechanisms—such as trials—impact societies emerging from conflict and/or an authoritarian past. In large part, this scholarship focuses on truth commissions, as opposed to trials before international tribunals. Given its post-conflict and truth commission orientation, the transitional justice scholarship can tell us little about how and when ICTs might actually impact civilian violence while wars are still underway. However, such accounts do suggest that trials can have one of two effects, which might extend to war settings. On the one hand, trials can potentially undercut social grievances that feed conflict by providing war-affected parties with a non-violent mode of redress.² At the same time, however, trials and other justice mechanisms might in fact open-up new political and social divisions that could fuel conflict. Snyder and Vinjamuri are particular proponents of this viewpoint.³ They argue that post-conflict and/or post-authoritarian societies are extremely fragile. Entrenched elites are unlikely to handover power to a new regime if they are likely to face trial and/or some sort of truth-seeking initiative. Consequently, trials and truth commissions should only take place alongside amnesty agreements.

The discussion in the transitional justice literature concerning the impact of trials dovetails directly with the 'peace versus justice' debate that is taking place in the international law (IL) scholarship and among practitioners. So-called 'justice advocates' hope that international criminal prosecution can help diminish atrocities, particularly over time.⁴ The assumption underlying this perspective is that the pursuit of justice addresses the underlying causes of violence, by, among other things, removing parties that might destabilize peace

² See, for instance, Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2002) Juan Mendez, "Accountability for Past Abuses," *Human Rights Quarterly* 19, no. 2 (1997).

³ Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2003).

⁴ See, for instance, Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal," *Human Rights Quarterly* 20, no. 4 (1998) M. C. Bassiouni, "Justice and Peace: The Importance of Choosing Accountability over Realpolitik," *Case Western Reserve Journal of International Law* 35 Part 2 (2003) Helen Durham and Timothy L. H. McCormack, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, vol. 2, *International Humanitarian Law Series* (The Hague ; Boston: M. Nijhoff Publishers, 1999) Mark S. Ellis, "Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability: The Role of International War Crimes Tribunals," *Journal of National Security Law and Policy* 2, no. 1 (2006) Catherine Lu, "The International Criminal Court as an Institution of Moral Regeneration: Problems and Prospects," in *Bringing Power to Justice? : The Prospects of the International Criminal Court*, ed. Michael Milde, Richard Vernon, and Joanna Harrington (Montreal ; Ithaca N Y: McGill-Queen's University Press, 2006) Dominic McGoldrick, "The Legal and Political Significance of the Permanent International Criminal Court," in *The Permanent International Criminal Court*, ed. Dominic McGoldrick, Peter Rowe, and Eric Donnelly (Oxford: Hart Publishing, 2004) Theodor Meron, "The Case for War Crimes Trials in Yugoslavia," *Foreign Affairs* 72, no. 3 (Summer 1993) Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100, no. 8 (1991).

Working Draft #3

agreements. Moreover, by removing disruptive leaders, or spoilers, ICTs can play a role in ensuring peace in the long-term. Proponents of the ‘peace’ side of the debate contend that trials might undermine tenuous peace processes.⁵ In other words, the threat of criminal prosecution might alienate key stakeholders (or, spoilers) from reaching any agreement unless they also secure amnesty. Peace proponents additionally point out that ICTs might potentially trigger violent retaliation. For instance, the threat of criminal prosecution might make it more difficult for humanitarian aid workers and activists to operate on the ground. As J.R. Crawford summarizes, “when you create an *ad hoc* tribunal, the tribunal itself becomes part of the dispute.”⁶

The international relations (IR) literature on international organizations—along with the broader IL scholarship—also speaks to ICTs’ wartime impact. However, unlike transitional justice and peace versus justice versions, the IR and IL literatures provide greater insight into when ICTs might have an effect on civilian violence. To start, realist-oriented accounts suggest that ICTs are unlikely to have much of an impact unless they secure the backing of a powerful state actor.⁷ A liberal variant that Gary Bass advances suggests that ICTs require the support of domestically liberal states both for their establishment and subsequent functioning.⁸ In both accounts, influential and/or liberal backers provide ICTs with their enforcement power (e.g. the ability to secure arrests), which is essential if these institutions are to have any impact on the ground. However, such accounts fail to theorize about what sort of impact ICTs might have should they secure the backing of a powerful and/or liberal actor. Moreover, the ICTY’s experience reveals two flaws in realist and liberal takes concerning ICTs’ wartime role. First, while the ICTY did depend on the support of influential actors to function, it did not always require them to execute arrest warrants in order to have an impact. In other words, even with limited support from powerful actors, the ICTY was able to have an impact on the ground. This had to do with the fact that Tribunal officials were interacting with a range of state and non-state actors as part of their prosecutorial efforts, which constitutes the second flaw with IR and IL arguments. Rather, the extent of authority that various belligerents had, along with the benefits they perceived in terms of violating humanitarian norms, mediated the ICTY’s impact. Such findings find support among constructivist IR theory on international organizations. In particular, constructivist analyses suggest that state actors’ perception of their identity and interests—resultant from their interactions with other (state) actors—are exceedingly important for understanding their behaviors. For instance, some state actors might want to appear modern. They will turn to international organizations in order to learn what this means. The ICTY in this scenario is an authority on appropriate wartime behaviors for a modern state. In this sense, it

⁵ See, for instance, Helena Cobban, "Think Again: International Courts," *Foreign Policy* (March-April 2006) James Richard Crawford, "The Internationalization of Criminal Law, Remarks. Proceedings of the American Society of International Law." (1995) Anthony D'Amato, "Peace Vs. Accountability in Bosnia," *The American journal of international law* 88, no. 3 (July 1994).

⁶ Durham and McCormack, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* Payam Akhavan, "Current Developments: The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment," *American Journal of International Law* 90, no. 3 (1996).

⁷ See, for instance, Jack Goldsmith, "The Self-Defeating International Criminal Court," *The University of Chicago Law Review* 70, no. 1 (2003) Jack Goldsmith and Stephen D. Krasner, "The Limits of Idealism," *Daedalus* 132, no. 1 (2003) Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?," *Washington University Law Quarterly* 84, no. 4 (2006).

⁸ Gary Jonathan Bass, *Stay the Hand of Vengeance : The Politics of War Crimes Tribunals*, Princeton Studies in International History and Politics (Princeton NJ: Princeton University Press, 2000).

Working Draft #3

might prompt state parties seeking membership in the modern state club to make more of an effort to uphold international humanitarian norms.⁹

Overall, each of three literatures—in tandem with the ongoing peace versus justice debate—provides only a cursory and a rather vague take on ICTs' wartime role. Transitional justice scholars along with IL scholars and practitioners engaged in the peace versus justice debate point out the different impacts that ICTs might be having. However, such accounts are unclear about how and when ICTs might have various effects. For instance, transitional justice and IL scholars frequently cite spoiler marginalization as a function that ICTs can perform. And yet, they do not explicitly clarify what they mean by spoiler marginalization. Does it involve the full-scale isolation of a spoiler in a prison cell, or does an indictment that results in the exclusion of a spoiler from peace talks suffice? Moreover, when is removing a spoiler likely to make resolving a conflict or stopping civilian violence more or less difficult?

Meanwhile, even though the IR and IL scholarships provide some clues as to when ICTs might be able to have an impact on combatant behaviors, they have largely failed to address how ICTs might endeavor to do so, or what sort of impact they are likely to have given certain conditions. So, for example, while realist and liberal variants underscore that ICTs require the support of influential (most likely liberal) state actors in order to have any impact, they neglect to explain how much support ICTs need to have various effects. Moreover, by focusing primarily on the establishment of ICTs, as opposed to their actual functioning, these versions similarly lose sight of the fact that ICTs interface with a variety of state and non-state actors as part of their prosecutorial efforts.

In addition, all three literatures, along with the policy debate surrounding ICTs' wartime impact, frequently neglect to clarify the outcome in question. For instance, countless transitional justice and IL scholars, along with many practitioners, frequently focus on deterrence as a role that ICTs can perform in wartime. However, deterrence involves preventing behavior, meaning it involves a non-event. And yet, deterrence proponents fail to clarify how we know this non-event when we see it, or how we can even measure it. In addition, the limited work that explicitly addresses ICTs' wartime role has predominately relied on select (hypothetical) incidents and cases,¹⁰ to make broad claims about what ICTs can and cannot accomplish in conflicts.¹¹ Thus, all three scholarships and the current policy debate surrounding ICTs have largely left open the questions of how and when these institutions might *actually* impact hostilities in different ways.

In order to enhance our understanding of ICTs' impact on civilian violence, the chapter proceeds to explicitly define its outcome of interest: civilian violence in ongoing conflicts. It then draws on a wealth of cross-case data in order to detail a theoretical argument for how and when ICTs can affect civilian violence.

⁹ Martha Finnemore, *National Interests in International Society*, Cornell Studies in Political Economy (Ithaca, N.Y.: Cornell University Press, 1996).

¹⁰ For literature that addresses specific cases of ICT impact, see Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006); James Meernik, "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia," *Journal of Peace Research* 42, no. 3 (2005); Michael J. Gilligan, "Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime," *International Organization* 60, no. 4 (2006).

¹¹ For an extended discussion of both critiques, see Mikaela Heikkilä, "The Balanced Scorecard of International Criminal Tribunals," in *The Effectiveness of International Criminal Justice*, ed. Cedric Ryngaert (Oxford: Intersentia, 2009); Cedric Ryngaert, ed., *The Effectiveness of International Criminal Justice* (Oxford: Intersentia, 2009).

Working Draft #3**II.III The Dependent Variable: Violence Against Civilians in Ongoing Conflicts**

The study focuses on ebbs-and-flows in the number of episodes of civilian violence over time. Violence against civilians consists of social interactions in which coordination among belligerent parties results in the infliction and attendant reception of severe damage to persons, their rights, and/or objects. These exchanges may involve any number of direct (e.g. actors that inflict the actual damage) or indirect (e.g. actors that intentionally support actors that actually produce violent acts) perpetrators of damage. However, if there is only one direct perpetrator, there needs to also be at least one indirect perpetrator as well. There are a whole host of labels for this sort of violence. For instance, political scientists might refer to these acts as extreme forms of collective violence or one-sided violence; criminologists tend to classify them as state crime, organizational crime, or political crime; lawyers typically call such acts structural criminality or system criminality; and policy makers use the terms atrocities, non-combatant violence, and civilian violence.

The definition of civilian violence presented here encapsulates the extant literature's emphasis on coordination and injury as key dimensions of violence against civilians, drawing particular inspiration from Tilly (2003).¹² I focus on civilian violence that occurs amidst ongoing conflicts, or settings in which there is armed combat between parties. In such settings, relatively high-levels of coordination exist, meaning participants overwhelmingly inflict damage on the basis of advance planning and/or on behalf of a centralized locus of leadership (such as a state, or paramilitary group).¹³ Specific manifestations of 'severe damage' include war crimes, crimes against humanity, and genocide. However, the definition differs in its numerical emphasis of two or more direct or indirect perpetrators of violence.¹⁴ Most extant conceptualizations emphasize that there need to be two or more direct perpetrators. In reality, however, it only takes one individual to commit a genocidal act, yet he or she is not necessarily acting alone—this direct perpetrator might be acting on behalf or supported by an indirect perpetrator.

It is important to underscore upfront that data on civilian violence is generally incomplete. Among other things, it is exceedingly difficult to collect data during a conflict. In addition, reporting is imperfect given the chaotic and traumatic circumstances of a war and the fact that most institutions responsible for keeping track of deaths in the population tend to collapse. Moreover, there is a wealth of under-reporting. For instance, if an entire family perishes, there is no one left to report the crime. Finally, many sources frequently rely on the same witness to verify information.¹⁵ Consequently, each case chapter triangulates data from

¹² Steven E. Snowden Lynne L. Barkan, *Collective Violence* (Boston, Mass: Allyn and Bacon, 2001) Craig Summers and Eric Markusen, *Collective Violence : Harmful Behavior in Groups and Governments* (Lanham, Md.: Rowman & Littlefield, 1999) Charles Tilly, *The Politics of Collective Violence, Cambridge Studies in Contentious Politics* (Cambridge: Cambridge University Press, 2003).

¹³ Tilly, *The Politics of Collective Violence*.

¹⁴ Summers and Markusen 1999 emphasize that collective violence occurs as a result of "the joint contribution of others" (p. xi). While this number is largely case contingent, "the number of *perpetrators* [sic] can range from a small group to an entire society" and "the number and type of *victims* [sic]" can "range widely" from "a gang attack on a single person" to "harm to an entire population or ethnic group" (p. xi). Tilly 2003 offers a more explicit sense of the numerical side of collective violence: it "involves at least two perpetrators of damage" (p. 3).

¹⁵ For a detailed discussion of issues regarding data on civilian violence, refer to Catrien Bijleveld, "Missing Pieces. Some Thoughts on the Methodology of the Empirical Study of International Crimes and Other Gross

Working Draft #3

various sources—ranging from Armed Conflict Event Location Data to data from the Demographics Department at the ICTY—in order to get a sense of general trends in civilian violence over time. An appendix explains which data sources each case chapter draws on, as well as evaluates what these sources do and do not tell us about trends in civilian violence.

II.IV The ICTY's Wartime Roles

During the Yugoslav Wars, the ICTY played a key part in de-escalating civilian violence through spoiler marginalization and by serving as a control on combatant behaviors. In addition, the threat of criminal prosecution before the ICTY provided international and domestic officials with important leverage in their efforts to curb atrocities. In what follows, I explain each role and its de-escalatory logic. The next section (II.V) clarifies the conditions that enabled the ICTY to effectively perform each role, and thereby play a hand in curbing one-sided violence.

A. ICTY Wartime Role #1: Spoiler Marginalization

Any prosecutorial effort that impinges on a spoiler's ability to realize his or her immediate interests constitutes spoiler marginalization. 'Spoilers' are typically defined as the leaders and parties "who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it."¹⁶ This study defines spoilers in slightly broader terms. In particular, it views a spoiler as someone who plays a key role in initiating, committing, and deploying violence as a means of securing their interests, but not necessarily in the context of peace negotiations. They are the perpetrators, as well as those leaders who can block a peace agreement. So, for example, the study would classify Bosnian Serb President Radovan Karadžić as a spoiler, long before he participated in any peace negotiations. Other spoilers might include specialists in violence, such as Ratko Mladić (the leading Bosnian Serb military leader). The main point is that spoilers in this study—regardless of whether peace is imminent—are the architects of civilian violence, responsible for instigating, coordinating, and perpetuating it.

ICTY officials specifically played a role in sidelining spoilers by investigating and/or indicting them. The surest way of marginalizing spoilers would have been to secure their arrest and/or detention. However, ICTY personnel never managed to secure the arrests of top leaders while wars in the region were ongoing. Nonetheless, even the hint of an investigation and/or indictment proved damaging to some of the spoilers that it did pursue. For example, as a result of his indictment before the ICTY, Karadžić was unable to attend peace talks at Dayton. He consequently lost out on a lot of deals that would have benefited him and his leadership.

In addition, even though ICTY officials did not necessarily set out to marginalize spoilers per se, they increasingly focused their efforts on such high-level offenders.¹⁷ For example, former ICTY Chief Prosecutor Richard Goldstone maintained that the Office of the Prosecutor (OTP) needed to build a sufficient evidentiary base against top-level leaders before it could go after them. Consequently, his office's indictments initially focused on lower-level perpetrators,

Human Rights Violations," in *Supranational Criminology: Towards a Criminology of International Crimes*, ed. Alette Smeulers and Roelof Haveman (Antwerp: Intersentia, 2008).

¹⁶ Stephen John Stedman, "Spoiler Problems in Peace Processes," *International Security* 22, no. 2 (1997): 5. See also Marie-Joelle Zahar, "Reframing the Spoiler Debate in Peace Processes," in *Contemporary Peace Making : Conflict, Violence, and Peace Processes*, ed. John Darby and Roger MacGinty (New York: Palgrave Macmillan, 2003).

¹⁷ Ellen L. Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009).

Working Draft #3

including Duško Tadić.¹⁸ As a result of the information gleaned from trying ‘little fish,’ the OTP was able to pursue big-name indictments against such personalities as Mladić and Karadžić.¹⁹

The ICTY’s experience indicates that when its officials effectively subverted a spoiler’s ability to go about business as usual, they were able to play a key role in de-escalating non-combatant violence. Relational accounts from the collective violence literature²⁰ and supranational criminologists²¹ shed insight as to how Tribunal personnel managed to do so. Both scholarships underscore the key role that high-level military and political leaders can play in facilitating atrocities. In particular, well-placed and resourced elites (e.g. spoilers) use violence against civilians as part of a strategic policy aimed at securing and/or advancing their position. They play an essential role in both launching and then coordinating atrocities. Specifically, they use their resource-advantage (for example, their access to information and/or military forces) to channel social grievances in violent directions where civilians who are perceived as complicit become the targets. In other words, without them, mass violence would be much more difficult to realize.

The implication of the relational-collective violence and supranational criminology literatures is that in effectively marginalizing even one spoiler, ICT officials can play an important role in de-escalating civilian violence. It takes more than one spoiler to facilitate violence against civilians, yet each spoiler brings something unique to the table (for instance, political acumen and/or military expertise). Sidelining one such actor—at least in the short-term—can impair the overarching campaign. Specifically, it will likely be difficult and/or simply take time to successfully replace the spoiler with an equally adept successor. Moreover, isolating a spoiler sends a strong message to others that they are fair game as well, making it harder for them to go about business as usual.

¹⁸ Duško Tadić is a former Bosnian Serb leader and member of paramilitary forces. For more details on him and his trial, see Michael P. Scharf, *Balkan Justice : The Story Behind the First International War Crimes Trial since Nuremberg* (Durham N C: Carolina Academic Press, 1997).

¹⁹ Richard Goldstone, "Interview with Author," (22 June 2009) Richard Goldstone, *For Humanity : Reflections of a War Crimes Investigator, The Castle Lectures in Ethics, Politics, and Economics* (New Haven: Yale University Press, 2000).

²⁰ V. P. Gagnon, *The Myth of Ethnic War : Serbia and Croatia in the 1990s* (Ithaca, NY: Cornell University Press, 2004) Stathis N. Kalyvas, "The Logic of Violence in Civil War," (Cambridge: New York, 2006) Elisabeth Jean Wood, "The Social Processes of Civil War: The Wartime Transformation of Social Networks," *Annual Review of Political Science* 11 (2008) Barkan, *Collective Violence* Stuart J. Kaufman, *Modern Hatreds: The Symbolic Politics of Ethnic War* (Ithaca: Cornell University Press, 2001) Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley Calif: University of California Press, 1985) Doug McAdam, Sidney G. Tarrow, and Charles Tilly, *Dynamics of Contention, Cambridge Studies in Contentious Politics* (Cambridge ; New York: Cambridge University Press, 2001) Tilly, *The Politics of Collective Violence* Karin Aggestam, "Prolonged Peace Negotiations: The Spoiler's Game," in *Unfinished Business: Why International Negotiations Fail*, ed. Guy Olivier Faure (Athens and London: The University of Georgia Press, 2012) Stedman, "Spoiler Problems in Peace Processes."

²¹ Christopher W. Rothe Dawn Mullins, *Blood, Power, and Bedlam : Violations of International Criminal Law in Post-Colonial Africa, New Perspectives in Criminology and Criminal Justice,; V. 2;* (New York: Peter Lang, 2008) Dawn Mullins Christopher W. Rothe, "Symbolic Gestures and the Generation of Global Social Control : The International Criminal Court," in *Critical perspectives on crime and inequality;* (Lexington Books, 2006) Alette Smeulers and Roelof Haveman, *Supranational Criminology : Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008) Alette Smeulers, "Perpetrators of International Crimes: Towards a Typology," in *Supranational Criminology : Towards a Criminology of International Crimes*, ed. Alette Smeulers and Roelof Haveman (Antwerp: Intersentia, 2008) Alette Smeulers, "What Transforms Ordinary People into Gross Human Rights Violators?," in *Understanding Human Rights Violations: New Systematic Studies*, ed. Sabine C. Carey and Steven C. Poe (Aldershot, England: Ashgate, 2004).

B. ICTY Wartime Role #2: Control

The ICTY, and ICTs more generally, are mechanisms of social control. Their purpose is to set the bounds of appropriate behavior. They do so by creating costs for violating atrocity crimes law²², including (the potential for) criminal prosecution, punishment, and/or social stigmatization for being identified as a ‘war criminal.’ ICTs can also engender benefits for actors that uphold norms governing the wartime treatment of civilians. In particular, compliance with an ICT’s rules can engender credibility in certain circles in the sense that one is acting within the bounds of what that circle of actors deems appropriate. For instance, ethnic Albanian leaders in Macedonia made a concerted effort to implement policies aimed at upholding ‘The Hague Tribunal’s [the ICTY’s] war rules’ prior to extensive international intervention. In this way, they sought to burnish their bona fides as a legitimate fighting force, worthy of negotiating with. Moreover, by meting out costs and benefits for certain behaviors, ICTs reaffirm, reinforce, and/or stabilize norms governing non-predatory interactions between citizens.²³

In an effort to enhance conceptual clarity vis-à-vis ICTs’ wartime impact, it is important to briefly clarify the difference between ‘control’ and ‘deterrence.’ Both terms are similar in the sense that they assume a role for ICTs in regulating combatant behaviors. However, as supranational criminologists increasingly emphasize in their own work on ICTs, as a social control, ICTs’ purpose is to change behaviors, whereas deterrence implies preventing behaviors.²⁴ In this sense, the control role involves observables, whereas deterrence involves non-events, which are tricky to measure. In order to gain the most leverage into the ICTY’s effects on civilian violence, this study has opted to focus on observable behaviors, and thus the control role.

While ICTs and courts more generally clearly cannot control all behaviors in a society, they endeavor to make it harder for individuals to perpetrate violations. Jakob von Holderstein Holtermann provides a useful way of thinking about the control role. Drawing on the work of risk analyst James Reason, he refers to ICTs as one successive layer in a block of Swiss cheese, “where each layer is designed to remove” a particular condition that facilitates a violation.²⁵ Von Holderstein Holtermann and Reason refer to the criminal system as a block of Swiss cheese because in complex human structures, it is impossible to design perfect control mechanisms. Rather, the goal is to layer pieces of Swiss cheese so as to avoid a situation where “the holes in many layers momentarily line up to permit a trajectory of accident opportunity.”²⁶ Von

²² There are a number of descriptors for the laws of war crimes tribunals, including international criminal law, international humanitarian law, international human rights law, or the laws and customs of war. None of these labels, however, fully captures the legal frameworks of modern ICTs. I thus use former U.S. Ambassador-at-large for War Crimes Issues, David Scheffer’s term, ‘atrocity crimes law.’ For a detailed discussion of how ‘atrocity crimes law’ constitutes an adept intersection of the four classic descriptors of ICTs’ legal frameworks, refer to David Scheffer, *All the Missing Souls : A Personal History of the War Crimes Tribunals, Human Rights and Crimes against Humanity* (Princeton, N.J.: Princeton University Press, 2012) 424-28.

²³ Andreas von Hirsch and Vivian C. Schorsch, "A System of International Criminal Justice for Human Rights Violations: What Is the General Justification for Its Existence?," in *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford, U.K.: Oxford University Press, 2012), 217.

²⁴ See, for instance, Mullins, *Blood, Power, and Bedlam : Violations of International Criminal Law in Post-Colonial Africa* Smeulers and Haveman, *Supranational Criminology : Towards a Criminology of International Crimes*.

²⁵ Jakob von Holderstein Holtermann, "A "Slice of Cheese"--a Deterrence-Based Argument for the International Criminal Court," *Human Rights Review* 11 (2010): 303 James T. Reason, "Human Error: Models and Management," *British Medical Journal* 320, no. 7237 (2000).

²⁶ Reason, "Human Error: Models and Management," 769.

Working Draft #3

Holderstein Holtermann underscores that ICTs “simply [add] another layer” by generating costs and benefits for certain behaviors. In this sense, it can slow the progress of a particular violation.

Relational-collective violence and rational choice accounts further help us to understand why serving as a control enabled the ICTY to play a role undercutting civilian violence. Both literatures underscore that non-combatant violence results primarily from rational elite calculations that weigh pursuing such processes to be more beneficial than any costs of doing so. Elites, in other words, are in a position to change the status quo policy of pursuing destructive courses of action. By creating costs for harming civilians and benefits for protecting them, ICTs can potentially prompt elites to recalibrate their wartime strategies to capture the most gains, as opposed to losses.

C. ICTY Wartime Role #3: Leverage

In various Yugoslav Wars, international and even domestic actors used the ICTY as part of their own efforts to change the calculus of parties responsible for atrocities. In general, there are two kinds of leverage that international and domestic forces can deploy vis-à-vis (alleged) perpetrators, both of which can involve potential criminal prosecution before an ICT.²⁷ First, mediators can use coercive pressure to manage violence. With this approach, parties use various carrots (for instance, the lifting of economic sanctions) and sticks (for example, the imposition of sanctions) to compel combatants to meet certain demands. Criminal prosecution before an ICT creates another stick for international and domestic actors to use as part of their efforts to manage violence. As regards the ICTY, the bargaining logic here was: if you/we continue this course of action, you/some of us will likely face criminal prosecution before the ICTY.

Second, international and domestic mediators can use symbolic pressure. States and/or even quasi-states actors are social creatures and thus seek to form associational ties with other states.²⁸ In other words, (quasi-) states generally want to belong, especially to clubs of like-minded states. They also want to be perceived as legitimate international actors.²⁹ Being labeled a ‘war criminal’ before an ICT makes it harder for (quasi-) state actors to associate with and secure legitimacy in particular clubs. For instance, as aforementioned, Gary Bass finds that liberal states are most prone to both creating and supporting ICTs.³⁰ If a belligerent actor wants to belong to this liberal club, an ICT’s extension of the war criminal label to him/her/someone in his/her (quasi-) state will make it harder to do so. In this context, international and domestic actors can use the potential stigma of an ICT labeling someone a war criminal to better manage conflict. Thus, symbolic pressure involving the ICTY operated along these lines: if you/we continue this course of action, you/we are likely to draw the ICTY’s attention and your/our state’s status will consequently decline among a community of states that you/we want to belong to.

Once again, the relational-collective violence and rational choice scholarships shed insight into why the leverage role enabled the ICTY in to play a role in curbing atrocities. Specifically, coercive and symbolic pressures can alter the calculus of top elites in ways that

²⁷ This breakdown draws inspiration from Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca, NY: Cornell University Press, 2009).

²⁸ John W. Meyer et al., "World Society and the Nation-State," *American Journal of Sociology* 103, no. 1 (July 1997).

²⁹ Finnemore, *National Interests in International Society*. For a similar argument, see Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 54, no. 4 (2005).

³⁰ Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*.

Working Draft #3

prompt them to pursue more restraint and/or agreements that lead to a de-escalation in civilian violence. In cases where leverage weights the costs of a particular course of action in such a way that it impairs a belligerent faction's ability to go about business as usual, it can prompt them to alter their course of action. This is exactly what the ICTY did in numerous instances. For example, in the case of Macedonia's conflict, international and domestic interlocutors used the threat of likely criminal prosecution before the ICTY—along with other carrots and sticks—to convince the National Security Council (NSC) to refrain from launching an all-out assault on rebel forces in a city close to the capitol. By the NSC's own estimates, such an assault would have resulted in substantial collateral damage. Interview and archival data indicate that the threat of criminal prosecution in this instance proved to be a particularly weighty concern for NSC leaders who were on the fence about proceeding with the offensive. Domestic actors in Macedonia also used the ICTY as a source of leverage for curbing civilian violence. Specifically, the Macedonian president was able to help facilitate an end to civilian violence by proposing that the ICTY determine culpability for war crimes, as opposed to local courts. Ethnic Albanian leaders threatened to continue waging a war that increasingly featured civilian violence if domestic courts handled war crimes prosecutions. However, government officials wanted to ensure that there was some accountability for abuses. The ICTY ensured that there would be trials that would be less biased.³¹ Thus, the ICTY provided a key source of leverage to domestic mediators.

D. A Note on the ICTY's Wartime Roles

Before proceeding to the next section, it is important to first point out the key differences between the spoiler marginalization, control, and leverage roles. Spoiler marginalization and control are both roles that ICTY personnel primarily initiated. So, when their prosecutorial efforts directly targeted a top-level offender, they launched a process of spoiler marginalization. For example, even though the United States ultimately excluded Bosnian Serb President Radovan Karadžić from the Dayton negotiations, they only did so after the ICTY indicted him and then lobbied the U.S. to deny him access to talks. Because the ICTY launched the action that ultimately led to Karadžić's marginalization, this is an example of spoiler marginalization. With control, ICTY personnel's broader prosecutorial efforts operate to change the calculus of combatants regarding the utility of perpetrating violations. For instance, in the Macedonian conflict, ethnic Albanian rebels adopted policies to respect 'The Hague Tribunal and its war rules,' long before international and/or domestic forces used the threat of criminal prosecution as a source of leverage in their efforts to mediate the crisis. Indeed, the uptick in certain policies—including efforts to punish violations and enhance training in atrocity crimes law—came about after then Chief Prosecutor Carla Del Ponte made a very public press conference and visit to the country.

With leverage, a third party—as opposed to ICTY personnel—was responsible for explicitly bringing the Tribunal's involvement directly to the attention of a combatant. For example, in the Bosnian War, the ICTY only came to the attention of Croat President Franjo Tudjman as a potential threat when the U.S. Ambassador conveyed that Croat forces' actions in Bosnia constituted a punishable 'war crime.' Before then, Tudjman and his administration—which had worked to create the Tribunal—fundamentally believed that the ICTY was for Serb forces only. Thus, because a third party primarily brought the Tribunal to the attention of a

³¹ There are also cases where the threat of criminal prosecution might have prolonged the realization of a peace agreement, including that of Joseph Kony in Uganda.

Working Draft #3

combatant, as opposed to anything that ICTY officials had done at that point, this is an example of leverage.

It is additionally worth noting that the three roles can complement each other. For instance, when international forces used potential criminal prosecution before the ICTY as leverage, this amplified the ICTY's control and spoiler marginalization roles by further elevating the costs of pursuing violence against civilians and/or supporting spoilers. A related point is that each role was sufficient for de-escalating civilian violence in the presence of certain conditions, which the next section turns to.

II.V When ICTY Officials' Work Facilitated the De-escalation of Civilian Violence

In order for ICTY officials' work to effectively marginalize spoilers, serve as a control, and/or provide a key source of leverage to international and domestic mediators, two conditions needed to be present. Mainly, the extent of support that ICTY personnel secured from influential actors (or, the strength of their enforcement power), along with the benefits that veto players perceived in violating humanitarian norms, jointly determined when the Tribunal was able to de-escalate civilian violence in performing these roles. The following section details both conditions.

A. Condition #1: Enforcement Power Strength

The ICTY's Statute tasks it with "prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia..."³² The Tribunal's 'enforcement power' concerns its ability to carry out this mandate. In order to prosecute alleged war criminals, ICTs such as the ICTY need—among other things—to be able to conduct investigations so that they can issue, amend, and confirm indictments. In turn, they need to secure arrests and be able to hold trials in order to achieve judgments. An ICT's enforcement power thus hinges on the extent to which it can pursue a range of prosecutorial tasks, from being able to conduct investigations through to securing judgments.

Two factors determined the strength of the ICTY's enforcement power. The first factor was the level of assistance that the Tribunal received.³³ The ICTY is dependent on third parties to operate at all. Specifically, they fund it, as well as provide an array of other vital resources such as personnel, a base of operations, and expertise. These forms of assistance allow the Tribunal's staff to pursue a limited set of prosecutorial tasks, and, as such, constitute a low level of assistance. For instance, because the ICTY lacked funding, resources, and personnel

³² United Nations Security Council, *Resolution S/Res/827* (New York, N.Y.: United Nations Security Council 3217th Meeting, 25 May 1993).

³³ Early scholarship on ICTs stressed that these institutions only require the support of powerful, unitary actors to function. See, for instance, Goldsmith, "The Self-Defeating International Criminal Court" Goldsmith and Krasner, "The Limits of Idealism" Stephen D. Krasner, *Interview: Conversations with History* (Institute of International Studies, University of California, Berkeley, 31 March 2003 [cited 5 June 2013]); available from <http://globetrotter.berkeley.edu/people3/Krasner/krasner-con0.html> Christopher Randolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals," *International Organization* 55, no. 3 (2001). However, more recent work stresses the array of actors that ICTs interface with in order to secure their enforcement power. See, for instance, Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (New York: Cambridge University Press, 2008) Christopher K. Lamont, *International Criminal Justice and the Politics of Compliance* (Farnham, England: Ashgate, 2010) Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State, Cambridge Studies in Law and Society* (New York: Cambridge University Press, 2010).

Working Draft #3

(including a prosecutor) in its first year and a half of functioning, it was highly circumscribed in what it could do. While new judges were able to draft the Tribunal's Rules of Procedure, the OTP was really only able to accumulate evidence from third parties, which it could not act upon given the absence of a Chief Prosecutor and limited evidence-vetting resources (for example, translators). In addition, whereas the Nuremberg and Tokyo Tribunals had an occupying military force to carry out their orders, modern ICTs must instead negotiate with a range of parties to secure evidence, access to crime scenes, and arrests. The support of state actors is especially important in this regard. As former ICTY President Antonio Cassese underscored in a 1997 report to the UNSC: "If States...refuse to implement orders or to execute warrants, the Tribunal will turn out to be utterly impotent. Thus if greater respect is accorded to the authority of States than the need to deter gross abuses of human rights, this will place severe limitations on what the Tribunal can achieve."³⁴ ICTY and other ICT insider accounts stress that securing arrests constitutes the highest level of assistance that tribunals can achieve. The un-substantiated assumption of much of the scholarship on ICTs—as aforementioned—is that without the ability to arrest suspects, these tribunals are highly limited in what they can accomplish. However, the experience of the ICTY indicates that this might not always be the case. The next highest level of assistance that the ICTY maintained involved access to crime scenes and evidence.³⁵ Securing either level of support is extremely challenging for ICT officials generally.³⁶

Besides the level of assistance that the ICTY secured, who provided it shaped its enforcement power. ICT insiders and scholars indicate that tribunals need support from an influential actor, or an actor who has something that a critical mass of political and military elites in a conflict identify with, or need.³⁷ An influential actor can, for instance, withhold key recognition, aid, the use of (para-) military forces, or membership in an international

³⁴ ICTY, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (New York: United Nations, 18 September 1997) 43.

³⁵ Scharf, *Balkan Justice : The Story Behind the First International War Crimes Trial since Nuremberg* Goldstone, *For Humanity : Reflections of a War Crimes Investigator* Pierre Hazan, *Justice in a Time of War : The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, 1st ed., Eugenia and Hugh M. Stewart '26 *Series on Eastern Europe* (College Station: Texas A & M University Press, 2004) Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor : Confrontations with Humanity's Worst Criminals and the Culture of Impunity : A Memoir* (New York: Other Press, 2008) Florence Hartmann, *Paix Et Châtiment : Les Guerres Secrètes De La Politique Et De La Justice Internationales* (Paris: Flammarion, 2007).

³⁶ M. Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability," *Law and Contemporary Problems* 59, no. 4 (1996) Peskin, *International Justice in Rwanda and the Balkans : Virtual Trials and the Struggle for State Cooperation* John Hagan, *Justice in the Balkans : Prosecuting War Crimes in the Hague Tribunal, Chicago Series in Law and Society* (Chicago: University of Chicago Press, 2003) Nerma Jelacic, ICTY, Registry, *Interview with Author* (The Hague, The Netherlands: 11 June 2009) Nerma Jelacic, ICTY, Registry, *Interview with Author* (The Hague, The Netherlands: 15 March 2012) Aleksandar Kontic, ICTY, OTP, *Interview with Author* (The Hague, The Netherlands: 12 June 2009) Theodor Meron, *Interview with Author* (The Hague, The Netherlands: 17 June 2009) Bob Reid, *Interview with the Author* (The Hague, The Netherlands: 20 March 2012) David Tolbert, *Interview with Author* (New York, N.Y.; Zagreb, Croatia: 4 April 2012) Mirko Klarin, *Interview with the Author* (The Hague, The Netherlands: 19 March 2012) Daniel Saxon, *Interview with the Author* (Chicago, IL: 11 May 2011).

³⁷ For ICT insider accounts that speak to the need for support from powerful actors, see footnotes 19 and 36. For ICT scholarship that addresses these tribunals' need for backing from influential actors, see, for instance, James Meernik, "Reaching inside the State: International Law and Superior Liability," *International Studies Perspectives* 5, no. 4 (2004) Randolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" Peskin, *International Justice in Rwanda and the Balkans : Virtual Trials and the Struggle for State Cooperation* Lamont, *International Criminal Justice and the Politics of Compliance* ibid.

Working Draft #3

organization. Who an influential actor is may vary over time and does not necessarily need to be a state, or international force. So, a renowned activist or politician on the ground could withhold key resources that a political and/or military elite needs in order to mobilize a violent campaign. However, as the ICTY's record indicates, more likely than not, the influential actors assisting an ICT are likely to be internationals. This is because ICTs frequently intervene in situations where the most powerful domestic actors are responsible for atrocities, and are thus unlikely to voluntarily incriminate themselves by assisting court officials. An influential actor can use whatever power they have over different conflict participants in order to secure (more) access, evidence, and arrests for an ICT. Without the backing of an influential actor, an ICT will be unable to prosecute alleged war criminals.

The strength of the ICTY's enforcement power thus depended on the level of assistance that it secured from influential actor(s). Both factors were jointly necessary and sufficient for the Tribunal to have any enforcement power. This means that without assistance from an influential actor, Tribunal officials would have been unable to complete prosecutions. Ultimately, it was the level of support that ICTY officials secured from powerful benefactors that specifically determined the strength of its enforcement power. In other words, the ICTY's enforcement power was strong—meaning it had the tools necessary to achieve prosecutions—when it maintained broad assistance from key actors. In such a scenario, there were actors capable and willing of securing arrests, as well as providing ICTY officials with access, evidence, and basic operational powers. Enforcement power was moderate when ICTY personnel maintained some assistance from key actors, such that they could pursue prosecutorial tasks short of arrests. Enforcement power was low when the ICTY maintained only limited assistance from key actors. In this scenario, Tribunal officials were—at best—only able to conduct partial investigations using evidence collected by third parties. I gauge the level of enforcement power the ICTY had by ascertaining the actual resources that key actors provided to the Tribunal over time. Besides the ICTY's own annual reports, insider accounts—along with countless interviews with ICT officials—shed insight into the specific forms of support the Tribunal received from influential actors at various points in time. Table 1 provides an overview of the condition of enforcement power strength.

B. Condition #2 Humanitarian Norm Violation Benefits

Belligerent veto players are the collective or individual actors whose agreement is necessary to change the status quo policy regarding the use of force.³⁸ To count as a belligerent veto player, collective or individual actors need to head up a formally organized group that has some control over territory and coercive means. Veto players make it possible for other actors to refrain from perpetrating violence. In other words, lower-ranking troops might be able to take some steps to curb civilian violence, but unless their superiors are also similarly inclined, such restraint is unlikely to last.³⁹ In cases where a state party is a warring faction, it is possible to identify veto players vis-à-vis a constitution. In other instances, veto players are the collective or individual actors whose input is essential to a group before taking on a course of action. For instance, their signatures might appear on military orders, and/or elites, as well as parties on the

³⁸ George Tsebelis, *Veto Players* (Princeton: Princeton University Press, 2002).

³⁹ In one example, a United Nations Protection Force (UNPROFOR) official indicated that a commander opted to pull his troops out of an area where an opponent had recently murdered a swath of civilians. He feared that his troops would carry out revenge for the murders. After the commander pulled his troops back, however, he was transferred and demoted. His replacement subsequently returned to the area where forces proceeded to carry out revenge killings. UNPROFOR Official, *Interview with Author* (1 July 2013).

Working Draft #3

ground, will differ to their decision-making. Briefly, it is worth underscoring that veto players constitute a broader category of actors than spoilers. While veto players might include spoilers, they are not always the architects of civilian violence. For instance, the North Atlantic Treaty Organization (NATO) was a veto player in the Kosovo War.

The ICTY's role in de-escalating civilian violence hinged in part on the ex ante benefits that veto players perceived in violating humanitarian norms. By 'humanitarian norms,' I am referring to fairly universal principles prohibiting extreme violence against other members of a society. In a broad sense, the societal norm of, 'do no harm.' I am also referring to international and domestic laws governing the treatment of civilians and their rights. So, for instance, during the Yugoslav Wars, a number of international humanitarian law (IHL) and human rights treaty obligations existed for parties. Among others, belligerents were obligated to uphold the United Nations Charter; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions and 1977 Protocols; the 1966 Covenant on Civil and Political Rights; as well as the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Moreover, the 1977 Criminal Code of Yugoslavia, which carried over into the laws of many newly independent, ex-Yugoslav republics, similarly featured numerous provisions upholding international and domestic prohibitions against civilian violence.⁴⁰ Veto players in the Yugoslav Wars were generally aware of humanitarian norms. Among other things, many top military leaders—who belonged to the Yugoslav National Army before joining up with their own national armies—received mandatory training on IHL, a key area of atrocity crimes law. Yugoslav citizens also had a military service requirement, which featured such training. Moreover, as aforementioned, veto players' own laws contained a number of provisions upholding IHL. In other words, while veto players might not have been aware of all the intricacies of atrocity crimes law (which burgeoned tremendously after the fall of Yugoslavia), they were at least generally familiar with its main prohibitions.

Ex ante, different veto players in a conflict perceived more or less benefit, relative to their core interests, in violating humanitarian norms. Humanitarian norm violation benefits were higher when, ex ante, a belligerent veto player prioritized interests for which non-compliance was perceived as the most expedient way of proceeding to achieve those interests. For example, Slobodan Milošević and other top Serb leaders were threatened by political transitions taking place in their countries. They used repressions and violence as a means of demobilizing opposition forces, long before the outbreak of conflict. In this sense, based on inferences from patterns of behavior prior to the outbreak of war, it is plausible to suggest that Serb veto players perceived high humanitarian norm violation benefits.

Humanitarian norm violation benefits were lower when, ex ante, a belligerent veto player faced competing core interests for which non-compliance was perceived as potentially damaging to the realization of some of those interests. For instance, the National Security Council in Macedonia—a veto player in the conflict—was split between a moderate and highly nationalistic party. Long before the outbreak of conflict, the representatives of each had approached minority rights differently. The more moderate party recognized that upholding humanitarian norms was

⁴⁰ For a detailed discussion of parties treaty obligations, refer to Jordan J. Paust, "Applicability of International Criminal Laws to Events in the Former Yugoslavia," *American University International Law Review* 9, no. 2 (1994) United Nations Commission of Experts, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, S/1994/674* (New York: United Nations Security Council, 1994) International Criminal Law Services, *Domestic Application of International Law* (2013 [cited 5 September 2013]); available from http://wcjp.unicri.it/deliverables/docs/Module_5_Domestic_Application_of_International_Law.pdf.

Working Draft #3

essential if Macedonia was going to successfully garner entrée into the western club of states, which was key to fending off weighty external threats. The nationalistic party, on the other hand, perceived ethnic Albanians as the central threat to Macedonia's future. Many of its members were also highly anti-Albanian and had long taken every opportunity possible to abuse them. For example, the Ministry of Interior—the portfolio that its party controlled—had a long track record of flagrant human rights abuses. The tensions that existed between each party ultimately created an opening for the ICTY: moderate officials used it as a means of reiterating why indiscriminate violence would prove costly to the government, co-opting support away from hardliners.

In order to gauge veto players' perceived benefits in violating humanitarian norms, I analyze prior patterns in their statements and behaviors. So, for instance, if a particular veto player is emphasizing the need to say, eradicate an alleged threat to a community, and he/she/it has previously pursued antagonistic policies vis-à-vis that alleged threat, it is possible to classify such a veto player as more hardline. Ultimately, I primarily rely on veto players' previous actions, as opposed to their statements, to draw inferences regarding their perceived benefits of violating humanitarian norms over time. It is also worth reiterating that the ICTY cases are particularly useful in that, for many of them (e.g. the conflicts in Croatia, Bosnia, and Macedonia), there is a control period of non-ICTY involvement. This means that I can get a sense of the pull that humanitarian norms exerted on veto players prior to the ICTY's intervention, in turn helping me to better isolate the ICTY's specific impact. Counterfactuals, as explained in the introduction, have also proved useful in this regard by providing logically substantive, control simulations. Table 1 provides an overview of the condition of 'humanitarian norm violation benefits.'

II.VI Implications of the ICTY's Experience

As the first wartime ICT, the ICTY has a lot to teach us about how and when ICTs might actually impact the course of civilian violence. Importantly, the ICTY's record indicates that ICTs can in fact de-escalate, as opposed to escalate, civilian violence. Specifically, they can marginalize spoilers that are responsible for initiating, coordinating, and perpetuating civilian violence. They can potentially serve as a control that prompts combatants to recalibrate their approach to deploying violence. Moreover, ICTs can provide domestic and international mediators with an important source of leverage in their efforts to get parties to refrain from courses of action that could be devastating for civilians.

However, whether ICTY personnel were able to effectively perform these three roles depended on the strength of their enforcement power and on the ex ante benefits that belligerent veto players recognized in violating humanitarian norms. In cases where Tribunal officials confronted hardliners who perceived weighty benefits in terms of subverting humanitarian norms, they required high enforcement power (e.g. the ability to secure arrests) in order to isolate spoilers, as well as to serve as an effective control and/or source of leverage. On the other hand, when ICTY personnel came up against veto players that recognized lower ex ante benefits in terms of violating humanitarian norms, they were able to do more with less. Specifically, the threat of criminal prosecution alone—whether emanating directly from the Tribunal and/or a third party—was sufficient to tip these veto players' calculus against the use of one-sided violence and the spoilers rallying such policies.

With the permanent International Criminal Court, the threat of criminal prosecution now extends to modern-day conflicts. It is thus essential that we begin to understand how and when

Working Draft #3

ICTs might actually contribute to limiting violence against civilians. The ICTY provides key insight into such questions. And yet, it is important to underscore that the theoretical argument I advance applies under a specific set of conditions. For instance, the ICTY intervened in settings where there were relatively clear lines of command and control, meaning its officials had distinct pressure points that they and others could focus their efforts on in order to produce results. This may not always be the case for the wars that the ICC intervenes in. The situation in the Central African Republic is an example. Moreover, the ICTY only targeted top leaders at the end of wars and just before foreign military forces arrived on the ground. The ICC, on the other hand, has explicitly gone after more key leaders while hostilities are still in full swing, and in contexts where foreign military forces are not always in play or able to control key areas. In this sense, targeted elites might have more room to lash out or stall efforts to mediate violence. Joseph Kony is a potential example. In other words, just because there was no evidence that the ICTY prolonged or escalated violence, does not mean that this is always the case. As more data on ICC situations becomes available, we can see if my findings related to the ICTY's de-escalatory role apply to the wider population of cases. In this vein, the concluding chapter presents an agenda for future research that builds on the theoretical insights gleaned from the ICTY's experience. In the meantime, the next four chapters analyze the ICTY's intervention in the wars associated with the break-up of Yugoslavia.

Working Draft #3

Table 1. The Conditions That Determined a De-escalatory Role for ICTY Officials' Work		
Condition	Definition	Operationalization
Enforcement Power Strength	The level of assistance that the ICTY received from an influential actor.	The ICTY's enforcement power strength was... <ul style="list-style-type: none"> - High when an influential actor was willing to execute arrests. - Moderate when an influential actor was willing to execute actions on the ICTY's behalf that fell short of arrests (e.g. they provided access to a crime scene and/or evidence). - Weak when an influential actor was willing to provide the ICTY with basic operational support (e.g. personnel, a base of operations, expertise)
Humanitarian norm violation benefits	The ex ante benefits that belligerent veto players (e.g. the collective or individual actors whose agreement is necessary to change the status quo policy regarding the use of force) perceived in violating humanitarian norms.	Humanitarian norm violation benefits were... <ul style="list-style-type: none"> - Higher when a belligerent veto player ex ante prioritized interests for which non-compliance was perceived as the most expedient way of proceeding to achieve those interests. - Lower when a belligerent veto player ex ante faces competing core interests for which non-compliance is perceived as potentially damaging to the realization of some of those interests.

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