SCHOOLYARD POLITICS: ETHICS AND LANGUAGE AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been both contentious and successful. By examining the ICTY from a Levinasian ethical standpoint, we might be able to understand how the court uses language to enforce ethical and moral standards upon post-war societies. Using linguistic methods of analysis combined with traditional data about the ICTY, I empirically examine the court using ordinary least squares (OLS) in order to show the impact that language has upon the court’s decision making process. I hypothesize that the court is an ethical entity, and therefore we should not see any evidence of bias against Serbs and that language will provide a robust view of the court as an ethical mechanism.
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CHAPTER 1
INTRODUCTION

I found one day in school a boy of medium size ill-treating a smaller boy. I expostulated, but he replied: "The bigs hit me, so I hit the babies; that's fair." In these words he epitomized the history of the human race.
-Bertrand Russell, Education and the Social Order

In any society where there have been cycles of ethnic conflict throughout time and history, the story of the "bigs" rings true. Different regimes with greater military strength have always had an advantage over less powerful groups. This cycle of violence and culture of impunity among those more and less powerful as power shifts hands was exactly the case of in the wars in the former Yugoslavia during the 1990s. In the historical context of the former Yugoslavia and the conflict there under the Milosevic regime, the Serbs had long considered themselves as being beat up on by the "bigs" (other ethnic groups). With the collapse of communism in Eastern Europe and the control that Tito had exercised over different previously warring factions, old ethnic tensions simmered over again. Those who felt that they had been treated unfairly in past times, used former ill-treatment to incite ethnic violence which ultimately resulted in intervention by the international community and the creation of the International Criminal Tribunal for the Former Yugoslavia.

Since World War II and particularly within the last two decades, war crimes tribunals and special courts have become increasingly utilized in the aftermath of violent conflict. Many scholars and practitioners have criticized international courts from various standpoints, claiming that they are ineffective and redundantly use a standard of victors’ justice (Meernik 2003). While politics has always played a part in the creation and implementation of war crimes tribunal (Bass 2000) the core of the critique lies in the idea that the court’s ability to reconcile war crimes
dwindles when the judicial process is effected by political reasoning. This effect ultimately results in the court not being a mechanism of social reconstruction achieved through ethically reconciling post-war societies, but instead a mechanism through which conflict may recur.

While the earliest war crimes tribunals date back to Peter von Hagenbach in 1472, the cost of a politicized courts can be seen in the trial of Napoleon by the British where the banishment of Napoleon lead to the second Napoleonic war (Bass 2000). At the same time, however, these court’s may create a single, international voice that speaks out against specific types of war crimes which presupposes an ethical relationship.

As horrible as genocide, ethnic cleansing, and other forms of atrocities are, an international court would not be legitimate if it allows atrocities to go unresolved. The importance of justice, even ad hoc justice, cannot be undermined if a court based on ethics is to be upheld. Justice must be preceded by some form of punishment of those individuals who committed acts of violence, murder and rape (Pham and Vinck 2007); and it is the court that achieves this. Ultimately if a society can be reconciled through legal means to help to prevent further atrocities (whether those means be through legislating morality or if they are simply a direct means of control and deterrence), international courts are the mechanism through which justice may be carried out. However it is the manner in which justice is carried out that is likely to determine the court’s outcomes (Akhavan 2001).

If a strategic war crimes tribunal, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), fails its mandate then it is reasonable to speculate that the international community would be willing to abandon the project for at least some time. Even more drastically, if the court fails its mandate then it is also fair to speculate that the
undercurrents that lead to the atrocity would not be addressed, and therefore the likelihood of recurrent conflict may increase.

Because of the difficulty of reconciliation in post-conflict societies, the ICTY was not created easily. When the court was first conceived it was not simply a mechanism by which to enhance international law, or even human rights issues. Instead, it was created with a specific mandate to bring peace and reconciliation to the victims of the Yugoslav tragedy. The nature of such a mandate makes it necessary to be both very precise when making decisions, as well as to render judgments which exemplify ethical behavior. In this sense, the court’s mandate\(^1\) goes beyond simply obtaining verdicts for violators of international law; it is an ethically based mandate that requires the court to keep the victims of all sides of the Yugoslav war in mind, and render decisions which consider all the opposition interests.

So what determines how we should measure the outcomes and the impact of international tribunals? Is it the significance of its verdicts? Might it be the particular punishments it metes out on those defendants who are found guilty? Or perhaps it is the removal of internationally unpopular leaders in war-torn societies? I argue that international courts may establish, among other things, an ethical mandate from which they seek to apply justice to post-war societies. Whether this mandate is based in fairness to all persons in the former Yugoslavia depends heavily upon \textit{how} the ICTY applies justice—not simply that it applies any justice at all. If the court applies little more than an arbitrary form of victors’ justice, then we can expect the court to be biased when rendering verdicts and sentences, and this may result in decisions that seem unfair, arbitrary, and without ethics. In turn, this may result in neither peace, nor reconciliation for the former Yugoslavia. If on the other hand, the ICTY carries out an ethical mandate which

\(^{1}\) Information on the court’s mandate can be found at \url{http://www.icty.org/sid/320}. Last accessed May 10, 2010.
considers the relationship between the parties who have been at conflict, it may further the reconciliation process.

An ethical mandate at the ICTY means that the court has been given an ethical authority by the United Nations (UN). This translates into an obligation of the ICTY to determine the ethical understandings that are assumed by law. I must therefore turn to what it means to carry out an ethical mandate. Here I use the term “ethical mandate” to argue that the ICTY is the embodiment of international ethics and exemplifies ethical decision-making through the judicial process in rendering decisions and passing down sentences. By examining the mechanisms of ethical mandates, I can draw conclusions about the courts ethical attitude and beliefs. One mechanism for examining whether the ICTY has implemented an ethical mandate can be seen through the tribunal’s use of opinions (and specifically the language used in the opinions) because these written statements show judicial intent most directly. Through examining the outcomes of the ICTY via empirical analysis I might discover that there is evidence that the court is creating an ethical mandate for post-conflict society to use.

To examine whether the ICTY has established an ethical mandate through its decisional process, I rely upon a Levinasian ethical system (Levinas 1969; Levinas 1996; Levinas 1992). Emmanuel Levinas provides the lens through which I interpret the outcomes to see if the court’s use of language provides any evidence of bias and considerations about ethics. Levinas has been chosen because of his insightful views about the innate human condition and the way in which individuals relate to others. It is his view of an ethical world where the collection of individuals acts in ways which radically shape ones views and attitudes to those they encounter. His assertion that ethics are the precursor for humanity shifts the view of the human condition to examine ourselves in relation to others around us is most appropriate for considering post-
conflict reconstruction because it is only through an such an understanding of justice that the international community can hope to truly promote peace and reconciliation within the former Yugoslavia.

The present study is important because understanding how the international community seeks justice for war-torn societies to prevent them from re-entering conflict contributes to our understanding about peace and reconciliation. Moreover, the outcome of the court as an entity of justice requires that the court act in an ethical manner when administering justice, and the study here examines whether this is the case (at least from a Levinasian perspective). If the ICTY is not successful in administering justice and creating an ethical mandate that allows the international community to act against human rights violators, then there is little to no reason to create a court. Moreover, there is little reason to believe that the ethnic tensions will cease. Future generations within the former Yugoslavia will rely on the ICTY’s decisions to argue that this was yet another set of injustices done to the ethnic group throughout history.

This thesis proceeds by first analyzing the historical context of Yugoslavia and ethnic cleansing between Serbs and non-Serbs. I then provide a contextual background of the different functions of the court by which it carries out its functions, the involvement of victims, witnesses, defendants, and judges in the judicial process. Focusing on those key elements allows me to examine how the ICTY implements its ethical mandate vis-à-vis the relationship between the different parties to the conflict. I then provide the theoretical context that informs the hypothesis based on a Levinasian view of ethical mandates. Lastly, I analyze the results of an empirical test for evidence of bias and the role of language.

This study aims to provide an analysis into the area of ethics within the international courts. While most studies focus on more traditional concerns such as ethnicity and criminal
hierarchies, this study considers the traditional factors in relation to other relationships that have not been focused on, but are just as relevant. Factors such as linguistic use of anger and emphasizing the human condition often occur in court proceedings and this study takes one of the first looks at the how those factors affect the sentencing and convictions of the tribunal. This study will demonstrate how the court’s use of language exemplifies both its ethical considerations and ultimately its implications for the international community.

History of Inter-group Hatred in Yugoslavia

At the onset of World War II when Axis powers invaded Yugoslavia they wasted little time and effort conquering the country. Surrounded and invaded from every side, German, Italian, and Hungarian forces quickly split the country up into different parts that they could control. After the invasion turned into occupation, resistance groups emerged to fight the occupying Nazis. When King Peter II and other members of government were forced to flee the country, leaving Josip Broz Tito and other leaders forced underground, where they managed to establish resistance groups--the two most prominent groups being Tito’s Partisan group and the rival Chetnik group led by Serbian Draza Mihailovic (Cohen 1997).

Relations between the Chetniks and Partisans became strained over a few key aspects. Mihailovic believed that Tito risked destroying all of Yugoslavia to pave the way for a Communist revolution. The reason Mihailovic believed that Tito risked destroying Yugoslavia is due to German policy at the time being one of reprisal for actions taken against them while Tito actively fought and resisted the Germans. This tension lead to conflict between the two groups and ultimately Tito believed that Mihailovic was aiding the Axis countries to remove Tito from power (Cohen 1997).
As this issue grew tenser, Mihailovic called for an ethnically pure “Greater Serbia.” While there is evidence of ethnic mistrust dating back further than WWII, this is significant because it is the first time that a leader called for ethnic cleansing in Yugoslavia. Consequently, this represented the beginning of a cycle of mistrust between Serbs and their neighbors that resulted in hatred and ethnic violence.

Tito responded by allowing for any of Mihailovic’s Chetnik members to defect to Tito’s Partisan group without repercussions (Cohen 1997). This offer of amnesty effectively managed to disarm Mihailovic’s group, allowing for Tito to pave the way for communist revolution in Yugoslavia which included an uneasy peace with Serbs and other ethnic groups.

Ultimately, with Mihailovic defeated and Tito having gained international favor and support as the leader of Yugoslavia, the Partisans fought off the occupation. Tito’s first order of business in shaping Yugoslavia was to capture Mihailovic and put him and his officers on trial. Charged with high treason and war crimes, the resulting military trial and execution of Mihailovic became a keynote in Serbian history. Although this effectively suppressed Serbs for the time, it also caused a bitterness to settle within the Serbian communities. Serbs believed they were being repressed by other ethnicities within Yugoslavia. This enmity continued into the 1990s conflict when some groups of Serbs began to call themselves Chetniks and bore the Chetnik flag (Cohen 1997).

Even with the death of the Chetnik movement after World War II, Tito struggled to keep Serbian and other nationalists in line. On multiple occasions, Tito put down insurrections and protests by nationalist parties and minorities to keep Yugoslavia from dissolving into civil war that had at its root ethnic tensions. In the end, and after the collapse of communism, the ultimate result of Tito’s actions was not the unity and brotherhood that he so desperately desired. Instead
over 50 years later, these same ethnic rivalries would erupt in more bloodshed, ethnic cleansing, rape, and genocide.

By the mid 80s, a fear of nationalist agendas began to drive the countries apart. Within an atmosphere of fear and uncertainty, Slobodan Milosevic, a political opportunist, gained power by inciting nationalist feelings within Serbian communities. Even though he was Montenegrin, he identified as a Serbian by birth right. With the former Yugoslavia being in the process of changing from a communist aligned country moving toward democracy, Milosevic’s quick rise to power and ethnic identification created even more fear and distrust. Claiming that he was interested in keeping Yugoslavia united, Milosevic resisted political and economic reform. These actions compounded the tensions, and by the 1989 Constitutional changes, even deeper ethnic rifts continued (Rogel 1998).

As these ethnic tensions escalated, and the former Yugoslavia began to dissolve, war became imminent. Rioting and boycotting by ethnic Albanians of the voting process allowed for Milosevic’s supporters to be elected to office with little or no opposition (Rogel 1998). Because of this, most of the provincial and higher offices became controlled by Milosevic’s supporters, even in areas dominated by non-Serbs. Serbs used the change as an opportunity to gain more political power and shifted the constitution to one that reflected a Serbian majority (Rogel 1998). While this served to appease the Serb majority that had been repressed under Tito’s reign, it also served to alienate and send fear throughout the non-Serbian communities.

By 1991, several regions of Yugoslavia began to seek independence. Their demands were very clear; they wanted sovereign rights and their own internationally recognized borders. These demands became recognized and supported by the international community, and sparked the conflict over rights to succeed and ethnic division. Serbia claimed that the succeeding nations
had no right to break off from Yugoslavia, and that the recognition of such a right based on
ethnic divisions represented a breach of international law.

In spite of this, political representation was not the primary contributor to the conflicts. Instead, ethnically based grouping was the cause of political boundaries. This hatred manifested itself through violent siege, rape, murder, and political persecution. One’s past history with their neighbors mattered little, and friends gave ethnically based reasons for hunting down and killing their former neighbors.

In fact, Elizabeth Neuffer argues that communities have significant trouble healing from ethnically based conflicts. This is due to communities’ difficulty in overcoming the idea that people who were once their neighbor had turned on them and committed acts of murder, rape, and genocide to those they had trusted in the past (Neuffer 2002). Therefore, the task of healing a community that is so deeply divided along ethnic through judicial processes is daunting, and must be very carefully applied.

Standards of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

Out of this situation, the international community recognized the need for a court to settle the issue of ethnically based violence and hatred within the former Yugoslavia and end the culture of impunity regarding such conflict violence (Goldstone 2002; Bass 2000). By no means was the use of an international tribunal a new invention of international law, but its method of operation was unique. The ICTY, as established, was not created to be concerned with groups, organizations, or governments, but rather it was designed to allocate guilt to individuals responsible for the intergroup fighting (Goldstone 2002; Meernik 2003). It was designed to address the ethnic tension and violence that individuals enacted upon others and therefore the
court’s jurisdiction is limited to individuals who perpetrated crimes. While the international community had seen similar types of hatred before, it had not put on trial perpetrators of ethnically based crimes.

The court was therefore tasked with jurisdiction over individuals, not of political or even ethnic groups, and its mandate was to assign guilt based on the relationships and violence that had occurred by individuals toward distinctive groups based on ethnic hatred.\footnote{This can be found at \url{http://www.icty.org/sid/320}. Last accessed August 31, 2009.} This mechanism was distinct from other legal mechanisms such as the International Court of Justice, which had been designed and used, not as a mechanism of moral justice, but instead to settle interstate disputes between sovereigns.\footnote{This can be found at \url{http://www.icj-cij.org/court/index.php?p1=1}. Last accessed August 31, 2009.}

The goal of providing justice to victims and witnesses was to bring a voice to the victims by aiding them with opinions that used their testimony to right the wrongs that had been committed based on ethnic identification. This task is quite daunting when considering that these victims and witnesses represented thousands of victims and witnesses involved in the conflict. The idea behind providing such was justice was that the court needed to allow the voices of the victims to be heard to allow for the court to bring justice, peace, and reconciliation to those who were involved in the tragedy. In turn, if the tribunal was to be successful in this, it was thought that it would end the culture of impunity regarding ethnic violence. While some scholars and legal activists raised concerns about the use of the victims in court and whether it furthered or helped to dissipate ethnic tensions, others raised concerns that victims were being silenced, rather than heard by the tribunal (Dembour and Haslam 2004; Wald 2004; Swaak-Goldman 1997).
The sentences rendered have been controversial at the ICTY—largely because of western notions of justice which has led to criticisms about the tribunal’s fairness (Keller, 2002). The ICTY does not have trial by jury, and the panel of judges that hears each case sentences each defendant to a term of years for the violations for which the defendant is found guilty. Sentencing is therefore a very delicate balance between the facts presented, the testimony of the victims and witnesses, defense counsel counter-arguments and evidence, and proof of violations that occurred under international law. When the judges write the opinion of the court, they take special care to note the victims of the crime and the culpability of the accused.

Consequently, issues of victimization help form the basis for findings of human rights violations and allocations of guilt. While the judges see the accused and specific victims and witnesses on a very individualized basis; the testimony and evidentiary proofs presented in court must ultimately be translated into a legal opinion that will be used by the political and legal world for future generations. A person must fit certain criteria in order to be accused of crimes in international law. At the ICTY, this means that the court must have reason to believe that an individual had command over other individuals who committed certain crimes, or else the court must find that the individual had committed or else had ordered the crimes themselves (the doctrine of command responsibility) (Danner and Martinez 2005).

The distinction between systematic versus individual methods a compromise of fairness that potentially yields to situations within the court where ethical violations can occur. The court accepts a standard of law that claims that lawyers are able to prosecute the accused for simply being in charge of individuals who committed crimes and doing nothing. Yet judges render such decisions based only upon the court’s personal view of events leading up to crimes. Therefore the outcome of each case is based off of merely the three judge’s opinion of a situation.
Judges themselves come from different legal traditions that may be similar or very different from those accused. Given that judges may make crucial decisions based upon their own desires, rather than fact of law or a systematic view of how to handle an individual’s circumstance, increases the risk of the court becoming an illegitimate entity.

For example, in the case of Milan Babic\textsuperscript{4} who was accused of knowing that crimes were taking place and making ethnically inflamed speeches, the judges actually sentenced Babic to a longer sentence than what the prosecution asked for. In spite of the fact that Babic had complied with the Milosevic trial and volunteered his surrender to the ICTY, the judges decided to be even harsher than what the prosecution had asked for from the tribunal.

Babic would later go on to commit suicide because of his remorse, signifying that it is important to keep this case in mind when looking at other cases. The primary reason behind the Babic decision was that Milan Babic was guilty of knowing but not doing anything to stop the ethnic cleansing and bloodshed. Enver Hadzihasanovic, a commander in Bosnia and Herzegovina, was found guilty of a very similar charge (failing to prevent, rather than simple knowledge) and yet only received a 3.5 year sentence. The court is not clear about why it would give one person, an ethnic Serb, a 13 year sentence while giving a non-Serb a 3.5 year sentence for what is essentially the same charge.

Different scholars and members of the ICTY would inevitably vary on their exact reasoning for such sentencing discrepancies. The conclusion, however, that most would agree with is that the individual facts of the case are received differently by the judges who hear evidence and then write judgments deciding punishment. When looking at the ethical implications of the court, judges and their decisions have command over the law deciding its use

and function. In the case of the ICTY, this is perhaps more prevalent than other international bodies where the judges have longer tenures and tend to come from only a legal background. The ICTY, however, obtains its judges from two distinct areas – professional judges and ambassadors. While the difference it negligible, it is important to note that a judge’s background will directly affect their beliefs and use of language at the court.

The first is professional judges and people who have been engaged in international law for some significant amount of time. This is hardly controversial, and is likely where most international legal bodies would prefer to hire its judges. In the case of the ICTY, judges are chosen by the UN General Assembly and can come from any part of the world, including those with questionable human rights records. However, those that have come from areas with poor human rights have also tended to rise above country loyalties on human rights issues (Wald 2004). I should therefore expect a great degree of care in regards to the law and legal considerations.

The second area judges tend to come from are from ambassadors. Unfortunately, very little research has been done on this issue thus far. Speculatively, it is hard to imagine an ambassador as being unbiased from political considerations in the tribunal because their career has been defined by politics. Yet even those who come from ambassador backgrounds (or in rare cases even other professions) have all had significant background in international law. An excellent example of this is Judge Liu Daqun, who was a professor and lecture in international law for most of his career and an ambassador for approximately one year before serving at the ICTY. This may allow for more political bias, but the difference between a judge with an ambassador background versus a legal background is currently unknown.
While this distinction may be a factor in understanding different outcomes, the reality is that judges are acting more as managers, rather than umpires, in court proceedings (Langer 2005). This is due to the length of trials and the necessity of bringing the tribunal to a close (Langer 2005), but it is also due to the judges having already decided the most likely outcome of the case. Furthermore, this occurrence does not seem to be a function of judicial background. Rather it is a function of the more practical concern that the UN is not spending the absurd amounts of money that it has funneled into the ICTY since its inception in order to see acquittals on individuals that it already believes to be guilty.\(^5\) Ethically, this is perplexing. If the UN funding concerns are driving court outcomes, then the court would not be concerned about ethics at all, or at least only minimally.

Judges deciding the collective guilt of Serbia is likely why there has been such a discrepancy in the sheer amount of indictments that have been served against Serbs as compared with their neighbors. In terms of years sentenced (a direct function of the amount of people indicted and found guilty) following the acquittal of Ramush Haradinaj, Serbs were sentenced to 947 years in prison, while the next highest sentencing was Croats with 167.5 years (Klarin 2009). Furthermore, of the 161 people currently indicted and tried, 140 of them are Serbian. Of those only 1 has been acquitted, while of the 21 non-Serbs there have been 9 acquittals to date.\(^6\) The unfortunate fact of the matter is that the UN was pitted against Serbia during the conflict and even sent in forces to stop Serbia and create independent states from the former Yugoslavia. Given that the court’s judges are elected by the UN, it seems only reasonable that the UN would select judges that agree with their form of international law, and therefore be more willing to convict and give longer sentences to Serbians. This would seem to allow for the conclusion that

\(^5\) This view is taken from interviews with ICTY personnel. Interviews took place between June 1 and June 15, 2009.
\(^6\) This information was taken from Meernik’s data set, updated September, 2009.
the ICTY is naturally biased against Serbs, and therefore cannot be seen as a legitimate entity. In order for peace and reconciliation to be successful, the court must be unbiased and therefore assign culpability based on fair definitions of the wronged and wrongly accused (King and Meernik n.d.). The opinions, as written by judges, can help us understand whether the ICTY is implementing a Levinasian view of an ethical mandate.

Furthermore, defense lawyers at the ICTY\(^7\) are very quick to point out that the summer 2009 motto of, “Bringing war criminals to justice, and justice to victims” assumes the idea that these supposed criminals are already guilty and only need to be put through a trial to determine the extent of their guilt and punishment. This effectively creates a legalized culture of impunity that the judges themselves are enforcing.

Whether these claims are empirically accurate has yet to bear out. Most likely because of the method through which the cases and sentences are decided creates a perfect storm of data issues coupled with the fact that ethnicity is never vocalized as a deciding factor in the outcome of cases. Consequently, the court has seen a significant amount of hostility over the years but it has not been shut down or stopped. In fact, the opposite has occurred because the international community and the UN believe it to be performing its job properly. There is simply not enough direct evidence of the court acting abusively towards Serbs to cause the international community to become concerned with the legitimacy of the trials.

Criticism of the Court

Because of the underlying tension between some scholars and the international community, several lines of criticism have been leveled at the court. One of the more radical criticisms has been that the court has exaggerated the conflict to achieve political aims

\(^7\) Interviews with ICTY personnel took place between June 1 and June 15, 2009.
(Johnstone 2002). While this line of criticism has its merits, the underlying tension is that the court is not an ethical mechanism by any means. Rather the court is a biased form of political and cultural impunity that is not seeking justice for the victims of Yugoslavia, but rather seeking convictions only for the sake of enhancing its political gains.

Biased decisions would imply that the court is implementing little more than a standard of victors’ justice coming from the UN system and led by a U.S. backed support of the ad hoc tribunal to further isolate Yugoslavia (Bass 2000). Considering that the ICTY has tried peoples of every ethnicity in Yugoslavia rather than just Serbs (even though there have been far more Serbs tried comparatively), it would not seem entirely fair to believe that the international community, and especially the UN, is a victor that claimed justice in the aftermath of the conflict. After all, the concern at the court has not been about nationality, but rather about the individuals who became victims during the crisis.

If victors’ justice is what the court is implementing, then the coalition of victors in this case would be the non-Serb communities that aligned with the UN during the conflict (Bass 2000). This is not to say that the court has condoned all actions by non-Serb communities. Rather it means that the court, if implementing victors’ justice, would be expected to rule against Serbs in court more often than not. Consequently, there is still a significant concern that the court is utilizing arbitrary forms of justice in the former Yugoslavia (Meernik 2003). If the court is implementing victors’ justice, the concern is that the ICTY could not promote peace and reconciliation in the former Yugoslavia among the different groups. Ultimately, however, the court’s mandate is direct when it claims that peace and reconciliation are the goals of the tribunal. If there is a set outcome to the cases, then the court’s ability to reconcile the people of former Yugoslavia will diminish with those who are not part of the victors’ coalition.
If the ICTY is rendering arbitrary decisions, then the court is not administering any form of justice to the accused based solely on legal considerations. Instead it is giving sentences based on personal understandings of how the laws ought to work. Empirically this is very difficult to encapsulate, given that each judge can interpret international law when rendering cases, and the judges can use the law and the language of the opinions to shroud their personal preferences and biases. Therefore, it is nearly impossible to determine when a judge is truly acting with regards to the law, rather than their own personal or political agendas.

I can attempt to identify trends within the cases to examine whether bias is occurring. One measure, for example, is the sheer difference in the number of people indicted by the ICTY based on ethnicity and whether there are significant differences across defendants that varies across ethnicities.

From a liberalist standpoint, bias may not be concerning at all. Another line of thought in international relations has claimed that bias may not be representative of anything other than liberal societies exporting their values to other countries (Bass 2000). Consequently, even if the judges at the ICTY are being somewhat biased against Serbs, it is not because of an innate ethical deficiency. Instead the judges are attempting to export more acceptable values and norms of the international community into Serbia to promote peace and reconciliation via the mechanisms of the court. The groundwork is then set to create a more stable and democratically-aligned Serbia.

Even within the liberalist standpoint, however, there is some criticism over the court’s innate authority to do so. Ultimately, this viewpoint amounts to little more than condoned cultural imperialism, as some international lawyers are quick to point out.\(^8\) Milosevic endorsed

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\(^8\) This was discussed by various interviews conducted with court personnel at The Hague. Interviews took place between June 1, 2009 and June 15, 2009.
this point when he claimed in his opening statement that the ICTY should be put on trial for its legitimacy. He claimed that the UN Security Council did not have the authority to bestow powers upon an entity that the Council itself did not have, thereby violating Serbia’s sovereignty.⁹

Judges are implementing standards of international law that have been established by the UN in accordance with the mandate of the ICTY. So regardless of whether this is positive or negative, it highlights the concern of whether or not it is ethical for the judges to be biased against Serbs in order to favor international law.

I argue that if there is a bias against the Serbs, then the court is ultimately harming the ethical foundations that international law is based upon. Ideals of fairness and equal rights are part of the core values within the language of the Geneva conventions and other international law instruments and legal doctrines. Yet by being biased against Serbs, even if it is to protect and enhance international law, the court is creating a culture of impunity that seeks to corrupt the very justice that the court wishes to implement. The future of international law is bleak if bias is accepting into legal reasoning to achieve purely political aims. At the root of this argument is an innate ethical understanding of the relationship between the court and the accused that defines the entirety of the court’s actions and legal reasoning.

I now turn to developing the theoretical framework and philosophical concepts that inform how I will evaluate the ICTY. Using a Levinasian philosophical system is a delicate process, and every care is taken to show that Levinasian philosophy highlights how one ought to consider the court’s actions. After creating this framework, I will turn to the task of showing how the court’s actions bear out empirically.

⁹ The original testimony of Milosevic can be found on the ICTY website at: http://www.icty.org/case/slobodan_milosevic/4, Case last accessed August 13, 2009.
CHAPTER 2
THEORY

Enlightenment liberalism has long promised that comfortable self-preservation will eliminate the pathology of a “longing for justice.” Yet the events in the former Yugoslavia suggest that the human need for justice is permanent – and that peace and reconciliation will not be possible until it is satisfied. In order to meet this need, ethics must be considered as the primary source from which justice is implemented in order to promote peace and reconciliation within the former Yugoslavia because justice must ultimately be preceded by proper ethical thought.

As a result, the actions of the ICTY should be analyzed from the perspective of perhaps the premier ethicist of the last half of the twentieth century, Emmanuel Levinas. Levinas is particularly influential as one of the few philosophers to see ethics as an innate condition of humanity, rather than an institution with pre-set guidelines that define what it means to be ethical (via the mechanisms of language and teaching) (Levinas 1969, 51). This fits both the court’s actions in terms of the how the judges treat the accused, and the necessary conditions by which one might consider the court as an ethical (or unethical) entity.

In regards to legal views of Levinas’ ideas, Louis Wolcher explains that in the 1990s lawyers and lawmakers found that Levinas offers a refreshingly new way of thinking about law and justice: instead of obsessing about mechanisms of power and strategies of resistance, Levinas makes the “irrational” ethical proximity of the I and the you into the origin of all subsequent movements and comportment, including the way of being that we call thinking about and doing law and justice. Wary of the violence and suffering that attends legal intervention, yet conscious of its absolute necessity if justice is to be done, scholars like Marinos Diamantides characterize the post-Levinasian “task” to be one of reclaiming “for the agent of justice the liberty to approach the other as unique . . . but not yet as abstract”. Others, like Amanda Loumansky, say that the “Levinasian philosophy of alterity encourages us to call the law to account, to constantly whisper in its ear...
‘Remember the other’’. In short, Levinas’ conception of ethics in relation to the political encourages thought to make the passage from ethics to justice, rather than continuing to search for justice in the ultimately lonely realms of individual cogitation and inspiration (Wolcher 2003, 94).

This is why Levinas is appropriate for analyzing how the ICTY provides moral and ethical considerations to be used in evaluating the court. Relying on Levinas’ views of ethics may allow us to examine the process of how institutions like the ICTY translate ethics into justice. One cannot consider justice without also considering the ethical implications of doing justice to another (Levinas 1969, 46). By treating those within the former Yugoslavia as radically different, they become reduced to something that is not the same as us, and thereby do an injustice to them. The first task in evaluating the court in this manner is to define exactly what an ethical view of justice implies from a Levinsian perspective, and then to explain in more detail how Levinas’ views affect our ethical and judicial considerations.

Defining Ethics

Ethics is a very broad subject that has been argued and defined in many different ways. Whether one accepts a Kantian version that defines ethics in terms of one’s duty, or in an Aristotelian fashion in terms of one’s virtue, ethics always concerns the relationship of one individual to another individual, whether or not understanding that relationship requires a proper understanding of God.

Some past philosophers, such as Hobbes, have scoffed at the idea of having an entity capable of moral reasoning. For Hobbes, this is largely due to the idea that all moral claims ultimately have no natural basis. Society needs the sovereign to answer the question of “What is moral?” Our natural lack of morality within the state of nature only furthers this by showing that
the individual can never be a morally responsible actor until the sovereign defines what is or is not moral for them (Hobbes 1651).

Consequently, ideas of ethics must also be subjugated to the sovereign because, like morality, individuals have no ability to define ethics within the state of nature. Since people are of roughly equal value, they will do whatever is necessary to preserve their own existence and therefore seek to advance themselves alone. Since morality simply does not exist within the state of nature, nor is it a part of human nature, we cannot make ethical claims without the aid of the sovereign. For Hobbes, there can be no ethical violation on the part of the ICTY because in this case, it is the sovereign that created the court and therefore ethics do not apply at all.

Instead of ethics being a construction of some other entity or abstract reasoning, ethics must pertain to the relation of one individual to other individuals. What this implies is that ethics are inherent, not discovered or created by some other entity or sovereign. All human interaction, from the time one begins to interact with another human being until the time one dies, necessarily concerns ethics. In some ways, this may seem mundane; in others, radical. One might accept a form of logic where moral concerns, such as murder, are very clearly a violation. Ethical considerations are often much more subjective, and therefore difficult to distinguish.

Such logic would also imply that separating out ethics within legal constructs is a far more difficult task. Whereas morality often relates to the breaking of laws in a direct manner, ethics relates to the process by which one decides to break a law. For example, a person who murders very clearly committed both an ethical and moral injustice. In this sense, ethics are both very broad, but very specific. Morality always considers ethics (even if in doing so one does not insist on being ethical in order to be moral), but ethics exist outside of morality because ethics must precede moral consideration. It would be hard to imagine a situation where one chose to
break the law (a moral consideration) where they did not first commit an ethical violation. Justice ultimately considers this point. Laws and legal reasoning often invoke moral language to address the wrong behavior. At the ICTY, however, it is even considered illegal to commit violations such as inciting hatred without a physical crime being committed as well (assuming no person was harmed as a direct result of the speech).  

Furthermore, ethics must be unbiased in order to be just. It is not enough to say that an ethical violation occurred and then treat it as one wills. Instead it must be recognized that ethical violations can occur even in the judicial process. Bias is the most common accusation of the court acting unethically. The ICTY clearly operates under the desire for justice to be blind. If it is found that justice is tainted by the presence of bias, then the justice that is implemented is not just.  

I prefer this form of ethics to Kant’s because it rescues ethics from institutional construction and considers them, instead, the choice of the individual. Such an approach is inadequate when considering the method by which the court functions. The court entrusts the opinion of three individuals to decide the fate of another individual. This means that any ethical system applied to the court must be able to capture the relationship the judges have with the accused, as well as the connection to the international community, people of the former Yugoslavia, and the victims themselves if it is to promote peace and reconciliation.

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10 This has been both a point of contention and debate within the ICTY. In Prosecutor v. Kordic, et al. the judges refused to accept the logic that Kordic has committed a crime against humanity by inciting hatred through speech. It further noted that such use was the first time that hate speech had been considered a crime against humanity. Therefore, while the court does consider speech that incites hatred along political or other lines a crime, it does not consider it a crime against humanity.

11 In American judicial thought, a similar concern is stated as “Fruit of the poisonous tree” where impure processes will result in impure results. For example, if evidence is obtained through illegal means, then any resulting gains are also poisoned. At the ICTY, I am referring to the sense that if the court is impure in its decisions (the tree), then the resulting peace will likewise be tainted. See Wong Sun v U.S.
This does not mean that other systems ignore the relationship of the individual. In fact, Kant stresses it. In claiming that the moral will is separate from the world of the senses, he establishes that moral law must be derived from its form alone, and not its content. If an individual is a morally responsible actor, then they must have a free will. Such a will cannot be limited or governed by a rule alone, for then it is unfree (Kant 1788).

Since the will cannot be governed by law, it must be autonomous. A self-governing will is a key concept for Kant’s categorical imperative. In this sense, Kant could potentially see the court as an entity of unethical behavior, because it does not treat the individuals as morally responsible actors. While Kant’s philosophy has a significant degree of similarity to Levinas, Kant’s most profound difference is the treating individuals as morally responsible actors. While Levinas would agree that individuals are morally responsible, he goes even further to say that it is the action of the individual in relation to another that determines whether an action is moral.

Yet the individual is the primary concern of ethics, meaning that the subjectivity of the individual must also be considered. Therefore, instead of considering more traditional Kantian philosophies where ethics are applied *a posteriori* to being, one must consider those that are innate to one’s construction, or *a priori* to being. This allows for ethics to be something necessarily considered within our construction, and therefore such constructs are exportable over time and space as an innate human condition rather than as an active decision.

The difference between *a priori* and *a posteriori* reasoning should be carefully considered when applied to the court because if ethics are a construction of the state, then it would be difficult to consider the ICTY a legitimate institution. This means that the court itself cannot accept the idea that laws are only legitimate after their creation. This is because the court uses ethical standards with a clear precedent in previous international law, but it also reserves the
right to create the standards of such laws. It does this largely through the *ad hoc* process of the court, but the implication is that the court is applying ethical standards in an *a priori* method.

**Levinasian Approaches to Ethics**

Even if the judgments of the court will serve to bring about (a perhaps temporary) peace, Levinasian ethics are required if we are to achieve reconciliation. To be capable of hating a people to such a significant degree to murder them on a large, systematic scale they must be treated as though they are something other than human – they must be *objectified*. Objectification comes through a rejection of the *other*,¹² which relies on a distinction between the self and the *other*. Regardless of the view of postmodern ethics one takes, this distinction is always made and because of it ethical violations occur when one reduces the *other* to something less than human in order to make it easier to kill, maim, rape, distrust, and dehumanize one’s enemies. Consequently, all ethical and moral thought of Levinas considers this distinction heavily, because it is the self’s rejection of the *other* that becomes of utmost importance.

This distinction between self and *other* encompasses both ethical mandate and ethical violation because the interplay between the two is what concerns ethics. This distinction must always be made in order to understand oneself even if one does not fully understand themselves. Only by gaining a more robust understanding of ourselves can one hope to achieve an ethical understanding of the *other*. This dyadic approach to the epistemology of ethical foundation is therefore endemic to humanity (*a priori*), as compared to a separate rationale (*a posteriori*) that philosophers such as Kant have argued.

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¹² This is in essence very similar to embracing the *other*. The key difference is that objectification comes through a rejection, as compared to an acceptance, of the *other*. 

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For the sake of this study, I will focus only upon the judges since they are the ones who are morally educating the perpetrators of international law. Since the judges are the ones who will ultimately determine whether the court is successful at peace and reconciliation, they have become the most important actors in promoting an ethical understanding of justice within the former Yugoslavia. Therefore I will focus my attention to them in order to determine how they are implementing ethics through their use of language and therefore promoting peace and reconciliation.

This entire system of self and other is summed up in a system called “alterity.” Edith Wyschogrod makes the most succinct argument for what Levinas means by alterity in *Emmanuel Levinas: The Problem of Ethical Metaphysics* claiming,

that traditional Western philosophy, including the work of Husserl and Heidegger, sustains a distinction between the one and the other. In empirical systems this distinction is retained as real; in idealistic systems it is rejected as illusory. But, Levinas argues, whether real or illusory, the distinction is always made and always rests upon the presupposition that it is constituted by a consciousness which discriminates. But the very possibility of incorporating the one and the other into a single point of view compromises the radical alterity, the 'exteriority' of the other. Alterity which can be conjoined with or separated from the one by thought is not true alterity but part of what Levinas calls "the same." Radical otherness derives from a more primordial source. It can never be adequately thought for it lies beyond ontology. It is reflected in the world through the advent of other persons (Wyschogrod 2000, 92).

Alterity is the key to understanding Levinas. Alterity is the summation of the self and other and the interplay that highlights all ethical actions. It encompasses both mandate and violation, and is the driving force of Levinas’ ethical system. In order for one to be ethical, one must first embrace radical alterity as the solution to the fear and distrust that results from compromising radical alterity.\(^\text{13}\) Because alterity is such a complex mechanism that lies beyond

\(^{13}\) In order to compromise radical alterity, we ultimately incorporate the self and the other into a singular point of view. Compromising radical alterity means that one would never achieve radical alterity and hence, we treat others unethically.
ontology, it can never be fully understood, but it is the process of trying to embrace it that makes us into a more ethical being.

Specifically, the concern of Levinas is that systematic views of ethics are flawed because they assume their construction is something that occurs after being when ethics are innate, endemic—existing as part of the very part of all systems and all human interactions. Yet if this were true, the court would be an ethical absurdity and the realists would be correct that the ICTY is only a function of power politics and representative of the UN Security Council enforcing their own view of ethics and justice upon their enemies within the former Yugoslavia. Ethics would only matter insomuch as our application of them after the fact, and could therefore change based upon societies or individuals who choose to manipulate them to serve their purposes. Yet, it could not be that ethics are so relative that they can mean anything to anyone. Ethics must mean something specific to everyone, and the court is not immune from this and as such the court must embrace radical alterity in order to show that the self, or perpetrators, should not violate the other, or victims of the tragedy. Therefore it is only through a proper understanding of ethics that the court can ever hope to achieve peace and reconciliation for the former Yugoslavia.

Consequently, Levinas argues that ethics are a natural part of our humanity, present even before one starts to construct their own identity. Because of the innateness of ethics, all human relations are defined in an ethical manner. This idea can most easily be seen through Levinas’ argument that “metaphysics precedes ontology” (Levinas 1969, 43). Instead of thinking "I" epitomized in “I think, therefore I am,” Levinas began with an ethical “I.” For him, the self is possible only with its recognition of the other, a recognition that carries responsibility toward what is irreducibly different (Levinas 1969, 42). The “I” being ethical before ontology (the study of Being) is what makes a Levinas particularly striking. This supposes that ethics and
ethical understandings of relationships are what precede being able to know; making ethics the bedrock of human relations and even knowledge (Levinas 1969, 42-49). Such an understanding of ethics applies to all people across time and space.

Since ethics necessarily means that the relationship of the individual to other individuals is the key concern for Levinas, he develops a system of self and other. This distinction is important, for it is the key to alterity and the experience of the other. As Levinas states,

The alterity, the radical heterogeneity of the other, is possible only if the other is other with respect to a term whose essence is to remain at the point of departure, to serve as entry into the relation, to be the same not relatively but absolutely. A term can remain absolutely at the point of departure of relationship only as I (Levinas 1969, 36).

In this sense, we are alien to everyone else around us, and this ultimately defines the self because it is only through the recognition of the other that the self can be truly discovered. The self, or ethical “I,” is formatted when identity is formed and is closely tied to ideas of security. Security in this way is not used in merely the physical sense, although that is part of it. It is meant in the much broader sense of safety both physically and mentally within one’s society. At its core, this assumes that the other exists (Hughes 1998).

With this construction of the self being reliant upon personal security, the concept of other becomes relevant and shatters concepts of interpersonal relationships. For Levinas, the other can never be known because one can never experience what defines the other. While one can never achieve a totality of the other in terms of being able to understand why they are the way they are (due to us lacking their experiences and background), it is our obligation to accept the other as they are, and not attempt to destroy them based on mere difference. The moment in which one recognizes the other they become shaped forever by the interaction with other people. The experience of the self and the other radically shocks the consciousness, and defines all succeeding actions (Levinas, 1969, 79-81).
Yet the mere recognition of the other is not enough for Levinas. Mere recognition does not provide an ethical obligation, nor does it answer the question of “what is right?” Instead, alterity must be radical. It must imply and demand action in the form of separating the “otherness” into oneself by accepting the difference of the other as tantamount to oneself without seeking its destruction. We are bound to treat the other not as a servant, or a threat, but as another human being with a will equal to that of our own. Even when political necessity requires us to eliminate a political opponent, it is unethical to treat that person with hatred and contempt. Instead, even the vilest of moral violators must be treated in an ethical manner even while they are put on trial.

At the same time, the other is not knowable to Levinas. One must try to reach the other through radical alterity in order to treat them as human, but they can never quite understand the other. Consequently, alterity very specifically demands that they treat the other as equal to oneself.

Inherently, this recognition should shock the individual. The world of the other is just as powerful as my own, and therefore one may be tempted to treat it as a threat to our own security. Levinas clearly argues that such action is not a proper understanding of ethics, however. Because alterity so radically shapes our perception of individuals, the interaction that introduces the self to the other defines the beginning of our ethical obligation. If one reacts with fear or hatred of the other, then subsequent interaction is nothing more than a continual power struggle where proper ethical foundations are irrelevant. Levinas argues, however, that proper ethical understandings are fundamental to shaping such interactions. For Levinas, to act unethically means one rejects the most fundamental premise of alterity – the movement of the self to the other.
If ethics are foundational in even knowledge, however, then ethics are not inherently normative (although their constitution may change dramatically over one’s life) or descriptive. Instead they are endemic within human understanding. At the youngest of ages, when children first begin to learn social interaction they are capable of knowing when something wrong has been done to them, even if they are incapable of knowing when they do wrong to others. Or in Levinasian terms, they are incapable of understanding that there is an other outside of themselves. Therefore with ethics as first philosophy, Levinas establishes the idea that ethics is both descriptive and prescriptive. Ethics are inherent as a part of humanity, but that our cognitive ability must also show that the other is the “primordial phenomenon of gentleness” (Levinas 1969, 150). This differs starkly with many skeptical philosophers who see the other as an entity that shocks the consciousness and creates fear and distrust because it is not knowable.

Levinasian morality means that if ethics are innate, then ethical interaction (both improper and proper relationships and the resulting ethical outcomes) should be seen within the actions of the court. Therefore, I can use the primary source of ethical consideration – language – to determine the court’s intent and ethical understandings. Using psychological measures of alterity in linguistics allows for a robust and accurate measure of ethics within the judges’ use of law and can be captured through empirical means.

Inherently, alterity means two things for this discussion. Descriptively, it is possible that ethical violations can be seen in a Levinasian fashion as the rejection of radical alterity. Both violators and victims self identify as victims, and see themselves as rejected by the other (which may have been occurring for long periods of time). This results resulting in hatred which is so severe that human beings felt they were permitted to mass murder other human beings simply because of what that human being was or represented. This is a clear rejection of alterity, and the
court took on the responsibility of assigning who has the greatest responsibility to the other. Because this rejection lead to ethnic violence, it is important to remember that the court should not further this issue by re-enacting the rejection of the “Other” as well, which may lead to only temporarily repressing this violence until it can be resumed.

Prescriptively, alterity enables the court to provide a method of reconciliation through which the acceptance of radical alterity can be achieved. The court therefore inherently considers ethics when determining standards of international law. Furthermore, the goal of international courts is to

maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.\(^\text{14}\)

The court’s adherence to ethics is a necessary precondition for justice. Without ethics, justice is corrupt and unreliable. At best, it will merely stall the cycle of hatred until individuals can find a method to reignite it. At worst, a violent uprising will occur in response to the supposed justice being implemented. Furthermore, without an ethical understanding of justice, the ICTY cannot be a viable mechanism of international law. Realistically, it would be hard to expect peace and reconciliation to be the outcome of the tribunal if justice does not recognize the other. The greater likelihood would be to symbolize the international community’s condemnation of Serbia during the conflict. If the ICTY is acting under an ethical understanding of justice, and especially a Levinasian version, then the court should be unbiased in its decisions to convict and sentence. The language of the court is the directive of its judgments and therefore

\(^{14}\) This is found in the UN charter, accessible online at [http://www.un.org/aboutun/charter/chapter1.shtml](http://www.un.org/aboutun/charter/chapter1.shtml).
its language may help those involved in the tragedy to recognize the other with the former Yugoslavia and therefore reduce the likelihood of continued ethnic violence and hatred.

Only by recognizing their ethical responsibility can one hope to end or reduce ethnic violence. In the case of the judges and the ICTY, this responsibility is in showing that the ethnic violence will not be condoned by the international community and that in order to heal the wounds of this conflict, it is necessary for the perpetrators to be brought to justice. For the latter to be successful, however, it is also necessary that the court does not further the hatred by failing to recognize that the hatred stems from a highly complex series of issues dating back over 50 years prior to the conflict itself. The court must recognize that all peoples are identifying as victims in this conflict and take every care to make sure that justice is not a biased form. Instead, the court must embrace ethics as what they are, the relationship of the one to the other, and help communities heal and reintegrate past the ethnic lines in order to sustain peace and reconciliation.

Language in International Law

Legal systems have long attempted to be as specific in their use of language as possible when determining law. This specificity exists in order to limit the amount invalid interpretations of the law and how it is applied. The result is that I can expect international law, as well as judges, to use language in a very specific fashion. This is perhaps more so true at the ICTY than other court’s because the ad hoc status of the court creates a very real concern about its legacy and ensuring that the work that is done at the ICTY is completed without any discrepancies in interpreting international law.
Also due to the ethical nature the court, the ICTY shows its intent within the language it
uses. The court must use language as leverage for the reasoning that the court provides in order
to enhance international law. Consequently, the court is very direct and precise with its use of
language. The judge’s task of interpreting international law requires them to use language that
emphasizes different aspects of that law in order to ensure that the law is both valid and fair.
Therefore while the words they choose have a varying degree of meaning they are also used very
specifically.

Because of how judges use language to convey reasoning I would expect to find the court
enforcing some form of ethics through the language they choose to use. The result is a system
where the court is holding individuals within the former Yugoslavia legally (and ethically)
accountable for their actions, meaning that the verdicts handed down from the bench convey a
sense of proper ethical behavior. This allows me to measure the language that the court uses
empirically so that I can see both what type of ethics the court is applying, and view them from a
Levinasian standpoint to see if the verdicts are ethically based.

The court is ultimately very aware of the language that it chooses to use, and how it
impacts international law. Ethical considerations are related by the court through its language
and I can use this in order to establish how the court fulfills its ethical mandate. I expect this
relationship to hold due to how the court uses language within the cases. When deciding how to
render a verdict in the case, the court takes special care to make sure that the decisions are made
based on what had been said up to that point. Therefore, the court is now using language in order
to justify decisions it has already made, but instead it is making decisions based on the language
it has already used within the case. Ultimately this will show how the court uses radical alterity
within its decision making process and will allow for me to draw conclusions about its ethical nature.

Hypothesis

Based on the Levinasian view of ethics, I hypothesize about the ethical nature of the court and whether it is truly upholding an ethical understanding of how to implement peace and reconciliation. The task with this is to examine the factors that provide insight into whether the court is adhering to innate ethical standards. Therefore, within my theoretical framework, I can test whether the court is adhering to innate ethical standards based on a Levinasian understanding of ethics.

The primary concern with examining the ethical nature of the court’s decision-making is whether I am being truly fair to both the court and the philosophical concepts that I apply. Every effort should be taken to ensure that I am not applying little more than an ethical standard that is inaccurate due to the “Levinas effect.”

Furthermore, a Levinasian understanding of ethics implies that the court is not biased against certain groups based on who the accused are and where they come from. If the court is to be impartial and to not incorporate principles of bias then I should not discover any significance among the key ethnic variables. This would show that the court is seeking radical alterity, and therefore acting in a manner that Levinas describes. I can test whether this is accurate with the following two hypotheses:

Hypothesis 1: The court is more likely to convict a defendant who is Serbian.

Hypothesis 2: Once convicted, the court will render longer sentences in cases where the accused is Serbian.

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15 This is a term used by Alford (2006) to denote that because Levinas is both ambiguous and potent in his use of language, it is possible for his meaning to misinterpreted. When this happens, one might take Levinas to such a radical degree as to mean anything to anyone. Every caution must therefore be exercised to ensure that Levinas is taken in the context he intends, and not to extrapolate that to intend whatever one wants him to intend.
The first hypothesis allows me to test whether there is a bias in the conviction phase of the trial. If there is, there should be a higher likelihood of an accused being found guilty when the accused is Serbian. It should be noted that when rendering their judgment, it is unlikely the court will mention ethnicity at all, and certainly not as a reason for deciding whether to convict, because that would show that the court does not consider legal principles and would therefore not be promoting peace and reconciliation at all. Consequently I cannot use a linguistic approach by simply measuring references to ethnicity to examine these first two hypotheses because it would not accurately measure what I am examining. Therefore, the first hypothesis is tested by looking closely at a binary coding of ethnicity according to the defendant’s ethnic background.

Regarding the second hypothesis, a similar method is used, but this time the outcome (dependent variable) is the sentence length. Whether a Serbian is receiving a longer sentence is a critical test of whether the ICTY is being biased in its decision making process. Bias in sentencing would imply that the court is not interested in advancing international law for altruistic or even legal purposes, but instead imply that the court is trying to ensure that Serbians are punished for crimes for no other reason than being Serbian.

It is important to note that it is more legitimate for me to test whether a bias against Serbs exists, as compared to whether the court is being fair to other ethnicities. This is largely due to the criticism that that court is being biased against Serbs, not that it is being fair to everyone else or even fair in only some circumstances. Therefore, proving that the court is biased against Serbs is more important and a more convincing test than proving that the court is completely unbiased. If both of these hypotheses fail to find support, I could successfully claim that the court is being unbiased to Serbs and that the crimes that occurred in the former Yugoslavia are proportionate to the indictments at the ICTY.
The remaining hypotheses are more concerned with the role of language used by the court. These hypotheses are important for testing a Levinasian understanding of the court because language is what shows the court’s intent and reasoning. Therefore, in order to gauge the ethics of the court, I must test for how the court uses language to its own end. As compared with the earlier hypotheses, these will measure conventional standards of the court versus the language that judges use in their judgments.

_Hypothesis 3:_ The court’s use of language that is inclusive of itself will yield a shorter sentence.

Hypothesis 3 allows me to test for a different measure of the court’s outcomes. I will test for this by looking at the court’s use of terminology such as “we” and “the court” in order to see the effect of language that emphasizes the court and its mechanisms. This will help me to examine whether when the court increases its concern about court mechanisms that it reduces sentences because it shifts the focus of the trial away from the victims. It may be the court is more interested in furthering international law for the sake of the court, rather than the sake of the victims of atrocities. This would indicate that the court is not very concerned about ethics or the _other_ in international law.

Where I might be more likely to see the court’s intentions in this regard would be as it relates to sentence length. The reason this would occur with sentence length is because the court is unable to identify the extent to which the accused is guilty, and therefore the judges must rely on establishing the court’s reasoning within law as to why a longer sentence is not required. As such I expect that a Levinasian viewpoint would suggest that the court is not focused on the _other_ and therefore would reduce the sentence length.

_Hypothesis 4:_ The court’s use of language that is emotionally charged will yield a shorter sentence.
Hypothesis 4 allows me to test whether the court’s use of emotionally based language results in shorter sentences. This includes both negatively based and positively based language because negative language shows the court’s disdain towards the accused. Such language is not necessary if the judges were simply convicting the accused (finding the defendant either guilty or not) because the use of negatively based language shows the judges’ contempt for the accused and therefore I should expect to see longer sentences. Likewise, the use of positive language means that they are exonerating an individual, and it is a sign that the court may not plan on giving a lengthy sentence because again, the court is showing their appreciation for the accused and their actions during the conflict. Therefore, I should expect positively based emotional language to be a significant indicator that a sentence will be shorter.

*Hypothesis 5:* The court’s use of language that is negative towards the accused will increase the probability of the accused being convicted.

Hypothesis 5 is similar to hypothesis 4 in that the key variable will be the court’s use of emotionally based language to evaluate whether the court is using emotionally based language in order to inform its decisions. In this case, the use of negative language will increase the probability of being convicted because it shows the court’s disdain for the accused and therefore increases the desire to punish the accused. As I argued with hypothesis 4, this is an alternative view of the court’s decisional outcomes. Negative language under hypothesis 4 only implies sentence length, but it may also be that negative language will increase the likelihood of being convicted as well.

*Hypothesis 6:* The use of language that emphasizes the human condition in the court’s judgments will yield a longer sentence.
Hypothesis 6 is perhaps the most important hypothesis for testing whether the ICTY’s decisions implicate a Levinasian ethical system. Here I expect that I may find evidence about whether Levinas is correct about ethics being innate and therefore the court is acting as a mechanism of ethics. If the court is truly concerned about the victims of the tragedy, I should expect that the court will exemplify this by emphasizing the human condition in its language.
In formulating a method to test these hypotheses, it is necessary to create a model that is parsimonious, yet the model must also accurately measure the nature of the philosophy of ethics. In fact, I cannot test for every aspect of Levinasian ethics within the court. Testing for evidence that the court is acting as a mechanism of international ethics, and then seeing if that ethical system seems to match to what Levinas describes and prescribes however, is a possibility. In terms of what Levinas describes, I can look for evidence of objectification and alterity in how the court uses language to see if there is an effect upon conviction and sentencing outcomes. I would expect to find the court using language that brings the perpetrators to see the faces of the other through their use of language in the court’s judgments, and therefore language should affect sentencing outcomes.

Quantifying philosophy can have disastrous ramifications for our ability to understand what the philosophy truly means. The method through which philosophy operates can rarely be quantified, and no quantifiable method to date has been able to capture the entire effect or purpose that the philosophy was designed to address. Taking philosophers too literally or too figuratively can lead to miscalculations and missspecifications of models. As such, I want to make two key assumptions about the models presented below. These models seek to clarify one of the foundational philosophical concepts that Levinas presents in his argument of alterity. Specifically that the recognition of the other within international law is a key component to how the court wishes to achieve peace and reconciliation. While it is not possible to quantify all of what Levinas argues because to do so would require being able to measure concepts that currently have no means of being measured (such as levels of alterity), I can take the
foundational cornerstone of the rejection of alterity – the objectification of the *other* – and use it as lens through which I view the court.

In this model, the goal will be to focus on the conditions of alterity as laid out by Levinas so that I can see if there is something more primordial to ethics than previously discussed. If Levinas is correct, then the court by virtue of its position within society is a natural catalyst from which I can determine if they are acting ethically or if they are simply a mechanism of victors’ justice. To add even more validity to this notion is the fact that the ICTY is not a mechanism of civil or common law traditions (instead it is a hybrid of legal systems with its own rules and norms). ”Doing justice” within the international law spectrum means establishing the ethical background from which future courts will rely upon when making decisions. This is why the issue of an international court has been so divisive. They are entities of justice, but the question then becomes, “whose justice?” I cannot clearly make a case that the justice of any one nation or group of peoples should supersede all other notions of justice, yet all peoples of the former Yugoslavia have a stake in the outcomes of the tribunal’s justice. Since ethics and justice are ultimately co-reliant ideas, justice ultimately needs to be a natural form, and not one that is tied solely to any specific nation or culture. The justice that is being exerted must be something that humanity shares in common with itself. Therefore, while I cannot quantify Levinas’ system as a whole, I can see if justice is something that seems to be flowing naturally in an ethical manner from the court. If the ICTY is simply administering biased forms of justice that favor unevenly the victors or other nations, then I should expect to see empirical evidence that the court is being biased along ethnic groups and very little, if any, consideration for the human condition.

The method and data for examining my hypotheses are unique. The ICTY hears cases according to the indictments by the Office of the Prosecutor (OTP), and in many instances, this
means that there are multiple defendants indicted in just one case for which there is an ICTY judgment. Sometimes there is only one person on trial, but many times it is common to find two or more. One case in particular tries seven people at the same time. However the ICTY even when trying multiple people will give different sentence lengths for the individuals within the case. When this is considered, it means two things for this analysis.

First, this reduces the overall number of observations. It makes no sense to treat 161 different individuals as though they were tried in 161 different cases when the reality is that they are grouped together for purposes of the ICTY’s decisional process. My method accommodates both the individual cases, while also accounting for the sentence length of each accused. Secondly, not all of the 161 accused persons have been successfully tried by the ICTY. Some died during the trial (such as Milosevic) while others were transferred to national courts or simply have not fully completed their trial. As such, I use only those cases where the trial has been completed with a judgment and sentenced rendered by the three-judge panels. As a result I have 68 observations and 36 clusters of cases.¹⁶

Within the models, I ultimately lose even more observations due to the nature of the modeling. First, there is a difference of kind within the outcomes. It makes no sense to run models that include not guilty verdicts when looking at the sentencing practices of the ICTY. This is due to the fact that a person who receives 12 months imprisonment is still found guilty, whereas a person who was acquitted was not. I therefore must exclude the accused that were found not guilty at the ICTY when considering models of sentence length. In these models I will lose 6 observations to people who were acquitted, leaving me with 62 observations.

¹⁶ In this modeling, the clusters will refer to case numbers. Hence while 4 accused persons may be tried in a single case, we can account for that by clustering around the case number.
Additionally, in models where the outcome variable is likelihood of an accused being found guilty, I cannot control for guilty pleas. Because a guilty plea will always result in a guilty verdict, it will predict the outcome perfectly every time, and therefore must be dropped from the models. Since there are 18 accused in my data set who plead guilty, this will reduce my degrees of freedom to 50 in these models.

Data

The data for this project come predominately from Meernik’s previous work on the ICTY (Meernik, 2003). Even considering that the court has not finished its mandate and most of the trials are very lengthy I am able to include all cases that have been completed by the Trial Chambers through July 2009. This includes over 95% of the cases that the ICTY has completed.

While Meernik’s data set encompasses the majority of conventional data that has been collected on the ICTY, it does not include a measure of the language used by the court in its written judgments that it hands down when it convicts and sentences a defendant. Therefore to measure the use of language I use a program called Linguistic Enquiry and Word Count (LIWC). This program is designed to measure the psychological processes and linguistic inferences of text files. From this it can extract a large number of different variables for consideration including issues such as the emotionally based language that a document uses to the occurrence of specific words within a text.

Ultimately, I use this program on a case by case basis, taking the judgment summaries issued by the ICTY from each case and using the LIWC program to analyze the individual

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19 As of July 31, 2009. All cases are retrieved directly from the ICTY website and the same section of judgment summary is used on each case.
judgments. This may cause concern about bias within the empirical results. Coding the data in this manner means that all persons accused in each case ultimately have the same values on the independent variables even if they have very different sentences. This is because the ICTY issues a sentencing judgment for all the defendants who were tried in the case. While there may be some concern about this, the ICTY Chambers rarely documents the reason for the differences in judgment outcomes. Because of the nature of the judicial proceedings at the ICTY, only 8 cases are individual decisions which would allow me to separate each person individually. Therefore, even though the judges may acquit one person in a trial and yet give another individual a 20 year sentence in the same case, they do not discuss why they choose to do so within the section of judgment summaries that I analyze with this program. As other research has done, to correct for this concern, I can cluster the observations by trials to minimize bias that may result (King and Meernik n.d.).

Because the court tends to put multiple accused on trial at one time when the situation overlaps with another accused, it does not distinguish between the accused much further than that. Therefore if a prosecutor submits evidence or calls a person to the stand to testify, the same observation would count the same for both accused. However, the judges may not weight the evidence equally between to the two accused, meaning while the observation is the same, they have an uneven effect upon the accused. The result is that within the cases, information tends to move very closely together, but since the judges give no reasoning as to what they believe to be true or false about each individual accused (or even name who they believe is responsible for an action), I cannot separate out the data to reflect a different effect between different accused persons.20

20 Tests were performed to see if multicolinearity exists within the variables I use. The data set used in this study did not score high enough to cause any concerns about overlapping variables.
Finally, there is a concern that the number of observations is low. It is true that the ICTY has not successfully completed many trials, and because of that, the observations in the data are limited. While not preferable, having as low as 50 observations in any of the tests does not violate the BLUE (Best Linear Unbiased Estimators) standard. It simply means that I must be discrete in handling the data and ensure that the results are reliable and therefore valid.

Method

The analysis here relies on 68 observations and 36 clusters based off of the case numbers for trials completed by July 2009. Technically speaking, any method that uses Ordinary Least Squares (OLS) is valid with at least 30 degrees of freedom. For the models to approach standard normalization, however, more cases would be preferable. Even with the limited number of cases, the results of this study can be both accurate and reliable. I will utilize OLS in order to obtain robust results for all tests. This includes for testing probability of conviction on binary variables. Although it would be preferable to use a logit or probit model in order to provide a robust view of the likelihood of an accused being found guilty, due to the limited number of observations I am unable to utilize these methods. To provide a comprehensive view of what the data set looks like, Table 1 provides a full list of variables and the relevant summary statistics.

Table 2 provides the same general information as Table 1 except that it only includes those who were found guilty. Due to the nature of this study, it is necessary to also incorporate a table showing the summary statistics of those who are guilty. Since several of the models account only for those who are guilty, this table can be referred to in order to see how the summary statistics change for those who are held liable for crimes in the former Yugoslavia.

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21 I did attempt to use both logit and probit in order to predict the models used in this study. However, when attempting to do so the models would not generate any outputs. Upon close inspection and consideration, I decided that OLS would be the best method to obtain stable results.
Table 3 provides an analysis of the summary statistics for those cases that did not plead guilty. This is important because guilty plea perfectly predicts the likelihood of a guilty verdict, and therefore it must be excluded from models where the dependent variable is likelihood of guilty verdict. This table provides a summary of the statistics used in these models.

The first dependent variable is *sentence length*. This is measured in terms of months and varies greatly across the data (Meernik 2003). It is also the dependent variable for four of the hypotheses I test, and perhaps the most common measure of the court used in other empirical studies of the ICTY. Sentences range anywhere from 0 months (on not guilty verdicts) to as high as 552 months, with most sentences constituting around 300 months.

*Verdict* is a simple binary measure that codes 1 if a person is found guilty of any charges brought against the accused, and 0 if not. It is also a highly common measure to predict the likelihood of being found guilty (Meernik 2003). In this study, it is used to measure the probability of conviction across several dimensions.

The first of the independent variables considers the role of ethnicity. *Serb* is a binary measure that indicates whether the ethnic background of the defendant is Serbian (Meernik 2003). Since there is a low number of non-Serbian accused, it is difficult to sub-divide even further between non-Serb ethnicities and still obtain results that are stable. Consequently, using a binary measure that looks at whether an individual is Serb or non-Serb will provide more robust results. This will provide a test of hypothesis 1 and 2.

An additional independent variable that is needed is the variable that measures the amount of witnesses called by the prosecution. This variable is designated as *prosecution witness* (Meernik 2003). Theoretically speaking, I should expect for the number of witnesses called by the prosecution to increase the both the probability of conviction and the sentence length because
it is one of the few innate variables that the court uses to show the face of the other – the testimony of the human cost of the conflict.

The number of witnesses called by the defense will likewise be controlled for, and is designated as defense witness (Meernik 2003). This variable is in essence the counterpart of the prosecution witness variable, and must be explained along with the prosecution witness variable. In a similar vein as the prosecution witnesses, defense witness should reduce the likelihood and duration of a sentence because it shows that the accused is not necessarily culpable and provides much clearer and fairer view of the events that the accused stands trial for.

It is should be noted that the witness variables are important, but difficult to measure. These variables are vital for understanding the ICTY’s explication of the other. The witnesses represent the face-to-face encounters of the perpetrators, the victims, and the experts who have been called in by the office of the prosecutor (OTP) and the ICTY to “do justice” and to promote peace and reconciliation. Such variables must be included to see if the court has any concern for this measure by the shear presence of witnesses. Witnesses are often material witnesses at the ICTY, and therefore only testify to questions of fact. Many times, the witnesses are even sealed so that no person can see or know of the testimony, which for Levinas would be a confounding issue. No matter the results, the presence of witnesses must be considered in light of the fact that witnesses provide a face of the other and are therefore a highly important factor when considering Levinasian ethics within the court.

Furthermore, prior research has shown that the intensity of the crime matters significantly at trial. This will be designated as crime rank and signifies that the more heinous the crime, the more likely it is that the court will convict or give longer sentences to the accused. This is coded as a “0” for those were acquitted. A “1” signifies a person who has been found guilty of war
crimes. “2” signifies a person who has been found guilty of crimes against humanity, and “3” signifies a person who is found guilty of genocide, the “crime of all crimes” (Meernik 2003, King and Meernik n.d.).

I will also use a control variable to measure the magnitude of the crime by using the number of charges on which an individual is found guilty. This will be designated as percent guilty and represents the extent of a defendant’s crimes. There is a significant concern that the number and variety of charges may not always correspond to the accused actual liability. Instead, this variable relies upon what the prosecution can prove at trial (Meernik 2003, King and Meernik n.d.). While the concern about this measure is justified, there simply is no better way to currently measure the magnitude of the crimes committed. For example, I could control for the number of verdicts an accused is found guilty of, but this would also ignore the proportion of the crimes committed (King and Meernik n.d.).

The relative power of the accused also matters significantly because the court is highly concerned about the use of power by commanders within the former Yugoslavia. Therefore I include a variable measuring the level of responsibility exercised by the accused. This is scored as a “1” for ordinary soldiers (guards and others of the like), a “2” for those in middle levels of power, and “3” for those in high level positions. This helps to gauge command responsibility and liability (Meernik 2003, King and Meernik n.d.). As levels of power increase, I should expect both a significant increase in sentence length and probability of being convicted.

To test the language used by the court and the ethical implications of their language, the first variable that LIWC measures is that of the human condition. These are words that are used
to designate when a person, as a human being, is being referred to by the ICTY judgment, and is therefore it signifies the extent to which the court is acknowledging humanity. For example, the LIWC dictionary acknowledges use of the world “child” or “children”; or “woman,” ”self,” and “adult” as humans and part of the humanity variable. The court would use this term when they are specifically referring to a type of grouping of persons. As such, the court is bringing the face of the other to their judgments by using language which is denoting the “human” existences. As this value becomes higher, I should expect both a longer sentence and more likely conviction because the court is ultimately most concerned about showing the human cost of the conflict in order to promote peace and reconciliation within the former Yugoslavia. The human condition variable provides a test of hypothesis 6, which is the closest empirical test available for a Levinasian ethical system.

In its judgments, the court also often refers to itself, often through using language that is self-inclusive. This would be language such as “ourselves” and “we”. Theoretically speaking, the connection between the court’s use of this language and the resulting sentence or conviction may seem shrouded. Close investigation reveals, however, that this variable denotes that the court is becoming more concerned with the functions of the court and is therefore not considering the liability of the accused. Since this is measured in relation to other language variables, this would make sense. As this variable increases, language that would hold the accused guilty or be used to give a longer sentence decreases, showing that the court’s concern for its own mechanisms results in the accused not being held as accountable. Self-inclusive language provides a test of hypothesis 3.
The use of emotionally based language should also be expected to matter significantly within the ICTY because it is emotionally based language that shows the thought process of the judges at the ICTY. I should expect the use of positively based language to show that the court is expecting to expunge the accused of some or all of their responsibility. Consequently, the presence of positive emotion should result in a lower sentence or less likely conviction. Positive emotion provides a test of hypothesis 4.

Just as with positively based emotion, I expect negatively based emotion to symbolize the court’s concern at the situation within the former Yugoslavia and the concerns surrounding the judgment. This is largely due to the fact that the court’s use of negative emotion should symbolize the court’s intention to both convict and give a longer sentence. Examples of this include “abandon,” ”ashamed,” and “burden.” Negative emotion will provide a test of hypothesis 5.

Analysis

The first hypothesis tested examines whether the court is more likely to convict someone who is Serbian. With regards to the conviction phase of the trials, I obtain different results than when examining the sentencing length. This is achieved through the use of modeling through OLS models. While it would be preferable to use logit or probit analysis, due to the restrictive number of observations available I cannot obtain stable results. However, OLS does not violate any Gauss-Markov assumptions and allows for me to obtain stable and robust results nonetheless.\textsuperscript{23} The results are shown in Table 4.

As Table 4 shows, positive emotion does not seem to hold a statistically significant relationship to the likelihood of a conviction (guilty or not guilty) while negative emotion does

\textsuperscript{23} These models were ran using STATA 9.0.
seem to affect the probability of being found guilty (hypothesis 5). This is not surprising, as one might expect the court to be more likely to find an accused guilty when the judges are angry at them.

Table 4 also indicates that being a Serbian is insignificant at the conviction phase of the trial. This is important because while much consideration has been given in this paper as to the court being biased against Serbs, Table 4 would seem to imply that no empirical evidence can be presented as to why this would be true. Again, it is important to note that different authors have found conflicting results about whether the court may be unevenly sentencing and conviction Serbs and potentially even exacerbating the issue of Serbian war crimes (Johnstone 2002; King and Meernik n.d.).

The crime rank variable holds a statistically significant relationship between the severity of the crime and the probability of being found guilty. It is worth noting that crime rank seems to have the largest magnitude of all the variables present in this model. It is further worth noting that none of the other control variables hold significance as well, meaning that in terms of conviction the rank of the crime may be the only factor that matters at the ICTY.

Table 5 indicates that the ethnicity of Serbian is insignificant at the sentencing phase of the trial. If there is a bias at play in the court, it is carefully hidden under other auspices in order to not invalidate the court’s convictions. Since the relationship is insignificant, I can claim that the court harbors no bias against those who are Serbian.

From a Levinasian standpoint, the lack of ability to demonstrate how the court is biased against ethnic Serbs is a positive sign for the court. If the court is to achieve its ethical mandate through radical alterity, it is necessary for the court to be unbiased when rendering decisions. While I cannot conclude that there is no bias against ethnic Serbs (or other ethnicities) within the
ICTY, I can say that no evidence exists within this data to support a conclusion that the court is being unfair against Serbian defendants.

To test the court’s use of self-inclusive language (hypothesis 3) with regards to sentencing practices, Table 5 provides the results. This hypothesis is the first of the language variables to be tested to examine whether the court is utilizing alterity within their sentencing practices. Self-inclusive language is insignificant within the sentencing practices of the ICTY. Since the self-inclusive language variable does not obtain statistically significance, I can find no evidence to support hypothesis 3. Therefore, even when the court emphasizes itself over the accused or victims, it is not shifting any culpability away from the accused.

Whether emotionally charged language has an effect upon sentencing (hypothesis 4) is also captured in Table 5. Again I controlled for the different levels of language that I would expect to find at the court and obtained intriguing findings. Positively based emotion has both a highly significant effect as well as a directionally relevant and impacting magnitude. It seems that as the percentage of positively based emotion increases, the sentence of the accused lowers by approximately 97 months.

Additionally, negative emotion does hold a statistically relevant relationship to the sentencing function of the ICTY. The directionality may be somewhat surprising, however, because it is the same direction as positive emotion, but with a significantly lower magnitude. Specifically, negative emotion reduces sentence length by 37 months per one unit increase in the overall percentage of negative emotion. Considering the range is 2.2% to 5.25% of total text, this can amount to a massively decreased sentence. This is most likely due to the court using negative emotion to reinforce their disdain for an accused when they cannot find the accused legally
culpable. This would imply that the court is still angry at an accused, but adheres to the rule of law rather than let emotion dictate their decisions.

When compared to my previous findings, I might be prompted to ask “Why would negative emotion in language both reduce the length of sentence and yet increase the likelihood of conviction?” Considering the propositions of a Levinasian ethical system, both scenarios make sense. In the former, because the judges used positive language in regarding the accused, they would be less likely to sentence them to longer imprisonment because the accused somehow exonerated themselves. In the latter, the court may be unable to find legal reasons why someone was culpable under international law (because there was not enough evidence to fully prove ones guilt). Therefore, while they want to enforce that they have reason to believe that an accused somehow contributed to the overall criminal atmosphere, they cannot hold them culpable under international law to the same extent as they wish.

One of the key variables in explaining a Levinasian concept of ethical relations is also captured in the human condition variable. In this model, concern for the human condition (hypothesis 6) by the court has both a significant relationship as well as being one of the strongest coefficients in the model. What this shows is a concern for the other – the key concept in Levinas’ work. Furthermore, the human condition also has a very high magnitude, greater of that than even criminal rank, which more traditional studies have claimed is the primary indicator of court outcomes (Meernik 2003).

In fact, concern for the human condition is more powerful of an indicator of sentence length than criminal rank by approximately 14 months (the magnitude is 67.33 months for every full point of increased language dealing with the human condition). In drawing this comparison, it is also important to note that the rank of the crime is not significant in this model. While it is
only a control variable that must be in the model, conventional wisdom has long been that the rank of the crime is what matters most at the ICTY. The implication of the human condition, however, successfully shows that this may not be the case.

From a Levinasian perspective, this is likely the most important finding that can be drawn from this model. The human condition shows the concern for the other by the court in the most direct method currently available, and the presence of the significance and magnitude of the human condition gives strong evidence that Levinas is correct about the innate ethics of humanity. In other words, because the court holds the other in such high regard, I can gain a strong background of the court as a mechanism of ethics. Consequently, it would seem as though the court is enforcing an innate ethical mandate as described by Levinas.

Furthermore, prosecution witnesses increase the total number of months one is sentenced for at a rate of .84 months per prosecution witness. This is the court’s innate measure of Levinasian ethics as measured by looking at the physical use of the other in court in a manner that Levinas calls the “face to face.” While the data set was not created by Meernik with this intent in mind, it is essentially the same occurrence. When the court brings in people who attest to the crimes they witnessed and lived through, they are creating a situation where the accused must face those that they violated. Consequently, this bringing together of the other and perpetrator is both interested for my theory, and symbolizes that the court does use the other in court in more than just their language.

At the same time, however, one might be concerned that the defense witness variable does not do the same thing, but with an opposite coefficient. The reason for this is that at the ICTY, most defense witnesses are called to show that the accused had no relation to the victims or they are called to establish the validity of the accused actions. The difference is that the
accused are not showing how they were a victim, and therefore not drawing sympathy as the other does, and instead only trying to wash their hands legally of the situation.

Unexpectedly, crime rank does not hold a statistically significant relationship to sentence length. Traditional studies have thought that crime rank was the primary determinant of conviction and sentencing (Meernik 2003, King and Meernik n.d.). Yet I find no support for this within this data.

Lastly, the percentage of counts for which the defendant is found guilty variable reveals some interesting insights. Due to the nature of the cases, one would expect that sentencing would be a function of not only of what crimes a person is accused of, but also of the magnitude of the crimes committed (King and Meernik n.d.). The percent guilty variable captures this, and allows for me to claim that for every one percent of overall conviction rate that a person increases, I should expect an increased sentence of 2.44 months. Given that the average percentage is 63.43 for those who have been found guilty at the ICTY, the magnitude of this variable can easily translate into several years with only a few counts difference.

Ultimately what the empirics seem to lend evidence to is that a Levinasian descriptive version of ethics does seem to be applied at the court. The concern of the ICTY has predominately been about the victims of the tragedy (the faces of the other) and this has borne out through the court’s language. By no means has any former evidence been disproven, specifically that the rank of the crime is what matters most at the court, but this analysis does shed light on the mechanisms through which the court operates and suggests that the language of the court is likely a more powerful predictor of the court’s behavior than the rank of the crime.

Language itself has been shown to be highly significant at the court, which makes perfect sense both theoretically and practically, and specific use of language has been given credence in
this work. This lends evidence to suggest that linguistic approaches may be viable for hermeneutically based approaches to international law. The fact that the magnitude of these variables outweighs variables such as criminal rank also speaks for their validity. Linguistic issues can be both a significant factor in determining the length of the sentence as well as the probability of verdict within international law.

Conclusions

The ICTY has been a highly debated, yet thoroughly utilized mechanism of international law. Concerns of bias and victors’ justice have been focal points of critiques of the court and have yet to be fully concluded. Whether the court truly is an entity of ethical consideration that is aiding the peace and reconciliation process will ultimately be seen years after the court finishes its mandate. While there is strong evidence to show that the court truly does consider ethical relations within its decision making process, a further conversation needs to occur about how language relates at the ICTY.

In terms of the ethical considerations, the ICTY does seem to be implementing a Levinasian understanding of ethics. This is a victory on two levels. First, it helps to stem the criticism that the court is being biased because the court is applying ethical understandings in order to promote peace and reconciliation. Secondly, it gives credence to the idea that ethics truly are innate from a Levinasian perspective. The further implication is that ethical understandings truly are a part of justice.

By showing that language is an important part of determining one’s ethical attitude, I have demonstrated that the court utilizes ethics within its mandate. This helps to address the concern that the court is utilizing biased standards of justice that would otherwise imply victors’
justice. This is perhaps the most important finding, and future work will need to focus more on
the role of language at the court in order to make determinations. It is both fascinating and
innovative to use an empirical method to gauge the courts attitude in this manner. The results of
the empirical analysis demonstrate that language is more powerful than other, more traditional
concerns such as the rank of the crime and therefore more attention should be focused on the
court’s use of language.

As far as bias is concerned, there is no empirical evidence showing that the ICTY is
biased against Serbs within this study. Others have argued that the bias is more carefully hidden,
and even suggested that the court has amplified Serb war crimes over other crimes in order to
advance the court itself. Ultimately, this issue will not be completely closed until well after the
court has finished its duty and shut down permanently. For now, however, I cannot conclude that
bias exists and therefore submit that there is no bias within the court.
Table 1. Summary Statistics of All Observations at the International Criminal Tribunal for the Former Yugoslavia

<table>
<thead>
<tr>
<th>Variable</th>
<th>Observations</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Min</th>
<th>Max</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>68</td>
<td>166.68</td>
<td>126.09</td>
<td>0</td>
<td>552</td>
<td>Length of sentence, measured in months</td>
</tr>
<tr>
<td>Verdict</td>
<td>68</td>
<td>.91</td>
<td>.29</td>
<td>0</td>
<td>1</td>
<td>Binary measure. 0=Not guilty, 1=Guilty</td>
</tr>
<tr>
<td>Serbian</td>
<td>68</td>
<td>.63</td>
<td>.48</td>
<td>0</td>
<td>1</td>
<td>Binary measure. 0=Not Serb, 1=Serb</td>
</tr>
<tr>
<td>Prosecution Witness</td>
<td>68</td>
<td>44.88</td>
<td>37.21</td>
<td>0</td>
<td>202</td>
<td>Raw count of witnesses called by prosecution</td>
</tr>
<tr>
<td>Defense Witness</td>
<td>68</td>
<td>28.61</td>
<td>27.84</td>
<td>0</td>
<td>99</td>
<td>Raw count of witnesses called by defense</td>
</tr>
<tr>
<td>Crime Rank</td>
<td>68</td>
<td>1.65</td>
<td>.68</td>
<td>0</td>
<td>3</td>
<td>Ranked 0 to 3, where 0 is an acquittal, 1 is guilty of war crimes, 2 is guilty of crimes against humanity, and 3 is guilty of genocide.</td>
</tr>
<tr>
<td>Power</td>
<td>68</td>
<td>1.85</td>
<td>.74</td>
<td>1</td>
<td>3</td>
<td>Ranked 1 to 3, with 1 being low amount of power and 3 being a high amount of power.</td>
</tr>
<tr>
<td>Percent guilty</td>
<td>68</td>
<td>57.84</td>
<td>35.38</td>
<td>0</td>
<td>100</td>
<td>Percent of overall indictments an accused is found guilty of.</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>68</td>
<td>.29</td>
<td>.46</td>
<td>0</td>
<td>1</td>
<td>Whether or not the accused plead guilty. 0 is not guilty, 1 is guilty.</td>
</tr>
<tr>
<td>Self-inclusive language</td>
<td>68</td>
<td>.02</td>
<td>.05</td>
<td>0</td>
<td>.31</td>
<td>Measures the frequency of self-inclusive language.</td>
</tr>
<tr>
<td>Positive emotion</td>
<td>68</td>
<td>1.22</td>
<td>.34</td>
<td>.66</td>
<td>2.28</td>
<td>Frequency of positive emotion</td>
</tr>
<tr>
<td>Negative emotion</td>
<td>68</td>
<td>3.57</td>
<td>.76</td>
<td>2.2</td>
<td>5.25</td>
<td>Frequency of negative emotion</td>
</tr>
<tr>
<td>Human condition</td>
<td>68</td>
<td>.82</td>
<td>.36</td>
<td>.25</td>
<td>1.76</td>
<td>Frequency of language that emphasizes human beings.</td>
</tr>
</tbody>
</table>
Table 2. Summary Statistics for Guilty Persons at the International Criminal Tribunal for the Former Yugoslavia

<table>
<thead>
<tr>
<th>Variable</th>
<th>Observations</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Min</th>
<th>Max</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>62</td>
<td>182.81</td>
<td>120.28</td>
<td>24</td>
<td>552</td>
<td>Length of sentence, measured in months</td>
</tr>
<tr>
<td>Verdict</td>
<td>62</td>
<td>1.00</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>Binary measure. 0=Not guilty, 1=Guilty</td>
</tr>
<tr>
<td>Serbian</td>
<td>62</td>
<td>.68</td>
<td>.47</td>
<td>0</td>
<td>1</td>
<td>Binary measure. 0=Not Serb, 1=Serb</td>
</tr>
<tr>
<td>Prosecution Witness</td>
<td>62</td>
<td>45.02</td>
<td>38.83</td>
<td>0</td>
<td>202</td>
<td>Raw count of witnesses called by prosecution</td>
</tr>
<tr>
<td>Defense Witness</td>
<td>62</td>
<td>28.16</td>
<td>27.44</td>
<td>0</td>
<td>99</td>
<td>Raw count of witnesses called by defense</td>
</tr>
<tr>
<td>Crime Rank</td>
<td>62</td>
<td>1.81</td>
<td>.47</td>
<td>1</td>
<td>3</td>
<td>Ranked 0 to 3, where 0 is an acquittal, 1 is guilty of war crimes, 2 is guilty of crimes against humanity, and 3 is guilty of genocide.</td>
</tr>
<tr>
<td>Power</td>
<td>62</td>
<td>1.82</td>
<td>.71</td>
<td>1</td>
<td>3</td>
<td>Ranked 1 to 3, with 1 being low amount of power and 3 being a high amount of power.</td>
</tr>
<tr>
<td>Percent guilty</td>
<td>62</td>
<td>63.43</td>
<td>31.85</td>
<td>9</td>
<td>100</td>
<td>Percent of overall indictments an accused is found guilty of.</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>62</td>
<td>.29</td>
<td>.46</td>
<td>0</td>
<td>1</td>
<td>Whether or not the accused plead guilty. 0 is not guilty, 1 is guilty.</td>
</tr>
<tr>
<td>Self-inclusive language</td>
<td>62</td>
<td>.02</td>
<td>.05</td>
<td>0</td>
<td>.31</td>
<td>Measures the frequency of self-inclusive language.</td>
</tr>
<tr>
<td>Positive emotion</td>
<td>62</td>
<td>1.24</td>
<td>.34</td>
<td>.66</td>
<td>2.28</td>
<td>Frequency of positive emotion</td>
</tr>
<tr>
<td>Negative emotion</td>
<td>62</td>
<td>3.57</td>
<td>.78</td>
<td>2.2</td>
<td>5.25</td>
<td>Frequency of negative emotion</td>
</tr>
<tr>
<td>Human condition</td>
<td>62</td>
<td>.83</td>
<td>.35</td>
<td>.26</td>
<td>1.76</td>
<td>Frequency of language that emphasizes human beings.</td>
</tr>
</tbody>
</table>

24Due to the fact that this table only includes guilty persons, this variable will not include “0” values since “0” is only for those who have been acquitted.
Table 3. Summary Statistics for Only Those Who Have Not Plead Guilty at the International Criminal Tribunal for the Former Yugoslavia

<table>
<thead>
<tr>
<th>Variable</th>
<th>Observations</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Min</th>
<th>Max</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
<td>50</td>
<td>172.44</td>
<td>140.07</td>
<td>0</td>
<td>552</td>
<td>Length of sentence, measured in months</td>
</tr>
<tr>
<td>Verdict</td>
<td>50</td>
<td>.88</td>
<td>.33</td>
<td>0</td>
<td>1</td>
<td>Binary measure. 0=Not guilty, 1=Guilty</td>
</tr>
<tr>
<td>Serbian</td>
<td>50</td>
<td>.52</td>
<td>.50</td>
<td>0</td>
<td>1</td>
<td>Binary measure. 0=Not Serb, 1=Serb</td>
</tr>
<tr>
<td>Prosecution Witness</td>
<td>50</td>
<td>59</td>
<td>32.65</td>
<td>8</td>
<td>202</td>
<td>Raw count of witnesses called by prosecution</td>
</tr>
<tr>
<td>Defense Witness</td>
<td>50</td>
<td>37.06</td>
<td>27.13</td>
<td>3</td>
<td>99</td>
<td>Raw count of witnesses called by defense</td>
</tr>
<tr>
<td>Crime Rank</td>
<td>50</td>
<td>1.56</td>
<td>.76</td>
<td>0</td>
<td>3</td>
<td>Ranked 0 to 3, where 0 is an acquittal, 1 is guilty of war crimes, 2 is guilty of crimes against humanity, and 3 is guilty of genocide.</td>
</tr>
<tr>
<td>Power</td>
<td>50</td>
<td>1.92</td>
<td>.75</td>
<td>1</td>
<td>3</td>
<td>Ranked 1 to 3, with 1 being low amount of power and 3 being a high amount of power.</td>
</tr>
<tr>
<td>Percent guilty</td>
<td>50</td>
<td>43.99</td>
<td>29.79</td>
<td>0</td>
<td>100</td>
<td>Percent of overall indictments an accused is found guilty of.</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>50</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>Whether or not the accused plead guilty. 0 is not guilty, 1 is guilty.</td>
</tr>
<tr>
<td>Self-inclusive language</td>
<td>50</td>
<td>.02</td>
<td>.05</td>
<td>0</td>
<td>.31</td>
<td>Measures the frequency of self-inclusive language.</td>
</tr>
<tr>
<td>Positive emotion</td>
<td>50</td>
<td>11.10</td>
<td>.27</td>
<td>.66</td>
<td>2.28</td>
<td>Frequency of positive emotion</td>
</tr>
<tr>
<td>Negative emotion</td>
<td>50</td>
<td>3.68</td>
<td>.79</td>
<td>2.2</td>
<td>5.25</td>
<td>Frequency of negative emotion</td>
</tr>
<tr>
<td>Human condition</td>
<td>50</td>
<td>.83</td>
<td>.34</td>
<td>.25</td>
<td>1.48</td>
<td>Frequency of language that emphasizes human beings.</td>
</tr>
</tbody>
</table>
Table 4. The Affect of Language on Verdicts at the International Criminal Tribunal for the Former Yugoslavia

| Verdict                      | Coefficient | Robust Std. Error | t     | P>|t| |
|------------------------------|-------------|-------------------|-------|------|
| Self-inclusive language      | 0.04        | 0.75              | 0.05  | 0.96 |
| Positive emotion             | 0.25        | 0.13              | 1.99  | 0.06 |
| Negative emotion             | 0.07        | 0.04              | 2.04  | 0.05*|
| Human condition              | -0.09       | 0.14              | -0.62 | 0.54 |
| Serbian                      | -0.13       | 0.09              | -1.33 | 0.19 |
| Prosecution witnesses called | 0.00        | 0.00              | 0.05  | 0.96 |
| Defense witnesses called     | -0.00       | 0.00              | -1.32 | 0.19 |
| Power                        | 0.00        | 0.06              | 0.15  | 0.88 |
| Crime rank                   | 0.41        | 0.07              | 5.36  | 0.00***|
| Constant                     | 136.06      | 94.77             | 1.44  | 0.16 |

n=50  *=Significant at 5%  **=Significant at 1%  ***=Significant .01%

Note: Significance is determined with one-tailed tests.
Table 5. How Language Affects Sentence Length at the International Criminal Tribunal for the Former Yugoslavia

| Sentence length (in months)                  | Coefficient | Robust Std. Error | t     | p>|t| |
|---------------------------------------------|-------------|-------------------|-------|------|
| Self-inclusive language                     | -237.20     | 217.63            | -1.09 | 0.28 |
| Positive emotion                            | -97.33      | 34.25             | -2.84 | 0.00*** |
| Negative emotion                            | -37.22      | 13.01             | -2.86 | 0.00*** |
| Human condition                             | 67.33       | 31.19             | 2.16  | 0.04* |
| Serbian                                     | 3.62        | 31.73             | 0.11  | 0.91 |
| Prosecution witnesses called                | 0.84        | 0.41              | 2.03  | 0.05* |
| Defense witnesses called                    | -0.52       | 0.63              | -0.83 | 0.41 |
| Power                                       | 3.11        | 16.97             | 0.18  | 0.86 |
| Crime rank                                  | 51.48       | 36.16             | 1.42  | 0.16 |
| Guilty plea                                 | -100.01     | 34.10             | -2.93 | 0.00*** |
| Percent guilty                              | 2.44        | 0.59              | 4.08  | 0.00*** |
| Constant                                    | 136.06      | 94.77             | 1.44  | 0.16 |

n=62

*=Significant at 5%   **=Significant at 1%   ***=Significant .01%

Note: Significance is determined with one-tailed tests.


