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Reconciliation and The Rule of Law: The Changing Role of International War Crimes Tribunals

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**RECONCILIATION AND THE RULE OF LAW:
THE CHANGING ROLE OF INTERNATIONAL WAR CRIMES TRIBUNALS**

**A CASE STUDY OF THE INTERNATIONAL MILITARY TRIBUNAL (IMT) AT
NUREMBERG AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE
FORMER YUGOSLAVIA (ICTY)**

by

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Abstract

This thesis explores the relationship between international war crimes tribunals and peacebuilding in post-conflict societies. The aim of the present study was to examine how the role and function of international tribunals has changed since the establishment of the Nuremberg tribunal in the early years after World War II. Due to the evolving nature of international law and the international criminal legal system, international tribunals have become increasingly recognized as an integral component of peacebuilding processes in the aftermath of conflict. As the first international tribunal mandated to restore international peace and security, the International Criminal Tribunal for the former Yugoslavia (ICTY) set a new precedent for international tribunals. Beginning with its establishment, there appeared to be a new trend of using international judicial mechanisms to promote peace and reconciliation in the aftermath of conflict. One important element of change was the increased tendency of international tribunals to engage in public outreach and help build the capacity of national justice sector institutions. As the first international tribunal to succeed the Nuremberg and Tokyo tribunals and the first UN tribunal of its kind, the ICTY has shown the extent to which international tribunals facilitate societal reconciliation is, and will be, understood within the context of the legacies they leave behind. Institutions such as the ICTY will not be judged solely on the merits of the ideals on which they were established, but instead on their concrete successes in the domestic arena and their ability to fortify domestic judicial capacity.

Keywords: Rule of Law, Peacebuilding, Reconciliation, Outreach, International Tribunals, Transitional Justice, and Capacity-Building

Chapter 1: International War Crimes Tribunals: An Introduction

In 1992, conflict engulfed the multi-ethnic republic of Bosnia and Herzegovina (BiH). It became the site of deadly warfare and the target of ethnic cleansing.¹ From 1992-95, grave crimes against humanity, violations of human rights, and genocide were committed in BiH.² The conflict claimed the lives of an estimated 100,000 people and forced another two million people, more than half the republic's population, to flee their homes.³ On May 25, 1993, United Nations Security Council (UNSC) Resolution 827 established the International Criminal Tribunal for the former Yugoslavia (ICTY) to bring to justice those persons responsible for these serious violations of international humanitarian law in the region of the former Yugoslavia since 1991.⁴

The ICTY was the first international tribunal to succeed the Nuremberg and Tokyo tribunals established in the aftermath of World War II. As the “genesis of international criminal law and enforcement” the Nuremberg and Tokyo tribunals provided the foundation for the creation of the ICTY in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994.⁵ Due to the evolution of international law and the international criminal legal system, international tribunals have become increasingly recognized as an integral component of peacebuilding in post-conflict societies. As the first international tribunal mandated to restore international peace

¹ The systemic elimination of one ethnic or religious group by another ethnic or religious group or groups from a region or society as by forced emigration, deportation, or genocide.

² Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca: Cornell University, 2009), 123.

³ “The Conflicts,” *ICTY*, n.d., <http://www.icty.org/sid/322>.

⁴ Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina* (Cambridge University Press, 2010), 3.

⁵ Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability After War* (Cambridge: Polity Press, 2007), 18.

and security, the ICTY set a new precedent for international tribunals. Beginning with its establishment, there appeared to be a new emphasis on using international judicial mechanisms to promote peace and reconciliation in the aftermath of conflict. One important element of change was the increased tendency of international tribunals to engage in public outreach and help build the capacity of national justice sector institutions. In this regard, promotion of the rule of law, institution building, and reconciliation has evolved out of the ICTY's work.

Following the end of WWII and the establishment of the Nuremberg and Tokyo tribunals, international humanitarian and human rights law expanded. Important conventions were agreed upon including the UN Genocide Convention of 1948, the Universal Declaration of Human Rights of 1948, the Geneva Conventions of 1949 and Additional Protocols of 1977.⁶ These developments in international law laid the foundation for transitional justice, a set of “judicial and non-judicial mechanisms aimed at dealing with the legacy of large-scale abuses of human rights and/or violations of international humanitarian law.”⁷ During the late 1980s and early 1990s transitional justice emerged in response to political events taking place in Latin America and Eastern Europe focusing more on abuses of human rights.⁸ Following the end of the Cold War in 1991, the intervention of outside actors in situations, previously “deemed beyond the purview of an outside entity,” significantly increased.⁹ Peace operations became more commonplace and their scope expanded, in some instances undertaking projects to build or re-build institutions in post-conflict or

⁶ Ibid., 23.

⁷ Ibid., 3.

⁸ Aryeh Neier, *The International Human Rights Movement: A History* (Princeton, New Jersey: Princeton University Press, 2012), 259.

⁹ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 1.

failing states.¹⁰ In 1993, the establishment of the ICTY appeared to “signal the advent of a developing norm of ‘international judicial intervention’, based on the understanding that justice was a non-negotiable element of sustainable peacebuilding.”¹¹ As international justice has been recognized as “part and parcel of a broader peacebuilding process,” courts such as the Yugoslav tribunal have “begun to embrace the idea that justice is not only a tool to fill justice gaps at the domestic level, but an instrument to strengthen domestic justice efforts.”¹² In this regard, not only did the ICTY secure accountability for past abuses, it made a direct contribution to increasing the capacity of the region’s national courts and informing the local communities of the Tribunal’s purpose and work in an effort to facilitate reconciliation in the region.¹³

The aim of the present study is to examine this change in the role and function of international war crimes tribunals since the early years after WWII. In order to understand this new emphasis on public outreach and domestic rule of law capacity building, we can examine the similarities and differences between the ITCY and Nuremburg and how they compare in origin, mandate and execution. Prior to the 1990s, international tribunals did not fall into the category of what was conventionally understood as a tool for peacebuilding. For the sake of clarity, I refer to peacebuilding as “action to identify and support structures which will tend to

¹⁰ Ibid.

¹¹ Ibid., 30.

¹² Carsten Stahn, “The Future of International Criminal Justice” (presented at the Opening of the Academic Year, Den Haag, Leiden University, 2009), 9, <http://media.leidenuniv.nl/legacy/opening-future-of-international-criminal-justice-pdf.pdf>.

¹³ For the purpose of this thesis, I will focus on the role and activities of the Nuremberg tribunal and the ICTY.

strengthen and solidify peace in order to avoid a relapse into conflict.”¹⁴ This thesis suggests that the ICTY has played a role in peacebuilding in the region of the former Yugoslavia in the sense that it made a direct contribution to strengthening the rule of law in the region.

As of July 1, 2013, the ICTY has transferred jurisdiction over its cases to a Residual Mechanism. This research arrives at a moment when the ICTY’s legacy and role in transitional justice processes is under considerable scrutiny and calls attention to the legacy of the ICTY.¹⁵ The ICTY’s overture into peacebuilding is profound. It has major implications for reconciliation on the ground and the role that future international tribunals play in the wake of conflict. Just as the ICTY was predicated on the Nuremberg principles, the ICTY now provides an important model for future judicial intervention in the aftermath of conflict. Although it has received a great deal of criticism, the ICTY gave impetus to the formation of the International Criminal Court (ICC), the first permanent court of its kind.¹⁶ The creation of the ICC marked an important step towards global accountability for all, building on the experience of the ICTY and a new legal precedent for universal jurisdiction. Providing a number of ‘lessons learned’ regarding public outreach and domestic rule of law capacity building, the ICTY continues to be instrumental in the emergence of internationalized

¹⁴ UN Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary-General*, UN Doc A/47/277-S/24111 (June 17, 1992) [hereinafter *An Agenda for Peace*].

¹⁵ Nerma Jelacic, Suzana Szabo, and Slavica Kosca-Vrlazic, eds., “Legacy of the ICTY in the Former Yugoslavia Conference Proceedings Sarajevo, 6 November 2012; Zagreb 8 November 2012,” trans. Balkan Investigative Reporting Network (BIRN) BiH (ICTY Outreach Programme, 2013), http://www.icty.org/x/file/Outreach/conferences_pub/naslijedje_mksj_sa-zg_en.pdf.

¹⁶ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 31.

and hybrid criminal courts and tribunals, which aim to achieve an even greater degree of coordination and/or integration with domestic courts.¹⁷

Understanding how the role and function of international tribunals regarding peacebuilding has changed regarding peacebuilding is the first step in understanding why this change has occurred. Furthermore, understanding this change informs the notion of how transitional justice has evolved and will continue to evolve over time. The ICTY has shown that the extent to which international judicial institutions facilitate societal reconciliation is, and will be, understood within the context of the legacies they leave behind. Institutions such as the ICTY will not be judged solely on the merits of the ideals that they were established on, but instead on their concrete successes in the domestic arena and their ability to fortify domestic judicial capacity.

Historical Context

Prior to the breakup of the former Yugoslavia, Josip Broz Tito held tight control over the ethnic, religious and nationalist groups under the umbrella of a ‘greater Yugoslavia.’ After Tito’s death, relations between the six former Yugoslav republics deteriorated. Politicians began to exploit nationalist rhetoric, pitting Serbs, Croats, and Bosniaks against one another. Prior to the breakup, Bosnia-Herzegovina (BiH) was an ethnically mixed state. Its three constituent peoples¹⁸ lived together in peace. However, on March 3, 1992, BiH’s declaration of independence from the former Yugoslavia elicited a violent response from the Bosnian Serbs. National sentiments mobilized the Bosnian Serbs and Yugoslav National Army (JNA) to partition BiH along ethnic lines, with the ultimate goal of creating a “Greater

¹⁷ Ibid., 81.

¹⁸ Bosniaks, Croats, and Serbs.

Serbia.”¹⁹ By means of armed resistance, they waged war against the Bosnian Croats and Bosnia Muslims. The war in BiH continued for three years, with two of the greatest atrocities being the years-long siege of Sarajevo that began in 1992 and the genocide at Srebrenica in 1995, which claimed the lives of over 8,000 Bosnian Muslim men and boys.²⁰ Between 1992-95, failed UN peacekeeping efforts exposed the “impotence and sterility of a system of world order...that was founded, in an attempt to bind the world legally to preventing future aggressions.”²¹ Although the U.S. and European Community formally recognized the state of BiH in the spring of 1992 and the UNSC established the ICTY in 1993, the war prevailed resulting in extreme casualties.²²

The Dayton Peace Accords (DPA) ended the war in late 1995 and separated the republic into two entities, the Bosnian Muslim and Bosnian Croat Federation of BiH, and the Bosnian Serb Republika Srpska (RS). In addition to separating these two entities and establishing a political, legal, and military framework in the country, the DPA “institutionalized international expectations for transitional justice in Bosnia.”²³ It required the two Bosnian entities to fully cooperate with the ICTY regarding “the investigation and prosecution of war crimes and other violations of international humanitarian law” in the region.²⁴ However, even though the DPA required states to cooperate with the Tribunal, the ICTY struggled in securing state cooperation

¹⁹ Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina* (Cambridge University Press, 2010), 1.

²⁰ Nettelfield, *Courting Democracy in Bosnia and Herzegovina*, 1.

²¹ David Rieff, *Slaughterhouse: Bosnia and the Failure of the West* (New York: Simon & Schuster, 1995), 21.

²² Ibid.

²³ Subotic, *Hijacked Justice: Dealing with the Past in the Balkans*, 126.

²⁴ “Article IX of the General Framework Agreement for Peace in Bosnia-Herzegovina,” *Office of the High Representative*, December 14, 1995, http://www.ohr.int/dpa/default.asp?content_id=379.

throughout the course of its mandate.²⁵ As an international body of law, lacking authority over the area in which it had jurisdiction, the ICTY was reliant on state cooperation in several ways. It grappled with moving states “complicit in atrocities to cooperate in the prosecution of suspects of their own political, national, or ethnic group.”²⁶ For years, the ICTY’s ability to carry out investigations was inhibited by states’ lack of inclination to turn over high-level suspects to the tribunal and assist in obtaining evidence, and locating and interviewing witnesses.²⁷ Despite these challenges, the ICTY “laid the foundation for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically that leaders suspected of mass crimes will face justice.”²⁸

At the time of the Tribunal’s establishment, national judiciaries were not willing or able to prosecute war crimes.²⁹ The legitimacy of domestic war crimes trials in postwar BiH were further complicated by the complex constitutional framework established by the Dayton agreement in 1995. Due to the prevailing influence of nationalists in the region, the professionalism of individuals working in the domestic courts was compromised, causing the fair trial of cases to be undermined.³⁰ In 2002, the ICTY adopted a completion strategy in anticipation of its closing and the need to transfer cases to local judiciaries in the region of the former Yugoslavia. In 2005, in response to the shortcomings of the domestic courts in

²⁵ Victor Peskin, *International Justice in Rwanda and the Balkans* (Cambridge, New York: Cambridge University Press, 2009), 45.

²⁶ *Ibid.*, xi.

²⁷ *Ibid.*, 4.

²⁸ “About the ICTY,” accessed March 23, 2014, <http://www.icty.org/sections/AbouttheICTY>.

²⁹ Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York, NY: Open Society Institute, 2010), 11, accessed March 12, 2014, <http://www.opensocietyfoundations.org/sites/default/files/that-someone-guilty-20100708.pdf>.

³⁰ Subotic, *Hijacked Justice: Dealing with the Past in the Balkans*, 140.

Bosnia, the ICTY in collaboration with the Office of the High Representative (OHR)³¹ established a War Crimes Chamber (WCC) in the Court of BiH.³² Additionally, as a component of the ICTY's completion strategy, the Tribunal aided the development of local judicial capacity in collaboration with other international organizations on the ground.³³

Literature Review

Approaches to securing accountability for genocide, war crimes, and crimes against humanity are continually evolving. A large and growing body of literature has addressed this evolution of international criminal justice and the emergence of transitional justice. A number of different scholars have examined the relationship between peace and justice, new norms in peace operations, and the integration and complementarity of approaches to peacebuilding processes. Although this literature has addressed how the relationship between peace and justice has developed and examined the role and expectation of international war crimes tribunals in post-conflict societies, there is a limited body of scholarship on exactly how the role and function of international tribunals has changed since the early years after WWII. Examining this new aspect of peacebuilding that has emerged out of the ICTY's work further informs the notion of how transitional justice changes over time.

Since its establishment the ICTY has become a "global paradigm," informing the work of both national and international courts.³⁴ Many of the cases that the ICTY

³¹ The Office of the High Representative (OHR) is an *ad hoc* international organization tasked with the responsibility of ensuring that the democratic progression of Bosnia-Herzegovina is successful, peaceful, and complies with all aspect of the Dayton Peace Agreement. For more information on the OHR, see: <http://www.ohr.int/>

³² Subotic, *Hijacked Justice: Dealing with the Past in the Balkans*, 142.

³³ Nettelfield, *Courting Democracy in Bosnia and Herzegovina*, 234.

³⁴ *Ibid.*

tried dealt with some of the most horrendous crimes committed since WWII.³⁵ In order to understand the new role that the ICTY has assumed we must recall the conditions under which it was established and its original goals. As an *ad hoc* institution, established under Chapter VII of the UN Charter, the ICTY's life span was directly linked to the restoration and maintenance of peace in the region of the former Yugoslavia.³⁶ Thus, some scholars argue that the strategy devised for the Tribunal's completion was a response to necessity.³⁷ Because of its nature as a UN institution, the ICTY was the first international tribunal to rely on and struggle with state cooperation.³⁸ Victor Peskin argues that, "the foundation for just societies depends in no small part on whether tribunals can overcome state obstruction and prosecute all sides of a conflict equitably, thereby arriving at a comprehensive truth about what happened and who bears responsibility."³⁹ He argues that the UN would be unable to fulfill its mission to prosecute perpetrators of war crimes and reconcile war-torn societies without state cooperation. Thus, the problem of state cooperation may have hindered the ICTY from having its intended effect on the region, causing it in turn to adopt new strategies for fulfilling its mandate.

In this regard, the challenges the ICTY faced throughout the course of its mandate required "new creativity."⁴⁰ It was forced to develop new strategies to overcome lack of state-cooperation, as well as address the limitations of the Tribunal, as an *ad hoc* institution, to deal with a backlog of cases within the constraints of its

³⁵ *Ibid.*, 56.

³⁶ Fausto Pocar, "Completion or Continuation Strategy?: Appraising Problems and Possible Developments in Building the Legacy of the ICTY," *Journal of International Criminal Justice* 6, no. 4 (September 1, 2008): 657, doi:10.1093/jicj/mqn043.

³⁷ Stahn, "The Future of International Criminal Justice," 9; Pocar, "Completion or Continuation Strategy?: Appraising Problems and Possible Developments in Building the Legacy of the ICTY," 657.

³⁸ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 31.

³⁹ Peskin, *International Justice in Rwanda and the Balkans*, 246.

⁴⁰ Stahn, "The Future of International Criminal Justice," 10.

mandate.⁴¹ Specifically, a decline in the international community's interest in the region encouraged the Tribunal to propose a "creative and courageous way" of closing down.⁴² For this reason, Fausto Pocar argues that the ICTY's Completion Strategy, which includes increased outreach and capacity building efforts, is much more than a strategy to wind down the Tribunals' trials and court proceedings. Instead, it is "aimed at restoring the original idea of the UNSC when it established the ICTY, that is, that the Tribunal would have primacy for a short period because of the inability of the local judiciaries to deliver justice and ensure a future of peace to the region."⁴³ Thus, if we consider the adoption of this strategy in its entirety "it is not so much a strategy to 'complete' the work of the ICTY as it is a strategy designed to allow continuation by local actors of those activities that were initially 'kicked off' by the ICTY under the mandate of the Security Council."⁴⁴

The relationship between law and politics is complex, and calls into question the productiveness of implementing international mechanisms of transitional justice.⁴⁵ Jelena Subotic argues that "transitional justice is quickly becoming an international norm, a standard of proper state behavior...yet the way this new international norm has played itself out in real politics of countries that have adopted it has departed greatly from international expectations."⁴⁶ The discrepancy between international expectations of international criminal courts and the reality of how they play out on the ground results in negative attitudes and perceptions of transitional justice mechanisms. In turn, Subotic questions what the appropriate political response to mass atrocities is today. She contends that because transitional justice mechanisms,

⁴¹ Ibid., 9.

⁴² Pocar, "Completion or Continuation Strategy?," 657.

⁴³ Ibid., 665.

⁴⁴ Ibid., 661.

⁴⁵ Subotic, *Hijacked Justice: Dealing with the Past in the Balkans*, 189.

⁴⁶ Ibid., p. 5.

such as war crimes trials and truth commissions, have been recognized as a necessary and desirable component of post-conflict reconstruction, there is an expectation that states will address violent conflict through international judicial institutions, as opposed to granting amnesties for war crimes. Subotic finds this expectation problematic due to the fact that there is a tendency for state actors to ‘hijack’ various methods of transitional justice for local political strategies. In addressing the major problem of how to deal with atrocities of the past, and the perpetrators of those atrocities, Subotic argues that there should be a stronger focus on the social transformation and reconciliation of post-conflict societies.⁴⁷

In order to understand this division between international and national expectations of transitional justice, the relative benefits and drawbacks of the range of possible mechanisms must be better understood. Through an examination of various judicial and non-judicial mechanisms for dealing with issues of justice and accountability in post-conflict societies, Kerr and Mobekk conclude that “while there is no ‘one-size-fits-all’ solution to the difficult and complex question of how to deal with past abuses, lessons from past and current endeavors can help provide a framework through which we might be able to better assess the best possible solution for a given situation.”⁴⁸ Examining the contexts in which the establishment of the Nuremberg tribunal and the ICTY were pursued is one of the most important considerations. In fragile post-conflict settings advancing justice, peace, and reconciliation is a complex task. It requires careful planning and a clear understanding of the specific history and background to the conflict and the actors involved.⁴⁹

⁴⁷ Subotic, *Hijacked Justice: Dealing with the Past in the Balkans*.

⁴⁸ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 3.

⁴⁹ *Ibid.*, 10–11.

Understanding the nature of the conflict is therefore crucial if we are to be able to draw sensible distinctions between the roles and activities of these two tribunals.

According to Kerr and Mobekk, the transitional justice process is directly affected by the existence of a peace agreement, financial capabilities, existing infrastructure and local capacity in the post-conflict setting, political will, and the degree to which the international community is involved.⁵⁰ In this regard, examining the historical context, principal justifications for and ultimate aims of the Nuremberg tribunal and the ICTY is the first step in understanding how trends in transitional justice change over time. Understanding the similarities and differences between these two major international tribunals can provide insight into the evolution of the role and function of international tribunals regarding peacebuilding since the early post-WWII period.

Over the past twenty years, transitional justice has become a “normalized and globalized form of intervention following civil war and political repression.”⁵¹ Rosalind Shaw and Lars Waldorf argue that, along with other transitional justice mechanisms, war crimes prosecutions have put into practice “a liberal vision of history as progress, a redemptive model in which the harms of the past may be repaired in order to produce a future characterized by the non-reoccurrence of violence, the rule of law, and a culture of human rights.”⁵² Within the practice of this liberal vision, transitional justice has recently “undergone a shift toward the local.”⁵³ As a result, “since the turn of the millennium, the field of transitional justice has been increasingly challenged by the people it is designed to serve: survivors of mass

⁵⁰ Ibid.

⁵¹ Rosalind Shaw and Lars Waldorf, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, ed. Pierre Hazan (Stanford, CA: Stanford University Press, 2010), 3.

⁵² Ibid.

⁵³ Ibid., 4.

violence.”⁵⁴ Moreover, “this latest phase of transitional justice is marked not only by a fasciation with locality, but also a return to Nuremberg’s international norms against impunity and a UN prohibition against granting amnesties for war crimes.”⁵⁵

With the emergence of transitional justice came subsequent developments in the role of international criminal tribunals.⁵⁶ It became widely recognized that a key aspect in reconciliation in the aftermath of conflict is the development of the rule of law. In turn, international criminal processes began to coalesce with domestic rule of law reform.⁵⁷ Pdraig McAuliffe argues that the inherent differences in the fields’ varying notions and conceptualizations of the rule of law have contributed to the divergence in approaches to the practice of international criminal justice. He contends that new developments in transitional justice are the by-product of legal and human rights theory. He argues that:

With the consolidation of transitional justice came an accelerated process of contagion learning, where policy-makers in one context appropriated the knowledge and methodologies accumulated in previous transitions. As transitional justice enters a ‘do everything, engage everyone’ era, a restorative paradigm of justice concerned with the individual, the family and the local community has shared parity with more status-legalist approaches.⁵⁸

For this reason, he contends that criticisms of the operation of *ad hoc* tribunals has led to an approach to transitional justice in which “victims emerged in transitional criminal trials from their earlier instrumentalization to become one of the main constituencies of prosecution, consultation became the paramount virtue of

⁵⁴ Ibid. 1.

⁵⁵ Ibid., 4.

⁵⁶ Pdraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (London: Routledge, 2013), 5.

⁵⁷ Ibid., 4.

⁵⁸ Ibid., 3.

accountability planning, and outreach has become imperative” to the success of international tribunals.⁵⁹

Traditionally, the primary role of criminal proceedings is to prosecute individuals for violations of the law. Yasmin Naqvi explains that, “from a common law perspective, [the criminal process] is not so much about finding the truth than as it is offering evidence that proves guilt or innocence...the ‘legal truth’ is merely a by-product of a dispute settlement mechanism.”⁶⁰ However, in the case of international criminal courts, this by-product has “taken on a new dimension.”⁶¹ Naqvi explains that, “the right to truth has emerged as a legal concept at the national, regional and international levels, and relates to the obligation of the state to provide information to victims or to their families or even to society as a whole about the circumstances surrounding serious violations of human rights.”⁶² She accredits the new dimension of this legal concept to the unique objectives of international criminal law. International criminal courts are inherently dispute settlement mechanisms; however, the principal aims of their founders have redefined the traditional role of the criminal process. When taken together, acknowledgement of a legal right to truth in international war crimes tribunals “would intermesh strategically with the broader objectives of international criminal law, arguably including those of restoring and maintaining peace.”⁶³ Thus, the objectives of international criminal courts have been redefined due to the emergence of the legal concept of the right to truth. It is no longer enough to examine the work of international tribunals in the courtroom. It is important to

⁵⁹ Ibid.

⁶⁰ Yasmin Naqvi, “The Right to the Truth in International Law: Fact or Fiction?,” *International Review of the Red Cross* 88, no. 862 (June 2006): 246, doi:10.1017/S1816383106000518.

⁶¹ Ibid.

⁶² Ibid., 245.

⁶³ Ibid., 247.

understand how their work plays out on the ground and affects the local communities for which they dispense justice.

Growing debates about the effectiveness of international criminal tribunals have caused scholars and practitioners to look to alternative responses to mass atrocities. For some time effectiveness was narrowly defined as international impact. Carsten Stahn argues that there has been a paradigm shift in international justice. International judicial institutions are no longer judged on their performance, but on their ability to contribute to problem solving.⁶⁴ Stahn contends that, “the effects of justice cannot be measured only by what is actually going on in the courtroom, but by their impact internationally and domestically.”⁶⁵ Moreover, he argues that justice is “no longer a one-way street—it is a dialogue among international institutions and jurisdictions and, most of all, a dialogue with domestic jurisdictions.”⁶⁶ For this reason, an analysis of the realistic achievements of international justice requires an understanding of how the relationship between international tribunals and peacebuilding has evolved over time.

Since the establishment of the ICTY and the ICTR new initiatives to combat impunity have been “welcomed as potentially offering advantages over other approaches.”⁶⁷ These initiatives have come in a multiplicity of forms from other judicial mechanisms for accountability such as the ICC, amnesties, truth commissions, and traditional informal justice mechanisms. According to Kerr and Mobekk, although there is still contention over “the potentially destabilizing impacts of transitional justice, and about sequencing of peace and justice processes,” the debate surrounding the implementation of transitional justice mechanisms “has

⁶⁴ Stahn, “The Future of International Criminal Justice,” 9.

⁶⁵ *Ibid.*, 2.

⁶⁶ *Ibid.*, 10.

⁶⁷ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 1.

largely shifted from *whether* to pursue some form of transitional justice, to *what form* it should take, what the degree of international involvement should be and who should be engaged.”⁶⁸ This thesis suggests that the ICTY’s emphasis on public outreach and domestic rule of law capacity building has redefined the degree to which international tribunals should be engaged in peacebuilding efforts on the ground.

Finally, the focus that has been placed by the international human rights movement over the last quarter century on securing accountability for “grave abuses” has, according to Aryeh Neier, led to the emergence of truth commissions, increased use of the principle of universal jurisdiction, and development of international criminal tribunals.⁶⁹ The movement’s concern with accountability first came into focus in 1983 on account of disappearances in Argentina.⁷⁰ For roughly a decade, “truth commissions were the preferred means of securing accountability.”⁷¹ However, when faced with holding perpetrators of “crimes committed in connection with ‘ethnic cleansing’” accountable, there was a call for prosecutions and criminal sanctions.⁷² In both regards, securing a reduction of crime underscores the movement’s promotion of accountability. Neier submits, “it will take a good many years before it is possible to make an assessment of whether the mechanisms for promoting accountability that are now in place are also achieving the deterrent purpose.”⁷³ In order to begin to make such an assessment, it is valuable to understand how Nuremberg, the first international tribunal mandated to establish individual accountability for war crimes committed during WWII, differs from its immediate successor, the ICTY. In order to understand the full potential and capacity of an

⁶⁸ Ibid., 2.

⁶⁹ Neier, *The International Human Rights Movement: A History*, 258.

⁷⁰ Ibid., 259.

⁷¹ Ibid., 264.

⁷² Ibid.

⁷³ Ibid., 284.

international war crimes tribunal, such as the ICTY, we need to critically analyze its role and function in relation to that of its predecessor.

Methodology

The research for this thesis is based on a compilation of primary and secondary sources. Qualitative research methods were also employed in the form of three semi-structured interviews and an observation of a conference entitled “Legacy of the ICTY in the former Yugoslavia” held in Sarajevo on November 6, 2012. The target populations for my data collection were individuals working for the ICTY and in the media sector in Sarajevo, BiH. Interviewees included two representatives of the ICTY, one in Sarajevo and one in The Hague, and one representative of the Balkan Investigative Reporting Network (BIRN). Additionally, data was gathered and analyzed from the “Legacy of the ICTY in the former Yugoslavia” conference. The conference had four panel discussions and participants were comprised of a variety of stakeholders including national judiciaries, victims, local NGOs, politicians, journalists, and transitional justice experts. A number of primary sources, including UN Resolutions, ICTY annual reports and factsheets, newspaper articles, and the Nuremberg Charter and ICTY Statute were examined. Additionally a number of secondary sources, on topics including international justice, the Nuremberg tribunal, and the ICTY were utilized in order to better understand the historical context and work of the two tribunals.

Chapter Organization

This thesis has four chapters including this introduction. The following chapter will compare and contrast the roles and activities of the Nuremberg tribunal and the ICTY. It will examine the factual circumstances surrounding the establishment of both tribunals, the principal aims of their founders, their legal basis,

and their criminal and territorial jurisdiction. By examining how these two international tribunals were both similar and different we can see a change in the role and function international tribunals have played in post-conflict societies since the early post-war years of WWII.

The third chapter will provide an in-depth examination of the ICTY's role and activities in the region of the former Yugoslavia. It will discuss some specific ways in which the ICTY engaged in conducting public outreach and strengthening the rule of law in the region, specifically in BiH. The relationship between the Nuremberg tribunal and the ICTY and the regions for which they dispensed justice is by far the greatest difference between the two tribunals. Illustrating the ICTY's overture into peace-building through public outreach and domestic rule of law capacity building efforts requires a lengthy examination of the specific series of programs and measures implemented by the Tribunal.

The fourth chapter will examine possible explanations for the ICTY's overture into peacebuilding. It will discuss some of the main challenges the ICTY faced in completing its mandate. Additionally, it will discuss policy implications of this new relationship between the ICTY and the local communities for which it distributed justice. I will suggest that since the end of the Cold War, and the establishment of the ICTY, the success of international tribunals has been redefined within the context of the impact they leave on domestic judicial systems. For this reason, over the course of its mandate, it has become apparent that the ability of the ICTY to contribute to the restoration and maintenance of peace in the former Yugoslavia depends on the impact and legacy it leaves on the local level. I will suggest that it is no longer enough for *ad hoc* tribunals such as the ICTY to merely exist and fulfill their basic mandates to distribute justice. The real success of international justice relies on these institutions'

ability to transfer responsibility from the international community to the local community and establish domestic judiciaries that can carry on their missions and make them domestic initiatives.

Chapter Conclusion

The aim of this research is to understand how the ICTY differs from its predecessor, the Nuremberg tribunal in order to provide a framework for future research into the reasons for the ICTY's overture into peacebuilding through public outreach and domestic rule of law capacity building efforts. This research informs the notion of the changing role of transitional justice mechanisms, specifically international tribunals, in post-conflict societies. It will help determine the extent to which the role of international tribunals has changed since the early post-war years of WWII, so that we can begin to understand if and in what ways transitional justice mechanisms can continue to aid in the peacebuilding process in the aftermath of conflict. More broadly, it will help determine the overall viability of transitional justice mechanisms in promoting peace and security in war-torn societies.

Chapter 2: Comparing the Nuremberg tribunal and the ICTY

The Nuremberg tribunal, which was formally established in the immediate aftermath of WWII, revolutionized the way people around the world think about accountability for international war crimes. Despite questions raised about the legitimacy of the Nuremberg trials, the tribunal marked a significant step forward in the development and codification of international law.⁷⁴ Nuremberg's findings led directly to the codification of the UN Genocide Convention of 1948, the Universal Declaration of Human Rights of 1948, and the Geneva Conventions of 1949 and Additional Protocols of 1977.⁷⁵ The legacy of Nuremberg provided the foundation for the establishment of the ICTY in 1993, and its sister tribunal the ICTR in 1994.⁷⁶ These International Criminal Tribunals (ICTs) have further expanded the role and function international law and international tribunals play in societies devastated by conflict.

The ICTY specifically, initiated a new way of thinking about the relationship between international and national justice institutions in war torn societies. Nuremberg and the ICTY were both established to hold individual perpetrators accountable for their actions under international law and demonstrate that leaders of mass crimes will face justice. They established indisputable historical records in an effort to combat denial and maintain peace. While the ICTY marked a "return to Nuremberg's international norms against impunity," its role and function differed greatly from that of the Nuremberg tribunal.⁷⁷ This chapter provides an in-depth examination of the similarities and differences between the two tribunals with respect

⁷⁴ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 18.

⁷⁵ *Ibid.*, 23.

⁷⁶ *Ibid.*, 19.

⁷⁷ *Ibid.*, 31.

to their modes of establishment, legal basis, political aims, and criminal and territorial jurisdiction. It looks at the specific circumstances that led to the establishment of each tribunal and their founders' motivation and goals in prosecuting war criminals under international law. Additionally, it examines each tribunal's criminal and territorial jurisdiction in order to understand their different roles and functions in distinct post-conflict situations.

The International Tribunals' Modes of Establishment

Prosecutions of war crimes on the international level were rare prior to the establishment of the Nuremberg and Tokyo tribunals. The Nuremberg and Tokyo trials "marked a watershed in international law," specifically with regards to enforcement.⁷⁸ They demonstrated that securing individual accountability for war crimes was a feasible aim.⁷⁹ The prosecution of Peter von Hagenbach⁸⁰ in 1474 is the earliest recorded trial in an international court for violations of the laws of God and humanity, which would be classified today as war crimes or crimes against humanity.⁸¹ The next notable attempt to prosecute individuals under international law took place at the end of World War I.⁸² However, in the aftermath of the war the "prospect of pursuing international justice through judicial means...was dead"

⁷⁸ Ibid., 18.

⁷⁹ Ibid.

⁸⁰ Peter von Hagenbach was the Governor of the town of Breisach. After being installed as Governor by Charles the Bold, von Hagenbach imposed a reign of terror on the town. He was tried, convicted, and condemned to death for violating the laws of God and humanity, which would be classified today as war crimes or crimes against humanity due to the fact that they took place during a military occupation. His trial is considered to have been international because 28 judges from different parts of the Holy Roman Empire conducted it.

⁸¹ Edoardo Greppi, "The Evolution of Individual Criminal Responsibility under International Law," *International Review of the Red Cross*, 00:00:00.0, <http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm>.

⁸² Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 18.

because Germany refused to hand over its alleged perpetrators and the Allies were not willing to use force.⁸³

The possibility of pursuing international justice was “radically different” at the end of WWII.⁸⁴ At the end of the war, the Allies—the United States (US), the United Kingdom of Great Britain (UK), the Union of Soviet Socialist Republics, and France—had achieved a total victory, the German government had collapsed, and the Allies were in occupation of the country. The Allies were holding a number of German leaders captive and needed to make a choice as to what to do with them.⁸⁵ They could have freed them without a trial; however, as explained by US Representative and Chief of Counsel to the International Military Tribunal (IMT) at Nuremberg, Robert H. Jackson “to free them without a trial would mock the dead and make cynics of the living.”⁸⁶ Thus, an appropriate plan for prosecution was necessary.⁸⁷

In December 1942, the Allied leaders of the US, UK, and the Soviet Union “issued the first joint declaration officially noting the mass murder of European Jewry and resolving to prosecute those responsible for violence against civilian populations.”⁸⁸ In October 1943, these three leaders—U.S. President Franklin D. Roosevelt, British Prime Minister Winston Churchill, and Soviet leader Josef Stalin—

⁸³ Debra DeLaet, *The Global Struggle for Human Rights: Universal Principles in World Politics* (Belmont, CA: Thompson Wadsworth, 2006), 164.

⁸⁴ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 19.

⁸⁵ Ibid.

⁸⁶ “Report of Robert H. Jackson to the President, Released by the White House on June 7, 1945” (United States Government Printing Office, June 7, 1945).

⁸⁷ Ibid.

⁸⁸ “The Nuremberg Trials,” *United States Holocaust Memorial Museum*, n.d., <http://www.ushmm.org/research/research-in-collections/search-the-collections/bibliography/nuremberg-trials>.

met and discussed their plans for the trial and punishment of Nazi war criminals.⁸⁹ The British government favored summary execution, arguing that Nazi leaders did not deserve a fair trial. However, the U.S. was adamant that the four Allied nations—the US, UK, the Soviet Union, and France—needed to demonstrate the democratic notion of justice in the punishment of Nazi leaders.⁹⁰ In their *Declaration of German Atrocities* released on November 1, 1943, the three Allied powers declared that “at the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party” deemed responsible for “atrocities, massacres and cold-blooded mass executions” would be sent back to the countries in which the crimes had occurred and be judged and punished according to the laws of those nations.⁹¹ The “German criminals whose offenses [had] no particular geographical localization” would be “punished by joint decision of the governments of the Allies.”⁹² On August 8, 1945, after the war’s conclusion, the Governments of the Allies (hereinafter referred to as ‘the Signatories’) signed the London Charter, which officially established the Nuremberg tribunal to prosecute these major war criminals.⁹³ While the prospect of prosecuting the principal German leaders was discussed prior to the end of the war, the Nuremberg tribunal

⁸⁹ “The Moscow Conference, October 1943,” Text, accessed March 23, 2014, <http://avalon.law.yale.edu/wwii/moscow.asp>.

⁹⁰ Philippe Sands, ed., *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge, New York: Cambridge University Press, 2003), 5.

⁹¹ Franklin Roosevelt, Winston Churchill, and Josef Stalin, “The Moscow Conference: Declaration of German Atrocities, Released November 1, 1943” (United States Government Printing Office, 1944).

⁹² *Ibid.*

⁹³ United Kingdom of Great Britain and Northern Ireland et al., “Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (‘London Agreement’),” August 8, 1945, <http://www.refworld.org/docid/3ae6b39614.html>.

was not formally established until after Victory in Europe Day (generally known as VE Day).⁹⁴

The situation at the time of the ICTY's establishment was fundamentally different. In May 1993, the UN established the ICTY under Chapter VII of the UN Charter, while conflict was still turbulent in the former Yugoslavia.⁹⁵ The violent breakup of Yugoslavia in the 1990s spurred the international community into action.⁹⁶ The UN recognized the severity of the situation, and urged parties to the conflict to comply with international law as early as September 1991.⁹⁷ In October 1992, the UN expressed concern over "widespread violations of international humanitarian law," including reports of mass killings and the practice of "ethnic cleansing" in the territory of the former Yugoslavia, specifically Bosnia and Herzegovina.⁹⁸ These reports moved the UN to call on Secretary General Boutros Boutros-Ghali to establish a Commission of Experts that could provide conclusions on these accounts of abuses in the region.⁹⁹ The findings of the Commission, which included evidence of grave breaches of the Geneva Conventions and other serious violations of international humanitarian law, led the UN Security Council (UNSC) to reaffirm its "grave alarm" at reports of widespread abuses in the former Yugoslavia, and determine that the situation constituted a "threat to international peace and security."¹⁰⁰ In 1993, the Security Council decided that in the particular circumstances of the former

⁹⁴ May 8, 1945.

⁹⁵ UN Security Council (SC), Resolution 827, UN Doc S/RES/827 (May 5, 1993), English (En).

⁹⁶ UNSC Res 713 (1991) was the first UN Resolution that concerned the breakup of Yugoslavia. It was adopted unanimously on 25 September 1991, and imposed an arms embargo, under Chapter VII of the UN Charter, on the Socialist Federal Republic of Yugoslavia.

⁹⁷ UNSC, Res 713, UN Doc S/RES/713 (September 25, 1991), En.

⁹⁸ UNSC, Res 780, UN Doc S/RES/780 (October 6, 1992), En.

⁹⁹ Ibid.

¹⁰⁰ UNSC, Res 808, UN Doc S/RES/808 (February 22, 1993), En.

Yugoslavia the establishment of an international tribunal would enable it to put an end to such crimes, bring to justice those persons responsible for committing crimes, and contribute to the restoration and maintenance of peace.¹⁰¹ On May 25, 1993, the UNSC passed Resolution 827 formally establishing the ICTY for the “prosecution of persons responsible for committing serious violations of international humanitarian law in the territory of the former Yugoslavia” since 1991.¹⁰²

The establishment of the ICTY was an historic moment for international justice. It was the first international tribunal ever to be established by the UN. According to the President of the Tribunal, its only predecessors “the international military tribunals at [Nuremberg] and Tokyo, were created in very different circumstances and were based on moral and judicial principles of a fundamentally different nature.”¹⁰³ The UN’s establishment of the ICTY was a “judicial response to the demands posed by the situation in the former Yugoslavia.”¹⁰⁴ The UN Charter is the foundation document for the UN’s work and gives the UN primary responsibility for the maintenance of international peace and security. Chapter VII allows the Council to bypass the general prohibition of the “threat or use of force” encompassed in Article 2(4) of the UN Charter.¹⁰⁵ In establishing the ICTY, the UNSC invoked its powers under Chapter VII of the UN Charter, which allows it to “determine the

¹⁰¹ Ibid.

¹⁰² UNSC, Res 827, UN Doc S/RES/827 (May 5, 1993), En.

¹⁰³ President of the International Tribunal, *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991*, transmitted by Note of the Secretary-General, UN Doc A/49/342-S/1994/1007 (August 29, 1994), En, [hereinafter *First Annual Report*].

¹⁰⁴ Ibid.

¹⁰⁵ UN Charter Art 2, para 4.

existence of any threat to the peace, breach of the peace, or act of aggression” and take military or non-military action to “restore international peace and security.”¹⁰⁶

In the UN Secretary-General’s report pursuant to paragraph 2 of Resolution 808 (1993), he notes that in the normal course of events, the establishment of an international tribunal would come at the conclusion of a treaty, drawn up and adopted by an appropriate international body, which the States parties would sign and ratify. However, this approach would require considerable time and would not guarantee that ratification is received from those states, which should be parties to the treaty. Therefore, in order to be truly effective, the Secretary-General asserted that the Tribunal should be established on the basis of Chapter VII, as “this approach would have the advantage of being expeditious and of being immediately effective as all states would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure of Chapter VII.”¹⁰⁷

The ICTY’s mode of establishment under Chapter VII of the UN Charter differentiates it from the Nuremberg tribunal. While Nuremberg was authorized by the four Allied powers of WWII, the ICTY was the first international criminal tribunal to be established by a globally recognized international body, the UN.¹⁰⁸ In 1994, the President of the ICTY argued that, “unlike the Nuremberg and Tokyo tribunals, the Tribunal [was] truly international...the Tribunal is not the organ of a group of States; it is an organ of the whole international community.”¹⁰⁹ However, similar claims could be made about the ICTY as it was authorized by a select group of

¹⁰⁶ UN Charter Art 39.

¹⁰⁷ UN Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 (May 3, 1993), En, [hereinafter *Report of the Secretary-General Pursuant to Para 2 of UNSC Resolution 808 (1993)*].

¹⁰⁸ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 31.

¹⁰⁹ *First Annual Report*, *supra* note 102.

States—the Security Council, which consists of five permanent members—the US, UK, France, China, and Russia. While the founders of the Nuremberg tribunal and the ICTY had similar aims—the prosecution of war criminals under international law—due to the different circumstances at the times of the tribunals’ establishment they adopted different ways of reaching these goals.

The Legal Basis of the Nuremberg tribunal and the ICTY

The legal basis of the Nuremberg tribunal was the London Charter, which the Allied governments signed on August 8, 1945. Having come to a conclusion on the mode of punishment for the major German war criminals, the Signatories drafted the Charter of the International Military Tribunal (IMT) (commonly known as the Nuremberg Charter), which was “annexed to and formed an integral part of the London Agreement.”¹¹⁰ Although the concept of individual criminal responsibility for war crimes was well established in international law prior to WWII, debate surrounded the legality of prosecuting individuals for crimes against humanity.¹¹¹ Individual accountability for violations of international humanitarian law was a new concept, which was not fully recognized until the Nuremberg tribunal. Pursuant to the Agreement, the Nuremberg tribunal was mandated under Article 6 of the Charter, “to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or members of organizations,” committed any crimes within the jurisdiction of the tribunal.¹¹²

¹¹⁰ United Kingdom of Great Britain and Northern Ireland et al., “Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (‘London Agreement’).”

¹¹¹ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 23.

¹¹² United Kingdom of Great Britain and Northern Ireland et al., “Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (‘London Agreement’).”

Three broad categories of acts are defined as punishable as crimes under international law in the Nuremberg Charter. The first, *crimes against peace*, consists of “planning, preparing, initiating, or waging a war of aggression, or a war in violation of international undertakings, as well as participating in a common plan or conspiracy to accomplish any of the aforementioned acts. The second class of offenses, *war crimes*, consists of violations of the laws or customs of war.¹¹³ The third category, *crimes against humanity*, consists of murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during war.¹¹⁴ The principle that individuals rather than states are responsible for violations of international law is also enacted in the Charter. It provides that any individual who joins in a common plan to commit any of the foregoing offenses is responsible for the acts of all other persons involved in its execution.¹¹⁵ In defining these categories of offenses as criminal under international law, Nuremberg established that “there are certain crimes of international concern which incur individual criminal responsibility.”¹¹⁶

Similarly, the ICTY was awarded jurisdiction over four categories of criminal offenses. In accordance with its Statute, the ICTY was mandated to prosecute “persons responsible for serious violations of international humanitarian law

¹¹³ Violations of the laws or customs of war include, but are not limited to, murder, all forms of ill-treatment of prisoners of war and inhabitants of occupied territories, plunder, wanton destruction, or devastation not justified by military necessity.

¹¹⁴ Crimes against humanity also cover persecution on political, racial, or religious grounds in execution of or in connection with crimes against peace or war crimes, whether or not in violation of domestic law of the country in which the crime took place.

¹¹⁵ United Kingdom of Great Britain and Northern Ireland et al., “Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (‘London Agreement’).”

¹¹⁶ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 2.

committed in the region of the former Yugoslavia” from 1991 onwards.¹¹⁷ However, in contrast to Nuremberg’s jurisdiction over both individuals and members of organizations, in accordance with Article 6 of its Statute, the ICTY, though having jurisdiction over individual persons, does not have the authority to prosecute “organizations, political parties, army units, administrative entities or other legal subjects” for aggression or violations of international humanitarian law.¹¹⁸ Articles 2 to 5 of the ICTY Statute identify the four different categories of crimes over which it had jurisdiction. The first category of offenses, *grave breaches of the Geneva Conventions of 1949*, sets forth rules for the wartime protection of civilians and those who are no longer participating in the hostilities. The second category, *violations of the laws or customs of war*, regulates the conduct of armed conflict.¹¹⁹ The third category, *genocide*, consists of any “acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”¹²⁰ The fourth category, *crimes against humanity*, consists of crimes directed against any civilian populations during an armed conflict of international or internal character.¹²¹

The notion of crimes against humanity included in the ICTY Statute, were first recognized in the Charter and Judgment of the Nuremberg tribunal. The other three categories of offenses evolved over many decades. Specifically, the Geneva Conventions of 1949 and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide were developed and codified as a result of the Nuremberg

¹¹⁷ *Report of the Secretary-General Pursuant to Para 2 of UNSC Resolution 808 (1993)*, *supra* note 106.

¹¹⁸ “Statute of the Tribunal,” accessed January 26, 2014, <http://www.icty.org/sid/135>.

¹¹⁹ The laws or customs of war are a body of international law made up of international treaties, conventions, and agreements including, the Hague Conventions of 1907, the Geneva Conventions of 1949 and Additional Protocols of 1977, and relevant customary international law.

¹²⁰ *Report of the Secretary-General Pursuant to Para 2 of UNSC Resolution 808 (1993)*, *supra* note 106.

¹²¹ *Ibid.*

principles, which set forth guidelines for determining what constitutes a war crime. In this regard, the ICTY reinforced and expanded on the concept of individual criminal responsibility for war crimes established by the Nuremberg tribunal and further codified international humanitarian law.¹²²

The Political Purpose of the International Tribunals

The Nuremberg trials, which tried and punished German war criminals, have been described “as the last act of war and the first act of peace” following WWII.¹²³ The trials had two primary objectives. First, they were intended to legally condemn the abuses committed by the Nazis, and in doing so justify the Allies’ victory. In a 1945 Memorandum to President Roosevelt, the Secretaries of State and War and the Attorney General asserted that “after Germany’s unconditional surrender the United Nations¹²⁴ could, if elected, put to death the most notorious Nazi criminals, such as Hitler or Himmler, without trial or hearing.”¹²⁵ However, they argued that the use of the judicial method was the “just and effective solution,” and would “command maximum public support...and receive the respect of history.”¹²⁶

In his report to the President in 1945 (which was widely accepted as an official statement of the position of the US), Justice Jackson contended that:

The task of making this record complete and accurate, while memories are fresh, while witnesses are living, and while a tribunal is available, is too important to the future opinion of the world to be undertaken before the case

¹²² Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice*, 42.

¹²³ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 19.

¹²⁴ In this context, the “United Nations” refers to the term coined by US President Franklin D. Roosevelt in the *Declaration of United Nations* of January 1, 1942 to describe the 26 nations that pledged to continue fighting together against the Axis powers during the Second World War.

¹²⁵ “Report of Robert H. Jackson to the President, Released by the White House on June 7, 1945” (United States Government Printing Office, June 7, 1945).

¹²⁶ *Ibid.*

can be prepared to make a credible presentation. Intelligent, informed, and sober opinion will not be satisfied with less.¹²⁷

This quote clearly demonstrates the importance placed, from the beginning, on conducting a fair and deliberative trial. It was crucial that defendants were provided a full and fair opportunity to defend themselves on every charge in order to satisfy public opinion that justice had been done in the case of the Nazi war criminals.

In his opening statement for the US at the Nuremberg trials, Justice Jackson reinforced the importance of making a complete and accurate record of abuses and outlined the Allies' goals in conducting the trials:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason...We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.¹²⁸

Although based on democratic notions of justice, critics regarded Nuremberg as a "show trial" because the Nazis were in essence being exposed to public

¹²⁷ Robert H. Jackson, "Justice Jackson Weighs Nuremberg's Lessons: In a Reply to Critics of the Trial He Finds That It Has Made 'Undiscriminate Vengeance' Obsolete. Lessons of Nuremberg Lessons of Nuremberg," *New York Times*, June 16, 1946, sec. The New York Times Magazine, <http://search.proquest.com/hnpnewyorktimes/docview/107765204/abstract/48C308D1D15B4227PQ/1?accountid=10141>.

¹²⁸ Robert H. Jackson, "Opening Statement before the International Military Tribunal," *Robert H. Jackson*, November 21, 1945, <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/>.

disapproval prior to their execution.¹²⁹ In 1946, in response to critics of the tribunal, Justice Jackson, provided a clear explanation for the Allies' decision to utilize military trials to investigate and punish Nazis leaders. He noted that the alternative mode of punishment was summary execution; therefore, "the choice that faced [US] President Truman was a simple one."¹³⁰ Justice Jackson asserted "if we had stood these twenty-two defendants against the wall and shot them 'by executive determination,' in ten years the United States would be defenseless against suspicion that we did not give them a trial because we could not prove their guilt or because they could prove their innocence."¹³¹ In this way, the political purpose of the Nuremberg trials is apparent in the Signatories' effort to satisfy Allied public opinion that justice had been done.

Moreover, Debra DeLaet argues that the Roosevelt administration's interpretation of the tribunal's purpose provides important insight into the principal aims of the trials—prosecuting Nazis for waging a war of aggression.¹³² Although the Nuremberg tribunal was mandated to try individuals for committing crimes in all three categories of crimes laid out in its charter the trials focused primarily on prosecuting Nazis for crimes against peace. According to DeLaet, this emphasis on crimes against peace, as opposed to crimes against humanity was indicative of the

¹²⁹ Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice*, 24.

¹³⁰ International Military Tribunal Robert H. Jackson Chief of Counsel for the United States, "Justice Jackson Weighs Nuremberg's Lessons: In a Reply to Critics of the Trial He Finds That It Has Made 'Undiscriminate Vengeance' Obsolete. Lessons of Nuremberg Lessons of Nuremberg," *New York Times*, June 16, 1946, sec. The New York Times Magazine, 1, <http://search.proquest.com/hnpnewyorktimes/docview/107765204/abstract/48C308D1D15B4227PQ/1?accountid=10141>.

¹³¹ Ibid.

¹³² DeLaet, *The Global Struggle for Human Rights: Universal Principles in World Politics*, 165.

Allies interpretation of the tribunal's purpose.¹³³ DeLaet reminds us of Gary Bass' argument that "in a rare explicit statement on war criminals, Roosevelt had called for indicting the top Nazis for waging war. He mentioned aggression, not the Holocaust, atrocities against civilians, or war crimes. At Nuremberg's conclusion, Truman echoed Roosevelt: 'The principles established and the results achieved places International Law on the side of peace as against aggressive war.'"¹³⁴ In this way, the Nuremberg tribunal allowed the victorious powers to assume jurisdiction over the losers.

A second political purpose of the Nuremberg trials was to establish new rules of international conduct and promote peace.¹³⁵ Justice Jackson contended that the law of the Nuremberg Charter "ushers international law into a new era where it is accorded with the common sense of mankind that a war of deliberate and unprovoked attack deserves universal condemnation and its authors' condign penalties."¹³⁶ He argues that:

If the nations, which command the great physical forces of the world, want the society of nations to be governed by law, these principles [laid out in the Nuremberg Charter] may contribute to that end. If those who have the power of decision revert to the concept of unlimited and irresponsible sovereignty, neither this nor any charter will save the world from international lawlessness.¹³⁷

¹³³ Ibid.

¹³⁴ Ibid., 164.

¹³⁵ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 19.

¹³⁶ Robert H. Jackson, *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, London, 1945* (Washington, DC: Department of State, February 1949), IX.

¹³⁷ Ibid., XI.

In his final report to the President, Justice Jackson asserted that the primary purpose of the Nuremberg tribunal was “to bring the weight of law and criminal sanctions to bear in support of...peaceful and humanitarian principles.”¹³⁸ In this way, the “assumption of Western moral superiority implicit in the liberal values expressed in the Indictment was accepted as a necessary underpinning for the creation of a new moral and political order” following the end of WWII.¹³⁹

In contrast to the four Allied powers who authorized the Nuremberg tribunal, direct protagonists in the Balkan conflict did not establish the ICTY. Acting as representatives of the international community, which declared the conflict a threat to international peace and security, the members of the UNSC established the ICTY. Instead of being officially established after the conflict had ended, to prosecute offenders from the losing side, the ICTY was established to prosecute all major ethnic groups involved in the ongoing conflict: Croats, Serbs, and Muslims, with the aim of preventing further crime and facilitating peace in the region.¹⁴⁰ Although this mode of establishment was different than that of the Nuremberg tribunal, the ICTY’s founders were similarly motivated by political objectives. As representatives of the international community, the UNSC was motivated to establish the ICTY in order to stop the violence in the former Yugoslavia and safeguard international peace and security without the use of military force.¹⁴¹

¹³⁸ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 19–20.

¹³⁹ Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice*, 27.

¹⁴⁰ DeLaet, *The Global Struggle for Human Rights: Universal Principles in World Politics*, 186.

¹⁴¹ *Report of the Secretary-General Pursuant to Para 2 of UNSC Resolution 808 (1993)*, *supra* note 106.

According to Judge Carmel Agius, the Vice President of the ICTY, the message that the UN sent back in 1993 was “loud and clear.”¹⁴² In creating the ICTY, the UNSC sent a distinct political message that those who committed war crimes would not face impunity. Judge Agius asserted that the goal of the Tribunal’s judges was to establish the truth about the conflict “because it is always the point where you need to start from if you are going to embark on a journey of reconciliation and rebuilding of society where the fabric has been very badly torn.”¹⁴³ In this way, the ICTY aimed to facilitate reconciliation in the region through reliable criminal proceedings.¹⁴⁴

The ICTY’s principal objectives were threefold: “to do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace.”¹⁴⁵ The first objective, “to bring to justice the persons who are responsible” for crimes perpetrated in the former Yugoslavia is set out in the preamble to UNSC Resolution 827 (1993).¹⁴⁶ This preamble also lays out the second objective that the establishment of the Tribunal “will contribute to ensuring that such violations [of international humanitarian law] are halted and effectively redressed.”¹⁴⁷ According to the ICTY President:

One of the main aims of the Security Council was to establish a judicial process capable of dissuading the parties to the conflict from perpetrating further crimes. It was hoped that, by bringing to justice those accused of

¹⁴² Nerma Jelacic, Szabo, and Kosca-Vrlazic, “Legacy of the ICTY in the Former Yugoslavia,” 20.

¹⁴³ *Ibid.*

¹⁴⁴ Janine Natalya Clark, “The Three Rs: Retributive Justice, Restorative Justice, and Reconciliation,” *Contemporary Justice Review* 11, no. 4 (December 2008): 331, doi:10.1080/10282580802482603.

¹⁴⁵ *First Annual Report*, *supra* note 101 at 11.

¹⁴⁶ UNSC, Res 827, UN Doc S/RES/827 (May 25, 1993), En.

¹⁴⁷ *Ibid.*

massacres and similar egregious violations of international humanitarian law, both belligerents and civilians would be discouraged from committing further atrocities. In short, the Tribunal [was] supposed to act as a powerful deterrent to all parties against continued participation in inhumane acts.¹⁴⁸

The UNSC's final objective in establishing the Tribunal was "to contribute to the restoration and maintenance of peace."¹⁴⁹ Established in the face of a "threat to international peace and security" as a measure under Chapter VII of the UN Charter, it was conceived that the Tribunal would act as a measure designed to "gradually...promote the end of armed hostilities and a return to normality."¹⁵⁰ In the ICTY President's first annual report on the ICTY in 1994, he contended:

How could one hope to restore the rule of law and the development of stable, constructive and healthy relations among ethnic groups, within or between independent States, if the culprits are allowed to go unpunished? Those who have suffered, directly or indirectly, from their crimes are unlikely to forgive or set aside their deep resentment...if no fair trial is held.¹⁵¹

This quote clearly illustrates the UNSC's motivation in establishing the ICTY as a measure to promote reconciliation in the region. Specifically, the ICTY aimed to contribute to a lasting peace in the region by individualizing guilt. Its founders believed that if the responsibility for the serious abuses committed in the region were not attributed to individuals, whole ethnic groups would be held accountable for the crimes and collectively categorized as criminal. The ICTY was thus established to "promote peace by meting out justice in a manner conducive to the full establishment

¹⁴⁸ *First Annual Report*, *supra* note 102 at 11-12.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, 12.

¹⁵¹ *Ibid.*

of healthy and cooperative relations among the various national and ethnic groups” in the former Yugoslavia.¹⁵²

Although the two tribunals shared similar motives in seeing that justice had been done, the aims of the ICTY varied from those of the Nuremberg tribunal in one specific way. Special emphasis was placed on the role that establishing facts about the conflict could play in contributing to the process of reconciliation in the region of the former Yugoslavia. The Council established the ICTY with the goal of distributing justice, “but at the same time, it [was] also a means to achieving a progressively reconciled society co-operating in peace and prosperity.”¹⁵³ While the mission of the ICTY mirrored Nuremberg’s international norm of individual accountability and preventing impunity, it was also designed to encompass the restoration of international peace and security and culminate in reconciliation in the region of the former Yugoslavia.¹⁵⁴

The goals of the ICTY cannot be properly understood without taking into consideration the circumstances under which the UNSC decided to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in the region of the former Yugoslavia since 1991. Because the ICTY was not established by direct protagonists in the Balkan conflict, and tried and prosecuted individuals belonging to all three major ethnic groups involved in the conflict, critiques that the tribunal served “victor’s justice” are not as applicable as they had been with Nuremberg.¹⁵⁵ However, the UNSC’s decision to establish the Tribunal was also inherently political as it was prompted by “the total

¹⁵² Ibid.

¹⁵³ Nerma Jelacic, Szabo, and Kosca-Vrlazic, “Legacy of the ICTY in the Former Yugoslavia,” 17.

¹⁵⁴ Ibid., 15.

¹⁵⁵ DeLaet, *The Global Struggle for Human Rights: Universal Principles in World Politics*, 168.

lack of progress towards peace in the region and the need to demonstrate to the international community that the UN was not sitting back idly while thousands were being brutally abused or massacred.”¹⁵⁶

Although the UN’s aims in establishing the ICTY were different than the Allies’ aims in establishing the Nuremberg tribunal, one tribunal is not superior to the other. The founders of both tribunals took note of the specific circumstances of the conflicts they faced when establishing these international tribunals. In the case of the Nuremberg tribunal, the Allied governments officially established the tribunal after the war had ended, with the goal of prosecuting Nazi war criminals in an effort to satisfy public opinion, establish new rules of international order, and maintain peace. In the case of the ICTY, the UN established the tribunal while conflict was still turbulent in the former Yugoslavia with the goal of deterring further crimes and restoring international peace and security in the region of the former Yugoslavia. As a consequence of these circumstances, the Nuremberg tribunal focused primarily on crimes against peace (*jus ad bellum*) when it came to prosecuting Nazi leaders, while the ICTY focused more heavily on violations of the laws and customs of war (*jus in bello*) when it came to prosecuting Balkan warmongers.

A Fundamental Change: The Tribunals’ Territorial Jurisdiction

While both tribunals were established to see that justice had been done and hold individual perpetrators accountable for their actions under international law, they did not share the same relationship with the regions for which they distributed justice. Specifically, their relationship to national courts was distinct. Concurrent to the Nuremberg trials, the Allied governments were engaged in efforts to denazify¹⁵⁷ and democratize Germany. However, although taken on by the Allied governments, these

¹⁵⁶ *First Annual Report*, *supra* note 102 at 10.

¹⁵⁷ Rid of Nazism and its influence.

efforts were not the direct actions of the Nuremberg tribunal.¹⁵⁸ In legal terms, the Nuremberg tribunal “did not address the relationship with national courts. It did however establish the right of the competent authority of any signatory of the [Nuremberg] Constitution.”¹⁵⁹ Each Allied government was authorized in their occupation zone, to try persons responsible for war crimes. Specifically, pursuant to Part I Article 10 “in cases where a group or organization is declared criminal by the Tribunal (Nuremberg), the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts.”¹⁶⁰ Additionally, Part I Article 11 provides that:

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.¹⁶¹

Following the trial and prosecution of military and political leaders of Nazi Germany before the IMT at Nuremberg, the US conducted twelve trials, known as the Subsequent Nuremberg Trials, to “try and punish persons charged with offenses recognized as crimes in Article II of the Council Law No. 10.”¹⁶² Additionally, lower-

¹⁵⁸ Fred Taylor, *Exorcising Hitler: The Occupation and Denazification of Germany* (Bloomsbury Publishing USA, 2011), 281.

¹⁵⁹ Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice*, 79.

¹⁶⁰ United Kingdom of Great Britain and Northern Ireland et al., “Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (‘London Agreement’).”

¹⁶¹ *Ibid.*

¹⁶² The Control Council for Germany enacted Law No. 10 on December 20, 1945 to establish a “uniform legal basis in Germany for the prosecution of war criminals and

level officials and officers were tried in subsequent war crimes trials before military courts in the British, French, and Soviet zones of occupied Germany and Austria in the immediate post-war period. The purpose of these trials was to determine the guilt of second-tier Nazis accused of the crimes, which had been established as criminal by the Nuremberg tribunal.¹⁶³

In the case of the ICTY, the Tribunal shared concurrent jurisdiction with national courts in the former Yugoslavia in relation to the crimes over which the Tribunal had jurisdiction. Pursuant to Article 9(1) of the ICTY Statute: “the international Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.”¹⁶⁴ However, Article 9(2) established that the ICTY had primacy over the national courts and at “at any stage of the procedure, the International Tribunal [could] formally request national courts to defer to the competence of the International tribunal in accordance with the present Statute and the [Tribunal’s] Rules of Procedure and Evidence.”¹⁶⁵ Additionally, the ICTY could refer cases to competent national authorities in the former Yugoslavia.¹⁶⁶

Chapter Conclusion

The primary aim of this chapter is to compare and contrast the Nuremberg tribunal and the ICTY. By examining the factual circumstances surrounding their

other similar offenders other than those dealt with by the International Military Tribunal (IMT).” “Subsequent Nuremberg Proceedings,” *United States Holocaust Memorial Museum*, June 10, 2013, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007074>.

¹⁶³ Ibid.

¹⁶⁴ *Report of the Secretary-General Pursuant to Para 2 of UNSC Resolution 808 (1993)*, *supra* note 106.

¹⁶⁵ Ibid.

¹⁶⁶ “Statute of the Tribunal.”

establishment, their legal basis, their founders' principal aims, and the tribunals' criminal and territorial jurisdiction it illustrates that these two tribunals differ in a few key ways. First, while the Nuremberg tribunal was formally established after the defeat and surrender of the European Axis countries, the ICTY was established while conflict was still ongoing in the region of the former Yugoslavia. Although both tribunals were similarly established to fulfill specific political aims, because of the different circumstances that led to their establishment, the ICTY raises several issues that were not encountered by the Nuremberg tribunal.

For instance, the two tribunals differ in their criminal and territorial jurisdiction. The criminal jurisdiction of the ICTY differed from that of the Nuremberg tribunal in two fundamental respects. First, the ICTY had jurisdiction over war crimes and crimes against humanity, specifically genocide; however, unlike Nuremberg, it did not have the authority to prosecute states for aggression or crimes against peace.¹⁶⁷ Second, the ICTY dealt with crimes perpetrated in the course of both international and internal armed conflict, while Nuremberg addressed only crimes committed in the course of an international armed conflict.¹⁶⁸

The two tribunals also differ in their territorial jurisdiction. This chapter has illustrated how the Nuremberg Charter made important provisions for the punishment of criminal organizations. In doing so, it established that individuals belonging to an organization, which Nuremberg found to be criminal, could be subject to subsequent trials held before national courts, conducted by the Signatories. However, the Nuremberg tribunal did not have a relationship with national courts in Germany. By

¹⁶⁷ "Mandate and Crimes under ICTY Jurisdiction," accessed January 26, 2014, <http://www.icty.org/sid/320>.

¹⁶⁸ The conflict in the former Yugoslavia was international in the sense that it was between republics. However, it was also internal in the sense that the conflict in Bosnia and Herzegovina was characterized by civil war between three ethnic minorities (Serbs, Croats, and Bosniaks).

contrast, the ICTY was established to share concurrent jurisdiction with national courts in the region of the former Yugoslavia. Although the ICTY and national courts shared jurisdiction, the ICTY was authorized to intervene and take over at any stage of national proceedings, if proved to be in the interest of international justice.

The ICTY's concurrent jurisdiction with national courts had major implications for its role and function in the region of the former Yugoslavia. Peacebuilding efforts on behalf of the ICTY came about as a consequence of this relationship between the Tribunal and national courts. In 2003, in anticipation of closing its doors, the ICTY developed an unprecedented relationship with national judiciaries in the region. Unlike Nuremberg, it made a direct contribution to increasing the capacity of the region's national courts through a number of avenues including adjudicating war crimes cases through the transfer of evidence, knowledge, and jurisprudence to national judiciaries.¹⁶⁹ The following chapter will focus specifically on the ICTY's relationship with national jurisdictions using Bosnia-Herzegovina (BIH) as an illustration of the role and activities of the ICTY in the region of the former Yugoslavia, specifically with regards to public outreach and domestic rule of law capacity building efforts.

¹⁶⁹ "Capacity Building," *ICTY*, accessed February 19, 2014, <http://www.icty.org/sid/240>.

Chapter 3: A Look at the ICTY's New Role

The ICTY played an important role in the peacebuilding process in the former Yugoslavia through outreach and capacity building efforts. Beginning in 1996, the ICTY pioneered a relationship with the national judiciaries of BiH, and other regions of the former Yugoslavia. Specifically, it took on new responsibilities, outside the traditional role of international tribunals. In this way, the ICTY established a new precedent for the role of international war crimes tribunals. Not only did it reinforce international norms of accountability, it demonstrated the importance of promoting a culture of rule of law, in which “no one, including government, is above the law; where laws protect fundamental rights; and where justice is acceptable to all in the aftermath of conflict.”¹⁷⁰ There was a realization that transitional justice, specifically criminal prosecutions, was a means to achieve peacebuilding by rule of law.

In order to ensure that grievances are redressed and actions are brought against individuals for abuses, a criminal justice system must be “capable of investigating and adjudicating criminal offences effectively, impartially, and without proper influence, while ensuring that the rights of suspects and victims are protected.”¹⁷¹ In more specific terms, an effective criminal justice system is defined by its ability to conduct fair and impartial trials. Throughout its existence, the ICTY realized that in order to have its intended effect on the region it would need to ensure that the national courts, with which it shared jurisdiction, were capable of conducting fair and impartial trials. Because the rule of law “is often a casualty during times of war” the Tribunal

¹⁷⁰ “What Is the Rule of Law?,” *The World Justice Project*, May 9, 2012, <http://worldjusticeproject.org/what-rule-law>.

¹⁷¹ “Criminal Justice,” *The World Justice Project*, June 9, 2012, <http://worldjusticeproject.org/factors/effective-criminal-justice>.

implemented a number of key programs in order to “re-establish the rule of law in criminal matters” in the region of the former Yugoslavia.¹⁷²

The Rules of the Road Procedure

In 1996, a procedure called “Rules of the Road” was established under the Rome Agreement to protect against arbitrary arrests on suspicion of war crimes. This program “regulated the arrest and indictment of alleged perpetrators of war crimes by national authorities.”¹⁷³ Under this procedure, the ICTY Office of the Prosecutor (OTP) was required to review and determine a case to have “credible charges” before national authorities could arrest a suspect.¹⁷⁴ If the OTP did not find a case to be credible, local prosecutors could not proceed with an arrest. Under this procedure, 1,419 files involving 4,985 subjects were reviewed. Out of these 1,419 local war crimes case files, the ICTY granted local prosecutors permission to prosecute 848 persons. In addition to the Rules of the Road program, a Transition Team within the OTP was designated to pass along useful evidence and hand over cases involving lower and immediate level cases to national courts.¹⁷⁵

The ICTY Completion Strategy

Ten years after its establishment, the ICTY was operating at full capacity. The national judicial systems in the former Yugoslavia were beginning to “demonstrate varying degrees of intent to improve their ability to handle war crimes.”¹⁷⁶ After a comprehensive evaluation of the work done over those ten years, the judges of the ICTY devised and adopted a strategic plan to close down the Tribunal. On August 28,

¹⁷² “Working with the Region,” *ICTY*, accessed March 21, 2014, <http://www.icty.org/sid/96>.

¹⁷³ *Ibid.*

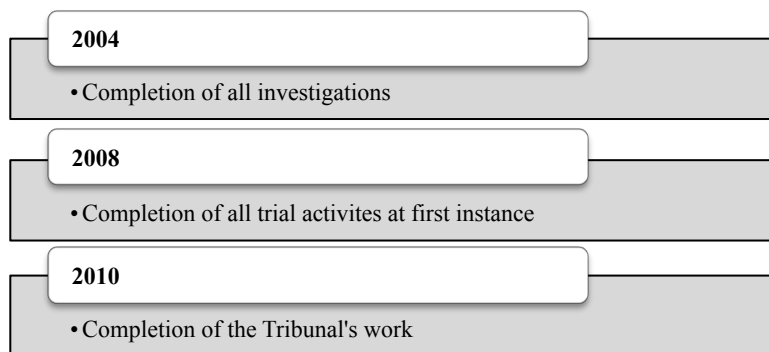
¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ “Completion Strategy,” *ICTY*, accessed March 23, 2014, <http://www.icty.org/sid/10016>.

2003 this plan, known as the Completion Strategy, was created under Resolution 1503 (2003) to ensure that the Tribunal concluded “its mission successfully, in a timely manner and in coordination with domestic legal systems in the former Yugoslavia.”¹⁷⁷ The Completion Strategy devised by the ICTY aimed to complete “all investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of the Tribunal’s work in 2010” (see Figure 1).¹⁷⁸

Figure 1. ICTY Three-Phase ‘Completion Strategy’ Timeline



In order to do so, the ICTY decided to concentrate its efforts on “the prosecution and trial of the most senior leaders suspected of being responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as strengthening of the capacity of such jurisdictions.”¹⁷⁹ As a core component of the plan to close down the tribunal, the ICTY began transferring cases to competent national judiciaries. Consequently, it began assisting in strengthening the capacity of the national judiciaries of the countries of the former Yugoslavia and making evidence collected by the ICTY available to national prosecutors.¹⁸⁰ Finally, as noted by Vice President of the ICTY Judge Carmel Agius, peer-to-peer meetings

¹⁷⁷ Ibid.

¹⁷⁸ UNSC, Res 1503, UN Doc S/RES/1503 (August 28, 2003), En.

¹⁷⁹ Ibid.

¹⁸⁰ Nerma Jelacic, Szabo, and Kosca-Vrlacic, “Legacy of the ICTY in the Former Yugoslavia,” 152.

between ICTY judges and local judges, prosecutors, and other officials were organized in order to ensure an effective transition from the international tribunal to national courts.¹⁸¹

Capacity Building Efforts

The ICTY demonstrated the contribution international criminal tribunals could make to building local judicial capacity and strengthening the rule of law in post-conflict societies. According to Martin Petrov, Chief of the Immediate Office of the Registrar, ICTY, “the ICTY has always been meant to be a temporary institution—we have all known from the day when it was established that one day it would close its doors. And that is why it had a limited mandate...to prosecute only the highest ranking military and political leaders.”¹⁸² There was an expectation that local legal professionals and institutions in the region would handle war crimes cases after the Tribunal closed its doors.¹⁸³ In attempting to fill the rule of law vacuum in the aftermath of conflict in the former Yugoslavia, the ICTY established an unprecedented relationship with local legal professionals and national judiciaries in BiH. Specifically, the Tribunal focused on transferring know-how, expertise, and materials to domestic courts in the region in order to facilitate the “implementation of international standards and best developed practices within the local judiciaries.”¹⁸⁴

Much of this transfer of expertise and materials took place under the War Crimes Justice Project, a collaborative project between the ICTY, the Organization for Security and Cooperation in Europe’s (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) and the United Nations Interregional Crime and Justice Research Institute (UNICRI), with funding from the European Union. The aim of this

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ “Capacity Building.”

project was to “meet the identified outstanding needs” of local judiciaries determined in a nine-month long needs assessment preceding the project, which asked local legal practitioners to define the challenges they were facing and the best ways to address these needs.¹⁸⁵ Based on these recommendations the project organized activities and developed the necessary tools to support the national jurisdictions in handling the investigation and prosecution of wars crimes. In turn, the project aimed to “support national ownership and provide sustainable benefits,” in order to ensure that actions are taken against individuals for offenses in the region and justice is brought to victims after the ICTY closed its doors.¹⁸⁶ The main components of the project included: bolstering staffing capacity in key areas, developing curricula and materials, professional development of local legal professionals, and access to the ICTY’s material and expertise (see Figure 2).¹⁸⁷

One of the main outstanding needs, identified by institutions within the national jurisdictions, was staffing capacity in key areas such as analysis and legal research. In order to address this need, the project sponsored the hiring of 32 additional support staff at domestic justice institutions in Bosnia and Herzegovina, Serbia, and Croatia. Throughout the course of the project, these additional support staff members were provided with training and support in order to promote retention.¹⁸⁸

¹⁸⁵ *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer Final Report* (Warsaw, Poland: OSCE Office for Democratic Institutions and Human Rights (ODIHR), September 2009), 7, <http://www.osce.org/odihr/68108>.

¹⁸⁶ “War Crimes Justice Project,” *Organization for Security and Cooperation in Europe (OSCE)*, n.d., <http://www.osce.org/odihr/74803>.

¹⁸⁷ “Factsheet on the War Crimes Justice Project” (OSCE Office for Democratic Institutions and Human Rights, October 26, 2011), 1, <http://www.osce.org/odihr/84406>.

¹⁸⁸ *Ibid.*, 2.

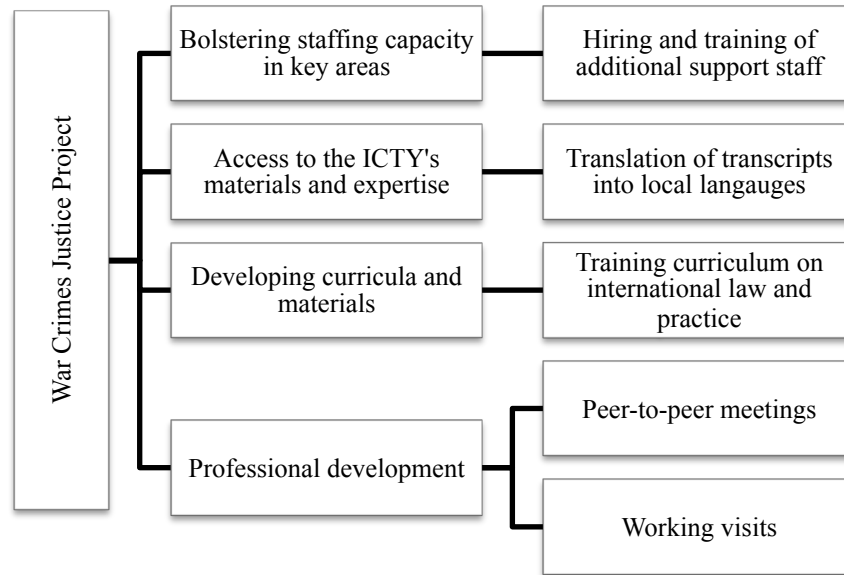


Figure 2. The War Crimes Justice Project Focus Areas

A second project focus area was the development of curricula on international humanitarian law and training materials. These curricula, training materials, and various other research and analysis tools, were developed in collaboration with the International Criminal Law Series (ICLS), several judicial and prosecutorial training institutions. One major success of this partnership was the development of the “first-ever training curriculum on international law and practice for local justice actors in the region.”¹⁸⁹ This manual, which outlines the ICTY defense counsel’s best practices, was produced to support practitioner’s legal training in the region. As such, it “provides training institutions with a platform for the sustainable delivery of training programmes for war crimes justice actors.”¹⁹⁰ As a component of this project, the UNICRI developed an e-learning portal to increase legal practitioners and judicial and prosecutorial training institutions access to materials relating to war crimes.¹⁹¹

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

A third outstanding need identified by the national authorities was the professional development of the legal professionals working on war-crimes cases in the region. In order to address this need, the project organized “working visits” for staff members from the prosecuting authorities of the region and “peer-to-peer meetings” between judges, prosecutors, and other local professionals. These visits and meetings were designed to facilitate the exchange of information between local legal practitioners, as well as between local legal practitioners and legal practitioners at the ICTY. In addition, the project provided 800 justice professionals with training on topics such as “international criminal law, the use of analytical tools and working with vulnerable witnesses.”¹⁹² Together, these meeting, discussions, and training events on legal issues aimed to strengthen co-operation between practitioners in the region.¹⁹³

Lastly, the project focused on national judiciaries’ access to the ICTY’s materials and expertise. In order to improve the ability of local legal practitioners, emphasis was placed on the production of transcripts of key proceedings and the most important Appeals Chamber decisions into Serbian, Bosnian, and Croatian. A total of 60,800 pages of proceeding transcripts, which national judicial institutions had identified as “most relevant,” were produced in local languages by the ICTY.¹⁹⁴ Over 18,500 of these 60,800 pages were produced in direct response to requests from national jurisdictions (see Figure 3). This capacity-building function greatly increased the number of transcripts of proceedings and materials provided by the ICTY, which legal practitioners in the region can directly use in all phases of their criminal

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid., 1.

proceedings. Additionally, the project organized trainings for lawyers in the region on accessing the Tribunal's records.¹⁹⁵

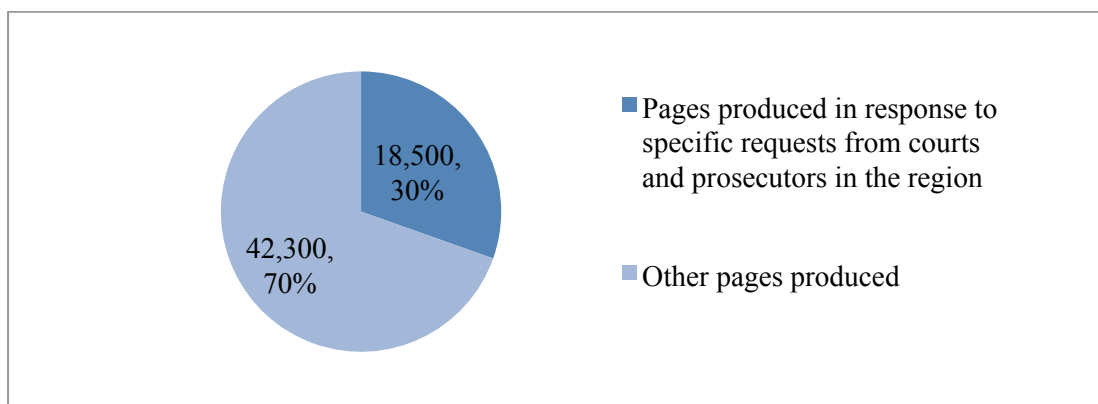


Figure 3. Pages of transcripts of the ICTY proceedings identified as most relevant by national legal institutions translated into local languages (Serbian, Bosnian, and Croatian) under the War Crimes Justice Project

Together these four project focus areas aimed to assist national judiciaries in not only trying cases of low and mid-level perpetrators transferred by the ICTY, but also supporting national judiciaries in investigating and prosecuting alleged perpetrators not indicted by the ICTY. The project made a significant contribution to national prosecutions in the countries of the former Yugoslavia by enabling the efficient exchange of information and expertise between the ICTY and the national judiciaries, with the hopes of ensuring the continuation of regional war crimes prosecutions long after the Tribunal completed its mandate.¹⁹⁶

The ICTY's Registry's Court Management and Support Service Section (CMSS) and the Office of the Prosecutor (OTP) also provided assistance to national judiciaries in a number of ways. The CMSS and OTP, which handle Requests for Assistance (RFAs) from states and international organizations investigating war

¹⁹⁵ *ICTY Annual Outreach Report 2012*, 25.

¹⁹⁶ *Ibid.*, 26.

crimes and crimes against humanity, facilitated a number of presentations and visits to promote knowledge transfer within the region.¹⁹⁷ Additionally, the OTP has established close ties with regional prosecutors, which “promotes an exchange of ideas and the development of inter-institutional understanding and memory” through training, technical assistance, and overall guidance from the OTP’s Transition Team.¹⁹⁸ Finally, a focus has been placed on public outreach and legal support in BiH.¹⁹⁹

In addition to assuming a role in strengthening the capacity of national judiciaries through knowledge transfer and establishing closer ties between the OTP and regional prosecutors. The ICTY, in 2005, in collaboration with the Office of the High Representative (OHR),²⁰⁰ established a War Crimes Chamber (WCC) in the Court of BiH in response to the shortcomings of the domestic courts in Bosnia.²⁰¹ Since the establishment of the WCC, the ICTY has continued to engage in capacity building with the Court of BiH. The WCC was established to strengthen the national judicial system in BiH by investigating and prosecuting war crimes committed in Bosnia in accordance with international law.²⁰² In order to maintain the timeline of the tribunal’s closure laid out in Resolution 1503 (2003) the ICTY began to refer lower and intermediate cases to the Chamber.²⁰³

¹⁹⁷ Ibid., 25.

¹⁹⁸ Ibid., 26.

¹⁹⁹ Ibid., 27.

²⁰⁰ The Office of the High Representative (OHR) is an *ad hoc* international organization tasked with the responsibility of ensuring that the democratic progression of Bosnia-Herzegovina is successful, peaceful, and complies with all aspect of the Dayton Peace Agreement. For more information on the OHR, see: <http://www.ohr.int/>

²⁰¹ Subotic, p. 142.

²⁰² Subotic, *Hijacked Justice: Dealing with the Past in the Balkans*, 142.

²⁰³ UNSC, Res 1503, UN Doc S/RES/1503 (August 28, 2003), En.

According to the Head of Communications at the ICTY, the relationship between the ICTY and the State Court of BiH is the strongest in the region and cooperation between the ICTY and the Court of BiH is full speed ahead. One indicator of their successful cooperation is the number of requests and responses to requests between the two courts, which is the highest in the region. A second indicator is the continuing presence of capacity building efforts at the Court. In 2012, ICTY judges and prosecutors were still meeting with and providing training to judges and prosecutors in the Court of BiH. Although overall the relationship between the two courts is the strongest in the region, the ICTY Representative explained that the Tribunal was not meant to forcibly direct the Court, but to provide support to legal professionals and institutions in the region. It couldn't exert pressure on national and regional judiciaries; it could only offer expertise, help, and lessons learned to local officials when they were designing their own strategies for investigating and prosecuting war crimes. She asserted that the ICTY was not there to impose its ideas on national judiciaries, but to provide assistance to local legal professionals in their legal system. This is important because the ICTY and national judiciaries' systems are different. You can't just "copy and paste."²⁰⁴ Therefore, the relationship functions on capacity-building and outreach efforts in order to support national judiciaries in conducting fair and impartial war crimes trials.²⁰⁵

The ICTY Outreach Program

Over the course of its mandate, the ICTY has developed an extraordinary legacy. During the immediate post-war period, the goal of the Tribunal to prevent impunity and face the past in the Balkans was gravely inhibited by the lack of the public's knowledge of the court in the region. In an effort to confront the gap in

²⁰⁴ Interview by the author, November 26, 2012.

²⁰⁵ Ibid.

awareness and strengthen the relationship between the Tribunal and the local communities in the former Yugoslavia, the ICTY created an Outreach Program in 1999, and opened field offices in Zagreb, Sarajevo, Belgrade, and Pristina.²⁰⁶ In order to bridge the gap between the ICTY and the local communities of former Yugoslavia, the ICTY Outreach Program focused on engaging with a number of different constituents including youth, the media, local communities, and as discussed earlier national judiciaries (see Figure 4).²⁰⁷

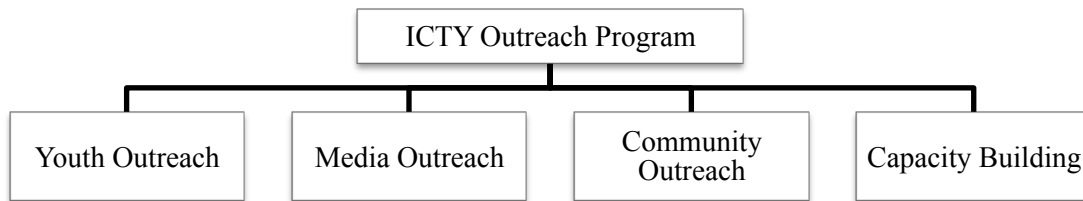


Figure 4. ICTY Outreach Program focus areas

One ICTY Representative based in The Hague, which I interviewed for this research, explained that it is important that people in the former Yugoslavia not only understand the achievements of ICTY, which are numerous, but also understand the wider impact of the Tribunal on the ground. She asserted that local populations “need to understand judgments. This is necessary in order for them to recognize the viability of international war crimes tribunals.”²⁰⁸ In particular, she explained that the establishment of facts is crucial to reconciliation in BiH because the communities are

²⁰⁶ Nettelfield, *Courting Democracy in Bosnia and Herzegovina*, 2010, 152.

²⁰⁷ Interview by the author, November 20, 2012.

²⁰⁸ Interview by the author, November 26, 2012.

so politically and ethnically polarized.²⁰⁹ At the 2012 *Legacy of the ICTY in the former Yugoslavia* conference held in Sarajevo, the Vice President (VP) of the ICTY concurred with this argument that, “the future of the country and its citizens cannot be built without an honest confrontation of the past.”²¹⁰ Similarly, an Editor at the Balkan Insight Reporting Network (BIRN) BiH maintained that if the “findings of war crimes are not adequately communicated to the people, explained to the people, then you are not going to have reconciliation.”²¹¹

Today, the link drawn by these individuals between the success of reconciliation in the region and the communication of facts established in war crimes trials to the people for which the Tribunal distributes justice is clear; however, the importance of informing the local population of the Tribunals’ findings was not realized for the first six years of its mandate.²¹² In establishing an Outreach Program, the ICTY “recognized that it had a role to play in the process of dealing with the past in the former Yugoslavia, one of the key challenges for societies emerging from conflict.”²¹³ It came with a recognition that the work of the Tribunal “would resonate far beyond the judicial mandate of deciding guilt or innocence of individual accused.”²¹⁴ In this regard, one ICTY Outreach Representative in BiH asserted that the “experience of Germany is precious to us, but it is different than the Bosnia experience and [it is] the same with Palestine and Israel and all around the globe. It is

²⁰⁹ Ibid.

²¹⁰ Nerma Jelacic, Szabo, and Kosca-Vrlazic, “Legacy of the ICTY in the Former Yugoslavia,” 13.

²¹¹ Interview by the author, November 12, 2012.

²¹² “Outreach Programme,” *ICTY*, accessed March 21, 2014, <http://www.icty.org/sections/Outreach/OutreachProgramme>.

²¹³ Ibid.

²¹⁴ Ibid.

very important to be present and promote the role of the ICTY and prosecution of war crimes as the basis of reconciliation and dealing with the past” in the Balkans.²¹⁵

A main focus of the Outreach Program is reaching out and informing younger generations in the region of the former Yugoslavia about the Tribunal’s purpose and work. It aims to increase students’ awareness about international criminal law and explain how the ICTY has helped prosecute those alleged perpetrators most responsible for atrocities committed in the region since 1991. Specifically, Outreach representatives fulfill this aim through a number of avenues including organizing study visits to the ICTY in which students can learn first-hand about the Tribunal’s work, facilitating internships for young professions to learn about the Tribunal’s rules and procedures, and coordinating presentations, lectures, witness testimonies, and films and debates with high school and university students in order to encourage discussion of the ICTY’s achievements and legacy. In 2012, a total of 80 presentations and lectures (see Figure 5) undertaken by the Outreach Program reached 1,651 university (see Figure 6) and 1,771 high school students (see Figure 7).²¹⁶

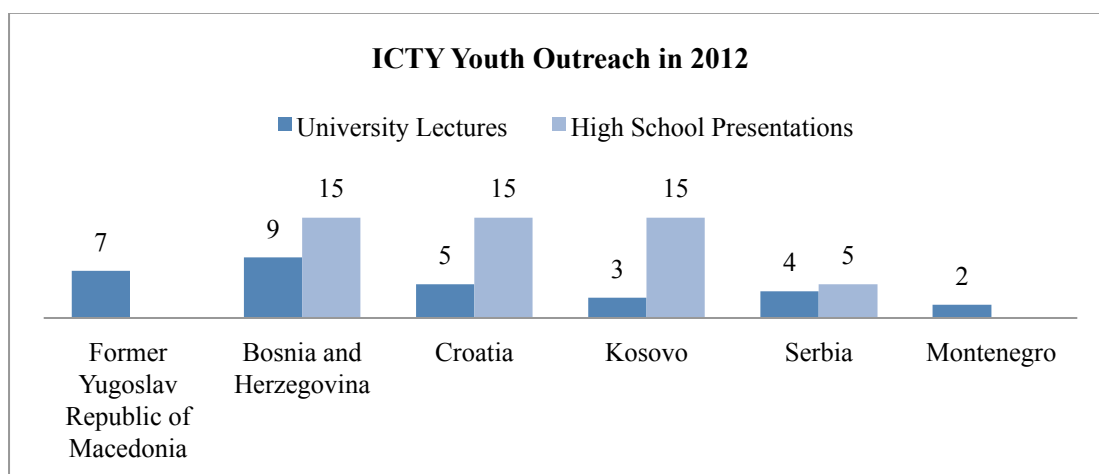


Figure 5. University lectures and high school presentations given in the region of the former Yugoslavia in 2012

²¹⁵ Interview by the author, November 20, 2012.

²¹⁶ *ICTY Annual Outreach Report 2012*, 8.

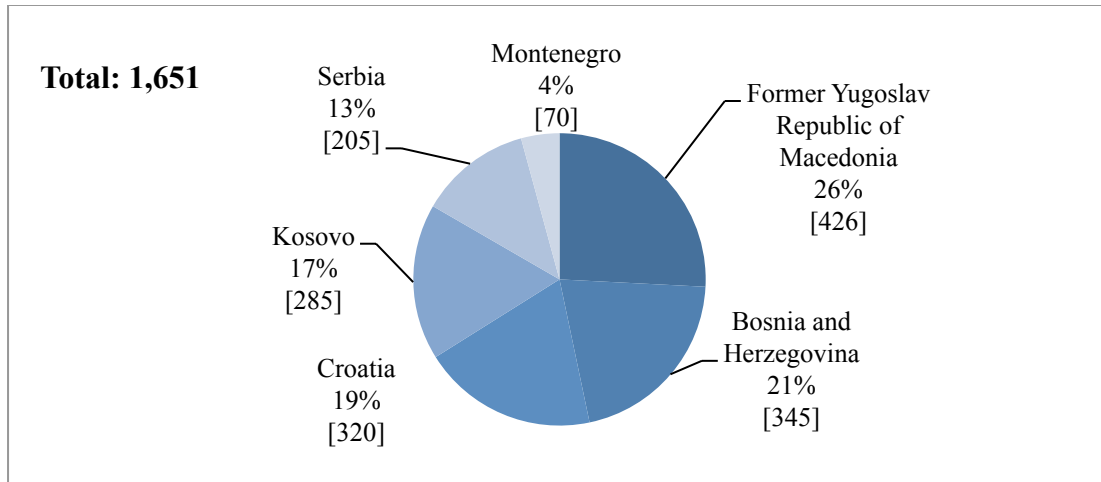


Figure 6. Statistical breakdown of the number of university students in the region of the former Yugoslavia that attended ICTY Outreach Program lectures in 2012

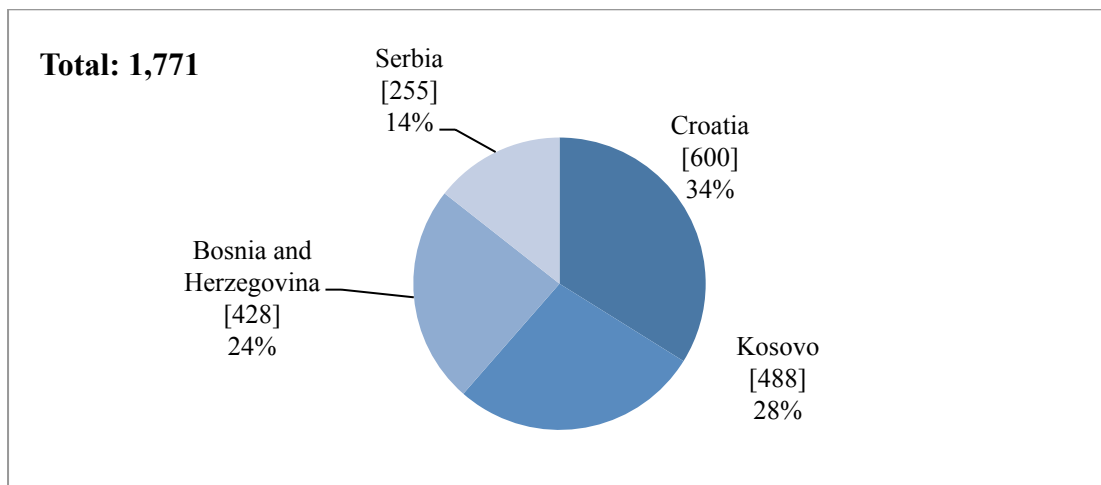


Figure 7. Statistical breakdown of the number of high school students in the region of the former Yugoslavia that attended ICTY Outreach Program presentations in 2012

During these study visits to high schools, the Outreach Program officers approach schools and ask for two hours for their presentation. Primarily, these presentations are given to students between the ages of 17-19 years old. Typically, one or two classes, totaling 30 students attend each presentation. The presentations have two parts. The first part is a general presentation about the purpose and work of the ICTY. The second part is a presentation of the ICTY's cases related to that specific community. Finally, students are encouraged to ask questions and engage in

debate about what they just learned at the end of the presentation. According to one ICTY Representative that I interviewed, students are encouraged “to be actively involved the presentation, to define the basic terms and principles of humanitarian law before we develop the concept of international justice, and the Tribunal, and why it is important.”²¹⁷ He explained that students are asked to “become a part of the presentation itself by their commands, their views, and their additions.”²¹⁸ According to the ICTY Representative, these presentations play an important role in helping the younger generation understand certain aspects and concepts, such as common law and pleas bargaining, which are not familiar in the region. Each presentation is followed by a questionnaire, which gauges the participants’ satisfaction with the presentation itself.²¹⁹

The media also plays an important role in establishing and maintaining the ICTY’s legacy. As such, the Outreach Program also focuses on media outreach efforts. In order to maintain an open relationship with journalists, the Outreach Program utilizes social media to disseminate “quick and concise information” about the Tribunal, its judgments, events, and Outreach projects.²²⁰ Additionally, the Tribunal’s website houses close to 18,000 documents, which range from the Tribunal’s Statute to courtroom filings. The website also features an Interactive Map web feature, which details the crimes investigated and adjudicated at the ICTY; pages that highlight current and past Outreach efforts; and video-streaming services for trial broadcast.²²¹ Finally, the ICTY organizes trainings for reporters and journalists on

²¹⁷ Interview by the author, November 20, 2012.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *ICTY Annual Outreach Report 2012*, 14.

²²¹ *Ibid.*, 15.

how to access its documents and transcripts and study visits to the Tribunal.²²² In 2012, the ICTY Outreach program sent out 116 press releases and advisories, and held 39 press briefings.²²³ Furthermore, 4,203,899 pages were viewed on the ICTY’s website (see Figure 9) and 1,092 people liked the ICTY Facebook page (see Figure 10).²²⁴

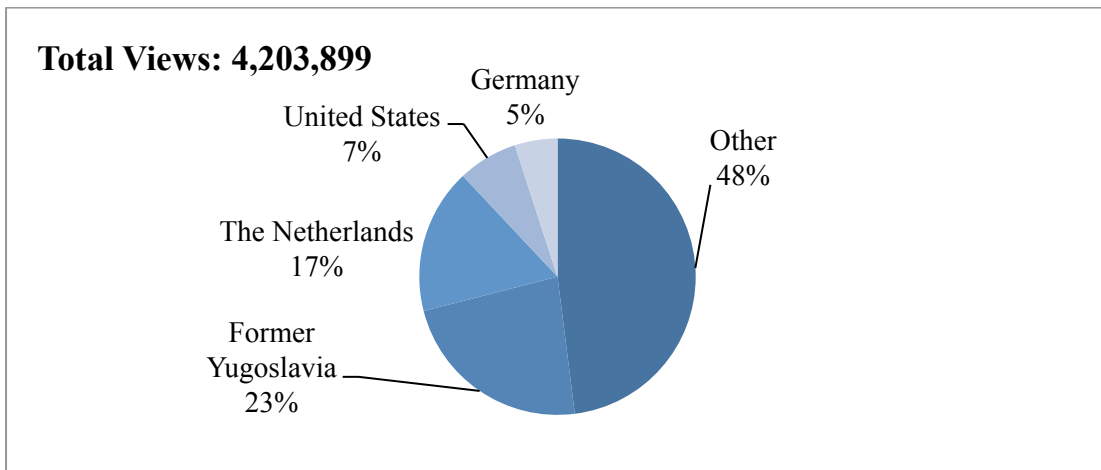


Figure 9. ICTY Website Page Views in 2012

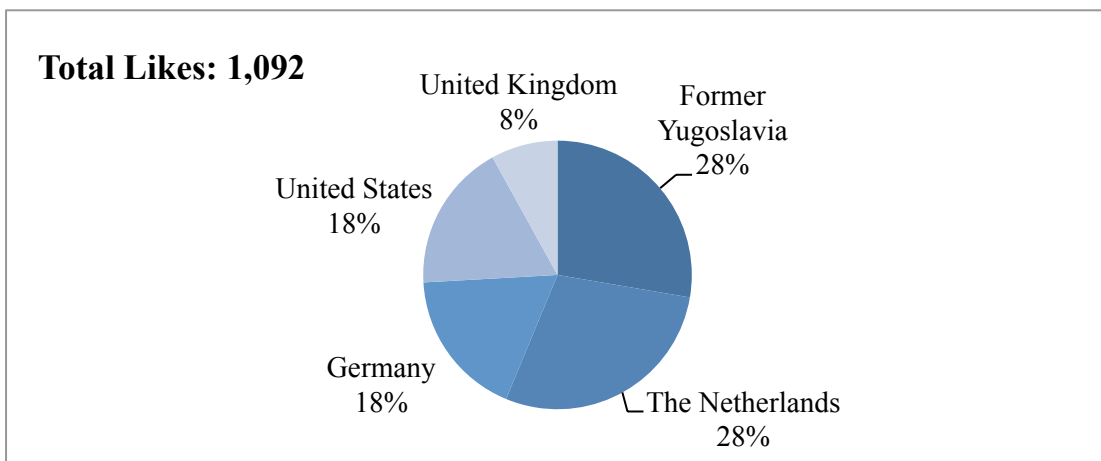


Figure 10. ICTY Facebook Likes in 2012 (May to December)

²²² Ibid., 17.

²²³ Ibid., 31.

²²⁴ Ibid., 32.

The Outreach Program also engages in community outreach efforts. In 2012, it created, promoted, and distributed its first feature-length documentary entitled ‘Sexual Violence and the Triumph of Justice,’ which outlines the ICTY’s role in the prosecution and adjudication of wartime sexual violence.²²⁵ Thousands of copies of the film were produced and distributed throughout the region of the former Yugoslavia. As of November 2012, a few hundred alone had been distributed in BiH. According to the ICTY Representative, some universities in BIH have been using the documentary as an educational tool, screening part of the film as part of their regular classes.²²⁶

Other community outreach efforts include meetings between the OTP and victims and members of the public, establishing information centers to preserve copies of public Tribunal records and establish future generations’ permanent access to these documents, and organizing Legacy conferences in the regions of the former Yugoslavia to discuss the initiative dialogue between local stakeholders about the Tribunal’s role and legacy in the region.²²⁷ In 2012, 157 people from the region of the former Yugoslavia (see Figure 11) and 9,063 people from the rest of the world visited the Tribunal (see Figure 12).²²⁸

²²⁵ *Ibid.*, 19.

²²⁶ Interview by the author, November 20, 2012.

²²⁷ *ICTY Annual Outreach Report 2012*, 22.

²²⁸ *Ibid.*, 30.

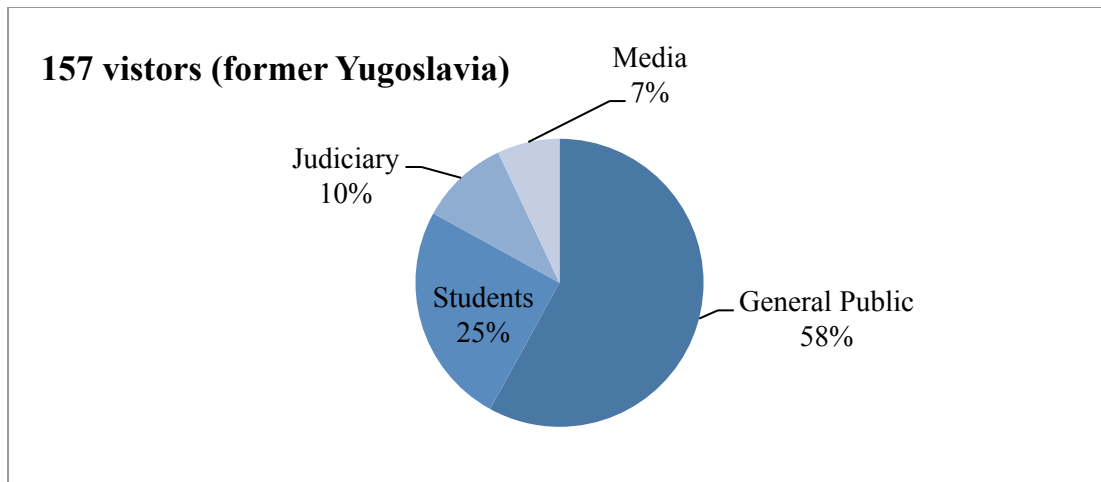


Figure 11. Number of people from the former Yugoslavia that visited the ICTY in 2012

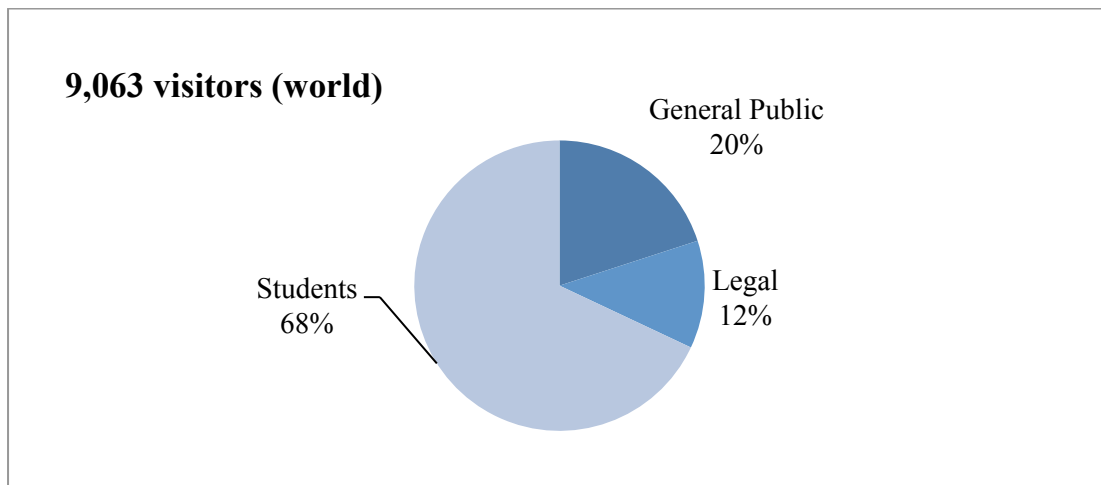


Figure 12. Number of visitors from the rest of the world that visited the ICTY in 2012

A primary example of community outreach efforts is the Outreach Program’s Bridging the Gap with local communities (BTG) project. This series of one-day events, which took place in 2004 and 2005, were one of the ICTY’s more “substantive engagements with the local communities of the former Yugoslavia.”²²⁹ This project was designed to approach those communities largely affected by war

²²⁹ “Bridging the Gap with Local Communities,” *ICTY*, accessed March 21, 2014, <http://www.icty.org/sections/Outreach/BridgingtheGapwithlocalcommunities>.

crimes.²³⁰ Panels of Tribunal staff, who had been directly involved in investigating, prosecuting, and adjudicating war crimes cases at the ICTY, gave “candid and comprehensive presentations” in the towns most affected by “the crimes at the heart of the Tribunal’s work.”²³¹ The conferences provided an opportunity for domestic stakeholders to learn “first-hand” about the ICTY’s work; learn about the context in which the Tribunal works, and discuss the community’s expectations of the Tribunal.²³²

Dealing with the Past Beyond the Tribunal

On December 2012, the UNSC established a Residual Mechanism, to be the legal successor of the ICTY and the ICTR.²³³ The structure of the Mechanism for International Criminal Tribunals (MICT) closely mirrors that of the ICTY. It has two branches, for the ICTY and ICTR respectively, which share one prosecutor, one president, and one registrar. Although this Mechanism will carry on the essential functions of the Tribunal, it does not share the ICTY’s full mandate.²³⁴ Like the ICTY, the MICT is a temporary institution. It will continue to operate until the Security Council decides that it has fulfilled its mandate.²³⁵ Since July 1, 2013, for ICTY cases, the MICT has had “jurisdiction to designate enforcement States, including for persons thereafter convicted” by the Tribunal. It has also assumed the role of the ICTY President, “to supervise the enforcement of sentences and to decide

²³⁰ Interview by the author, November 20, 2012.

²³¹ “Bridging the Gap with Local Communities.”

²³² *Ibid.*

²³³ Nerma Jelacic, Szabo, and Kosca-Vrlazic, “Legacy of the ICTY in the Former Yugoslavia,” 152.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

on requests for pardon or communication of sentence, including convicted persons already serving their sentence.”²³⁶

This mechanism will continue part of the work of the ICTY and assist national jurisdictions in investigating and prosecuting war crimes.²³⁷ At present, the ICTY is responsible for completing all ongoing proceedings. However, any new proceedings or notices of appeal filed are to be carried out by the MICT. Moreover, the MICT has jurisdiction over a number of other functions including enforcing sentences handed down by the Tribunal, requests for early release, and protection of witnesses.²³⁸ The Mechanism is also responsible, at present, for assisting national judiciaries. It responds to requests for assistance on transfer of evidence.²³⁹ Although the Outreach Program will remain separate from the ICTY and the MICT, as trials at the ICTY winds down, outreach will increase. According to an ICTY Representative the Outreach Program field offices will only remain in those countries that still have cases on trial.²⁴⁰

Chapter Conclusion

This examination of the ICTY’s completion strategy, public outreach and capacity building efforts has illustrated the relationship between the ICTY, national judiciaries, and the local communities for which the Tribunal distributed justice. In its decision to close the Tribunal, the Security Council reinforced the ICTY’s responsibility in achieving reconciliation and establishing the rule of law.²⁴¹ It encouraged increased outreach efforts and established a number of programs for

²³⁶ “The Mechanism for International Criminal Tribunals,” *ICTY*, accessed March 20, 2014, <http://www.icty.org/sid/10874>.

²³⁷ Nerma Jelacic, Szabo, and Kosca-Vrlazic, “Legacy of the ICTY in the Former Yugoslavia,” 151.

²³⁸ *Ibid.*, 153.

²³⁹ *Ibid.*, 165.

²⁴⁰ Interview by the author, November 26, 2012.

²⁴¹ UNSC, Res 1503, UN Doc S/RES/1503 (August 28, 2003), En.

strengthening national judicial capacity to prosecute war crimes. Cooperation was built between the ICTY and the national courts, specifically the State Court of BiH. While the Nuremberg tribunal established a number of important international legal norms and led to the prosecution of Nazis in other national courts, it did not assume the same role as the ICTY in supporting and empowering national jurisdictions. Today, the legacy of the ICTY is not only predicated on its contribution to international law, it depends on its cooperation with national judiciaries, local populations of the former Yugoslavia, and the media. The following chapter will discuss possible explanations for this difference between the Nuremberg tribunal and the ICTY. In addition, chapter four will discuss the larger implications of these changes, specifically the idea of legacy and policy implications for international criminal tribunals that may be established in the future.

Chapter 4: Possible Explanations and Implications

The shift in the role of international criminal tribunals since the early years after WWII is an intriguing one that could be usefully explored in further research. This paper examined the changing relationship between international war crimes tribunals and reconciliation in post-conflict societies since WWII. Using the Nuremberg tribunal and the ICTY as case studies, it illustrated how these two important international tribunals differ from one another. Most importantly, it demonstrated that their differences range from the mode in which they were established to the relationship they have with national jurisdictions and the local communities for which they distributed justice. Primarily, unlike Nuremberg, the ICTY played a role in the process of peacebuilding in the region of the former Yugoslavia by taking on the task of rebuilding and strengthening the capacity of national judicial institutions.

There are a number of possible explanations for this shift in the function and role of international war crimes tribunals in post-conflict societies since WWII. The first part of this chapter will look at some of the possible reasons for this variation in the relationship between the two tribunals and the regions for which they distributed justice. The second part of this chapter will draw conclusions about how this evolution may impact international judicial intervention in the future and discuss the larger implications of international criminal tribunals engaging in the peacebuilding process in societies devastated by conflict.

Possible Explanations for the ICTY's New Role

One possible explanation for why the ICTY adopted a role in the peacebuilding process in the region of the former Yugoslavia is the factual circumstances surrounding its establishment. The ICTY was established under

Chapter VII of the UN Charter as a measure to bring to justice those responsible for serious violations of international humanitarian law in the region and in turn, contribute to the restoration and maintenance of peace in the region. Chapter VII authorizes the UNSC to take action “with respect to threats to the peace, breaches of the peace, and acts of aggression.”²⁴² It provides the UNSC with the power to determine the existence of any threat to “international peace and security” and to take military or non-military actions necessary to restore it.²⁴³

According to Kerr and Mobekk, “the [ICTY’s] mode of establishment under Chapter VII of the UN Charter as a measure for international peace and security was truly innovative and had a number of implications for its mandate and operation.”²⁴⁴ This “interpretation of the [UNSC’s] powers and responsibilities” marked an important shift in the perceived link between peace and justice as “mutually reinforcing objectives.”²⁴⁵ The ICTY was established as a temporary institution to prosecute war criminals and thus restore and maintain peace in a region still characterized by conflict. It was established for this specific purpose at a time when national jurisdictions were not willing or able to do so. This mode of establishment may explain why the ICTY has assumed a direct role in the process of peacebuilding in the region of the former Yugoslavia. In order to conclude its mission successfully, in a timely way, the Tribunal was compelled to conduct public outreach and strengthen the competency of national judicial systems in the former Yugoslavia.

A second possible explanation for the ICTY’s role in the peacebuilding process in the Balkans is the Tribunal’s geographical location. The fact that the ICTY was set up outside the region for which it distributed justice posed problems for

²⁴² UN Charter Art 39.

²⁴³ Ibid.

²⁴⁴ Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 31.

²⁴⁵ Ibid., 32.

knowledge and awareness of Tribunal's purpose and work. Unlike the Nuremberg tribunal, which was established in Nuremberg, Germany, the ICTY was established in The Hague, 2,000 km away from the region for which it dispensed justice. The decision to locate the Tribunal in The Hague was based on the notion that "by acting outside the cauldron of domestic politics, the tribunals' international judges and prosecutors would [be able to] uphold the law and not fall victim to the political forces that have characteristically undermined the legitimacy of domestic war crimes trials in deeply divided societies."²⁴⁶ It was believed that the "independence and insulation from external pressure" would enable the Tribunal to "deliver justice fairly and impartially."²⁴⁷

However, the location of the Tribunal proved to be problematic in fulfilling its mandate.²⁴⁸ Since its initiation, knowledge about the ICTY, as an international court of law, has not been pervasive. During the immediate post-war period, the goal of the Tribunal to deter impunity and face the past in the Balkans was gravely inhibited by the lack of knowledge of the court in the region.²⁴⁹ Specifically, in 1995, the genocide at Srebrenica demonstrated the lack of the tribunal's progress to prevent further crimes.²⁵⁰ It became clear that the ICTY would only achieve its desired impact if it made an effort to inform the population of the former Yugoslavia about its purpose and work.²⁵¹

Outreach provides a formal program by which international and local actors can manage expectations of international justice and increase familiarity of facts

²⁴⁶ Peskin, *International Justice in Rwanda and the Balkans*, 6.

²⁴⁷ *Ibid.*, 5.

²⁴⁸ Janine Natalya Clark, "Judging the ICTY: Has It Achieved Its Objectives?," *Journal of Southeast European & Black Sea Studies* 9, no. 1/2 (March 2009): 123, doi:10.1080/14683850902723454.

²⁴⁹ Nettelfield, *Courting Democracy in Bosnia and Herzegovina*, 205.

²⁵⁰ *Ibid.*, 1.

²⁵¹ "Outreach Programme."

about the war established in the courts. According to Nettelfield “courts’ expressivist impact will always be limited if individuals do not know how they work.”²⁵² Although the location of the Tribunal may have removed it from the influence of political forces in the region, it may also explain the misperceptions and mistrust of local populations in the region. Thus, the location of the ICTY may have undermined the legitimacy of its proceedings. Because the court, and its proceedings and verdicts, were removed from the everyday lives of the people in the region, it was easier for the public to critique the verdicts being handed down by distant foreigners as biased. Specifically, that the ICTY is anti-Serbian.²⁵³ In this regard, the decision to locate the ICTY in The Hague may have increased the functional need to adopt a public outreach strategy to overcome these negative perceptions and attitudes towards the Tribunal.

Finally, developments in norms of international judicial intervention following the Cold War may be responsible for the emergence of this new role of international tribunals. International tribunals can play a crucial role in peacebuilding when domestic authorities are unwilling and/or unable to investigate and prosecute war crimes cases.²⁵⁴ With the understanding that justice, peace and democracy are mutually reinforcing imperatives, the UN Secretary General contended that although “restoring the capacity and legitimacy of national institutions is a long-term undertaking...urgent action to restore human security, human rights and the rule of law cannot be deferred. Thus, United Nations peace operations are often called upon

²⁵² Nettelfield, *Courting Democracy in Bosnia and Herzegovina*, 2010, 282.

²⁵³ “War Crimes Opinion Poll Discussed in Serbia,” *ICTY*, February 28, 2012, <http://icty.org/sid/11021>.

²⁵⁴ UNSC, *Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (August 23, 2004, 14), En, [hereinafter *The Rule of Law and Transitional Justice*].

to help fill this rule of law vacuum.”²⁵⁵ According to McAuliffe, “implementing processes of accountability in the aftermath of war will often serve as an impetus for rebuilding the judiciary, and vice versa.”²⁵⁶ The notion that peace and justice are reinforcing in this way may be responsible for changing the character of international justice and transforming the role of international tribunals in post-conflict societies.

There are a number of possible explanations for the change in the role of international tribunals. This brief examination of some of the possible causes illustrates the ways in which the circumstances surrounding an international tribunal’s establishment, its legal basis, political aims, criminal and territorial jurisdiction, and relationship with the region for which it distributes justice are linked.

Implications and Conclusion

The purpose of this study has been to better understand the ICTY’s role and activities, in part by comparing them to the roles and activities of the Nuremberg tribunal. Perhaps the most important distinction is the legacy of each of these bodies. Since July 1, 2013, jurisdiction over ICTY cases has been transferred to the MICT. This transition calls attention to what the Tribunal’s role has been in transitional justice processes in the former Yugoslavia. Evaluation of the Tribunal’s work identifies one of its key contributions to reconciliation and peacebuilding efforts in BiH as the development of the WCC in the State Court of BiH, as well as the strengthening of national judiciaries in the region. As an international tribunal, the ICTY was established to prosecute those individuals responsible for violations of international humanitarian law. As its work evolved it also assumed the responsibility of building the capacity of national judiciaries in the former Yugoslavia and

²⁵⁵ Ibid., 10.

²⁵⁶ McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship*, 5.

outreaching the findings of the Tribunal to both the international community and local communities in the region of the former Yugoslavia.

At the ICTY Global Legacy Conference held in Sarajevo, BiH in November 2012 representatives from the ICTY, the broader international community, and officials from national judiciaries, experts on transitional justice issues, lawyers, victims, journalist, politicians, representatives from leading NGOS, and other local stakeholders gathered to discuss the ICTY's role and accomplishments in BiH and the greater Balkan region. During the conference, participants engaged in constructive dialogue about the scope of the Tribunal's legacy, its role in transitional justice processes, and local priorities for the future. The legacy of the ICTY, or "that which the Tribunal will hand down to its successors and others" includes the factual findings, judgments and decisions of the court; the Tribunal's rules of procedure and evidence and best practices; the records of the Tribunal; its institutional legacy in developing local judiciaries and establishing a precedent for the creation of other international and hybrid criminal courts; its regional legacy in promoting the rule of law and supporting domestic judicial capacity in the region; and the MICT through which the Tribunal's work will be continued and preserved.²⁵⁷

The ICTY's contribution to the rule of law and peace and reconciliation in the region is indisputably immense. It spans from the war crimes trials to the establishment of new courts in the region. According to Judge Hilmo Vucinic, Court of BiH, the importance of the legacy of the ICTY is "huge for the jurisdiction of Bosnia and Herzegovina."²⁵⁸ He asserted that:

²⁵⁷ Richard H. Steinberg, *Assessing the Legacy of the ICTY* (Martinus Nijhoff Publishers, 2011).

²⁵⁸ Nerma Jelacic, Szabo, and Kosca-Vrlazic, "Legacy of the ICTY in the Former Yugoslavia," 25.

The increase in efficiency is immense if we take into account that from 2005, when the War Crimes Department was established, until September 2012, ninety cases of war crimes were finalized involving 122 accused, while, before the ICTY 126 persons were accused, and the ICTY needed the period from 1993 until 2012 to complete the trials in these cases.²⁵⁹

Vucinic explained:

The Law on Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and Use of Evidence Collected by the ICTY in Proceedings before the Courts in Bosnia and Herzegovina...[are] a novelty in criminal legislation in Bosnia and Herzegovina...[it] is a decisive contribution to the processing of war crimes before the Court of Bosnia and Herzegovina and enables us to use all evidence obtained by the ICTY.²⁶⁰

In conjunction with the research and interviews conducted for this project, the conference proceedings clearly illustrate how the Tribunal's engagement in extensive trainings and administration of substantial assistance to national courts has redefined its role in the region. In this way, it has raised the question of the future role and responsibility of international tribunals in the peacebuilding process in post-conflict societies.

As the first international tribunal to be established since the Nuremberg and Tokyo tribunals, as well as the first international court established by the UN, the ICTY provides a model for the development of future international judicial mechanisms. Since the establishment of the ICTY and the ICTR, the ICC along with a number of special 'hybrid,' 'mixed' and 'internationalized' courts and tribunals have been established, including the Special Court for Sierra Leone (SCSL) in 2002, the

²⁵⁹ Ibid.

²⁶⁰ Ibid., 24.

Extraordinary Chambers in the Courts of Cambodia in 2003, and the Special Tribunal for Lebanon in 2009, in which international and domestic law, procedure and personnel are mixed.²⁶¹ First and foremost, the shortcomings of the ICTY reinforced calls for the creation of the ICC, the first permanent and treaty based international criminal court.²⁶² Furthermore, the ICTY has illustrated the incredible contribution that transitional justice mechanisms can make to strengthening domestic judicial capacity and helping fill the rule of law vacuum in post-conflict societies. These new hybrid, mixed, and internationalized courts and tribunals occupy a “middle ground between the purely international model adopted by the ICTY, ICTR, and ICC and the purely domestic courts.”²⁶³ In light of the challenges faced by the ICTY, these special criminal tribunals have “sought to advance a number of [the Tribunal’s principal] objectives” including re-establishing the rule of law and contributing to the restoration of peace in post-conflict societies. The shortcomings of the ICTY reinforced the need to adopt integrated and complimentary approaches to dispensing justice in the aftermath of conflict. In this regard, these special courts and tribunals aim to further contribute to building local capacity in a weak or failing domestic judicial system.²⁶⁴ According to the Secretary-General:

There a number of important benefits to locating tribunals inside the countries concerned, including easier interaction with local population, closer proximity to the evidence and witnesses and being more accessible to victims...National location also enhances the national capacity-building contribution...allowing them to bequeath their physical infrastructure (including buildings, equipment and furniture) to national justice systems, and to build the skills of national

²⁶¹ Ibid., 80.

²⁶² Kerr and Mobekk, *Peace and Justice: Seeking Accountability After War*, 58.

²⁶³ Ibid., 81.

²⁶⁴ Ibid., 176.

justice personnel. In the nationally located tribunals, international personnel work side by side with their national counterparts and on-the-job training can be provided to national lawyers, officials and staff.²⁶⁵

Public outreach strategies have also been adopted by many of the ICTY's successors, including the ICC, in light of the challenges faced by the ICTY. Effective communication and outreach have been recognized as crucial elements in the success of transitional justice. The failures of the ICTY, in engaging with the local community at an early stage, led these new international justice mechanisms to initially adopt strategies to ensure that affected communities are informed, updated, and engaged in the investigations and proceedings.²⁶⁶

Taken together, the findings of this study provide important insight into how the notions of accountability, rule of law, and peace and justice have evolved over time. Despite the criticism of the ICTY, the absence of such an organization would have caused BiH, as well as other regions of the former Yugoslavia, to significantly lag behind in their quest for democracy and reconciliation. This thesis illustrates that it is no longer enough for *ad hoc* tribunals such as the ICTY to merely exist and fulfill their basic mandates. The real success of international justice relies on these institutions' ability to transfer responsibility from the international community to the local community and establish domestic judiciaries that can carry on their missions and make them domestic initiatives. Just as the ICTY was predicated on Nuremberg's legacy, the establishment of future international judicial mechanisms will likely continue to be influenced by the ICTY's experience. Therefore, understanding how

²⁶⁵ *The Rule of Law and Transitional Justice*, *supra* note 253.

²⁶⁶ Clara Ramirez-Barat, *Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (International Center for Transitional Justice, January 2011), 6.

the ICTY is both similar and different from the Nuremberg tribunal provides important insight into how the role of international tribunals will continue to change.

As the 20th anniversary of the ICTY's establishment approached, Judge Carmel Agius, Vice President of the ICTY, urged participants of the *ICTY Global Legacy Conference*, held in Sarajevo, BiH in 2012, to remember the legacy of the Nuremberg trials. Recalling the ICTY's rocky start, and doubts surrounding the Tribunal's capability to "conduct a proper investigation, let alone hold a trial," Judge Agius called attention to the legacy the ICTY has built over the course of its mandate. He asserted that, having indicted and accounted for 161 individuals accused of war crimes in the former Yugoslavia, the ICTY "is a leader in the global fight for justice."²⁶⁷

So—the question remains, what is the ICTY leaving behind? When will the Tribunal's legacy be fulfilled? According to Judge Agius:

The legacy of the ICTY, the facts it established, its archives, and its contribution to the rule of law in the region will certainly prove to be a decisive facilitator in the process of facing the past and securing reconciliation in not only Bosnia and Herzegovina but also the entire region. The Tribunal's legacy will be fulfilled when it inspires this and future generations to transform Bosnia and Herzegovina through the rule of law, accountability, and equal justice.²⁶⁸

The ICTY has demonstrated the role the international community can play in preventing a return to conflict in the future. By addressing the causes of conflict, in a legitimate and fair manner, the ICTY was able to strengthen the rule of law in the

²⁶⁷ Nerma Jelacic, Szabo, and Kosca-Vrlazic, "Legacy of the ICTY in the Former Yugoslavia," 13.

²⁶⁸ *Ibid.*, 14.

region of the former Yugoslavia in the wake of conflict. The role of international tribunals should extend well beyond the courtroom. The unprecedented role assumed by the ICTY, to help rebuild the rule of law in the region of the former Yugoslavia was crucial to fulfilling its mandate. In comparison to the Nuremberg tribunal, as well as in its own right, there are a number of lessons to be learned from the ICTY. International tribunals face a host of constraints. In transitional contexts, limits are placed on the reach of criminal justice. Moreover, funding, resources, caseload, and time constraints make balancing and achieving primary objectives complex. For this reason, it is pivotal that international war crimes tribunals consider their exit strategy and legacy at the time of establishment.

The conclusion of the ICTY legacy conference offers a good summary of the important themes that arose in the conference, as well as my interviews. After the final panel, the difficulty in drawing conclusions from open debate was noted. The Director of Communication at the International Center for Transitional Justice (ICTJ) noted that the people of BiH are “still fighting against each other with [their] versions of truth.”²⁶⁹ Now, the legacy of the ICTY is offering the community of BiH a “unique opportunity” to make use of their findings to advance the work of domestic courts and encourage the organic growth of reconciliation in the region.²⁷⁰ One of the closing speakers at the conference noted that human rights violations do not happen in the abstract—justice must be made to address people in their daily lives. Therefore, when we look to the future, it is important to look towards the new generation and recognize the importance of bolstering national judicial capacity and conducting outreach in the public sphere.

²⁶⁹ Ibid., 82.

²⁷⁰ Ibid., 107.

Ultimately, the extent to which international institutions facilitate societal reconciliation is, and will be, understood within the context of the legacies they leave behind. What we can learn from the incorporation of assessing issues of impact in the completion strategies of *ad hoc* tribunals is that prior to their establishment, there is a need to examine and clearly define their desired goals and objectives for post-conflict societies. This study shows that in the future, institutions such as the ICTY will not be judged solely on the merit of the ideals that they were established on, but instead on their concrete successes in the domestic arena and their ability to fortify domestic judicial capacity. It is only with meaningful support of domestic reform constituencies, specifically, domestic rule of law capacity building within the justice sector, that international judicial intervention will have the greatest hope for maintaining and restoring peace in post-conflict societies.

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