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*If You Want Peace, Work for Justice: An Evaluation of International Jurisdiction and
Sustainable Peace Building in the former Yugoslavia*

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Global Studies Capstone Thesis

Dr. Tom King

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Abstract

This thesis paper provides an evaluation of international criminal tribunals and their ability to incite sustainable peace in ethnically conflicted regions of the world. This research focuses particularly on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the role it has played in reconciling ethnic tensions in the Balkans. First, an extensive review of the literature concerning international jurisdiction provides background information on the two opposing views of international relations: realism and legalism. Both perspectives of international relations have significant implications for the effectiveness of this UN Tribunal and whether or not such supra-national institutions are ultimately effective. The most significant element of research, however, was done in conjunction with the ICTY Outreach Programme office in The Hague, Netherlands, and with the organization Human Rights Watch. After an extensive evaluation of the Tribunal's development over the last decade, and most importantly, the activities of the ICTY Outreach Programme in the states which formerly comprised Yugoslavia, the conclusion is reached that the ICTY provides an effective model for other international criminal tribunals. Recommendations for international policy and further research are also provided.

Introduction

One of the most striking developments of the twenty-first century has been the adoption of the United Nations Declaration on Human Rights: a standardized, globally accepted norm establishing the most basic and fundamental rights to which each human being is entitled. Furthermore, as a result of globalization, a number of supra-national governing bodies have been created to mediate the complex relationships between states in this new world order. The unprecedented interconnectedness of modern states and the establishment of universal human rights have had both positive and negative consequences – creating a mix of solidarity and ambiguity in the international community.

In 1995, Richard Holbrooke referred to the former Yugoslavia as “the greatest collective security failure of the West since the 1930s.”¹ The subsequent ad hoc tribunal that was established to try war criminals responsible for committing grave atrocities during the conflict has become a test to the efficacy of international jurisdiction. The International Criminal Tribunal for the former Yugoslavia (ICTY) is an UN-mandated, ad hoc tribunal which seeks to hold individuals accountable for crimes committed during the Yugoslav wars of the 1990s and foster reconciliation among ethnic groups in the Balkans. It is the first war crimes tribunal to be established since the Nuremburg trials of World War II, and was created in conjunction with a tribunal for Rwanda (ICTR).

International criminal court systems are revolutionary in the context of world history, and it is likely they will continue to play a very important role in international policy in the future. The greatest concern of international court systems in general is establishing legitimacy; this can only be accomplished if international criminal tribunals

¹ Holbrooke, Richard. “America, a European Power,” *Foreign Affairs* (1995): 40.

are seen overwhelmingly as fair and impartial, rather than as institutions cloaking “victor’s justice” or Western ideology. The ICTY provides the best standard for comparison precisely because it has been used as a model for other tribunals and as justification for the establishment of the permanent International Criminal Court (ICC). Evaluating the effectiveness of the ICTY is thus vital in order to determine whether it is actually an effective model that should continue to be replicated in the future.

Overall, the ICTY has many forces working against it: The historical precedent that tribunals fail to establish peace, the inherently problematic issue of collective action in the international community, and the prevalent notion that UN institutions are structurally ineffective. Despite this, international tribunals are a growing phenomenon and are vehemently advocated by the most powerful nations as a necessary first step in the process of building peace and reconciliation. This paper seeks to address the main concerns associated with them – namely, do international criminal courts achieve their goal of peace and reconciliation? And if so, what specific mechanism of the court system causes this?

Literature Review

Executive Summary

There is an overwhelming amount of literature written on the topic of international criminal law. This review seeks to provide a critical analysis of the two major opposing arguments at work: Realism and an “idealist” legalism. With regard to state sovereignty, realists hold that global institutions, like international courts, are inherently flawed and biased while simultaneously infringing on state sovereignty. In an anarchic system of states, where power and influence are what matters, global institutions will be limited in their effectiveness. Legalists, however, will argue that international criminal law has slowly, but surely, created precedence of individual accountability and justice for victims of human rights abuses in the international system. In the former Yugoslavia, legalists argue the ICTY has been effective at apprehending major war criminals – Slobodan Milosević being the most notable – although it has taken many years and shaky cooperation on behalf of the international community.

Introduction

The view that international criminal tribunals are a form of victor’s justice is as old as international relations. As Thucydides said, “the standard of justice depends on the equality of power to compel.”² Realists have criticized institutions like the International Criminal Court and war tribunals for moralizing foreign policy, and are skeptical of them because they merely reflect the underlying balance of power. Therefore, the main issue to be addressed is questioning the two opposing theories of international relations with regard to this topic: Namely, are such tribunals fair and unbiased and thus beneficial to

² Meernik, “Victor’s Justice or the Law,” p. 144

the promotion of peace, according to legalists and idealist theory? Or, are they infused with the politics of major world powers that can interfere with the efforts to end the cycle of violence, according to a Realist perspective?

Sovereignty and International Law: Reconcilable Differences?

Sovereignty

The principle of sovereignty holds that the state, itself, is the ultimate source of political authority within its territory. States are accorded freedom from un-requested external interference in the domestic affairs of the state, particularly if this interference is coercive in nature.³ The implication, therefore, is that states are not, and should not be, subject to the authority of any higher institution or Principle, which therefore creates an underlying conflict when dealing with supra-national governing bodies like the ICC and the ICTY.

From a Realist perspective of international relations, state sovereignty provides a measure of stability, predictability, and order within the anarchic system of nation-states. As Bruce Cronin states in his research on this topic, “it is the single equalizer in world of great inequality.”⁴ Especially for weak states, this principle of sovereignty provides a political and legal deterrent to the imposition of values and policies by more powerful states.

However, Cronin also notes the negative side of sovereignty as well. While it protects weak states from coercion and external interference, for strong states, sovereignty provides the legal justification to allow them to define and pursue their

³ Bruce Cronin, “The Tension between Sovereignty and Intervention in the Prevention of Genocide,” *Human Rights Review* (2007): 293.

⁴ *Ibid.*, 294

interests unilaterally without being subjected to the will of an international majority.⁵ Consequently, this relieves the powerful states of the obligation to help the weak (like populations suffering human rights abuses, for example) when they do not believe it to be in their best interests to do so.

In both of these cases, the principles of sovereignty enable the societies of both strong and weak states to develop their own domestic institutions based on their unique values and principles.

Sovereignty and the International System

In the international arena, sovereignty becomes a very complex issue, and only becomes harder to mediate as states become more closely intertwined as a result of globalization. The complex relationships that arise from international interdependence impose limitations on a state's will to be independent. As Cronin suggests, most political leaders of the world recognize that a stable, predictable, and functional international order requires formal rules that define acceptable behavior, regulate political interaction, and facilitate the resolution of conflicts.⁶ Because states receive their sovereignty, at least in part, from their recognition as legitimate political actors in international affairs, the international community has long claimed the right to place limits and responsibilities on state action.⁷

Chief among a state's responsibilities is to provide for the security and wellbeing of its population (and obviously, forms of mass violence like genocide and ethnic cleansing are the ultimate negation of this responsibility). Therefore, Cronin points out, because states have extensive authority over their territories, they are responsible for

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

ensuring that conditions within their borders do not threaten international peace and security. When they abdicate this responsibility, it is generally assumed that the broader community is obliged to take action to rectify the situation.⁸ Ethnic violence not only provokes gross human rights abuses, but these events also tend to produce mass refugee flows, cross-border guerilla movements, and create tensions with neighboring states. Thus, the international community is directly impacted by these occurrences and has a stake and interest, as well as a moral duty, to do everything within its power to prevent situations like these from occurring.

Sovereignty and a New World Order

In June 1992, the changing nature of international security problems and the central concept of sovereignty were addressed in the UN secretary generals' report, *An Agenda for Peace*. In it, Boutros Boutros-Ghali, emphasized the need to improve preventative diplomacy, peacemaking, peacekeeping, reconstruction, and maintaining of peace after wars (civil or international). He stated:

The foundation of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute sovereignty, however, has passed; its theory was never matched by reality. It is the task of the leaders of states today to understand this and to find a balance between the needs of good international governance and the requirements of an ever more interdependent world.⁹

The passing of the Cold War and the resulting new arrangement of international affairs raised the cost of states excluding themselves from the international sphere.

⁸ Ibid.

⁹ Boutros-Ghali, *Agenda for Peace*, par. 17, as cited by James Gow, "Shared Sovereignty, Enhanced Security: Lessons from the Yugoslav War," from *State Sovereignty*, ed. by Sohail H Hashmi, University Park (1997): 152.

Subsequently, it also raised the level of accountability for powerful states to remain complacent when norms of the international system were not being honored.

The International Criminal Court

The ICC and State Sovereignty

Throughout the twentieth century, state sovereignty has been one of the most enduring obstacles for advancing international criminal law. While the establishment of the International Criminal Court (ICC) signifies the immanent demise of this link between sovereignty and impunity, it reveals the continuing importance of state compliance and cooperation. Whatever the obstacles that state compliance poses, the ICC can be seen as the culmination of a long struggle to ensure that the worst perpetrators of gross human rights abuses will be held accountable for their crimes.¹⁰

Background: The ICC

The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity, and war crimes.¹¹ It is a court of last resort and it will not act if a case is investigated or prosecuted by a national judicial system, unless the national proceedings are disingenuous. The clear advantage of the ICC is the power to prosecute without the consent of the defendant's state of nationality. This jurisdictional

¹⁰ Steven Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law*. New York (2006): 19.

¹¹ *Rome Statute of the International Criminal Court*, Art. 5, 17 July 1998, UN Doc. A/CONF.183/9.

structure circumvents the problem of perpetrator regimes shielding their own nationals from justice, something that is not uncommon in situations of this severe nature.¹²

Establishing Legitimacy

The jurisdiction and functioning of the court is governed by its founding treaty, the Rome Statute, and signed by 108 countries.¹³ The ICC's juridical power is flexible insofar as it has no centralized mechanism of enforcement and it is dependent on state cooperation (and its legitimacy) to implement and enforce its rules and procedures.¹⁴ It is essential to note that, while it has 108 member countries, many critical world powers are not signatories, namely the United States, Russia, and China,¹⁵ which is potentially damaging to the courts legitimacy and power to enforce compliance.

This question of legitimacy is also essential for assessing the feasibility of establishing a truly international criminal law system using procedures and personnel adapted from a variety of national judicial systems.¹⁶ It begs the question: is it possible to weave together diverse judicial systems and legal norms to deliver justice that fulfills demands for retribution while protecting the rights of the accused? The outcome of the courts have the potential to provide the quality of justice required to legitimize international law and promote peaceful conflict resolution, but if history is any indication of the likely outcome, it will probably not be favorable.¹⁷

Weaknesses

¹² Madeline Morris, "Democracy, Global governance, and the International Criminal Court," from *From Sovereign Impunity to International Accountability*, ed. by Ramesh Thakur et al, UN University press (2004):187-8.

¹³ ICC website

¹⁴ Roach, 3

¹⁵ ICC website

¹⁶ James Meernik, "Victor's Justice or the Law?: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia," *The Journal of Conflict Resolution* 47, no. 2 (2003): 141

¹⁷ Ibid.

While the institutional mechanism exists to try the accused and to deliver justice to victims, there are several major impediments to the effectiveness of this court. Bassiouni notes that in 1971, the UN General Assembly adopted the “Resolution on War Criminals,” affirming that a State’s refusal “to cooperate in the arrest, extradition, trial, and punishment” of persons accused or convicted of war crimes and crimes against humanity is “contrary to the United Nations Charter and to generally recognized norms of international law.”¹⁸ Furthermore, in 1973 a resolution entitled *Principles of International Co-operation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity* was also adopted by the Assembly.¹⁹ Despite these resolutions, Bassiouni points out that no specialized international convention has been passed on this subject, and, therefore, the duty to prosecute or to extradite remains to be proven part of customary international law rather than an established *obligation*.²⁰

Moreover, national enforcement of humanitarian crimes is difficult as few states recognize the application of universality, and accordingly, few countries have enacted national legislation needed to prosecute genocide and crimes against humanity.²¹

In practice, there are also significant weaknesses with respect to states carrying out the duties to prosecute or extradite criminals, and for states to cooperate with each other in the investigation, prosecution, and adjudication of those charged with such crimes.²²

¹⁸ UN Res. On War Criminals, as cited by Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability.” *Law and Contemporary Problems* 59, no. 4 (Autumn 1996): 15.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 16

²¹ *Ibid.*, 17

²² *Ibid.*, 15

Overall, it seems there are sufficient human rights norms in the international system, but what is lacking is the political will to enforce them. Even though an international criminal court is established, it will have to be considered as being on the same continuum as national criminal courts and all these legal systems will have to work in a complementary way to reinforce one another in order to achieve effective deterrence.²³

The Politics of Intervention

Despite an overwhelming consensus that there is a moral responsibility to stop atrocities like genocide or ethnic cleansing, political leaders remain hesitant to support intervention even when such events are confirmed.²⁴ Humanitarian concerns are only one factor in the decision for outside forces intervene. In most cases, it must also be politically advantageous to do so. For this reason, many states in the developing world, as well as competing major powers, have viewed specific cases of intervention as unjustified violations of sovereignty, making it difficult to gain a consensus on the need for action.

Sovereignty and Responsibility: A Problem of Collective Action

After many years of disagreement over the issue, Cronin argues that there is now a general consensus that States do, in fact, have both the right and the responsibility to intervene in cases of genocide. The overarching problem is one of *collective action*. States continue to be suspicious of each other's motives, while at the same time, they balk at themselves paying the cost in lives and resources to protect another country's population. International procedures for stopping genocide mandate that intervention is

²³ Ibid.,18

²⁴ Cronin, 295

supposed to be limited to alleviating the humanitarian crisis while protecting the sovereignty of the offending state. That is, defeating the enemy or altering the political make-up of the government constitutes a violation of established norms of sovereignty. As a result, powerful and influential states are unlikely to intervene in situations where it is not politically (or economically) advantageous to do so, a manifestation of realism.²⁵ In the long term, it is unlikely this trend will waiver significantly.

Cronin affirms this point when he states:

...The ability of the international community to oppose genocide has also been hampered by the opposite problem rooted in the principle of sovereignty: Even when most states agree that acts of genocide have occurred and that such actions are violations of international law, those with the ability to act have refused to do so, drawing on their sovereign right not to put their citizens at risk to protect a foreign population.²⁶

Therefore, “the institution of sovereignty provides a cover for the great powers to avoid their responsibilities when they did not believe it to be in their best interest to intervene.”²⁷

Bass argues that the politics of war crimes tribunals is really a story of the constant tension between liberal ideas and crude self-interest.²⁸ The single biggest challenge for international war crimes tribunals has been the unwillingness of even liberal states to endanger their own soldiers, either by arresting war criminals or in subsequent reprisals. Holbrooke, among others, has explained the Pentagon’s reluctance to pursue

²⁵ This is often cited as an example why the United States and the West were so late in intervening in Yugoslavia. There were no economic or political incentives to do so. With a trend like this, creating fundamental change in the structure of the intervention and prevention systems is difficult to achieve.

²⁶ Cronin, 295

²⁷ Ibid., 296

²⁸ Bass, Gary Jonathan. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton (2000): 276

Bosnian war criminals as a product of what he calls Washington's "Vietmalia syndrome,"²⁹ referring to the casualties of Vietnam and Somalia.

However, there is a powerful idealism present in liberal states which pushes back these more self-interested principles, so the future outlook is not totally bleak. Bass notes this observation in his book: Although citizens tend to come before foreigners, liberal states also have a universalistic strand built in – a domestic ideology that sees rights as universal and unavoidable, which can thus force liberal states to worry about the plight of foreigners. From the eventual intervention in Yugoslavia, to the present-day movement to send aid to Darfur, this struggle between the self-serving and humanitarian impulses resurfaces time and again. This humanitarianism can be a potent force in the making of a liberal states' foreign policy.

Lastly, complicating matters even more is the absence of a reliable enforcement mechanism at the international level. This is the main reason, as Roach outlines, why the efficacy of the rule of law is often subjugated to the rule of state sovereignty (since only the State possesses a standing army to enforce the rule of law).³⁰ However, Roach also argues that to say that the rule of law cannot exist in some form at the international level, nor continue to evolve, is to ignore the implications of the continuing trend toward global governance.³¹

The Creation of the ICTY: A New Kind of Tribunal?

Historical Precedence of Criminal Tribunals: The Case of Nuremburg

²⁹ Ibid., 277

³⁰ Roach, 2

³¹ Ibid.

Following World War II, the four Allied powers established the International Military Tribunal for Nuremberg on August 8, 1945, by implementing the London Accord. This accord contained 33 articles which set forth the structure of the tribunal and listed the elements of war crimes, crimes against humanity, and crimes against peace, with jurisdiction only extended to Nazi and Italian officials.³²

While these trials have been championed by human rights activists, Bass argues that they are envisioned as more selfless than they actually were at the time. To the American and British governments, these trials were largely about denouncing German aggression, and much less about punishing crimes against humanity (referring to the Holocaust) that people primarily remember Nuremberg for today.³³ Furthermore, Bass believes the single biggest defect of the trials was the concerted Soviet effort to make Nuremberg into a travesty: a propaganda-filled, show-trial that Stalin's Russia was accustomed to at the time. Ironically, it was the Europe's leading democracy, Britain, which was opposed to the trials taking place. Winston Churchill lobbied to have Nazi leaders shot without trial, while the totalitarian Soviet Union pushed for them to take place.³⁴ For many critics, these trials were a prominent display of victor's justice.

Despite this, Bass argues it is significant that the victors even took an interest in justice. Nuremberg was followed by a series of international gestures aimed at outlawing crimes against humanity, including a UN General Assembly resolution in December 1946 affirming Nuremberg's charter and judgment, and the UN's 1948 adoption of the Genocide Convention. Bass quotes Richard Goldstone, the first chief prosecutor of The

³² Ibid. 25

³³ Bass, 25

³⁴ John Rodden, "Heuristics, Hypocrisy, and History without Lessons: Nuremberg, War Crimes, and "Shock and Awe"," *Journal of Human Rights* 7 (2008): 34

Hague and Rwanda tribunals, who says “the recognition of crimes against humanity was the most important legacy of Nuremberg.”³⁵

At that point in time, the legitimacy of the UN offered a unique opportunity to test and even push the validity of boundaries of international criminal law. At the very least, it encouraged addressing the difficult issues regarding the inviolability of state sovereignty and the need to assess the relationship between the universality of heinous crimes and state irresponsibility.³⁶

Creation of the ICTY

The UN International Criminal Tribunal for the Former Yugoslavia (ICTY), in The Hague, is the first international war crimes tribunal since Nuremberg. Given the increasing number of confirmed eyewitness reports of unlawful detentions and mass killings in Bosnia-Herzegovina, many leaders and policymakers had become convinced that the lack of international (and domestic) accountability had produced a culture of impunity. This provided the rationale for the unprecedented decision by the UN Security Council to establish the ICTY pursuant to Chapter VII of the Charter in 1993 (and International Criminal Tribunal for Rwanda [ICTR] in 1994), established by Security Council resolution 827, passed on 25 May 1993.³⁷ The ICTY intends to offer an efficient and effective *ad hoc* juridical framework for investigating and prosecuting the perpetrators of crimes that took place during the Yugoslavia war (1991 – 1995) and within Yugoslavia’s 1991 borders.³⁸

³⁵ Goldstone, as cited by Bass, 20

³⁶ Roach, 26

³⁷ Ibid., 30

³⁸ Ibid.

The ICTY Statute, which sets forth the Office of the Prosecutor, Judiciary (a chamber of judges and appeals chamber), and Registry, contains 24 articles, four of which enumerate the categories of crimes: grave breaches of the 1949 Geneva Convention, violations of the laws and customs of war, crimes against humanity, and genocide.³⁹ Accordingly, it empowers the Prosecutor to investigate the core crimes of genocide, crimes against humanity, and war crimes, and it allows the Prosecutor to conduct its judicial affairs independently of the Security Council and to focus on the individualization of guilt of the perpetrators.⁴⁰

According to the court's founding documents, the objective of its establishment was to take action to redress or stop the ethnic conflict and inter-communal violence that occurred in the region since 1991, and respond to the threat to international peace and security posed by those serious violations.⁴¹ However, there has been some debate about the larger objectives of the court – whether it was to establish a culture of deterring future perpetrators, or if it provided an alternative security option to sending troops into Yugoslavia.⁴²

Issues with the ICTY

Roach believes that the ICTY provides a crucial historical turn in international criminal justice since it eliminates the politics of victors' justice, while also constituting an arguably important deterrent effect, which has withered the culture of impunity in the region.⁴³ Akhavan, likewise, agrees that precedents of accountability, however selected

³⁹ ICTY Website

⁴⁰ Ivan Simonovic, "The Role of the ICTY in the Development of International Criminal Adjudication," *Fordham International Law Journal* 23 (1999): 440.

⁴¹ ICTY website

⁴² Roach, 30

⁴³ *Ibid.*, 31

and limited, contributes to the transformation of a culture of impunity that has hitherto implied the political acceptability of massive human rights abuses.⁴⁴

However, the ICTY Prosecutor's discretionary power has generated political tensions between states and the ICTY. Here, the Serbs have contended that the ICTY has targeted a disproportionate number of their own ethnic group, the most high-profiled indictment being charged to Slobodan Milosević.⁴⁵ It is precisely this claim of bias that allowed Milosević to conduct a long, drawn-out trial in The Hague where he stood accused of committing genocide, crimes against humanity, and war crimes.

A Modern-day Nuremburg?

Similar problems which face the ICTY plagued earlier tribunals. The Nuremburg and Tokyo Tribunals after World War II have been viewed as both laudable attempts to “stay the hand of vengeance” and as a form of victor's justice. Likewise, realist critics argue that such criminal tribunals (like Nuremburg and the ICTY) are only created when the interests of major powers have been affected, and that the institutions' structure and decisions are inherently compromised. International criminal tribunals, according to this reasoning, can never escape the political interests that led to their creation and these biases will tend to promote the international community's interest in deterrence and retribution and tend to work against the interests of the accused.⁴⁶

Few expected the creation of the ICTY to be effective in capturing and prosecuting those responsible for the ethnic cleansing, mass killings, and other atrocities from the Balkan wars of the early nineties. Many, like Holbrooke, saw the creation of the

⁴⁴ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, 1 (2001): 8

⁴⁵ Roach, 31

⁴⁶ Meernik, “Victor's Justice or the Law?” 145

ICTY as a public relations maneuver designed to deflect attention from the inability of the United Nations to stop the Balkan wars.⁴⁷ Bass states, "...the establishment of the Hague tribunal was an act of tokenism by the world community, which was largely unwilling to intervene in ex-Yugoslavia but did not mind creating an institution that would give the *appearance* of moral concern. The world would prosecute the crimes that it would not prevent. The tribunal was built to flounder."⁴⁸ As Roach outlines, to the extent that this option would save lives and reduce military costs, it would also provide a cost-effective alternative to military intervention.⁴⁹

As Meernik points out in his research, "Victor's Justice or the Law?", there is certainly a lot riding on the effectiveness of the ICTY's work and its ability to fulfill the United Nation's mandate "to do justice." His research draws on the two opposing theories of international relations to this topic: Are such tribunals fair and unbiased and thus beneficial to the promotion of peace, according to liberal theory? Or, are they infused with the politics of major world powers that can interfere with the efforts to end the cycle of violence, a realist perspective?⁵⁰

He initially hypothesizes that the resources, experience, and moral forces are weighted heavily in favor of the international community and that it is likely the accused cannot obtain a fair contest. Based on a series of hypotheses regarding the influence of these legal and political procedures on judgment and punishment of the accused, he develops a statistical model to assess these factors on the judges' verdicts and sentences. He concludes that the evidence is generally in favor of the legitimacy of the courts, and

⁴⁷ Holbrooke, Richard. *To End A War*. New York (1998): 46.

⁴⁸ Bass, 207

⁴⁹ Roach, 30

⁵⁰ Meernik, "Victor's Justice or the Law?," 141

that political factors largely do not explain verdicts or sentences. Rather, those found guilty received punishment in proportion to the number and severity of crimes committed, and no ethnic groups are singled out for unequal treatment.⁵¹

According to the court, by trying individuals on the basis of their personal responsibility, be it direct or indirect, the ICTY personalizes guilt. Accordingly, this shields entire communities from being labeled as collectively responsible for others' suffering.⁵² The aim of the individualization of guilt, in this instance, is to distinguish the guilt of individuals from their communities, and thereby limiting the perception of collective guilt and arguably favoring reconciliation. While this is the intention of the ICTY, Roach argues that whether or not the tribunal has accomplished this task of reconciliation remains open-ended.⁵³

However, the significance of the apprehension and trials of Milosević, as well as other major military leaders from the war, has countered the argument that the tribunal is only another Nuremburg. As the court boasts: "For the first time in legal history, an indictment was filed, by the ICTY Prosecutor, against an acting Head of State, Slobodan Milosević, for crimes allegedly committed while he was in office. Other individuals holding the highest political and military office have also been indicted."⁵⁴

The Effectiveness of Tribunals: Case Study of the Former Yugoslavia

Perceptions from the Balkans

⁵¹ Meernik, "Time to Stop Running," 8

⁵² ICTY website

⁵³ Roach, 47

⁵⁴ ICTY website

Saxon, a former prosecutor at the ICTY, evaluates how Serbs, Croats, and Muslims (the three significant nationalities of the former Yugoslavia) view the ICTY's compliance with its mission and offers his views on where it has succeeded and failed as a tool of peace and international justice.

He outlines the perspective of these ethnic groups in the Balkans, and his insights are vital to understanding how these minorities perceive such institutions and the attitudes they carry towards each other. Significantly, he states:

In my experience as a prosecutor at the ICTY, each national party to the armed conflict in the former Yugoslavia attempts to use the trials to present – and create – its own version of the history of the war. The ICTY is often perceived as having the ability to formally designate a particular national group with “victim” or “perpetrator” status. The “creation” of such simplistic versions of history often becomes extremely important to the accused in ICTY courtrooms, just as important as the formal legal proceedings dedicated to discerning the truth.⁵⁵

Nationalities in the Balkans have a long history of being dominated or repressed, so this distinction between victim and perpetrator can be easily manipulated to a people's advantage. Each of the three primary nationalities in the region views themselves as victims rather than perpetrators of aggression and atrocities against other parties.⁵⁶ Such is the nature of ethnic conflict in general, and nationalistic sentiments have the potential of undermining the court's legitimacy for one group or breeding further resentment between ethnic groups if verdicts are viewed as unbalanced or biased.

Furthermore, it is essential to understand that the former Yugoslavia has no history or tradition of a strong, independent judiciary. Even today, according to a BBC report, Serbia and Montenegro are referred to as “a region renowned for organized crime

⁵⁵ Dan Saxon, “Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia,” *Journal of Human Rights* 4 (2005): 563

⁵⁶ Interview with Aleksander Kontic, Legal Officer, ICTY, 6 May 2004, as cited by Saxon, 562

and corruption.”⁵⁷ Democratic values are not easily exportable, especially when an area has no historical foundation for such values. In this light, the international community’s goal of bringing “the rule of law” to the region, via the ICTY, was perceived as a very ambitious. Saxon argues that even where the concept was understood, residents would be just as likely to view the establishment of the rule of law as an idealistic Western dream rather than a Balkan reality.⁵⁸

Arguments against Tribunals and the ICTY

Throughout his book, Bass outlines what he describes as “a dizzying array of lofty objectives for international war crimes tribunals” set forth by legalists. According to Bass’ interpretation, “they are to bring justice, establish peace, outlaw war all together, ease bitterness, or establish new international norms that will help lift us out of anarchy.”⁵⁹ Bass argues that these sweeping claims have become accepted as a kind of orthodoxy among human rights activists, who frequently cite the success of Nuremburg, with little other empirical proof or study to back up the claim. Bass argues that “although most people have a sense that prosecuting war criminals is a morally good thing to do, there is no reliable proof that doing so will always have good results.”⁶⁰

Bass says there are many reasons to be skeptical of the notion that war crimes trials are always appropriate. He notes that due process may interfere with substantive justice, through technical acquittals and delays in punishing people who “richly deserve it.” The spectacle of foreign-imposed trials may cause a nationalist backlash. Or, a moralistic insistence on punishing war crimes may make it impossible to do business

⁵⁷ “Arrests in Montenegro Editor Case,” *BBC News* 3 June 2004, as cited by Saxon, 567

⁵⁸ Saxon, 562

⁵⁹ Bass, 284

⁶⁰ *Ibid.*

with “bloodstained leaders who, however repulsive, might end a war.” When politics is linked to law, he argues, crucial flexibility is lost – potentially with catastrophic results.⁶¹

As the political tensions unfolded in Yugoslavia from the late 1990s onward, the international community did not initially involve itself to a great degree. It was more preoccupied with other major international problems, notably the impending collapse of the Soviet Union and the Gulf War in Iraq. It was only by late June 1991 that any significant steps were taken to contain and control what had begun as a political crisis and evolved into a military crisis of significant magnitude.⁶² At heart, these criticisms stem from the belief that politics inspired the design and influences the work of the ICTY. Because the United Nations Security Council could have authorized any such institutions to adjudicate a number of bloody conflicts, but chose instead to create only two particular tribunals (the ICTY and the ICTR), it acted selectively and politically. Therefore, if international criminal tribunals are created only when the interests of major world powers are affected, their institutional structure and their decisions are compromised.⁶³ Furthermore, realists and proponents of *realpolitik* argue that every conflict is unique: the variables of each conflict are diverse and they cannot be categorized or characterized in a way that a common international legal regime can be applicable to all of these heterogeneous conflicts.⁶⁴

Observers of the ICTY’s proceedings also doubt some of the technical capabilities of the court to bring peace and deliver positive results. Ralph Zacklin, the UN’s Assistant Secretary General for Legal Affairs, once stated in a published article that “the ad hoc

⁶¹ Ibid.

⁶² Ibid., 160

⁶³ Meernik, 145

⁶⁴ Bassiouni, 13

Tribunals have been too costly, too inefficient and too ineffective. As mechanisms for dealing with justice in post-conflict societies, they exemplify an approach that is no longer politically or financially viable.”⁶⁵ The court’s budget for the year 2008 – 09 alone totaled over \$342 million, a cost which is borne by all UN member nations.⁶⁶ The physical distance of the tribunal from the actual victims also raises concern: The Hague lies over a thousand miles from the countries that comprised Yugoslavia, and those who suffered persecution or wish to testify can find it cumbersome to travel such a distance.⁶⁷ In the case of Milosević, some argue that he “escaped justice” by dying before his trial had concluded – despite the fact that it had dragged on for almost six years.⁶⁸ Lastly, the highly technical, formalistic, and adversarial proceedings of the ICTY may not be the most effective forum for describing and understanding the complex and traumatic histories brought before it. Saxon explains, “The ICTY has, with mixed results, used predominantly ‘common law’ methods and procedures in an attempt ‘to normalize the extraordinary trial.’”⁶⁹ Along these lines, it is believed that few people from the region have acquired a broad understanding of the cases or how the ICTY itself functions, which creates a sense of alienation between the courts’ proceedings and the population it intends to serve.⁷⁰

Support for Tribunals and the ICTY

It is undeniable that ethnic groups within Yugoslavia have nursed deep-seeded grievances against one another for some time. But in and of itself, ethnic friction, no

⁶⁵ Zacklin, R. “The Failings of ad hoc International Tribunals,” *Journal of International Criminal Justice*, 2 (2004): 541, as cited by Saxon, 568.

⁶⁶ ICTY website <<http://www.icty.org/sid/325>>

⁶⁷ Rodden, 36

⁶⁸ Ibid.

⁶⁹ Saxon, 568

⁷⁰ From an interview with Aleksander Kotic, The Hague 6 May 2004, as cited by Saxon, 563

matter how serious, did not make the tragedy inevitable – or the three ethnic groups equally guilty.⁷¹ While history, and particularly the carnage of WWII, provided plenty of tinder for ethnic hatred in Yugoslavia, it took the institution of nationalism from the top down, inoculated primarily through the medium of television. Many people in the Balkans may have been bigoted, but in Yugoslavia it is their leaders who have been criminal.⁷² As Holbrooke notes of his experience in the Balkans:

The only mechanism for dealing with such problems was imperfect but vital: the International War Crimes Tribunal, located at The Hague. When it was established by the UN Security Council in 1993, the tribunal was widely viewed as little more than a public relations device. It got off to a slow start...During our negotiations, the tribunal emerged as a valuable instrument of policy that allowed us, for example, to bar Karadzic and all other indicted war criminals from public office. Yet no mechanism existed for the arrest of indicted war criminals.⁷³

The dramatic dethronement of once seemingly invincible architects of a “Greater Serbia” and ethnic cleansing (namely Milosević and Karadžić), has gone far beyond what most observers imagined was possible when the ICTY was first established in 1993.

To address the argument that tribunals are highly politicized, and therefore corrupt in a sense, some scholars argue that the suggestion of law being divorced from politics is a naïve perspective. As Saxon states, “law is only an extension of politics, and if well-reasoned legal decisions can create more favorable conditions (i.e. *political decisions*) for the respect of human rights, there seems nothing inappropriate for using the law as such a benevolent tool.”⁷⁴ By focusing its prosecutions on the most notorious defendants, like Milosević and Karadžić, the Tribunal sends a strong political message that no one is above the law. This prioritization of who to prosecute also targets the

⁷¹ Holbrooke., 23

⁷² Warren Zimmerman, cited by Holbrooke, 24

⁷³ Holbrooke,190

⁷⁴ Saxon, 569

criminals who have often amassed large amounts of illegitimate power during the conflict.⁷⁵

Furthermore, Madeline Albright, former secretary of state and an adamant legalist, said upon visiting the Hague tribunal in 1997:

Justice is essential to strengthen the rule of law, soften the bitterness of victims' families, and remove an obstacle to cooperation among the parties. It will help ensure that our forces can depart Bosnia without the fear that renewed violence threatening U.S. interests might one day return. It will establish a model for resolving ethnic differences by the force of law rather than the law of force.⁷⁶

Despite their *ad hoc* mandates, the ICTY directly influenced the adoption of the statute of the ICC at the 1998 Rome Diplomatic Conference.⁷⁷ With the precedents established with the ICTY, the ICC blueprint for a future international criminal justice system, however limited, has raised accountability to an unprecedented prominence in the international system. The spread of accountability reflects the early glimmerings of an effective international justice system.

Along these lines, Rodden acknowledges that Milosević's death in 2006 precluded a certain kind of justice; however, he argues that great strides were made in his trial toward a standard of international justice. Many midlevel Belgrade bureaucrats testified against him before the ICTY, and the ICC is now pursuing similar inquiries with regard to the Congo, Darfur, and other places.

The creation of the ICTY's "Outreach Program" has been an attempt to reconcile the possible alienation victims might experience from the court's distant proceedings. According to the ICTY website, this program strives to make the Tribunal's activities

⁷⁵ Ibid.

⁷⁶ Albright statement at the ICTY, 28 May 1997, as cited by Bass, 284

⁷⁷ Akhavan, 9

transparent, accessible, and intelligible to communities in the affected regions by engaging the local media, legal community, non-governmental organizations (NGOs) and youth-based programs. The program also provides legal aid to the prosecutors of domestic war crimes trials.⁷⁸ Programs of this nature create an essential bridge between the formal legal procedures and the real human emotion tied to these cases, and should be expanded to ensure the positive ramifications of the Tribunal's work.

Finally, Saxon argues that although the wounds of the past are far from being healed, the ICTY has, at a minimum, played an important role in moving the process forward and forcing entire communities to confront the worst parts of their histories. While it will take generations before reconciliation is legitimately realized, discovering the truth of the past, at least, should provide some hope that history does not repeat itself.

Conclusion – Are War Crimes Tribunals Effective?

Realists in international relations maintain that international institutions are superfluous. International institutions merely reflect the underlying balance of power, and at worst they are misguided because they inject moral issues with their accompanying bias into diplomacy.⁷⁹ However, with the growing interconnectedness among states as a result of globalization, it is obvious that the global trend is toward increased cooperation and communication among states; if anything, for efficiency's sake. Furthermore, there has been a drive for increased accountability of states, especially with regard to grave humanitarian crimes. Overall, international criminal law has been developing, and will continue to develop, over the next few years. Relevant literature has

⁷⁸ ICTY Website < <http://www.icty.org/sections/Outreach/OutreachProgramme>>

⁷⁹ Meernik, 145

outlined the concerns with international criminal tribunals as well as the potential benefits that can be reaped by them; so far, the results have been mostly positive with regard to the ICTY. There is a growing adherence to the findings of the court and its judgments have been effective at holding individuals accountable for war crimes.

Roach argues that in the case of international collective intervention into humanitarian emergencies, new rules and principles will need to be devised that replace the traditional rules of the UN charter (referring to the principles of non-intervention and the sovereign equality of states) and that challenge conventional notions of global power.⁸⁰

⁸⁰ Roach, 3

Methodology

Engaging the community of the former Yugoslavia proved to be a bit of a logistical challenge for my thesis research. In order to obtain the broadest representation of the work of the Tribunal, as well as the local communities affected by the war and the Tribunal's sentences, I wanted to contact individuals, organizations, and institutions that had affiliations with both the Tribunal itself and ties with the local community. Interviews were conducted primarily by email with the non-governmental organization Human Rights Watch and with three representatives of the ICTY Outreach Office. In addition to interviews, my research was supplemented with pertinent literature provided by my community partners as well as current articles published from reliable news sources.

I chose to contact Human Rights Watch because the organization is very active in monitoring the progress of ICTY trials. While they certainly take a legalist approach to their international work⁸¹, I felt the organization was extremely reputable and would nevertheless provide a perspective independent of my UN contacts. Through my initial communication with their offices, I was given a reference to Ms. Param Preet Singh, a counsel with the International Justice Program, who I was told would be monitoring the trial of Radovan Karadžić during the year. I enthusiastically tried to arrange an interview, but unfortunately she was out of the office for an extended amount of time and I was unable to personally speak with her. Despite this drawback, her colleague Ms. Mia Psorn, an associate with the International Justice Program, sent a report on the ICC which Ms. Singh authored, titled "Courting History," as well as a report from July 2008 titled

⁸¹ According to the organization's mission statement: "For 30 years, Human Rights Watch has worked tenaciously to lay the legal and moral groundwork for deep-rooted change and has fought to bring greater justice and security to people around the world."

“Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts.” Both reports were able to provide critical accounts of the successes and failures of the ICC and ICTY through personal interviews with government representatives and local NGO groups.

My communication with the ICTY Outreach offices came about by coincidence while I was searching for contact information for the Tribunal. The ICTY Outreach Programme is the official representative of the Tribunal's Registry in the region of the former Yugoslavia, and according to the Programme’s mission, it “aims to communicate to the people of the former Yugoslavia the importance of holding accountable individuals who violate international humanitarian law and the significance of rendering justice to victims.”⁸² Outreach engages the regional media and legal community, supports local non-governmental organizations and youth-based programs, works with international organizations and the diplomatic community, and speaks directly to victims and the general public. In addition to the main operations and administrative office in The Hague, the Outreach Programme consists of four regional offices in Sarajevo, Zagreb, Belgrade and Pristina.

I established contact with representatives at the Outreach Programme initially through email communications and followed up with a phone interview. My primary contacts were Magdalena Spalinska, information officer with the Outreach Programme, and her colleague Rebecca Cuthill, who also works at the Hague office. They provided general insights to the work of the Tribunal and provided a wealth of information for my research, including documents and reports that I would have been unable to obtain

⁸² ICTY Outreach website

without their assistance.⁸³ Ms. Cuthill also referred me to Mr. Refik Hodzic, a colleague from the Sarajevo regional office, who would have been able to answer questions pertaining to the receptiveness of the Outreach programs in Bosnia and answer questions about the transfer of cases from The Hague to domestic courts. Unfortunately, after much persistence, I was unable to personally communicate with Mr. Hodzic in a suitable amount of time because he was frequently traveling out of the office.

In addition to interviews, I chose to supplement my research with a survey published by the BBC on August 1, 2008 regarding Radovan Karadžić's first appearance before the ICTY.⁸⁴ This article polled the opinions of people living in Serbia and Bosnia to survey their reactions to the indictment of this high-profile military commander. It was beneficial to have a source which was independent of the ICTY and proved to be an insightful and effective tool to gauge sentiments of local residents. Also, since I was unable to procure this kind of information myself, this reliable and independent data source proved to be a viable alternative. This information served as a basis for many of the questions I asked my community partners about the receptiveness of different ethnic groups to the activities of the Tribunal.

Although I was unable to obtain the amount of personal commentary I originally hoped for, the representatives at the ICTY Outreach office were extraordinarily helpful in the amount of additional resources they provided. Initially, I expected the bureaucratic offices of the UN to be the most cumbersome to communicate with; but to my surprise, Ms. Spalinska and Ms. Cuthill were the most open, engaging, and helpful contacts by far. The information I obtained from them was very pertinent and provided an important

⁸³ See appendix 1 for an abbreviated transcript of our email communications and referred documents.

⁸⁴ See appendix 2 for a copy of the brief BBC survey.

foundation for the conclusions I have drawn in this research. The UN documents I reviewed from their offices were also very consistent with the accounts given in the Human Rights Watch report on Bosnia. Overall, I believe I was able to obtain an accurate and complete picture of the Tribunal's effectiveness in local communities through these resources and information.

Findings

The most important finding of my research was the discovery that an official liaison office exists in conjunction with the ICTY. Given its significant size and scope, I was surprised that it had not been referenced in the literature I reviewed about this Tribunal. The Outreach Programme seeks to address most of the problems the Tribunal is critiqued for, and its sole purpose is working to establishing a connection between the UN Tribunal and the local communities in the Balkans. Therefore, their activities became central to my research.

In 2008, Human Rights Watch created a report detailing the transfer of cases from the ICTY to cantonal and district courts in Bosnia and Herzegovina. This document provides an excellent overview of many residual problems that remain in the region with the prosecution of war crimes. In particular, the researchers in the report highlighted the importance of domestic trials to victims:

The fact that the ICTY and the State Court of Bosnia and Herzegovina generally have jurisdiction over cases dealing with more senior perpetrators or more politically sensitive crimes does not mean that the crimes tried before cantonal and district courts are not very serious. In fact, for many victims, trials of people who physically committed the atrocities, rather than their leaders, may be of greater importance.⁸⁵

This point reflects the more general accusation made against the ICTY: That first, by holding trials physically far away from victims, and second, by only prosecuting high profile leaders who commanded such atrocities (rather than those who actually carried out the violence), international tribunal systems alienate justice from the victims they aim to serve.

⁸⁵ “Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts,” *Human Rights Watch* no. 1-56432-341-2 (July 2008): 7.

Through my research, however, I was able to learn that as part of the Tribunal's completion strategy,⁸⁶ the Outreach office is working to transfer cases to local and regional courts and strengthen the legitimacy of these domestic institutions. This kind of collaboration involves the distribution of key legal documents in Serbian, Croatian, and Bosnian languages, as well as the training and education of legal professionals through roundtables, seminars and conferences.

The same document from Human Rights Watch asserts the need for prosecutors to build stronger relationships and communication with witnesses and victims. One NGO representative told Human Rights Watch that many victims lacked information and knowledge of the workings of the court system and believed that prosecutors were capable of bringing indictments without witness participation. Witnesses' lack of participation has fueled resentment among many prosecutors, with some asserting that witnesses change their testimony due to bribes from defense attorneys. It is imperative that steps be taken to combat this lack of trust so that prosecutors and victims can achieve the common goal of successfully prosecuting crimes committed during the war. The recommendations provided by Human Rights Watch state:

Providing adequate witness support and protection services would go some of the way to overcoming this, but other steps are also needed. Outreach is essential to this. Prosecutors who have been able to effectively use witness testimony in prosecutions of war crimes, crimes against humanity, or genocide cite repeated, sustained contact with witnesses as a key tool to building trust and to overcoming suspicion, especially across ethnic lines.⁸⁷

In working with the ICTY Outreach office, I was able to learn a significant amount about the programs and the collaborations they have with both the international

⁸⁶ The Tribunal's mandate is set to expire in 2012, when all proceedings will have been completed

⁸⁷ "Still Waiting," *HRW Report*, 42-3.

and local community. Of particular interest was the “Bridging the Gap” series which took place in 2004 in conjunction with the Helsinki Committee for Human Rights.⁸⁸ This was a series of events which took place in areas of Bosnia and Herzegovina where some of the most notorious crimes under the Tribunal’s jurisdiction were committed. This event, considered a landmark by the Tribunal, was specifically intended to “bridge the gap” between the local communities and the Tribunal’s legal community. The participants in this series of conferences consisted of victims associations, municipal authorities, judicial institutions and law enforcement agencies, local politicians, and civil society representatives.⁸⁹ These conferences were specifically targeted towards communities of ethnically mixed populations with the intention of creating dialogue between ethnic groups, civilian groups, and legal representatives – both international and national.

In many instances, both victim groups and prosecutors expressed their frustration with the justice process. These sentiments were documented in the Human Rights Watch Report on Bosnia:

One NGO stated that an outreach event that they organized began with mutual recrimination where victims’ groups attacked prosecutors for lack of action and prosecutors blamed victims for refusing to participate and for changing their testimony.⁹⁰

Among other issues, victims and witnesses expressed their confusion with understanding the legal processes, and prosecutors complained of uncooperative witness participation.

However, from additional accounts gathered at this conference, even those who were

⁸⁸ Source of this information is highlighted in Appendix 1: interview with Ms. Magdalena Spalinska of the ICTY Outreach office.

⁸⁹ As stated by Magdalena Spalinska, Appendix 1.

⁹⁰ “Still Waiting,” *HRW Report*, 60.

frustrated with the entire situation were pleased to have a venue to voice these resentments:

This airing of grievances was ultimately helpful as it began a dialogue between victims' groups and prosecutors that had not previously been possible. Another person said that outreach events helped break down prejudices and fostered communication. Another participant stressed the importance of including religious leaders in outreach events: their views can carry tremendous weight in some communities, and it is important that they be part of the broader discussion of accountability for war crimes.⁹¹

The creation of dialogue in this way is vital for improvements to be made in the justice process and for the process of peace and reconciliation to be possible. Ms. Spalinska from the Outreach office stated that "victims, who had testified at the Tribunal ... praised the event and additionally some stated that without the ICTY nothing ever would have been done for them."⁹² She also provided a documented response from one of the attendees at an event in Prijedor:

...Meetings like this one, that is what the people need. The Serbs and the Muslims are still full of distrust for one another. But that is not the same as war. We have never really understood the cruelty of that time. We still don't really understand it.⁹³

Comments like these reflect the importance of ICTY Outreach efforts in bringing all of these different groups together into dialogue, both to express gratitude for the work of the Tribunal and to express their frustration. Conference series like this have been replicated in other former Yugoslav republics since 2004 and there has been significant media coverage surrounding the events, which greatly enhances their impact and spreads awareness of these issues.

⁹¹ Ibid.

⁹² See Appendix 1.

⁹³ Unidentified respondent, see Appendix 1.

Another essential element to Tribunal, aside from the establishment of justice, is the determination of truth. By allowing victims to come forward and have their stories recorded, a documented history is established and acknowledgement of the atrocities that occurred is possible. The nature of ethnic conflict, as with any war, is chaotic and filled with strong nationalistic sentiment, propaganda, and contempt for the “enemy.” An independent institutional apparatus, like the ICTY, is extremely beneficial in this regard and necessary as these states recover from the destruction of the war. Furthermore, with events like Bridging the Gap, Ms. Spalinska explains that:

Tribunal investigators, prosecutors and chambers staff provide an insight into the meticulous and painstaking investigations conducted by the tribunal and explained how the crimes and the responsibility of the perpetrators were proved *beyond a reasonable doubt* before the court.⁹⁴

This is the most basic foundation to creating sustainable and peaceful relations in the region. Reconciliation is achieved only by first establishing the truth of what happened.

Along these lines, the Tribunal announced the launch of its online records database on April 6, 2009.⁹⁵ More than 150,000 public court records and documents, from the first filing submitted in 1994 through today, are now openly accessible to the world. This is a significant development for any global institution; with this action, the Tribunal is taking advantage of technology to make its processes more open and transparent. Furthermore, this diminishes the significance of its geographical distance.

Given the nature of the criticisms in the literature review, the Outreach Programme is a unique institution that is effective at creating a link between The Hague and the actual citizens of the Balkans who were affected by the crimes of the war. Given that the ICTY is the first Tribunal of its kind since Nuremburg, it should not be expected

⁹⁴ Appendix 1, emphasis added

⁹⁵ ICTY Press release, 6 April 2008.

to function perfectly since its inception. The failure of past tribunals has been largely due to their ineffectiveness at reconciling the sentiments of victimized populations. By including a significant liaison component to the legal framework of the Tribunal – a seemingly small structural change in the operations of a massive international institution – the benefits of the Tribunal’s work will actually permeate the society of the people it has affected.

Thucydides argued that politics is “the arena where conscience and power meet, and will be meeting until the end of time.” It is undeniable that politics have played a significant role in the creation and shaping of the ICTY and of international criminal jurisdiction as a whole. But what this shows, to me, is that the international community is collaborating in a way that harnesses the power of globalization to enforce human rights and justice for victims of mass atrocities. The spreading of Western legalism, in the interest of human rights abuses, should not be perceived as a negative aspect of globalization. Rather than viewing global governance as the imposition of a single (American or Western) solution to the problem, it is best seen as a way of supporting and sustaining governance at other levels.

The relationship between the ICTY and the sovereign states in the Balkans has fundamentally changed, in my eyes, through this research. The creation of this institution can certainly be seen as a form of intervention; but, after considering the finite mandate of the tribunal, in combination with the work of the Outreach Programme in aiding the proper development of local governments and prosecutors, the ICTY actually reinforces the importance of the sovereign state. Through this research, I began rethinking the notion that it must be *either* the national *or* the international sphere that holds power.

Rather, they seem to work in conjunction with each other to develop and affirm their own authority.

Legal frameworks, while not a solution in themselves, are important because they have a very large impact on society. Any politically and socially stable state requires a strong rule of law within an independent and trustworthy legal system. While local governments and courts are more directly accountable to their populations, at the time of the ICTY's inception, the courts in the Balkans were not equipped to properly prosecute cases of this extreme nature. As of now, the evidence strongly supports the idea that the ICTY has created a standard of accountability for human rights abuses, when fifteen years ago, there was none. This would not be possible without the creation of the ICTY and its mechanism of implementation, the ICTY Outreach Programme.

Conclusion

Through this extensive research process, I have come to the conclusion that the ICTY, in conjunction with its Outreach Programme, provides effective model as an international criminal tribunal and has been a vital contributor of peace in the Balkan region. A legal solution, in and of itself, is not a total solution to the all of the issues created by the ethnic conflict in the 1990s. However, the extensive work of the liaison office has created a dynamic approach to reconciliation that was absent until this point in history. That is why, however important the actions of the court are, the extent of outreach work is single-handedly why it has been effective. The Tribunal has established a rule of law in the midst of violent warfare and dissolution, has been a source of truth and investigation of the crimes committed, and its Outreach Programme has supported mediating efforts to encourage reconciliation and dialogue in local communities.

While the rule of law is a necessary component of any country that seeks to establish political and social stability, perhaps the most vital function of the Tribunal has been the establishment of accountability and responsibility for the war crimes that were committed. The recordings of victim testimony, documentation of narratives, and the collection of evidence are all necessary for establishing the truth of what occurred at this time. The extensive documentation procedures of the court are a way of recording history as it happened, and not how people wish to think it happened.

By making the Tribunal's work transparent – through the receptiveness of those working in the Outreach offices, the availability of court documents and proceedings on the internet, and regularly providing updates and special media programs to the public –

the ICTY is utilizing some of the greatest resources made possible by globalization: the diffusion of accessible information and the ease of communication.

Although it has not been a perfect reconciliation, as proved by nationalistic sentiments that still remain in Serbia,⁹⁶ such strong feelings and resentments cannot be expected to simply evaporate once a war has ended. It will likely take generations for relationships among ethnic groups to return to normal – as they were for centuries before the arrival of nationalism in the nineteenth century – but Outreach has done a significant amount of work targeting younger generations of Serbs, Bosnians, Muslims, and Croats, who will be more receptive to moving beyond the artificial divisions that incited this violence. What is significant about the Outreach’s programs, such as the Bridging the Gap series of 2004 mentioned earlier, is that it brings all of these different groups together in solidarity.

Although it is contended that only high profile leaders from this time have faced punishment, this alone sets an astonishing legal precedent, historically. It seems fitting that a high profile court would try high profile cases, and in fact, that is exactly what has happened. A large number of lesser claims are increasingly being brought to cantonal and district courts in former Yugoslav states now that the proper legal apparatuses have been developed to deal with them.

In fact, the transfer of cases back to national court systems is a defining feature of the ICTY and the Outreach program. This conclusion is the least intuitive one I expected to draw from this research, but it is certainly the most compelling: Supra-national governing bodies do not necessarily erode state sovereignty, and in fact, I believe the structure of the ICTY is such that it re-affirms the importance of state sovereignty. The

⁹⁶ Documented in the BBC Survey, appendix 2

Tribunal, recognizing that national judiciaries are better equipped to address the grievances and deliver the justice that victims seek, has taken extensive measures to reform these domestic capabilities in the Balkans. In all actuality, global governance relies increasingly on effective national capabilities rather than the substitution of those capabilities, and the fact that the legitimacy of the Tribunal itself depends on the successful development of these Balkan states is evidence to this. The competitive worldview that pits supra-national institutions against sovereign nation is changing; and ultimately, global institutions can complement state authority, rather than simply pose a challenge to it.

Recommendations

Programs like Outreach are, in my opinion, the most defining aspect and crucial component to the success of the ICTY Tribunal. The scope and effectiveness of the Outreach Programme is a necessary element to the peace-building process and should be adapted to all other Tribunals dealing with ethnic conflict of this nature. A significant part of the work they do is aiding the development of local judiciaries which is an essential contribution to the peace and reconciliation process. By fostering the establishment of the rule of law, and creating a culture of capacity building and dialogue, sustainable peace is likely to develop for future generations in this area. It is essential that the Outreach Programme continues to operate after the Tribunal's mandate has expired so societal change can still occur long after justice has been served.

Possible avenues for future research include the role of international bodies like the European Union and the influence it has on the ICTY's legitimacy. Cooperation with the Tribunal has long been used as a bargaining chip for EU membership, which can be perceived as ideological coercion or a positive affect for the Tribunal.

Also, given the intense, nationalistic nature of the ethnic conflict in Yugoslavia, more research could be done to analyze the impact of globalization on the nature of nationalism – whether it provokes individuals and groups to become more extreme or if the interconnected nature of globalization fosters more cooperation.

Overall, international war crimes tribunals like the ICTY are effective in so far as they restore order and the rule of law *after* violence has occurred; but ultimately, these situations are not inevitable, and a solution remains to be found for preventing these atrocities from happening in the first place. This problem might be best addressed by re-

evaluating the roles of international organizations, revisiting the concepts of sovereignty and its relationship to responsibility in the international system, and defining the duties of intervention on behalf of the international community. Global institutions, like the UN and the ICTY, are created *intentionally* as facilitators of collective action in the international community, although the traditional notions of state sovereignty and power have impeded this. It appears that while the world is continuously being changed and shaped by globalization, the rules of old-world politics are still being applied to these new and dynamic problems facing the century. The resources, humanitarian efforts, and will of the international community are abundantly available to address these issues, but they have yet to be harnessed in an effective way to change the course of such conflicts.

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Methodology:

ICTY Outreach Page <http://www.icty.org/sections/Outreach/OutreachProgramme>

Findings:

ICTY Press release, <http://www.icty.org/sid/10099>

“Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts.” *Human Rights Watch* no. 1-56432-341-2 (July 2008).

**Appendix 1: Record of Contact with Magdalena Spalinska, ICTY Outreach
Information Officer, and Rebecca Cuthill, ICTY Outreach**

Sent: Tue 4/7/2009 9:37 AM
From: [Rebecca Cuthill \[Cuthill.icty@un.org\]](mailto:Rebecca.Cuthill@un.org)
To: [Wasson, Elizabeth P](mailto:Wasson.Elizabeth@un.org)
Subject: RE: ICTY response

Dear Elizabeth

Thanks for the mail.

What I was going to suggest you look at is firstly some information we have on our website regarding 11bis case transfers:

<http://www.icty.org/sid/8934>

and also the overview of the types of activities Outreach engages:

<http://www.icty.org/sid/8937>

You can see from this list that over the past 12 months or so key partners have included the OSCE, UNDP as well as locally based NGO's. I can discuss in further detail if you like.

Articles discussing 11bis transfer include those written by Michael Bohlander, "The transfer of cases from international criminal tribunal to national courts"

<http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf>

and "The transfer of cases before the ICTY to competent national jurisdictions", Tilman Blumenstock and Wayde Pittman.

In addition I would encourage you contacting Refik as he can provide a far more thorough analysis of the situation "on the ground".

I am not at work tomorrow but can be reached on Thursday.

Warm regards
Rebecca

Rebecca Cuthill
ICTY Outreach
tel: +31 70 512 5759
fax: +31 70 512 8953
email: cuthill.icty@un.org

Churchillplein 1
2517 JW The Hague
The Netherlands

Sent: Tue 4/7/2009 8:26 AM
From: Rebecca Cuthill [<mailto:Cuthill.icty@un.org>]
To: Wasson, Elizabeth P
Cc: Refik Hodzic
Subject: RE: ICTY response

Dear Elizabeth,

Thank for your mail, 3pm this afternoon would be fine.

However having looked at your questions I realise that as many deal with regional collaboration I would also suggest you speak to my colleague based in our Sarajevo office, Refik Hodzic. I have already spoken to him about your questions and have copied him on this e-mail so you may contact him directly.

Having said that I am more than happy to chat and can probably point you to some interesting background information and articles relating to these issues.

Warm regards
Rebecca

Rebecca Cuthill
ICTY Outreach
tel: +31 70 512 5759
fax: +31 70 512 8953
email: cuthill.icty@un.org

Churchillplein 1
2517 JW The Hague
The Netherlands

From: "Wasson, Elizabeth P" ewasson@providence.edu

Sent: 07/04/2009 07:07
To: "Rebecca Cuthill" Cuthill.icty@un.org
Subject: RE: ICTY response

Dear Rebecca,

If you are available, I will call at 15:00 (if I am not mistaken, you are six hours ahead of the time in New York?). Please let me know if this is an inconvenient time.

Generally, I am interested in learning more about how Outreach collaborates with local judiciaries - how the tribunal determines what cases to transfer, how many cases have been transferred, and more about the work Outreach does in developing and reforming national judiciaries.

I was also wondering if you have any information on how Outreach works with NGOs or other special organizations in the region - Are there any organizations in particular that Outreach works closely with or any examples of recent collaborations?

Thank you so much for taking the time to speak with me. I look forward to talking with you!

- Elizabeth Wasson
ewasson@providence.edu
Providence College
549 River Ave
Providence, RI 02918
Tel. (651) 338-1828

-----Original Message-----

From: Rebecca Cuthill [<mailto:Cuthill.icty@un.org>]
Sent: Mon 4/6/2009 9:15 AM
To: Wasson, Elizabeth P
Subject: RE: ICTY response

Dear Elizabeth

Thanks for your e-mail, tomorrow, 7 April will be fine. Please let me know the time you plan to call and a list of questions would be most helpful.

Warm regards
Rebecca

Rebecca Cuthill
ICTY Outreach
tel: +31 70 512 5759
fax: +31 70 512 8953
email: cuthill.icty@un.org

Churchillplein 1
2517 JW The Hague
The Netherlands

From: Magdalena Spalinska [<mailto:spalinska@un.org>]
Sent: Mon 3/23/2009 6:53 AM
To: Wasson, Elizabeth P
Cc: Rebecca Cuthill
Subject: ICTY response

Dear Elizabeth,

Thank you for your questions, which raise extremely interesting points on a number of levels. We think it would be better if we could set aside some time to speak to you about these issues. What we can do right now is provide an overview of the Bridging the Gap series, what we hoped to achieve and some reactions from the audiences.

Bridging the Gap / Overview

Outreach, in conjunction with the Helsinki Committee for Human Rights in Republika Srpska, launched a series of events in 2004, taking place in areas where some of the most notorious crimes under the Tribunal's jurisdiction were committed. They were a series of landmark events specifically aimed at bridging the gap between the Tribunal and specific communities in the region of the former Yugoslavia that were most effected by the crimes that fall under the Tribunal's jurisdiction. The events all took place in Bosnia and Herzegovina and were part of the Tribunal's strategic plans to ensure its activities are accessible and understood by communities in the region in order to cement a lasting peace and foster reconciliation.

Using layman's terms, Tribunal investigators, prosecutors and chambers staff provided an insight into the meticulous and painstaking

investigations conducted by the Tribunal and explained how the crimes and the responsibility of the perpetrators were proven beyond reasonable doubt before the court. A total of five conferences were held in Brèko, Foèa, Konjic, Prijedor and Srebrenica.

The public comprised members of victim associations, municipal authorities, judicial institutions and law enforcement agencies, as well as local politicians and civil society representatives. The audiences had the opportunity to ask questions from senior Tribunal staff who presented the findings with an openness that was a hallmark of this particular conference series.

The series were targeted at people living in the communities and as such were a "mixed population", of course victims were a key target group within this and their reactions / response to the series were observed with a great deal of interest. At the time the type of comments we received were along the lines of:

Srebrenica:

After the conference in Srebrenica, representatives of victim groups indicated that one of the main achievements of the event was to say publicly, and with authority, that genocide was indeed committed - and that it could no longer be denied. Sarajevo daily *Oslobođenje* published the following: "President of the Association of Returnee Women, Hatidza Memiseviæ, finds the conference very important, in particular because the materials presented offer irrefutable evidence about the crime and criminals."

Prijedor:

"This was one of the most significant events in Prijedor in recent times"
-Muharem Murseloviæ, BiH delegate, RS National Assembly

Victim's, who had testified at the Tribunal, also praised the event and additionally some stated that without the ICTY nothing ever would have been done for them. When asked if the situation in Prijedor was hopeless one of the attendees replied:

"Not at all. Meetings like this one, that is what the people need. The Serbs and the Muslims are still full of distrust for one another. But that is not the same as war. We have never really understood the cruelty of that time. We still don't really understand it"

In addition, significant media coverage followed the conferences, a good example of this was the thoughtful and impressive 15-minute mini-documentary about war crimes in Brèko that was broadcast on FTV's primetime "60 minutes" flagship investigative news programme.

On the back of the series Outreach worked closely with a Sarajevo-based production company to produce five complementary documentaries that were aired across the country to wide audiences (estimated to be around 2 million people).

The conference series has later been repeated, in a modified format, for Serbian audiences in cooperation with the Belgrade-based NGO Humanitarian Law Centre.

Regarding the EU question - as this is a question about the EU policy, you are advised to inquire with the EU on that.

Regarding the existence of Outreach after the closure of the Tribunal - this is an issue which is still being debated. In attachment you will find an interesting UN Security Council report discussing the issue of residual mechanisms that have to be considered before the ICTY completes its work. You will find public information and capacity building mentioned there.

(See attached file: link to UN site and article Dec 2008.doc)

Hope this information is useful in your research. As stated before, if you would like to talk on the phone about some further aspects, we are ready to coordinate on that.

Best regards,

Magdalena Spalinska
Information Officer

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From: Wasson, Elizabeth P
Sent: Sun 3/8/2009 10:43 PM
To: Magdalena Spalinska
Cc: Cuthill.icty@un.org
Subject: RE: Contact Referral

Dear Ms. Spalinska and Ms. Cuthill,

Thank you so much for taking the time to speak with me. I recently completed an extensive literature review for my thesis on the topic of international criminal law and focused primarily on the ICTY. This Tribunal is of particular interest to me because so many other Tribunals have been modeled after it, and I think the ICTY has been a pioneering force in establishing international legal norms. High-profile cases like Milosevic's trial or Karadzic's pending trial seem to have bolstered the Tribunal's credibility despite the criticisms surrounding them. I found this research to be very interesting, especially in light of recent events like the indictment of Sudanese President Bashir to the ICC. It will be interesting to see how the international community responds to this and how events will unfold in the coming weeks.

Critics of the ICTY often cite its distance and foreignness to the people it aims to serve as the main problem with such an institution. This is why I am really interested in the work of the Outreach Programme and how effective it has been.

On the website, I read about a conference called "Bridging the Gap" that occurred in 2004-05. I was curious how well these kinds of programmes are received - do you encounter different reactions to the ICTY among different ethnic groups? Does this effect its legitimacy in any way or create more tension among ethnic groups?

With the apprehension of Radovan Karadzic, some people have argued that EU ascension pressure has been more effective than mandates from the Tribunal itself to persuade authorities to cooperate with the court system. What is your take on this?

Lastly, will the Outreach Programme continue to operate after the Tribunal is closed?

I apologize for such a lengthy email - feel free to elaborate as much or as little as you like to these questions. Thank you so much for taking the time to do this, and I look forward to hearing from you!

Best,
Elizabeth Wasson

From: Magdalena Spalinska [<mailto:spalinska@un.org>]
Sent: Fri 3/6/2009 11:27 AM
To: Wasson, Elizabeth P
Cc: Rebecca Cuthill
Subject: Fw: Contact Referral

Dear Ms Wasson,

Thank you for your inquiry and interest in the ICTY. Myself and my colleague Rebecca Cuthill (copied on this message) are representatives of the Hague Office of the ICTY Outreach Programme. We will be happy to receive your questions, and we will provide answers as much as we are able to, or forward to the colleagues who may be in a better position to do so.

We would also appreciate some more information about your research.

Looking forward to hearing from you.

With best regards,

Magdalena Spalinska
Information Officer

ICTY
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Netherlands

----- Forwarded by Magdalena Spalinska/CS/UNICTY on 06/03/2009 17:16 -----

From: "Wasson, Elizabeth P" <ewasson@providence.edu>
Sent: 05/03/2009 22:46
To: outreach@icty.org
Subject: Contact Referral

Hello,

My name is Elizabeth Wasson and I am a university student in the United States. I am currently working on a thesis project researching the ICC and the ICTY and their effectiveness in areas of ethnic conflict. I have extensively read through your website and I am very interested in learning more about the work you do with the Tribunal.

I was hoping to get in touch with some people affiliated with the Outreach Programme who have worked in the Balkan region or with the court to ask a few brief questions. It would really help me synthesize my academic research with the opinions of those who work closely with these matters and can provide insight that book and journal articles cannot.

If there is contact information for anyone that would be interested in speaking with me, please email at ewasson@providence.edu or I can also be reached on my cell phone at 1-651-338-1828.

Thank you so much for your time and I greatly appreciate any help you can provide!

- Elizabeth Wasson

Appendix 2: Copy of BBC News article from surveying Reactions to Radovan Karadzic's pending trial at the ICTY

Page last updated at 14:48 GMT, Friday, 1 August 2008 15:48 UK

 [E-mail this to a friend](#)

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Karadzic trial: Readers' reaction

BBC News website readers in Serbia and Bosnia have been reacting to Radovan Karadzic's first appearance at the UN war crimes tribunal in The Hague on Thursday.

Read a selection of their opposing views below.

I am from Serbia and I am glad to see this criminal sent to The Hague. The protests here showed that the support for the war criminals comes from the worst corners of Serbian society. I am hopeful that my country is beginning to wake up and start seeing right from wrong. Patriots are not those who burn other people's houses. I am proud of Serbian history but not what Serbs did in the 1990s. We in Serbia have to face our past to be able to move ahead. Just like what the Germans did after the war.

Ana, Serbia

The Hague prosecutes only Serbs. If justice is not for all, it is not justice at all.

Roman, Belgrade, Serbia

Such a sad moment - another Serb in that illegitimate court! Everybody considers him guilty, so he stands no chance. The only way he'll get out of there is by dying. Hopefully he'll provide evidence and show what Richard Holbrooke and others really did, what their role in the war was. Arresting him was a very poor call by the newly formed Serb government.

Milica Milivojevic, Belgrade, Serbia

Karadzic has been caught, everyone knows about his crimes, even the Serbs wanted him arrested. However, his brainchild, a genocidal entity, Republika Srpska, built on the blood and tears of hundreds of thousands of innocent, continues to exist despite all the crimes, ethnic cleansing and exclusion that this entity within Bosnia itself continues to represent. You can't just have Karadzic tried for what he's done and leave his pet project, Srpska, in existence and continuing in his footsteps - obstructing the return of non-Serb refugees and obstructing all of the Bosnian state institutions, development and progress of the country.

Ali, Bihac, Bosnia

War is war, and Karadzic was defending our way of life. As always, only the losing side is put on trial, even though both parties committed these so-called crimes. What's worse, Karadzic is being judged by a foreign court that has no jurisdiction over Serbia, it's

nothing more than a show trial. If he's to stand trial, then what about George Bush? This trial is hypocrisy!

David, Belgrade, Serbia

The prosecution will have to prove that Karadzic actually planned, organised and ordered what he is charged with, and since this will be a very difficult task, the court may well end up in a position either to free him - that is politically unacceptable - or pass a guilty verdict and thus demonstrate political bias. In both cases Karadzic wins.

Roman, Belgrade, Serbia

It is important for the Serb population to understand that this is a necessary event that will allow us to move forward. Like many Serbs I find myself caught in the middle, where I truly don't know how to feel about this entire situation. It is heart wrenching that only Serb leaders have been tried and found guilty in The Hague, while other war criminals from the region walk free. The EU and the international community continue to leave Serbia with ultimatums that do not sit well with its people.

I believe Karadzic's arrest is a stepping stone towards a stronger economic future and stability in the region. It is a shame that every couple of months, the world has to see protests in the streets of Belgrade that always end up in riots and chaos. We no longer have to ask ourselves why people look at us in a negative way. If you act like animals you'll be treated like animals. Unfortunately the world doesn't see Belgrade the other 362 days of the year when there are no protests and when the city is filled with a positive atmosphere that cannot be matched anywhere in Europe.

Nikola, Belgrade, Serbia

It wasn't the secession of Serbs from Bosnia that ignited the war, but the secession of Bosnia from former Yugoslavia, and the insistence of Muslim and Croat leaders that their unilateral and unconstitutional separatist decisions obliged Serbs as well. The civil war that broke out generated atrocities on all three warring sides. Bearing in mind the fact that only Serb leadership is being prosecuted, and no single relevant Muslim or Croat politician or general, Karadzic's trial will neither contribute to justice or to long lasting peace, but will only stir up the passions.

Branko, Belgrade, Serbia

For me as Serb, this is only way to bring back the honour which Serbia and Serbs had before 1990. It's a fact that some Serbs committed war crimes. However, it's also a fact that for the majority of Serbs nowadays our national heroes are [tennis players] Novak Djokovic and Ana Ivanovic, not Radovan Karadzic and Ratko Mladic. The majority of Serbs want Serbia to become an EU member by 2012 or 2014.

Aleksandar Vuckovic, Kragujevac, Serbia

Serbia has finally got rid of its biggest monster. I wish Karadzic good health, so he can receive his due sentence.

Ivan, Pirot, Serbia

It seems that the prosecution's tactics are going to mostly rely on already finished cases, avoiding proving allegations from scratch. Taken together with the vague concept of command responsibility, his case may be lost from the start. This is the strategy: all right, we have proven that the atrocities had taken place; and second, you knew, or must have known of them, and you didn't stop them. Thus, you are guilty. But the problem with this approach is that no single president in just any conflict would be spared from the prosecutions.

Marko, Belgrade, Serbia