

Bursting The Hague's Bubble: The Evolution of ICTY Outreach

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Abstract

By the end of 2017, the International Criminal Tribunal for Former Yugoslavia (ICTY) will close its doors after more than two decades of operation. As the first international criminal tribunal since the Nuremberg Trials, the ICTY has been hailed as a monumental development in international law and the sign of a new era of criminal accountability and justice for war crimes. As the ICTY began its work and grew not only in its legal foundation but as an institution, changes were made in response to criticisms and challenges to its efficiency and impact as a mechanism of transitional justice (TJ). This thesis aims to provide insight on the use of international criminal tribunals as a mechanism for TJ, and investigate how the ICTY as an institution strove to meet its mandate and over time developed new strategies and mechanisms to try and fulfill its goals. The development of the Outreach Programme is examined as an important innovation in the Tribunal's lifespan and as a case of institutional learning and adaptation in response to challenges and perceived failures. This thesis provides insight on factors involved in processes of change at international courts and is relevant to the study of international interventions for post-conflict reconstruction and future TJ efforts.

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Introduction

Things being the way they are, would it not be better if our big and small leaders were made to sit in the dock instead of at the negotiating table? And if, with the help of famous experts in international laws of war, we had a Nuremberg Trial of our own, no matter how small and modest? Not when ‘this is all over’ but instead of whatever might soon befall us.

- Mirko Klarin, “Nuremberg Now!” May 16, 1991¹

During the disintegration of Yugoslavia in the 1990s, armed conflict erupted and populations were subject to forced expulsions, persecution and ethnic cleansing. Amidst violence and the proliferation of politicians using local media to spout propaganda spurring ethnic hatred, journalist Mirko Klarin voiced a prophetic call for a war crimes tribunal, modeled after the Nuremberg Trials held by the Allies to hold top Nazi leaders accountable for crimes, to bring justice to the Balkans. In the years following Klarin’s article, demands for justice intensified as members of the international community rallied behind the belief an international legal response to the conflict was essential, particularly as gross violations of international law became hard to ignore due to the televised coverage of atrocities, especially mass rapes and killings in Bosnia. In 1993, the UN Security Council (UNSC) created the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY built off the precedent of the Nuremberg Trials, reaffirming the belief in using criminal trials to establish responsibility and guilt and show global intolerance towards violations of human rights for which state sovereignty could not serve as a shield.

Now after more than two decades in operation and over 150 individuals indicted, the Tribunal is poised to close its doors in completion of its mandate by the end of 2017.² At its establishment, the UNSC tasked the Tribunal with prosecuting persons responsible for violations

¹ Mirko Klarin. "Nuremberg Now!" The Path to The Hague: Selected Documents on the Origins of the ICTY (1991).

² See UNSC 770th Meeting, 8 June 2016, SC/12391.

of international humanitarian law committed in the territory of the former Yugoslavia and granted jurisdiction over four groups of crimes: crimes against humanity, grave breaches of the 1949 Geneva Conventions, genocide, and violation of the laws or customs of war.³ With the establishment of the first international war crimes tribunal since the Nuremberg Trials, the international community envisaged the beginning of a new era of criminal accountability to send a message that the age of impunity was meant to come to an end.⁴ While a range of speculations over the true motivations behind the UN's decision to create the ICTY exist, it was an undeniably monumental development in international law and TJ, signaling a rebirth of an organized international focus on justice, dormant since the period following WWII.⁵

This thesis provides insight on the use of international criminal tribunals (ICT) as a mechanism for “transitional justice” (TJ), and investigate how the ICTY strove to meet its mandate and over time developed new strategies and mechanisms to try and fulfill its goals, exemplifying processes of institutional learning and adaptation in the face of perceived failures and changing norms. Especially interesting is the establishment of the Outreach Programme in 1996, started by Judge Gabrielle Kirk McDonald with the intention of bridging a gap in communication between the Tribunal in The Hague and local communities in the areas under the court's jurisdiction in order to ensure the ICTY could fulfill the objectives stated in its mandate. While at the time creating a plan for outreach was groundbreaking, conceptualizations of international justice efforts have evolved to see outreach and attention to local audience as a crucial component, now considered an essential part of TJ mechanisms. Examining the circumstances surrounding the

³ Bob Reinalda. *Routledge history of international organizations: from 1815 to the present day*. Routledge, 2009, 616.

⁴ <http://www.icty.org/en/about>

⁵ See David MacDonald and Robert Patman. *The Ethics of Foreign Policy*. Routledge 2016, 222 on the view that the Tribunal was an act of political contrition following the failure of a swift response by the international community and establishment of tribunals as alternatives to military risks.

creation of the Outreach Programme sheds light on challenges of international justice and the use of the Nuremberg model in a society with very different sociopolitical circumstances.

I argue that the ICTY's creation of the Outreach Programme developed from officials involved with the ICTY realizing local perceptions were critical to the Tribunal's ability to effectively complete its mandate and achieve its goals, especially reconciliation. Different phases of the ICTY's process of learning and developing the Outreach Programme will be traced in order to identify what led to the changing approach to justice. Within chapter two, I situate the ICTY within theories of justice and TJ, provide the context for the Tribunal's creation, its envisioned purposes, and expectations placed upon it from its beginning. In chapter three, I show the Outreach Programme as an example of institutional adaptation and demonstrate what led to the institutional shifts and changes. In doing so, the factors that contributed to the creation and development of the Outreach Programme are showcased and provide answers to the research question. The final chapter shows how the Outreach Programme evolved and reflects the Tribunal's changing focus over time, including the ICTY's Completion Strategy and efforts within the final phase of operation. I conclude with a review of key findings and reflect on what this case shows about the dynamics of TJ efforts in complex sociopolitical situations.

The rationale for the use of an ICT to respond to mass atrocities rests in the notions of TJ, an umbrella term for the belief that societies must confront past abuses to move forward. While there is no single definition, TJ encompasses a grand effort to redress wrongdoings and to provide remedies from violence and is considered to include a set of judicial and non-judicial practices and mechanisms. ICTs have become the norm for international interventions and post-conflict efforts for reconstruction.⁶ As the first ICT since Nuremberg, the ICTY has been written about extensively

⁶ Rosemary Nagy, "Transitional justice as global project: critical reflections." *Third World Quarterly* 29, no. 2 (2008), 276.

from a variety of angles; however, continued exploration of its development and impact remains crucial, as it provides insight into not only international courts, but into TJ efforts and international intervention more widely. As the Nuremberg trials were vital to the precedent and vision for the creation of the ICTY, the Tribunal has set an impressive legal precedent globally, paved the way for a number of other criminal tribunals' establishment and has served as a point of reference for other justice efforts, and "in turn affected the way in which subsequent post-conflict tribunals have been composed and function. The Special Court for Sierra Leone, the East Timor Special Panels, the Cambodian Extraordinary Chambers and the Kosovo Courts, as well as the International Criminal Court (ICC), have been constructed to address at least some of the limitations identified with the earlier Tribunals."⁷ This thesis contributes to the existing literature on the ICTY by examining it within the framework of TJ efforts developing to adjust to their sociopolitical contexts. Tension between immense expectations and institutional goals in comparison to what is realistically achievable has followed the ICTY throughout its operation and investigating what changes were implemented to respond to this provides lessons useful for practitioners in the field of TJ. By identifying factors involved in creating change and lessons to be learned from the ICTY's evolved approach to TJ, knowledge can be shared to benefit future justice efforts.

Created as the conflict remained unresolved, the ICTY was a lofty, and perhaps overly idealistic project, facing criticisms and challenges from its onset. As time went on, the ICTY grew in its basis of international law and as an institution, adapting to try to best achieve the goals stated in its threefold mandate; to bring to justice persons responsible for war crimes, to deter the committing of further crimes and 'contribute to the restoration and maintenance of peace.'⁸

⁷ Madelaine Chiam. "Different models of tribunals." *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* Brill, 2007: 205.

⁸ UN 1993b. Security Council Resolution 827, *S/RES/827 (1993)*, 25 May 1993.

Reflecting on the timing of its initial period of operation shows obvious failure in the goal of deterrence, as highlighted by the occurrence of the July 1995 slaughter of over 7,000 Bosnian Muslim men and boys in Srebrenica, and Serbian forces committing further atrocities in Kosovo, which eventually resulted in the interventionist action by NATO in 1999.⁹ Since its foundation, the ICTY has struggled to overcome the rough start of uncertainty and regional hostility at its infancy, and later on meet the high expectations placed upon it by the international community and locals. Looking at the ICTY's development over time and creation of the Outreach Programme shows a story of idealism merging with pragmatism, as the Tribunal faced the harsh realities of a polarized post-conflict zone and had to evolve to adjust to such a context by actively working to shape public opinion and combat the misperceptions and propaganda spread by nationalist forces.

⁹ Muslim Bosnians will herein be referred to as Bosniaks.

Chapter 1 - ICTY and Transitional Justice: A Theoretical Framework

1.1 Introduction

As a mechanism of TJ, the ICTY serves as the main institutionalized international effort in the former Yugoslavia, intended to assist the region in moving forward from conflict. Throughout its years of operation, the ICTY has had to develop new strategies to address the context it operates in and work to best fulfill its mandate. This thesis examines the ICTY's changing approach to TJ by investigating the factors involved in the creation of the Outreach Programme. This chapter provides the context in which this thesis works to understand what led to evolved understanding of justice efforts and changing practices at the Tribunal.

Frameworks of institutional learning can be applied to understand what led to an evolved understanding of the relationship between international justice and local communities in response to challenges facing the Tribunal and the institutional process of creating and implementing a new strategy that eventually became a norm. Theories of institutional learning that encompass knowledge transfers help explain how the ICTY's Outreach Programme serves as an example for other TJ efforts. Beyond looking at the specifics of the ICTY's Outreach Programme, this thesis serves as a general case for institutional change in relation to stated goals, such as those written in the ICTY mandate, as well as those that are implied and associated with an institution, which in this case is the goal of reconciliation.

Examining the ICTY's institutional development and utilization of an outreach strategy to address criticisms and failures of public perception can provide insight on how to make efforts of internationally led TJ mechanisms or institutions work for other communities. The case of the ICTY Outreach Programme shows that international institutions aimed at delivering justice, peacebuilding, and post-conflict reconstruction must incorporate local perspectives from the onset

and establish reasonable expectations, for both the local and international community. Looking at how international justice institutions may incorporate learning and institutional change, it is apparent that goals must be cautiously set and based off of comprehensive examinations of the context the institution will be operating within. Mechanisms of international criminal justice must be taken into consideration in relation to theories of TJ, which show criminal proceedings and retributive justice are only one component of TJ. This is especially relevant to reconciliation, as the ability of an organization focused on international criminal justice to contribute to social repair is questioned by many, especially as understandings of TJ continue to develop and move in a more holistic direction.

1.2 Research Question and Value

This research contributes to the field of literature on international and TJ efforts, international intervention, and post-conflict reconstruction by analyzing how ICTs may respond and adapt to criticisms and perceived failures as they develop and operate in a complex and politically charged setting. From the time of its initial establishment and development, the ICTY faced criticism from a variety of audiences globally. After its first few years of operation, the ICTY seemed to internalize some sets of the critiques and feedback and responded by adapting institutionally. The matter of which audience and voices led to change at the ICTY is intriguing, not only for the individual case of the ICTY, but also for what it reveals about factors contributing to change at other international institutions focused on justice efforts.

Faced with the matter of institutional change and adaptation at the ICTY over its more than two decades in operation, this thesis seeks to address an empirical puzzle: why did the ICTY focus and respond more to the outside legal and international community than the local stakeholders in

Bosnia when altering its approach to transitional justice? In this case, the altered approach to TJ is manifested in the creation of the Outreach Programme. In light of this, the research question is: how was the decision to create and develop the Outreach Programme reached and what does this reflect about institutional goals and changes for mechanisms of international criminal justice?

1.3 Literature Review

In the face or aftermath of major conflict and political change, a variety of methods for post-conflict management have been developed by the international community to guide a society forward. TJ has emerged as the category of responses to post-conflict justice and peacebuilding, conceptualized as justice associated with periods of political change, characterized by institutional, and often legal, responses to confront wrongdoings of repressive regimes and violent offenders.¹⁰ This literature review explores aspects of TJ, examining arguments for the usage of ICTS as a mechanism for bringing justice to a society and moving it forward following conflict, assessing arguments linking international criminal justice and reconciliation. Theories of what obstacles ICTs face will be considered in relation to literature on institutional change to provide background for possible answers to my research question.

“Transitional” in that it occurs at extraordinary times, in societies experiencing political and social transitions between political regimes and times of violence and peace, TJ has become an increasingly popular field of scholarly inquiry in the past two decades. Along with this growing popularity is a mounting debate over the appropriateness and desirability of TJ mechanisms as means for achieving peace, promoting human rights and democracy, and social reconstruction to

¹⁰ Ruti Teitel, "Transitional justice genealogy." *Harv. Hum. Rts. J.* 16 (2003): 69.

heal the effects of past wrongs.¹¹ Nagy refers to TJ as a modern ‘global project’, citing the emergence of a body of customary international law and normative standards for action following conflict.¹² TJ is considered to include a set of judicial and non-judicial practices to address wrongs in times of conflict or repression especially aimed at dealing with violations of human rights and humanitarian law, and is mainly seen in four types of mechanisms: reparations, institutional reform, truth commissions and criminal trials.¹³ This ‘global project’ has evolved to prioritize criminal trials as the choice method for institutionalized justice efforts.¹⁴

Most literature within the TJ field cites the Nuremberg Trials as monumental developments in institutionalized responses to conflict and pursuits of accountability following serious violence and notes how they show the rationale for using trials as post-conflict efforts to move society forward. With the Nuremberg paradigm came the established prioritization and understanding of individual culpability for international crimes committed during war. With the ICTY, this notion of individualized guilt was further developed, for the Nuremberg tribunal was a military court, whereas the ICTY is not a strictly military matter and reflects a recognition of individual responsibility not being shielded by state sovereignty.¹⁵ The intention for the Tribunal to ‘contribute to restoration and maintenance of peace’ is in the Tribunal’s mandate, showing the true belief an ICT based off the Nuremberg model could have such an effect, despite the different

¹¹ Oskar NT Thoms, James Ron, and Roland Paris. "The effects of transitional justice mechanisms." *Center for International Policy Studies, CIPS Working Paper*, 2008, 4.

¹² Nagy, "Transitional justice as global project", 276.

¹³ N Roht-Arriaza, ‘The new landscape of transitional justice’, in N Roht-Arriaza & J Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century*, New York: Cambridge University Press, 2006, 2.

¹⁴ Beyond just criminal trials, institutionalized TJ is increasingly popular, even becoming part of “regional integration requirements” as the EU or NATO have started requiring candidate states to “implement some form of institutional reckoning with the past as a condition for joining”. Jelena Subotic. *Hijacked Justice*. Cornell University Press, 2009: 5.

¹⁵ Franca Barconi, *The International Criminal Tribunal for the Former Yugoslavia and its Mission to Restore Peace*, 12 *Pave Int’l L. Rev.* 233. (2000): 235.

circumstances surrounding the court's establishment.¹⁶ Reconciliation was never a stated goal for Nuremberg, and while it is not officially part of the mandate of the ICTY, it has been continuously linked with the goals of the court and framed as natural byproduct of the tribunal's proceedings by key figures, such as the ICTY's first President, Antonio Cassese. In 1999, Cassese wrote about the merits of ICTs, highlighting the court's establishment of individualized guilt as the strongest means for preventing acts of revenge. He argued reconciliation naturally results from judicial proceedings along with an accurate record of atrocities for future generations.¹⁷ Preventing collective guilt and responsibility is believed to help rehabilitate societies and lead to conflict-resolution and peace.¹⁸ While TJ institutions utilizing ICTs as their mechanism for justice face a paradoxical position of looking backward, with retributive intentions, and forward-looking goals of social reconstruction, and the implied and oft associated goal of reconciliation, the establishment of truth through trial's proceedings is cited as a source of healing.¹⁹ Fletcher and Weinstein write of TJ scholars' common view of ICTs as a critical mechanism for discovering and conveying truth and describe this is a necessary foundation for societal healing.

Regarding reconciliation, Saxon notes that while technically an official goal, it is even entrenched in the judgments themselves, seen for example in the sentencing of Dragan Erdemovic, who had confessed participating in the Srebrenica massacre.²⁰ The judgement noted his confession and remorse helped further the ICTY's objectives of restoring peace and bringing about

¹⁶ UNSC, Resolution 827 (1993) Adopted by the UNSC at its 3217th meeting, 25 May 1993, S/RES/827 (1993).

¹⁷ Antonio Cassese. "Reflections on International Criminal Justice." *The Modern Law Review* 61, no. 1 (1998): 6. Also argued by other scholars such as Norbert Ehrenfreund, *The Nuremberg Legacy: how the Nazi war crimes trials changed the course of history*, (New York: Palgrave Macmillan, 2007), 36.

¹⁸ Roman David, "International criminal tribunals and the perception of justice: the effect of the ICTY in Croatia." *International Journal of Transitional Justice* (2014): iju012, 480.

¹⁹ Isabel Stefjla. (In)Humanity on Trial: On the Ground Perceptions of International Criminal Tribunals, PhD Diss., University of Toronto (Canada), 2015, 32.

²⁰ Dan Saxon "Exporting justice: perceptions of the ICTY among the Serbian, Croatian, and Muslim communities in the former Yugoslavia." *Journal of Human Rights* 4, no. 4 (2005).

reconciliation. The sentencing proclaimed, “Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.”²¹

As TJ has grown as a field, reconciliation has increasingly been seen as a goal and outcome of TJ efforts. Gready and Robins argue that as TJ has spread, its definitions have broadened to adopt more holistic understandings of the needs for post-conflict societies, including not just criminal prosecutions and the other dominant interventions, but also commemorative practices, memorialization, education, reconciliation initiatives and more.²² This reflects the growing connections between TJ and peacebuilding and post-conflict reconstruction, with a shift in TJ to move beyond just legal responses to include a wider political and social realm and integrate local voices and initiatives. Evolved conceptualizations of TJ as needing to be holistic to be effective in social reconstruction point to some major criticisms of the international community’s usage of ICTs as the main post-conflict response. These criticisms come along with increasingly high expectations placed upon ICTs as mechanisms of TJ, while simultaneously there is limited attention to what they accomplish, especially in regard to reconciliation.²³ Clark seeks to fill this gap with her book exploring the relationship between ICTs and reconciliation, aiming to assess and measure the impact of the ICTY on reconciliation locally.²⁴ Clark’s work is worth noting for much of the literature on reconciliation is speculative due to the nature of reconciliation being a long-term process, requiring investigating future generations to truly provide accurate evaluations.

²¹ Erdemovic Sentencing Judgement, Case No. IT-96-22-Tbis, 5 March 1998, para. 21.

²² Paul Gready and Simon Robins. "From transitional to transformative justice: a new agenda for practice." *International Journal of Transitional Justice* 8, no. 3 (2014): 344.

²³ Stefjla. (In)Humanity on Trial, 25.

²⁴ Janine Clark. *International trials and reconciliation: Assessing the impact of the International Criminal Tribunal for the Former Yugoslavia*. Routledge, 2014.

Particularly relevant to this thesis' research question is the obstacle of varied audiences and competing narratives. Megret argues international justice institutions have different constituencies and often fail to satisfy varying audiences.²⁵ In looking at the ICTY, Megret saw a point of contention: that the Tribunal has been more important for the development and application of international law and justice than for the people living in the region. This sentiment is critical to this thesis' notion of a disconnect between the ICTY and the local communities, which is the main perceived failure and obstacle to fulfillment of ICTY goals and relates to the institutional change of creating the Outreach Programme. For the ICTY, audiences are further divided within the former Yugoslavia along ethnic lines. Megret's theory about the problematic nature of having different constituencies may be seen as an alternative explanation of the ICTY changing its approach, as the Tribunal may have developed to show the local communities they were prioritized. Another major obstacle for the ICTY, and internationally led justice efforts in general, is the matter of a disconnect with distance, culturally and geographically in the case of courts outside the area where conflict has taken place. This distance leaves room for misunderstanding, as well as "the tendency to exclude local communities" which is identified as "a primary flaw, raising fundamental questions of legitimacy, local ownership and participation."²⁶ Subotic's *Hijacked Justice* powerfully argues that the ICTY became a political tool locally in the nationalist polarized setting, and that this was possible due to the lack of connection to the court, local media and figures' ability to manipulate public opinion of the Tribunal. She points to the contrasting public reactions across the region to cases as indicators of the "remarkable incompatibility of

²⁵ Frédéric Mégret. "The legacy of the ICTY as seen through some of its actors and observers." *Goettingen Journal of International Law* (2011).

²⁶ Patricia Lundy and Mark McGovern. "Whose Justice? Rethinking Transitional Justice from the Bottom Up". *Journal of Law and Society*, Vol. 35, No. 2 (June 2008): 264.

public narratives about the war of the 1990s” showing the impossibility of any verdicts from the ICTY being able to change the public memory of violence.²⁷ Subotic’s argument provides insight into the ICTY’s need for outreach: to mitigate the different responses of ethnic groups to trials, because reactions were falling into the trap of being divided along ethnic lines and manipulated by nationalist propaganda. This problem relates to the issue of exporting the Nuremberg model of justice to the former Yugoslavia, where the context was very different than Germany following WWII. Teitel writes that ICTY differed from Nuremberg in that ‘victor’s justice’ was meted out over a defeated enemy in its vanquished country, whereas with the ICTY justice was being meted out in the midst of a continued political conflict.²⁸ This disregard to the differing circumstances relates to a problem of TJ efforts in general, for as Nagy says, there is a tendency of the international community to impose ‘one-size-fits-all’, technocratic and decontextualized solutions.²⁹ This is seen with the ICTY’s lack of any form of outreach from its inception to deal with the polarized setting in which it was established.

With active communication, the court could have tried to address its varied audiences and express the Tribunal’s purpose rather than falling victim to misperceptions spread by propaganda; and with the creation of the Outreach Programme, the ICTY could work “to counter damaging government information from Serbia and Croatia, aimed at discrediting the work of the Tribunal.”³⁰ During its first phase of operation, factors working against the ICTY became more apparent and resulted in institutional learning. Such lessons are essential to examine for they provide insight for other justice efforts in the future to see what to consider for institutional

²⁷ Subotic. *Hijacked justice*, 172.

²⁸ Ruti Teitel. “The law and politics of contemporary transitional justice.” *Cornell Int’l LJ* 38 (2005): 846.

²⁹ Nagy, “Transitional justice as global project”, 275.

³⁰ Jelena. Subotić. “Legitimacy, Scope, and Conflicting Claims on the ICTY: In the Aftermath of Gotovina, Haradinaj and Perišić.” *Journal of Human Rights* 13, no. 2 (2014): 178.

planning in order to avoid troubled beginnings. Kaye notes that little existing literature shares lessons “lessons that will have particular resonance for the UN in future institution-building and for similar judicial institutions such as the ICC” and that the institutional perspective is valuable and must not be ignored.³¹ This thesis aims to address this gap identified by Kaye and within the academic literature where there is no predominant focus on the institutions of international and transitional justice themselves; and therefore, follows an approach to explaining the ICTY’s development by examining theories of justice and institutions and drawing upon theory regarding institutional learning, change, development, adaptation and knowledge transfer.

It is notable that many studies criticizing international organizations and institutions often lack a base of sufficient knowledge of the actual operation, functioning or mandate.³² In *Rethinking International Organizations*, international organizations are examined from the perspective of management studies, indicating the necessity of looking at the internal structures of an institution to understand its actions. Relevant to this thesis is the concept of learning, explored within the field of organizational studies. Particularly helpful are works relating learning and failure, such as Peter May’s text which says, “learning implies improved understanding, as reflected by an ability to draw lessons about policy problems, objectives or interventions.”³³ Also helpful is Hall’s work on ‘social learning,’ defined as a deliberate attempt to adjust goals or strategies in response to both past experiences and new information. According to Hall, learning can be seen when policy has changed as a result of such a process.³⁴ Connecting the concept of learning with notions from which actors can learn or guide institutional learning, and potential outcomes of learning processes,

³¹ David Kaye. "Archiving justice: conceptualizing the archives of the United Nations International Criminal Tribunal for the former Yugoslavia." *Archival Science* 14, no. 3-4 (2014): 393.

³² Dennis Dijkzeul, and Yves Beigbeder. "Introduction. Rethinking International Organizations." *Dijkzeul, Dennis/Beigbeder, Yves* (2003): 1-26.

³³ Peter May. "Policy learning and failure." *Journal of public policy* (1992): 331-354.

³⁴ Peter Hall. Policy paradigms, social learning, and the state: the case of economic policymaking in Britain. *Comparative Politics* 1993, 25(3): 275–296.

is Emanuel Adler and Peter M. Haas' work on international organizations. They explain learning as "not only the acquisition of new information about the environment but also the acceptance of new and innovative ways of drawing linkages between causes and effects and means and ends" and regard learning as a process that is linked to politics and leads to the questions "who learns what, when, to whose benefit, and why."³⁵ Such understandings and questions are relevant to the exploration of institutional change at the ICTY.

While no existing studies of an epistemic community related to the ICTY could be found, Hopkins' study of institutional change within the international food aid regime and the role of the epistemic community provides a thorough example of a process of change and is helpful for this thesis. Using regime and institution interchangeably, Hopkins views the international food aid regime as providing lessons on the influential role of epistemic communities and how they can contribute to evolutionary change for institutions. With his examination of the evolution of food aid and the role played by intellectual critics, Hopkins illustrates key aspects of the process of change at international institutions saying, "criticisms of norms and principles that originally shaped the regime have fostered change."³⁶ The relevant epistemic community continuously interacted with each other through articles, proposing reforms and alternatives, consulting with universities and governments, and meeting at events. While some may have disagreed on aspects of policy and certain details, they were united in shared beliefs of the main concepts and visions for international food aid. Together they developed an evolved understanding of the regime and its purposes. As "relevant knowledge" changed, consensus about particular regime features and goals also changed, bringing about new institutional practices. Hopkins argues the motivation for

³⁵ Emanuel Adler and Peter M. Haas. "Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program." *International Organization*. Vol. 46. No. 1. Winter. MIT Press, 1992, 368-70.

³⁶ Raymond Hopkins. "Reform in the international food aid regime: the role of consensual knowledge." *International Organization* 46.01 (1992): 226.

change principally came from the epistemic community of food aid specialists, though other actors and groups were involved with proposals and recommendations. Though Hopkins clearly indicates the epistemic community as a driving force for change, he notes that tracing membership and actual concrete impact is difficult. Hopkins' examination of reform in the international food aid regime provides lessons about how ideas and new knowledge may be nurtured by epistemic communities to lead to evolved understandings and policy changes. Such lessons are applicable to a variety of international regimes, such as the international TJ regime manifested by the establishment of the ICTY, ICTR and other courts.

1.4 Argument and Concepts

Beyond providing insight into one innovation at the ICTY and how practices may change at ICTs, this thesis reveals how TJ efforts can evolve as they operate and adjust to manage challenges to their legitimacy and success. Such information is crucial, as TJ mechanisms and international justice institutions learn from each other. As the longest running court, the ICTY has had the most opportunities to learn to adapt to its sociopolitical circumstances and improve its functions as understanding of the needs for post-conflict justice mature. How this matured understanding is formed is can shed light on indicators for how other institutions may improve, especially in response to challenges to their effectiveness and changing political scenes.

Looking at its initial goals, the ICTY reflected great hopes and idealist intentions guiding an institution not adequately equipped to handle its grand mission, due to limited resources, inadequate planning, and local forces working against its effectiveness by not cooperating and tarnishing the court's image for their own political benefit. When the UNSC created the Tribunal, the expectations for what the court could accomplish were overly ambitious and positioned the

Tribunal for continuous perceived failures. As the ICTY developed and grew, it became apparent that its lack of perceived legitimacy locally was an obstacle to the successful fulfillment of the Tribunal's mandate and goal of reconciliation. Legitimacy connects to a main purpose of the court's proceedings — the establishment of an accurate and accepted historical record, for as Kerr writes, "decisions handed down by the court were intended to have a restorative impact in the region...this could only be successful if the Tribunal was perceived as a credible judicial institution."³⁷ Former ICTY Deputy Prosecutor noted, "the tribunal's work was subject to gross distortions and disinformation in many areas in the former Yugoslavia."³⁸ The Tribunal was created while nationalist governments and people spouting rhetoric that had contributed to the conflict were still in place, and the Tribunal had no way of combatting this. Kerr and Mobekk note, "[i]t should also not be forgotten that it was only in 2000 that Serbia and Montenegro and Croatia got rid of their nationalist governments, and even then not entirely," and that there was an "extremely effective propaganda machine intent on distributing malicious rumors and fostering negative perceptions of the ICTY."³⁹

With divided ethnic parties still in power, the ICTY provided a space for the continuation of conflict by other means. Without a way to spread the message about its work, and operating in a form of justice unfamiliar to locals, the Tribunal fell victim to ongoing polarization in the political arena of the former Yugoslavia. Post-Dayton Bosnia has been labeled a 'frozen conflict' with extreme institutionalized ethnic polarization, and scholars such as Steflja argue that the war carried on by other means with the international community's involvement with the ICTY making

³⁷ Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 61.

³⁸ D. Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings', 2002 *The Fletcher Forum of World Affairs* 26, no. 2, 11.

³⁹ Rachel Kerr and Eirin Mobekk. "Peace and Justice: Seeking Accountability after War." Cambridge: Polity (2007), 51.

minimal difference.⁴⁰ Especially in societies with ongoing polarization and conflict, there must be a thorough examination of factors at play when determining the feasibility of justice mechanisms' mandates. The creators of the ICTY did not adequately do this, and subsequently had to learn to adjust while proceedings were in progress and negative public opinion had already largely been shaped regionally. Without any outreach effort from the onset, the court was unable to "actively participate in the creation of its own narrative, allowing space for exploitation, ridicule, and exoticization of the tribunal by agents of ethno-nationalism."⁴¹ To counter the negative opinions and misunderstandings surrounding the Tribunal, the Outreach Programme was developed six years after the Tribunal started. This shows a slow learning period, but an eventual change in policy in response to the perceived failures and challenges facing the ICTY.

In order to determine the factors involved in influencing the ICTY's creation of the Outreach Programme, I formed a hypothesis drawing upon theories of institutional change and international intervention efforts:

H₁: Institutional change and adaptation at the ICTY developed from internal organizational learning enhanced by consultation with an epistemic community, which led to matured understandings of the needs for international criminal justice in a post-conflict community and resulted in the establishment of the Outreach Programme to help fulfill the ICTY's goals.

To provide a comprehensive examination of the elements involved in the ICTY's changing approach to TJ, I formed an alternative hypothesis based on theories on advocacy and the influence of civil society to account for change coming from local communities in the former Yugoslavia:

H₂: Institutional learning and change developed in response to realities at the local level, and the ICTY changed its approach due to bottom-up pressures.

⁴⁰ Steflja, (In)Humanity on Trial, 70.

⁴¹ Steflja, (In)Humanity on Trial, 104.

The following chapters provide a thorough analysis of the factors contributing to the ICTY's change and adaptation of its approach through the development and implementation of an Outreach Programme, showing that the evidence supports H₁ and makes H₂ infeasible due to the factors present and involved during the time the Outreach Programme was conceptualized and created.

1.5 Methodology and Research Design

To best explain the ICTY's development over time and the creation and evolution of the Outreach Programme denoting different phases of the ICTY's lifespan, this thesis employs the methodology of process tracing. This method essentially examines the “steps in a process to make inferences about hypotheses on how that process took place and whether and how it generated the outcome of interest.”⁴² Bennett and Checkel relate process tracing to a historical explanation, drawing off of historian Clayton Roberts' view of historical explanations building off of theories to explain the steps contributing to an outcome.⁴³ Process tracing is the most appropriate choice of methodology for this research since it is aimed at looking at how a specific cause (A) leads to a given outcome (B) within a single case research design⁴⁴. By utilizing an in-depth analysis of a case, process tracing allows for increased understanding of effects and processes that can be connected to general cases. In this instance, by using process tracing to investigate what led to the ICTY's institutional change and adaptation manifested in the creation of the Outreach Programme, broader understandings related to international institutions and TJ mechanisms may be reached.

⁴² Andrew Bennett, and Jeffrey T. Checkel, eds. *Process Tracing: From Metaphor to Analytic Tool*. Cambridge University Press, 2014, 6.

⁴³ Bennett and Checkel, *Process Tracing*, 8.

⁴⁴ D. Beach, and R.B. Pedersen. *Process-Tracing Methods: Foundations and Guidelines*. Ann Arbor MI: University of Michigan Press, (2013), 2.

Bennett and Checkel's advice for best practices in process tracing instructs researchers to "cast the net widely for alternative explanation."⁴⁵ Following such criteria, this thesis provides a hypothesis (H₁) and an alternative hypothesis (H₂), for the hypothesis is most convincing after the evidence is shown to be inconsistent with an alternative explanation. The methodological choice of utilizing process tracing was informed by Ernst B. Haas' views on studying change in international organizations. Haas argues, "although our concern is with the shape of the organization...we cannot explain changes in shape without paying attention to every step in the sequence."⁴⁶ Following this logic, in order to comprehensively grasp the reasoning behind establishing the Outreach Programme and what it reflects about institutional learning, especially in relation to institutional goals and impact, the steps leading to the program's creation must be traced. Beach and Pedersen's instructional text, *Process-Tracing Methods: Foundations and Guidelines* provides guidance on how to follow steps in a sequence, outlining three variants of process tracing to do so: theory-testing (TT), theory-building, and explaining-outcome.⁴⁷ This thesis will utilize TT process tracing, as it allows for knowledge to be developed that is generalizable to other cases, specifically relevant here to future international and TJ efforts. This methodology's ability to generate findings that can be applied to other cases of TJ efforts is important in contributing to research on international criminal justice and making sure the applied mechanisms, such as ICTs, successfully fulfill their goals and impact their targeted audiences.

When speaking of a causal relationship between A and B, the nature of causality must be clearly indicated. Process-tracing methods relate to the ontological position within social science of a mechanistic understanding of causality, within which the focus is on the "dynamic,

⁴⁵ Bennett and Checkel. *Process Tracing*, 21-23.

⁴⁶ Ernst B. Haas, *When Knowledge is Power: Three Models of Change in International Organizations*. Vol. 22. Univ. of California Press, 1990, 20.

⁴⁷ Beach, and Pedersen, *Process-Tracing Methods*, 3.

interactive influence of causes on outcomes and in particular how causal forces are transmitted through the series of interlocking parts of a causal mechanism to contribute to producing an outcome.”⁴⁸ Bennett defines causal mechanisms as “processes through which agents with causal capacities operate in specific contexts to transfer energy, information or matter to other entities.”⁴⁹ In other words, by investigating the causal mechanisms, TT process tracing allows for more than a mere description of a sequence of events from A to B, but rather shows the causal force of the events leading from one to the other.

Process tracing helps uncover and identify the steps in the process that produce the outcome of this particular institutional change.⁵⁰ This thesis involves the piecing together of documents including ICTY officials’ statements, UN reports, ICTY documents, Outreach Programme archives, media coverage, secondary literature and additional input from semi-structured interviews with Ms. Rada Pejic-Sremac, Head of the ICTY Outreach Programme in The Hague and Mr. Almir Alic, ICTY representative in Sarajevo. With this method I can determine what led to the institutional change of the Outreach Programme, and how the program itself has developed and improved the Tribunal’s public perception and awareness of its activities in the former Yugoslavia, and is approaching the end of the Tribunal. In the following chapters, this thesis shows the phases of the ICTY’s relationship to its goals, how Outreach fits in, and what accounts for shifts from one phase to the next.

For the research design, the foundation will be laid in chapters one and two to explore the process in chapter three, which highlights the creation of the Outreach Programme. Chapter three

⁴⁸ Haas, *When Knowledge is Power*, 25

⁴⁹ Andrew Bennett, "The Mother of All" Isms": Organizing Political Science Around Causal Mechanisms." (2008). In *Revitalizing Causality: Realism about Causality in Philosophy and Social Science*, ed. Ruth Groff, 205-19. London: Routledge, 207

⁵⁰ Alexander L. George and Andrew Bennet. *Case Studies and Theory Development in the Social Sciences*, Bcsia Studies in International Security (Cambridge Mass: MIT Press, 2005) 176.

traces what led to the ICTY's evolved understandings of the needs for achieving its mandate, and shows whether the evidence supports H_1 or H_2 in response to the research question. If H_1 is right, the creation of the Outreach Programme is led by figures within the ICTY itself in conjunction with consultation of an epistemic community, as institutional learning and evolved understandings lead to the creation of the program. If H_2 is right, there is evidence of institutional learning, but it in response to bottom-up pressures from local voices, including civil society. Chapter three provides analysis of what led to institutional learning, and will reveal the causal mechanisms involved in changing the ICTY's approach to TJ.

Chapter 2 - Hopes and Aspirations for the ICTY

2.1 ICTY Foundation

As previously mentioned, the legal foundation of the ICTY came from the UNSC's Resolution 827 in 1993, which created an ad hoc subsidiary of the UN responsible for the investigation and prosecution of crimes committed on the territory of the former Yugoslavia since January 1, 1991, the sociopolitical context surrounding its foundation is equally important to the institution's history and development as a TJ effort.⁵¹ As Yugoslavia disintegrated, brutal fighting and ethnic cleansing were carried out while the international community stood by, partially unwilling and partially unsure how to effectively respond. The UNSC reacted with limited actions, enforcing an arms embargo in 1990-91, then putting in place a weak peacekeeping presence, along with a "no-fly" zone over Bosnia that failed to prevent further violence. The international community's response is widely considered to be a humanitarian failure, and a variety of factors are pointed to for the lack of an effective and timely response to prevent further carnage. One explanation for the minimal UN reaction is that it "reflected the keen desire of the Bush Administration to avoid any involvement in the Balkans in the run-up to the 1992 US elections."⁵² As tragedy continued to unfold in the former Yugoslavia, broadcasting and extensive media coverage also carried on, especially in the West. Public outcry led to increasing public pressure on Western governments to "do something" about the violence, especially amidst the horrors of the

⁵¹Lana Ljuboja, "Justice in an Uncooperative World: ICTY and ICTR foreshadow ICC ineffectiveness." *Hous. J. Int'l L.* 32 (2009): 770.

⁵²A. Leroy Bennett and James K. Oliver, *International Organizations: Principles and Issues*, 7th edn, Upper Saddle River, NJ: Prentice Hall, 2002: 243.

siege of Sarajevo. Certain moments particularly captured the Western publics' attention, such as the 1992 shelling of people standing in a breadline in Sarajevo in May.⁵³

Facing increasing pressure, the international community finally acted and created the ICTY. Speculation remains over the intentions behind the Tribunal's establishment, with voices ranging from praise, to skepticism, to disdain. Those praising the action associate the Tribunal with hope, saying for example, "[w]hen the world could no longer ignore the blatant atrocities scarring the former Yugoslavia, the ICTY emerged as a beacon of hope for the protection of human rights."⁵⁴ Other voices speculated a more selfish motivation on the part of Western governments involved in creating the Tribunal as "many observers looked upon the ICTY as a public relations maneuver designed to deflect attention away from the inability of the United Nations to stop the Balkan wars."⁵⁵ Further identified factors include creating the ICTY "as a sop to those who could not tolerate the escalation of human rights abuses but did not want to initiate military action; and as a triumph of liberal thinking over those devoted to realpolitik who were concerned more with stability than with rectifying terrible wrongs."⁵⁶ Voices criticizing the creation of the court and the powers behind it, especially within the former Yugoslavia itself, can be pointed to for the less than welcoming environment in which the Tribunal found itself at its onset.

Such criticisms of the intentions behind the Tribunal's creation are relevant to the issue of legitimacy and negative public perception the ICTY found itself facing. Amidst extreme polarization in the region, opinion of the ICTY's creation and eventual proceedings was highly

⁵³ Stephen J. Blank, *Yugoslavia's Wars: The Problem From Hell*. No. ACN-95034. Army War Coll Strategic Studies Inst Carlisle Barracks PA, 1995, 58.

⁵⁴ Ljuboja, "Justice in an Uncooperative World", 769.

⁵⁵ Kimi L. King, and James D. Meernik. *Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice*. na, 2011, 350.

⁵⁶ Laurel E. Fletcher and Harvey M. Weinstein. "A world unto itself? The application of international justice in the former Yugoslavia." 2004: 36.

divided along ethnic lines. Reports such as the Centre for International Policy Studies' working paper on the effects of TJ mechanisms show support for the ICTY mainly comes from the ethnic group of Bosniaks, while Serbian and Croatian suspicions and distrust of the Tribunal run strong. The report notes this undermines "the notion that the ICTY has helped promote reconciliation."⁵⁷ Distrust by Serbian populations is unsurprising, as the ICTY was seen as a political intrusion from the West, which was already seen as biased against Serbs.⁵⁸ The negative opinion of Serbs towards the ICTY stemmed from Western actions, as Steflja states "the NATO bombing of Serbia in 1999 only confirmed the suspicions of the Serb populations about Western countries' intentions as they perceived both NATO and the ICTY as American-led international organizations." Connecting this to the ICTY's issues with legitimacy and public perception she says, "[i]t is not surprising then that Serbian communities in Serbia and BiH struggled to understand how the same actors could both 'bomb us' and 'judge us' fairly?"⁵⁹ The Director of the Belgrade Center for Human Rights spoke to this saying, "[w]hat the ICTY failed to realize is that the perception of its actions mattered as much if not more than the actions themselves."⁶⁰

In its initial period of operation, the ICTY had to work to overcome the challenges to its credibility, which framed it as an entirely Western-imposed facade of intervention. In his piece, "The failings of ad hoc international tribunals", former Assistant Secretary General for Legal Affairs Ralph Zacklin writes, "[t]o be credible, the Tribunal needed not only the political support of the international community," but to also build its own reputation and merit.⁶¹ Without any official function of the ICTY devoted to building its merit and expressing its intention to

⁵⁷ Thoms, Ron, and Paris, "The effects of transitional justice mechanisms." 80.

⁵⁸ Kristin Xuequin Wu. "Experiences that Count: A Comparative Study of the ICTY and ScSI in Shaping the Image of Justice." *Utrecht Law Review*, Vol. 9, Issue 1, Jan 2013, 60.

⁵⁹ Steflja, (In)Humanity on Trial, 104.

⁶⁰ Steflja, (In)Humanity on Trial, 110.

⁶¹ Ralph Zacklin. "The failings of ad hoc international tribunals." *J. Int'l Crim. Just.* 2 (2004): 367.

individualize guilt and not blame collective groups, this issue of reputation was not addressed from the onset and left room for years of negative opinions to build a strong distrust and disdain for the Tribunal by many locals, especially Serbs.

The outsider nature of the Tribunal, and the powers behind it, also further harmed the court's perception locally and differentiated it from its institutional successor, the Nuremberg trials, for while the Allies were involved in the international conflict Nuremberg addressed, the conflict the ICTY addressed was more regional. Regardless, the ICTY was created as an institution enshrined in symbolism, showing an international response to a civil conflict and the determination to condemn massive violations of international humanitarian law. In this case, the ICTY and its predecessor and 'sibling court', the ICTR, serve as "landmark institutions whereby several Western powers and the UNSC granted themselves the position of arbitrators in other states' civil conflicts."⁶² The outsider nature of the Tribunal sets an important foundation when addressing this thesis' empirical puzzle regarding the ICTY's seeming prioritization of the outside legal and international community over local stakeholders in Bosnia when altering its approach to TJ, for the people of the former Yugoslavia were from its onset merely subjects of the court, holding no official positions or guiding the direction of the proceedings.

2.2 ICTY Mandate and Goals

As this thesis analyzes how the ICTY as an institution evolved in an effort to better achieve the objectives stated and implied within its mandate, the statute of the Tribunal is invaluable. The ICTY was established with official goals in its threefold mandate — to bring to justice persons responsible for war crimes, to deter the committing of further crimes and to contribute to the

⁶² Stefjla, (In)Humanity on Trial, 24,

restoration and maintenance of peace — that have been referred to by many as both idealistic and unrealistic. For instance, Judge Gabrielle Kirk McDonald, who served as the second President of the ICTY, said the Tribunal was established with a ‘lofty’ statute and mandate filled with huge expectations that bringing to justice the persons responsible for the worst crimes in the former Yugoslavia would cease the threat to peace and security, and contribute to restoration and maintenance of the peace in the region, with the ultimate result being reconciliation.⁶³ This association of reconciliation, as mentioned by Judge McDonald along with dozens of other influential figures, highlights a problem of institutional design, planning and coordination at the Tribunal, as reconciliation was never officially a goal but was constantly referred to as an objective by key individuals associated with the court. An honorable but notable culprit, who regularly linked the ICTY and reconciliation, is Antonio Cassese. In the first annual report to the UN he said, “[f]ar from being a vehicle for revenge,” the ICTY serves as an instrument for reconciliation for “[i]f responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then the whole ethnic and religious groups will be held accountable for these crimes and branded as criminal.”⁶⁴ Such statements are not wrong in their theoretical foundations, yet they misconstrue or, at the very least, confuse what the actual goals and priorities are for the Tribunal, questioning whether reconciliation is a goal. ‘Goal ambiguity’ is identified as a problem for the effectiveness of institutions, and is especially likely when there is broad or vague language in a mandate or statute providing room for interpretation and misguided goals and expectations.⁶⁵ Such ambiguity can lead to difficulties in making operational strategies, and shows

⁶³ Gabrielle Kirk McDonald. "Problems, Obstacles and Achievements of the ICTY." *J. Int'l Crim. Just.* 2 (2004): 569.

⁶⁴ Payam Akhavan, ‘Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’, 20 *Human Rights Quarterly* (1998): 766.

⁶⁵ Yuval Shany. "Assessing the effectiveness of international courts: A goal-based approach." *American Journal of International Law* 106, no. 2 (2012): 225-270.

a lack of comprehensive planning. This lack of institutional clarity regarding goals and objectives has long plagued the Tribunal, and can be linked back to its mandate and statements early on by key figures. Information including scholarly reports, interviews and articles written by officials intimately involved with the ICTY all provide contradicting evidence regarding the objective of reconciliation. Fletcher and Weinstein write, “[a]spirations for the ICTY ran high...UN debates did not consider reconciliation as a direct outgrowth of the ICTY. The primary objectives of the tribunal were the punishment of war criminals and restoration of peace and security. Yet the record of debate at the UNSC suggests that the seeds for another goal for the court, promoting reconciliation, were planted at its inception.”⁶⁶

As the ICTY operated and developed, the reality of the immense challenge of accomplishing the *official* goals within its mandate became more apparent. The institution, or those involved in guiding it, had to learn over time the complexity of the sociopolitical context for TJ efforts, and as the Tribunal progressed it became clear that “[a]dvancing justice, peace and reconciliation in a fragile post-conflict setting is a complex task, requiring careful planning and nuanced understanding of the particular historical, social, cultural and political context.”⁶⁷ Responding to a question about expectations surrounding the ICTY, particularly regarding reconciliation, Ms. Pedjic-Sremac remarked, “at the beginning [of the ICTY’s operation] expectations were quite unrealistic.” She continued by stating that the expectation of bringing reconciliation to the region is not the task of the court and “in the mandate you have [ICTY contribution] to the peace and stability...but reconciliation was never mentioned.” She said overtime it was implied within peace and stability yet this was a mistake, for in her opinion, contributing to peace and stability does not directly equate to reconciliation. Furthermore, she

⁶⁶ Fletcher and Weinstein. “A world unto itself?” 36.

⁶⁷Kerr, and Mobekk. “Peace and Justice”, 10.

argued that reconciliation is an unrealistic goal for the court, even unofficially, saying “if you’re talking about reconciliation, you know how huge that task is... and then [the Tribunal] is faced with political structures that are not willing to face what happened during the conflicts...it is just not possible”.⁶⁸ Pedjic-Sremac spoke of the learning process for the feasibility of court activities and goals, especially in relation to reconciliation, saying that while the Outreach Programme was started to help the Tribunal achieve its goals, there was still little understanding of how this would happen. She said at the beginning, the work is chaotic and overwhelming, and much of what is realistic and necessary must be ‘figured out along the way’.

The broad and largely unrealistic nature of the Tribunal’s mandate connects to several other dilemmas for the ICTY’s impact and legacy. Beyond the lack of clear and feasible institutional goals, there has been an ever-present uncertainty on who the Tribunal’s target audience is, and continuous issues of differing expectations from the international community and local populations. Mégret argues the ICTY, and international justice institutions and TJ efforts in general, have varying constituencies. He notes the ICTY’s impact seems to have been more significant for the international legal community than for the people in the former Yugoslavia.⁶⁹ The notion of varied audiences existing for an international institution with such goals is unsurprising; yet crucial to address. With different audiences come different strategies, for if the target audience is global, the court can focus its strategy on the realm of international criminal law and the strengthening law’s reach in global crises in hopes of deterring future atrocities, whereas if the target audience is the local population then the cultural context, sociopolitical climate and potential impacts and consequences domestically must be further considered and planned for.⁷⁰

⁶⁸ Personal interview, April 25, 2017.

⁶⁹ Mégret. “The legacy of the ICTY as seen through some of its actors and observers”.

⁷⁰ Stefjla, (In)Humanity on Trial, 38.

Minow poses the question of who the actual intended audiences for international tribunals are, writing that, “Judge Cassese suggests that the United States and its mass media are major targets, as well as the United Nations leadership.”⁷¹ Related to this thesis’ empirical puzzle about the influence of certain communities and powers, Minow’s highlighting of major powers connects to the audiences that pushed for the creation of the Tribunal, and continued to have influence over the development of the court, including its institutional changes. Looking at the politics surrounding the creation of ICTs, and the relationship between their mandates and audience is crucial, for the emergence of TJ efforts like the ICTY may be seen as the result of larger geopolitical influences and interests. The institutional design and focus of a court is illuminating, for one may see the “structure and mandates of the courts as intimately affected by the competing political forces that established them.”⁷² The lack of a clearly defined and prioritized audience for the Tribunal’s efforts has harmed its effectiveness by impacting public opinion and expectations. Additionally, issues of a lack of coordination with the mandate’s focus and becomes an issue of “resolving conflicting goals and expectations between those working within the tribunal to promote its strict legal mandate and the ambitions of those inside and outside of the Balkans who see the work of the tribunal as part of a more expansive vision for social reconstruction.”⁷³

Viewing the various identified weaknesses within a framework of institutional theories provides opportunity for analyzing and uncovering the forces at play behind international TJ efforts. As it differed from Nuremberg, the ICTY had neither a true precedent to build off of nor a

⁷¹ Martha Minow. *Between vengeance and forgiveness: Facing history after genocide and mass violence*. Beacon Press, 1998, 125.

⁷² Mikkel Jarle Christensen. "Academics for international criminal justice: The role of legal scholars in creating and sustaining a new legal field." *iCourts Working Paper Series*, No. 14 (2014): 7.

⁷³ Fletcher and Weinstein, "A world unto itself?", 35.

strong example to follow; yet, due to its long lifespan, the institution has had the opportunity to learn, grow and be a source of lessons to other efforts of international justice.

2.3 ICTY as Example

The establishment of the ICTY marked a historical moment in the reinstating of ICTs as the mechanism through which the international community should respond to conflict and violations of human rights. Since the ICTY's establishment, several tribunals and courts have followed, built off the legal precedent and learned from the Tribunal's successes and failures. The ICTR was established shortly after the ICTY in the aftermath of the Rwandan genocide, when, "[b]uilding off the platform of the ICTY, the Security Council passed Resolution 955 on November 8, 1994 and created the ICTR."⁷⁴ The court focused on Rwanda is considered the ICTY's 'sister tribunal' and they are often looked at and analyzed together for lessons.

Beyond providing legal precedent for the succession of courts established after the ICTY, the Tribunal serves as a rich source for lesson learning due to its position as the first court and now as the longest running tribunal. Within studies of institutional and organizational theory rests the belief that others emulate programs and policies developed globally across the world, and significant lessons are learned by looking at other institutions.⁷⁵ Currently there is an abundance of literature theorizing about notions of learning, especially on the conceptual level, but a lack of significant application of these theories to a range of organizations beyond state actors, such as

⁷⁴ Ljuboja, "Justice in an Uncooperative World", 771.

⁷⁵ See Richard Rose, *Lesson-drawing in public policy: A guide to learning across time and space*. Vol. 91. New Jersey: Chatham House Publishers, 1993.

international courts.⁷⁶ Applying this to the increasingly popular TJ model of ICTs is a useful exercise in seeing how an institution learns as it develops, and how this knowledge is transferred. A thorough application of lesson-learning theory to all ICTs is beyond the scope of this paper, but could provide rich insight in future research. Lessons already learned from the ICTY are cited in a variety of texts, for instance, it is noted that the SCSL learned from the Tribunal's mistakes, and adjustments through the creation of an Outreach Programme, resulting in a stronger emphasis on community outreach from SCSL's inception. After acting on the knowledge from the lessons of the ICTY, the SCSL's Outreach Programme is considered to have had a great impact on the credibility of the court among local people.⁷⁷

⁷⁶ Colin J. Bennett and Michael Howlett. "The lessons of learning: Reconciling theories of policy learning and policy change." *Policy sciences* 25.3 (1992): 288.

⁷⁷ Michael P. Scharf and Ahran Kang. "Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL," *Cornell International Law Journal*: Vol. 38: Iss. 3, Article 12, 2005, 917.

Chapter 3 - The Outreach Programme as Institutional Innovation

3.1 Significance of the Outreach Programmes

In the context of international justice efforts, the term ‘outreach’ refers to a range of approaches utilized to raise awareness of TJ mechanisms, encourage participation in proceedings and activities, and enhance feelings of local ownership towards an ICT, and is now widely considered a crucial component of international justice efforts.⁷⁸ According to Judge Vohrah of the ICTY and ICTR and Jon Cina, former Special Assistant to President McDonald and Legal Assistant, Registry at the ICTY, outreach efforts are critical to the success of an ICT because the victims and general populations of the states in which they occurred must be made aware of the court’s activities.⁷⁹ The ICTY’s Outreach Programme has been linked to its ability to achieve the objectives stated in its mandate for “to fulfill its objectives of promoting security, reconciliation and strengthen the rule of law in the former Yugoslavia, the work of the Court needs to reach directly the ordinary citizens of the region who are the ultimate peace-builders.”⁸⁰ The Outreach Programme helps overcome weaknesses of the Tribunal in the realm of public relations, such as providing translation of materials, increasing awareness of the court’s activities, combating misconceptions spread by nationalist propaganda and educating younger generations about the Tribunal. According to ICTY President Carmel Agius, Outreach is vital for despite the Tribunal’s “geographical remoteness from the locations where the atrocities occurred and its use of languages and procedural rules foreign to the countries of the former Yugoslavia, the Outreach Programme has enabled people in the region to witness justice being done in The Hague.”⁸¹

⁷⁸ Patrick Vinck, and Phuong N. Pham. "Outreach evaluation: The international criminal court in the Central African Republic." *International Journal of Transitional Justice* 4.3 (2010): 422.

⁷⁹ Lal C. Vohrah and Jon Cina. "The Outreach Programme" *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald: In Honour of Gabrielle Kirk McDonald*. Martinus Nijhoff Publishers, 2001: 550.

⁸⁰ Barconi, *The International Criminal Tribunal for the Former Yugoslavia and its Mission to Restore Peace*, 247.

⁸¹ “15 Years of Outreach at the ICTY” *ICTY Outreach Programme, Registry, ICTY, The Netherlands*, 2016: 1

With outreach activities, awareness and understanding of the Tribunal can move beyond circles of legal professionals to the general public. Without outreach efforts, information about an ICT largely remains limited to those studying and working closely to it, not easily reaching the average person in the areas affected by conflict. This was especially true for the ICTY at first, as it was minimally covered by local media in the former Yugoslavia and had no materials in local languages until the Outreach Programme translated them. Judge McDonald, who led the charge of creating the Outreach Programme says, “[a]lthough the ICTY Outreach Programme was a novel idea when first established, it has served as a model for outreach programs within all the international criminal institutions, including the International Criminal Court.”⁸² Outreach is inherently connected to perceptions of the court, and may serve to bridge the gap between international and local expectations. Fletcher and Weinstein’s work, examining the application of justice at the ICTY, notes that the interactions between a court and post-conflict communities has a profound impact on how the court’s work is perceived by the communities and in turn, perceptions have the ability to strongly affect the ability of the court to fulfill the social and political aspects prescribed in the mandate.⁸³ An implication of outreach’s understood importance is that ICTs can express their own objectives, state their judgments and frame their own achievements, but this does not directly translate into their message being heard or accepted by populations in the area under court jurisdiction. Various constituencies and audiences exist and may receive messages differently, notably groups such as “victims...NGO activists, local

⁸² “15 Years of Outreach at the ICTY”, 3

⁸³ Fletcher and Weinstein, “A world unto itself?”, 40

journalists and other professionals, as well as government and opposition leaders — not to mention the different nationalities in the former Yugoslavia.”⁸⁴

The Outreach Programme was a groundbreaking development in the ICTY’s institutional identity and legacy, as it created a new concept and mechanism for an ICT. For professionals from systems of domestic criminal justice, shaping public opinion and teaching about judgments was an unfamiliar, but novel idea and reflects an evolved understanding of the need to connect to the international and local audiences for international justice efforts to have a chance at making a meaningful impact in post-conflict regions. The creation of the Outreach Programme reflects a major learning point at the ICTY, showing an increased awareness that public opinion of the Tribunal is minimally influenced by the actual proceedings in The Hague, but rather the general population’s perceptions are shaped to a greater extent “by the views of the local political, academic and cultural elites towards the ICTY and the manner in which the local media depict proceedings at The Hague.” For the first six years of the Tribunal’s existence, the political and military elites in the countries of the former Yugoslavia were still those who themselves were being investigated, so it was politically advantageous for them to discredit the ICTY.⁸⁵

Other courts have been able to profit from the ICTY’s matured understanding of the need for outreach efforts, and now an operationalization of this commitment to ensuring affected communities are aware of the courts’ activities is seen with a similar handling by all courts and ICTS with outreach efforts and focus on fostering feelings of local ownership and connection.

⁸⁴ Donna Artz. "Views on the ground: the local perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone." *The ANNALS of the American Academy of Political and Social Science* 603.1 (2006): 231.

⁸⁵ Mirko Klarin. "The impact of the ICTY trials on public opinion in the former Yugoslavia." *Journal of International Criminal Justice* 7, no. 1 (2009): 90.

3.2 Context of Criticisms and Challenges Facing ICTY

The significance of the Outreach Programme can be fully appreciated when viewing it within the context of criticisms of the Tribunal's failure to initially have meaningful engagement with the populations of the former Yugoslavia. The relationship between the ICTY and the local populations was strained from the onset, one main reason being the charge that the Tribunal was merely formed "by the outside world to distract from its failure to stop the war and thus served mainly to boost the self-image of concerned outsiders."⁸⁶ Especially in Bosnia, the ICTY presence was seen as part of a contested and superficial post-conflict international intervention.⁸⁷ Additionally, in the Tribunal's first few years of activities there was minimal contact with local populations and all the court's proceedings and legal documents were produced in English and French, with no translation into Bosnian/Croatian/Serbian (BCS). This lack of translation and contact between the Tribunal and local populations had widespread consequences, such as the lack of feelings of local ownership and connection to the court, as well as leaving room for media and political leaders to spread continuous propaganda about the ICTY and use it for their own ethnonationalistic aims, perpetuating the conflict.⁸⁸

The continuation of ethnonationalistic narratives and negative media surrounding the Tribunal is unsurprising, as the ICTY was established while the conflict was still happening. The misunderstanding and misinterpretation of the institution was perpetuated by a lack of outreach and communication from the Tribunal and continuously exploited by the ruling nationalist parties with the media under their control and "[a]s the Tribunal's judgments have established, many of

⁸⁶ Johanna Mannergren Selimovic. "Perpetrators and victims: Local responses to the International Criminal Tribunal for the former Yugoslavia." *Focaal* 2010.57 (2010): 52.

⁸⁷ Selimovic. "Perpetrators and victims", 58.

⁸⁸ Selimovic. "Perpetrators and victims", 52; Stefjla, (In)Humanity on Trial, 27.

these groups [were] themselves responsible for creating the atmosphere conducive to the ethnic conflicts which occurred.”⁸⁹ Without an institutionalized mechanism for communicating with the public in the former Yugoslavia, the Tribunal was unable to combat the nationalist governments and harmful rhetoric about the ICTY. The lack of communication from the ICTY, and presence of forces working against it in the region, shows significant consequences of the ICTY being in a bubble of international legal focus with a major disconnect between The Hague and the local audiences. Realizing this and making changes accordingly was essential to the ICTY’s development. Creating the Outreach Programme was a major turning point at the ICTY, moving the Tribunal in a positive direction, closer to being able to fulfill its mandated goals.

3.3 Institutional Learning at the ICTY: Growing Awareness of a Failure of Public Opinion

This section will provide evidence connecting to **H₁**, which argues the ICTY’s innovation and change is due to the factors of internal organizational learning, enhanced by consultation with an epistemic community. These factors contributed to matured understandings of the needs for international criminal justice in a post-conflict community and resulted in the development of the Outreach Programme.

President McDonald’s leadership resulted in the creation of the Outreach Programme. The position of President of the ICTY provided McDonald the opportunity to bring about changes to advance the Tribunal and increase its chances for success. The President’s duties include “representing the ICTY within the framework of the international community’s attempts to foster

⁸⁹ Vohrah and Cina. "The Outreach Programme", 551

and secure peace in the Balkans.”⁹⁰ When McDonald took over as President, she articulated four aims, which included increasing the awareness of the Tribunal.⁹¹ Many hail McDonald as a visionary leader, and her personal foresight combined with the evolving understandings of the role of a criminal trial within TJ is attributed to setting the foundation for envisioning the Outreach Programme.⁹² Cox’s work on executive leadership provides insight to the power McDonald had in her position and the subsequent ability to act off of institutional learning and create change. Cox refers to the executive head as a possible conversion variable, saying through leadership an international organization may be transformed.⁹³ Cox highlights Haas’ *Beyond the Nation State*, in which an international organization is seen as a structure within a global environment, responding to demands and expectations of states and other organized forces, and with that the executive head is in a key position to maximize organizational opportunities and respond to pressures in a way that enhances the organization. Significant to accomplishing this transformation is the executive head's ability to “define an ideology which gives clear goals to the organization and prescribes a method for attaining these goals.”⁹⁴ McDonald acted on behalf of the new understandings she gained through institutional learning, consulted with an epistemic community and successfully framed the need for outreach in a way to gain support and funding from the international community for an Outreach Programme as a method for the Tribunal to achieve its mandated objectives.

⁹⁰ Jon Cina and David Tolbert. "The Office of the President." Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald: In Honour of Gabrielle Kirk McDonald. Martinus Nijhoff Publishers, 2001: 85.

⁹¹ Cina and Tolbert, "The Office of the President." 94.

⁹² For example, ICTY Registrar John Hocking credits McDonald with “remarkable foresight to understand that the proceedings taking place in The Hague needed to reach the people of the former Yugoslavia.” “15 Years of Outreach at the ICTY” 5.

⁹³ Robert W. Cox. “The Executive Head: An Essay on Leadership in International Organization.” *International Organization*, Vol. 23, No. 2 (Spring, 1969), 207.

⁹⁴ Cox, “The Executive Head”, 212-213.

McDonald specified a particular interaction which spurred the process of institutional learning and evolved understandings of the needs for international justice efforts. She said an interaction with reporters made her realize the Tribunal had to change its approach to “actively work to dispel the myths, rumors and misunderstandings about [the ICTY].”⁹⁵ She recalled that shortly after she was elected President of the Tribunal in 1997, she spoke with reporters who had just returned from the Prijedor region, and they told her many people in the area did not believe the rulings from the Tribunal’s findings in the Tadic judgment regarding the commission of brutal crimes against people held in camps in Omarska, Keraterm and Trnopolje. According to the reporters, locals still believed that the camps were ‘collection centers’ where people were temporarily kept at their own request. This struck McDonald deeply and personally, as she had been Presiding Judge of the Trial Chamber that conducted this trial over six months, hearing from 125 witnesses and producing a judgment of over 7,000 pages revealing the camps had subjected people to inhumane living conditions, including beatings, rapes and murders. McDonald writes that upon hearing this from the reporters, she felt all the work had been in vain and feared the Tribunal had failed the people of region, especially those that had served as witnesses. This led her to the conclusion, “it was essential that the Tribunal actively work to bring its message and the facts about its work to the people of the region. To this end, the Tribunal held the ICTY Outreach Symposium” in The Hague in October 1998, intending to connect legal and judicial professionals from the region with the Tribunal.⁹⁶ Leading legal personnel from the former Yugoslavia came to meet with Tribunal officials at this symposium, though there was no involvement of local representatives or NGOs from the region, as the alternative hypothesis, H₂, would require for

⁹⁵ “15 years of outreach at the ICTY”, 2.

⁹⁶ “15 years of outreach at the ICTY”, 3.

evidence of bottom-up pressure and domestic involvement in the creation of the Outreach Programme.

In November 1998, shortly after the Outreach Symposium in The Hague, McDonald dispatched a representative, Jim Landale, from the Press Office, and Jon Cina, from her office, to go to Bosnia and Croatia to meet with a variety of actors to consult on what the Tribunal could do to improve its image. They conducted over 100 interviews with different professionals in Bosnia and Croatia.⁹⁷ McDonald writes that through this process she realized “before the Tribunal can be truly effective and achieve its mandate, the people in the region must share a consensus that the Court is legitimate. They must know, understand and appreciate the work of the Tribunal.” Following this realization and matured understanding, McDonald rallied for an Outreach Programme, framing it as critical to the Tribunal’s establishment of its mandate.⁹⁸

Looking at the factors involved in this phase of ICTY development and creation of the Outreach Programme relates to the factors identified in H₁, and shows they are all present and serve as causal mechanisms. This is a case of learning at an international organization, for as Haas writes, ‘learning’ occurs in situations in which an organization questions the basic beliefs underlying the selection of its ends.⁹⁹ President McDonald’s realization judgments were unknown and unaccepted by many in the region led her to question aspects of the Tribunal’s operation, especially the belief that judicial statements could speak for themselves.¹⁰⁰ Following such questioning came the idea that the ICTY needed to change and adapt institutionally to be proactive

⁹⁷ “15 years of outreach at the ICTY”, 3.

⁹⁸ McDonald. “Problems, Obstacles and Achievements of the ICTY.”, 569.

⁹⁹ Haas, *When Knowledge is Power*, 36.

¹⁰⁰ In our interview, Pejic-Sremac noted there had been the belief that judgments speak for themselves because of the experience coming from national courts where the courts are understood, operate on the same values as the people, and do not need any form of outreach. Therefore, actively influencing public opinion was a foreign concept to legal professionals.

in influencing public opinion to make sure the mandated objectives could be met. McDonald's consultation with her staff at the ICTY and other professionals in the justice field shows the factor of consultation with an epistemic community. Haas writes, "[i]nternational organizations are exposed to knowledge through the medium of *epistemic communities*."¹⁰¹ An epistemic community is a network of knowledgeable experts with common outlooks and technical qualifications making them experts in a field. Such shared beliefs can be seen within international justice organizations' staff members, who are seen as "true believers in the cause of transitional justice" and members of an "international justice industry".¹⁰² Lutz and Sikkink argue "the transitional justice network resembles what political scientists call an *epistemic community*..." though it differs because while classic literature on epistemic communities says states turn to such communities in times of uncertainty, the TJ network independently pursues their cause.¹⁰³ The contemporary TJ network also seems to differ from the classical epistemic community in that it incorporates leaders and officials involved in the organization, not just an outside community of experts.

This section has highlighted some key examples of the evidence showing that institutional change and adaptation at the ICTY came from international organizational learning along with institutional leadership and consultation with an epistemic community. A thorough examination of this phase in the ICTY's lifespan, in which Outreach was created, shows institutional change came in response to outsiders' voices and actions rather than pressure from the former Yugoslavia itself. Such evidence supports H₁ and shows the Outreach Programme was created with the

¹⁰¹ Haas, *When Knowledge is Power*, 40.

¹⁰² Subotic, *Hijacked Justice*, 21-22.

¹⁰³ Ellen Lutz and Kathryn Sikkink. "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America," *Chicago Journal of International Law*: Vol. 2: No. 1, Article 3 (2001): 3.

international community's objectives for the ICTY's mandate in mind rather than in response to local voices and needs.

3.4 The Relationship Between the Local and the Outreach Programme

This section shows that the evidence does not support H₂: Institutional learning and change developed in response to realities at the local level, and the ICTY changed its approach due to bottom-up pressures.

As indicated in the previous section, President McDonald came to the conclusion there was a need for connecting the Tribunal to the people of the region of the former Yugoslavia after realizing that the local population was not receptive to the Tribunal's work for a variety of factors, but most importantly, the Tribunal was doing nothing to address and combat this problem. Before the development of the Outreach Programme, there was no comprehension of the local people as stakeholders in, or active agents of change, for the justice process at the ICTY.¹⁰⁴ This was due to the highly divided and fragmented segments of the population, the foreign nature of TJ and ICTs, or perhaps just the mere oversight on the international community's part when planning the ICTY.¹⁰⁵ This lack of conceptualizing an active role of the populations of the former Yugoslavia is exemplified in communications by the UN about the ICTY, seen even in reports calling for locals' increased awareness but not increased agency. For instance, in a review of the ICTY's

¹⁰⁴ Lundy and McGovern. "Whose Justice?", 278.

¹⁰⁵ Civil society consisted of victims' associations but they were weak, ethnically fragmented and had limited resources. Julie Broome. "Making the sum more than its parts: civil society and the rule of law in transitional justice." School of Oriental and African Studies, University of London.

effectiveness conducted by a UN Advisory Committee in 1999, emphasis was put on the need for local knowledge, but never local input or increased feelings of ownership.¹⁰⁶

For H₂ to be correct, there would be evidence of bottom-up pressures calling for a changed approach to TJ from the Tribunal. This would require a strong presence of civil society, or some form of organized voices engaged in a dialogue with the ICTY. With this presence of civil society, the “boomerang effect” could be seen, in which domestic civil society serves as a causal mechanism to mobilize external shaming processes and engagement with transnational advocacy networks (TANs).¹⁰⁷ TANs are networks of activists, distinguishable in that their work is motivated by values. Advocacy networks serve as significant channels for linking actors in civil societies, states and international organizations, and may serve as a source for change at institutions. Keck and Sikkink write that when they “succeed they are an important part of an explanation of changes in world politics.” The networks promote norms and pressure institutions and actors to adopt new policies.¹⁰⁸ For this theory to be applicable there would need to be a presence of domestic civil society in the former Yugoslavia calling for change at the ICTY. However, domestic civil society, in its weak and limited presence, was not truly local at the time, due to the heavy influence of international NGOs in the region and “due to the fact that much of civil society in the Balkans [was] comprised of organizations that are hostile to transitional justice or the liberal accountability norms of the international community” and local organizations

¹⁰⁶ The Expert Group mandated by the Secretary-General to evaluate the effectiveness of the Tribunal’s activities further to the Resolution of 18 December 1998, see A/54/634, “Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda”, (“ACABQ Report”) , 11 November 1999.

¹⁰⁷ M. Keck and K. Sikkink. *Activists beyond borders: Advocacy networks in international politics*. Ithaca, NY: Cornell University Press, 1998,12-38

¹⁰⁸ Keck and Sikkink, *Activists beyond borders*, 89-91.

therefore did not have meaningful engagement with the Tribunal and its legal process.¹⁰⁹ Additionally, following the war, the region attracted a huge amount of attention from international NGOs, many of which opened local offices with the intentions of building civil society and contributing to reconciliation. This ‘internationalized’ TJ processes and removed them from local populations, making them more international than local.¹¹⁰

The “boomerang effect”, or any other theory accounting for bottom-up pressure leading to institutional change at the ICTY does not properly account for the ICTY’s creation of the Outreach Programme due to the timing in which the relationship between civil society and the Tribunal strengthened.¹¹¹ It is accounted that the ICTY “only belatedly engaged in a dialogue with domestic NGOs” after the establishment of the regional Outreach offices.¹¹² Engagement with local NGOs occurred only once the Outreach Programme had opened field offices in Sarajevo in 2000 and Zagreb, Pristina and Belgrade in 2001 and had spent time translating previously unavailable key Tribunal documents into BCS and Albanian.¹¹³ This shows that H₂ does not account for the ICTY’s changing approach and creation of Outreach. Related back to the methodology of process tracing and specifically, TT process tracing, the lack of evidence to support H₂ leads to the rejection of bottom-up pressures as a mechanism, or cause (A), leading to the effect (B) and outcome of the creation of the Outreach Programme. Without adequate support for H₂, there is insufficient evidence to claim H₂ as an accurate descriptor of why the ICTY changed its approach to TJ after its initial period of operation. Reaching such a conclusion provides insight to this thesis’ empirical

¹⁰⁹ Jill A. Irvine and Patrice C. McMahon, “From International Courts to Grassroots Organizing: Obstacles to Transitional Justice in the Balkans,” in Olivera Simic and Zala Volcic, *Transitional Justice and Civil Society in the Balkans* (New York: Springer, 2013), 232.

¹¹⁰ Subotic, *Hijacked Justice*, 126.

¹¹¹ Irvine and McMahon, “From International Courts to Grassroots Organizing”, 233.

¹¹² Christopher Lamont. "Coercion, norms and atrocity: explaining state compliance with international criminal tribunal for the former Yugoslavia arrest and surrender orders." PhD diss., University of Glasgow, 2008, 62.

¹¹³ See Annual ICTY Report of 2001, S/2001/865, 39.

puzzle of why the ICTY focused more to the outside legal and international community than the local stakeholders when altering its approach and methods, for there was limited domestic support and it was seen as a foreign, outsider implemented intervention.

3.5 Outreach as a Site for Continuous Development

The establishment of the Outreach Programme in 1999 was a major innovation and turning point in the ICTY's development, and helped set a new precedent for international justice institutions' relationships with local communities, yet its value extends beyond its mere creation. Speaking of the role of Outreach, Pejic-Sremac noted that throughout the Programme's lifespan, it continuously developed and changed as staff worked to determine what would best help with adjusting and managing public expectations, raising awareness, and other matters impacting the ICTY's overall effectiveness and ability to fulfill its mandate.¹¹⁴ The Outreach Programme has gone through various phases of development and focus, guided by understandings of the needs of local populations and the Tribunal's needs. Major turning points have jumpstarted new phases, such as the transition to more active engagement with local media after the broadcasting of Milosevic's trial in 2001 led to increased awareness that nationalist groups continued to use and manipulate the perception of ICTY trials for propaganda purposes, and that the Tribunal needed to be more involved in shaping its own image, especially with Serb populations.¹¹⁵ This led to a change in Outreach's focus, with more active involvement seen with activities such as a weekly contribution to *Balkan*, a Belgrade daily newspaper.¹¹⁶

¹¹⁴ Personal interview, April 25, 2017.

¹¹⁵ Scharf 2002: 915.

¹¹⁶ An archive is provided by Outreach of all contributions to *Balkan* and *Justice in Transition*, a bi-monthly journal published by the Serbian War Crimes Prosecutor's Office at <http://www.icty.org/sid/9974>

Evolved understandings of the ability of the court to facilitate reconciliation also guided changes in Outreach's focus. Alic described the Youth Project, started by Outreach in 2011, as the highlight of outreach efforts and noted the program has reached over 10,000 people, mostly in Bosnia, through lectures on the Tribunal's work.¹¹⁷ Speaking of why youth focus is fundamental to Outreach, Alic highlighted the connection between young people in the former Yugoslavia and the goal of reconciliation. He pointed to the generations born after the war as where the "the real hope, and real potential to move forward in this reconciliation process is." Such views reflect an evolved understanding of the potential for reconciliation, as he says he feels the older generations are still "waging the wars of the 90s through other means" and reconciliation may not be possible for older people and victim groups. Alic said, "if you are talking about cases of genocide, like in Srebrenica, there are whole families that are wiped out, is it realistic to ask some mother who lost five sons to just forgive? I think not."¹¹⁸ It is beyond the scope of this thesis to address the validity of such statements about the plausibility of reconciliation for older generations and victims, but such views are important to highlight because they show continued questioning of TJ efforts' capacity for impact, and the need for continued development of different aspects of justice mechanisms to fit the needs and realities of local populations. In this case, youth outreach has been prioritized for a focus on reconciliation and hope that knowledge of the ICTY will live on after its closing; however, such understandings also point to the need to further question and examine the appropriateness of linking ICTs and reconciliation as goals.

¹¹⁷See <http://www.icty.org/en/outreach/youth-outreach>

¹¹⁸ Personal interview, April 19, 2017.

Chapter 4 - Looking Forward

4.1 *The Final Phase*

As the ICTY approaches its end, much attention has been given to its final period of operation, along with a strong focus on the Tribunal's legacy. The ICTY website has several pages dedicated to the topic of legacy, noting that as the Tribunal prepares to close at the end of 2017, "the ICTY is seeking to ensure its work and achievements remain accessible and meaningful, both for the people in the region of the former Yugoslavia and worldwide." A series of events, *ICTY Legacy Dialogues*, began in 2010 as the Tribunal transitioned outreach to focus more on legacy, saying the 'Legacy Conferences', "aim to ensure that the Tribunal's contribution to accountability for international crimes will endure after the ICTY has closed its doors, in particular by enabling others to build on the work and achievements of the Tribunal."¹¹⁹ Such attention is echoed in an ICTY publication celebrating fifteen years of outreach, in which the Tribunal's last president, Carmel Agius, points to the critical nature of the Tribunal's work being understood by the international community as a whole, and the communities in the former Yugoslavia.¹²⁰ While not clarified by Agius, such emphasis on the critical need for understanding of the international community and the local populations relates to the institution having learned over its lifespan the need for public awareness in order for the Tribunal to have a significant impact.

An additional element of the last phase of the ICTY's operation relates to the continuation of judicial efforts in the former Yugoslavia. The institutional focus on the ending of the Tribunal has been formalized through various 'completion strategies' produced by the ICTY President and Prosecutor for the UNSC every six months since 2004.¹²¹ In 2008, then ICTY President, Fausto

¹¹⁹ <http://www.icty.org/en/in-focus/icty-legacy-dialogues>

¹²⁰ "15 Years of Outreach at the ICTY", 1

¹²¹ Completion Strategy Reports: <http://www.icty.org/en/documents/completion-strategy-and-mict>

Pocar, Polar claimed that the concept of the ‘Completion Strategy’ was conceived by previous President of the ICTY, Judge Claude Jorda, and his colleagues in 2000. Motivated by the desire to ensure expeditious trials for the accused, and Tribunal officials’ awareness that the international community’s interest in the region was fading, which could lead to financial concerns. Such a statement on the incentives for preparing a strategy for the ending of the court reflects the prioritization of the international community over the needs of the locals in the former Yugoslavia.¹²² In “Swaying the Hand of Justice”, Hagan looks at policy change at the ICTY in response to external politics and argues the dates proposed for the Tribunal’s closing were pitched to placate and cater to the UNSC and the international community’s financial interests. In response to the announcement that ICTY trials were supposed to end in 2008, a senior official remarked, “We never institutionally endorsed it...there was no basis for the agreement in any realistic analysis of the work that had to be done”.¹²³ Amnesty International voiced concerns on the implementation of this strategy, saying it appears to be dictated by financial constraints influenced by a changing geopolitical setting in which countries of the former Yugoslavia have become less of a priority in the international scene.¹²⁴ Due to the Tribunal’s reliance on the international community for support and financing, and the power this financial concern has had over the court’s entire operations, it is unsurprising that financial pressures are associated with pressures to conclude the Tribunal.¹²⁵

¹²² Fausto Pocar. "Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY." *Journal of International Criminal Justice* 6, no. 4 (2008): 657.

¹²³ John Hagan, Ron Levi, and Gabrielle Ferrales. "Swaying the hand of justice: The internal and external dynamics of regime change at the international criminal tribunal for the former Yugoslavia." *Law & Social Inquiry* 31, no. 3 (2006): 605-606.

¹²⁴ Amnesty International, “Amnesty International’s concerns on the implementation of the “completion strategy” of the International Criminal Tribunal for the former Yugoslavia.” *Amnesty International Journal*, June 2005: 3.

¹²⁵ Dafna Gozani. "Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court." *Loy. LA Int'l & Comp. L. Rev.* 36 (2014): 336.

Further troubling with this top-down process of decisions related to the Tribunal's completion was the UN's influence on the Outreach Programme, guiding it away from spreading awareness about the Tribunal to focusing on local capacity building for national judiciaries within the former Yugoslavia without basing decisions from needs identified by the Outreach staff. The Completion Strategy outlined the necessity for the ICTY to focus on strengthening judicial systems in the region in order for cases to be transferred to national courts. In 2004, the US and EU provided funding for the launch of a domestic war crimes chamber in the Bosnian state court system to which some ICTY cases involving 'smaller fish' could be transferred after the chamber was ready following ICTY assistance with expertise, information and personnel.¹²⁶ Following this, Outreach was pushed to devote most of its attention, with its already limited funds and staff, to help develop national judicial potential. The ICTY's 2005 Annual Report noted Outreach is, "primarily focused on transferring knowledge and best practices to the judiciaries of States of the former Yugoslavia."¹²⁷ This enforced redirection of Outreach focus shows the problematic power dynamic between the international community and the Tribunal's activities. While aiding in the development of national judicial systems for the transfer of cases and strengthening the rule of law is certainly important for post-conflict justice and transition, diverting the attention of the Outreach Programme from its activities with the general public reflects an unfortunate dismissal of lessons learned about the importance of connecting the Tribunal with the varied audiences of the local population.

Essential to the ending of the Tribunal is the establishment of the International Residual Mechanism for the Criminal Tribunals (MICT), created as a political decision by the UNSC to end

¹²⁶ David Kaye. "Justice beyond the Hague: supporting the prosecution of international crimes in national courts." No. 61. Council on Foreign Relations, 2011, 12.

¹²⁷ See the 2005 Annual Report of the ICTY, S/2005/532, 39.

the work of the ICTY and ICTR, following their failure to meet the once indicated Completion Strategy dates. In 2010, with Resolution 1966, the UNSC created an alternative mechanism to allow for the closure of the Tribunals while still allowing for the continuance of their necessary functions. The MICT is hailed as an important means for ensuring the legacies of the tribunals.¹²⁸ It is important to note that within the final phase of the ICTY's operation, the Tribunal is handling some of its most important trials yet. Prosecutor Serge Brammertz remarks that the Tribunal's final trials, particularly those against Radovan Karadzic and Ratko Mladic are among the most important in the court's history, and Karadzic's trial will be going to the MICT. Brammertz notes that "effective outreach will be needed now more than ever" as outreach has been deemed essential to helping with public awareness and opinions for such important cases.¹²⁹ Karadzic's case is especially significant as he is the highest level official to have been sentenced at the ICTY since the late Serbian President, Milosevic, died in 2006 while on trial.¹³⁰ Yet, despite the ICTY, and the international legal community in general, seemingly having realized the importance of outreach, according to both Pejic-Sremac and Alic of the ICTY Outreach offices, despite the MICT handling important cases it will not have an outreach component, or at least for now it is not included in the MICT's mandate.¹³¹ Such a paradox raises questions about the intentions of the powers behind the creation of the MICT and once again the issue of target audience for ICTs. With such blatant concern for legacy of the institution yet a lack of plans for outreach efforts to continue, one must wonder if the local audience is, or ever has been, a priority at all.

¹²⁸ Gabrielle McIntyre. "The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda." *Goettingen J. Int'l L.* 3 (2011): 926-929

¹²⁹ "15 Years of Outreach at the ICTY", 4

¹³⁰ Aaron Matta and Anca Iordache. "Historic ICTY Trial Judgement in the Case Against Radovan Karadzic." The Hague Institute for Global Justice, March 2016.

¹³¹ Personal interviews, April 19 and 25, 2017.

4.2 Outreach Beyond the Tribunal's Closure

The essence of what the Outreach Programme has developed correlates to the importance of education for TJ and post-conflict healing. Without knowledge of the conflict and awareness of multiple perspectives and factual history, reconstruction and reconciliation are far less likely. While the Tribunal created the Outreach Programme to help fight misperceptions of its work and spread awareness of what the ICTY was actually doing, greater understanding of the conflict in the former Yugoslavia itself was always in mind. Such understanding is especially relevant to the Tribunal's intentions to establish an accurate historical record and contribute to reconciliation. Education efforts are clear through outreach activities working with students, but also extends to how Outreach has focused attention in its last few years on setting up mechanisms for the ICTY's work and knowledge of the conflict to be accessible and shared beyond the closing of the Tribunal and Outreach Programme.

In my interview with Alic in Sarajevo, we discussed how outreach could live on after the Tribunal's closure. He said his office had worked on enabling the ICTY's legacy to be shared and continued in several ways, such as training teachers in Bosnia to give presentations about the Tribunal, and subsequently about the conflict and its history. This is especially important due to the lack of attention to the history of the conflict and to TJ efforts within the school system. Additionally, Alic highlighted Outreach's involvement in the establishment of information centers, one of which will be in Sarajevo's city hall.¹³² The mayor of Sarajevo, Komsic, and the ICTY's Judge Pocar signed an agreement in 2016 on the opening of this information center. Komsic said for Sarajevo and Bosnia the archives of the Tribunal, which will be at the information center, are

¹³² Personal interview, April 19, 2017.

“crucial for dealing with the past, because without dealing with the past we cannot build peace and stability”.¹³³ An ICTY spokesperson said that plans are still tentative regarding the center’s activities, since they are dependent on securing funding, but if possible, in addition to providing access to the Tribunal’s databases and materials, the center will seek to raise awareness about the issue of war crimes with the aim of strengthening TJ in Bosnia.¹³⁴ Alic noted a vital aspect of the centers is that locals, rather than the Tribunal, will run them. A UNSC report on the feasibility of the centers noted a local’s suggestion for the center’s information to also be made available to other institutions, such as law faculties for educational purposes. It is too soon to tell what will become of the information centers and how they will impact the ICTY’s legacy, but they provide opportunities for valuable future research and exploration, especially in relation to TJ and education.

“Information Centre of the ICTY to be established in Sarajevo,” *Sarajevo Times*, November 30, 2016.

¹³⁴ Emina Dizdarevic. “Hague Tribunal to Open Information Centre in Sarjaevo,” *Balkan Insight*, Nov. 28 2016.

Conclusion

The evidence provided in this research shows the ICTY's creation of the Outreach Programme provides insight on the empirical puzzle regarding the Tribunal focusing more on the outside legal and international community than the local stakeholders in Bosnia when altering its approach to TJ. Due to the inherent legal and outsider nature of the Tribunal as a mechanism of international intervention, there was always more of a channel institutionally and systematically for the outside voices to influence its path and development than local stakeholders. Outside voices and opinions also had a significantly stronger impact than local voices for the direction of the Tribunal's development due to the ICTY's reliance on international sources of funding. A target audience was never determined for the Tribunal, reflecting a lack of institutional foresight and comprehensive design. Failure to determine a target audience, or show a prioritization of the local community led to damning views such as that voiced by former ICTY spokesman, Refik Hodzic, who after working at the Tribunal wrote a piece in *Balkan Insight* in response to a judgment of acquittal for Yugoslav general, Perisic. Hodzic wrote in 2013, "The ICTY has never truly made a commitment to the people of the former Yugoslavia to chart the course to fulfilling its broader mandate, because, simply, it has never seen them as its primary constituency...I have come to accept that the ICTY is, unfortunately, not *our* court, but just another UN body."¹³⁵ Such views are not unprecedented and seriously impede the effectiveness of the Tribunal in achieving its mandate for any audience at all. While the struggle of initial institutional design and planning is understandable given that the ICTY was the first contemporary attempt at an ICT, the problem of institutional ambiguity and overly zealous goals was never adjusted and set the court up for disappointing such grand expectations.

¹³⁵ Refik Hodzic. "Accepting a Difficult Truth: ICTY is Not Our Court", *Balkan Insight* Mar. 6, 2013.

The evidence shown in H₁ points to the leading role the international community took in the ICTY's development and change, and provides insight into the channels of influence at international justice efforts. Only with awareness of the consequences and effects of the international community's interests dominating ICTs can future efforts be appropriately adjusted, planned and run. When making plans for justice interventions and mechanisms there must be a comprehensive reflection about what TJ tools are appropriate and for what purpose, and a reconsideration of the association of ICTs and reconciliation.¹³⁶ While domestic voices may themselves not always have the power to force change at an ICT, as H₂ showed to be the case, consulting with local audiences is vital for the ultimate success of a TJ effort.

Research such as that conducted in this thesis may help provide insight for institutions on matters of institutional planning for justice efforts, for as Shany writes, "better understanding of the structure and process of international courts can therefore help, by way of reverse engineering, in assessing the feasibility of effective outcomes." If there is no outreach mechanisms at an ICT it is unlikely that there would be any facilitation of change in public opinion and no effective way to achieve a goal of reconciliation.¹³⁷ The capabilities of an ICT must be comprehensively understood and viewed within the light of the sociopolitical situation during and after a conflict, as well as factors such as international voices and the presence of civil society in order to understand how a mechanism of TJ will actually play out, and hopefully make a positive impact following an atrocity such as what occurred in the former Yugoslavia.

¹³⁶ Ioannis Armakolas and Eleni Vossou. "Transitional Justice in Practice: The International Criminal Tribunal for the Former Yugoslavia and Beyond." *UNISCI Discussion Papers*, N. 18, October 2008.

¹³⁷ Shany, "Assessing the effectiveness of international courts" 23.

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