

**WHAT IS LEFT BEHIND:  
THE NORMATIVE LEGACY OF THE INTERNATIONAL  
CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA**

by

Blazka Felicijan

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**Examining Committee:**

Dr. Lisa Sundstrom

Supervisor

Dr. Katharina Coleman

Additional Examiner

## **Abstract**

Ever since the International Criminal Tribunal for former Yugoslavia handed down its final verdict in November 2017, there has been much speculation regarding the achievements and legacies left behind by the historic judicial institution. However, less attention has been given to the Tribunal's normative influence. By outlining three of the ICTY's normative legacies the study seeks to illuminate the Tribunal's unique normative capacity. The ICTY's role in the codification of the norm against wartime sexual violence is further analyzed to explore how international organizations such as the Tribunal can contribute to norm development and norm diffusion. Limits to normative influences are revealed, which put into question whether the Tribunal has actually left a lasting impact in the region that matters the most; Serbia and Bosnia and Herzegovina. Analyzing the Tribunal's normative capacity will shed light on the prospects and limits of mandates for future international judicial institutions.

## **Lay Summary**

This thesis explores how the International Criminal Tribunal for former Yugoslavia has influenced the behavior of law-breaking individuals, the operation of similar organizations and contributed to the peace in the region. The study presents three different legacies and helps us understand why the Tribunal was much more than just a court. Emphasis is placed on the Tribunal's work to improve laws prosecuting wartime sexual violence in order to see whether international organizations can indirectly decrease this particular crime and improve human rights across the globe. Since the international criminal system appears to be expanding, it is crucial to review the prospects and limits of their abilities in order to increase its effectiveness.

## **Preface**

This thesis is the original, unpublished work of the author, Blazka Felicijan.

## Table of Contents

<b>Abstract.....</b>	<b>iii</b>
<b>Lay Summary .....</b>	<b>iv</b>
<b>Preface.....</b>	<b>v</b>
<b>Table of Contents .....</b>	<b>vi</b>
<b>Acknowledgements .....</b>	<b>vii</b>
<b>Dedication .....</b>	<b>viii</b>
<b>Chapter 1: Introduction .....</b>	<b>1</b>
<b>Chapter 2: What is Normative?.....</b>	<b>4</b>
<b>Chapter 3: The Individual Criminal Responsibility Norm.....</b>	<b>7</b>
3.1    The Deterrence Effect .....	8
3.2    The Effect on Human Rights Improvements .....	11
<b>Chapter 4: Bearing Witness.....</b>	<b>15</b>
<b>Chapter 5: The Norm against Wartime Sexual Violence.....</b>	<b>22</b>
<b>Chapter 6: ICTY as Norm Teacher .....</b>	<b>28</b>
<b>Chapter 7: Limits of ICTY’s Normative Power.....</b>	<b>32</b>
<b>Chapter 8: Conclusion.....</b>	<b>40</b>
<b>Works Cited.....</b>	<b>43</b>

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## **Dedication**

To my Andrew.



## Chapter 1: Introduction

Throughout the two-decade-long operation of the ICTY, many have speculated about the possible legacies of the international criminal tribunal. When established in 1993, the tribunal was put on a high legal and moral pedestal by the Security Council who set its overly ambitious goal “to contribute to the restoration and maintenance of peace” (Clark 123). As the first of its kind, the ICTY was primarily expected to deter further crimes, to do justice, and help maintain peace in the region. However, through its operations, the Tribunal itself has discovered the limitations of its ‘transformative’ influence and narrowed down its principle objectives to: (1) ending impunity, (2) bringing justice to victims, (3) and establishing an objective timeline of the 1990s Yugoslav conflict (Clark 125).

Since its closing in 2017, these primary functions, as well as the Tribunal’s main objectives, have been closely evaluated to determine the final legacy of the historical criminal tribunal. Most notably, the international organization has itself established ‘ICTY Legacy Dialogues’ organizing conferences to evaluate its work. The legacy discussion solely revolves around the Tribunal’s jurisprudence, procedure and practice, where representatives from all three ICTY organs<sup>1</sup> as well as policy makers deliberate and assess the value of the Tribunal’s legal achievements (“ICTY Legacy Dialogues”). However, this discussion seldom goes beyond the judicial achievements of the international organization. Although a few panel discussions have addressed the value of its witnessing programs, the dialogue remains focused on its contributions to international law such as its contributions to procedural law and the creation of a Judicial Database, which grossly

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<sup>1</sup> The Chambers, the Registry and the Office of the Prosecutor.

expanded access to a vast amount of jurisprudence in international procedural and criminal law (“Developing International Law”).

It has been scholars who have attempted to assess the ICTY’s legacy beyond its judicial aspects. The academic literature that seeks to determine the legacy of the international criminal tribunal is mostly ‘single legacy’ driven, meaning scholars predominantly focus on a single legacy in an attempt to assess its particular value and limits. For example, scholars such as Meernik, King, Nettelfield and Orentlicher have predominately focused on the organization’s reconciliatory contributions to the region of former Yugoslavia. While Nettelfield and Orentlicher have suggested the ICTY has contributed to positive regional attitudes towards justice and accountability, Meernik and King state that there has been little empirical evidence to support this claim (Nettelfield 2010; Orentlicher 2018; Meernik and King 2001). Moreover, Nicola Henry and Judith Herman advance this conversation by focusing on the Tribunal’s possible contributions to regional transitional justice through witness-facilitated reconciliation (Henry 2008; Herman 2015). Although their findings are quite pessimistic, their work is crucial for understanding the normative limits of international judicial institutions.

Although the ICTY’s biggest normative achievement is its codification of and influence on the norm of wartime sexual violence, there has been only a handful of work that would attempt to evaluate it. Here, the thesis mostly relies on work from scholars like Crawford and Askin, who help frame the theoretical discussion on the codification of the norm. The possible explanation for the lack of literature on sexual violence in terms of international law might be that the topic has only recently found its ground in the international legal system. The discussion has previously found a place outside of the ‘courtroom’ seeking alternative measures for justice. Nonetheless, the ICTY’s official website provides an abundance of documents such as the Rules of Procedure and

evidence and data gathered through the years of operation that serve to establish links between the academic literature and the Tribunal itself.

However, arguably the most insightful literature, for this thesis, has been written by scholars who have focused on the normative capacity of the international judicial systems at large. While scholars such as Kim and Sikkink, Snyder and Vinjamuri do not make explicit references to the International Criminal Tribunal for former Yugoslavia, their work on international justice reveals intricate normative effects also evident in the Tribunal (Kim and Sikkink 2013; Snyder and Vinjamuri 2004). It is important to note that their works mostly discuss the International Criminal Court and its capacity to enact change. Since the ICC can currently be seen as the most ambitious attempt at reaching international justice, the thesis will also limit its scope to only discuss ICTY's normative influence on the ICC.

There is an immense amount of literature on the impacts of ICTY. However, for the purposes of this essay analysis of the tribunal's legacies will be narrowed down to its normative legacy. The goal of this thesis is not only to determine the normative legacy of the Tribunal but also to evaluate the normative capacity (as well as the possible limits) for international criminal tribunals in the future.

## **Chapter 2: What is Normative?**

In order to analyze the normative contributions of the International Criminal Tribunal for former Yugoslavia, it appears crucial to first define what the paper considers as ‘normative’ legacy. This thesis adopts a definition of a norm as “a standard of appropriate behavior for actors with a given identity” (Finnemore and Sikkink 891). Norms involve standards of ‘appropriate’ or ‘proper’ behavior, which are inherently intersubjective as they are constructed from judgments by society. One can recognize norm-breaking behavior as an action that garners disapproval or is stigmatized while norm-confirming behavior is met with praise (Finnemore and Sikkink 892). The Tribunal acts as an institution, which in norm language represents “a collection of practices and rules defining appropriate behavior for specific groups of actors in specific situations” (Finnemore and Sikkink 892).

When considering measuring normative or perhaps ideational impacts, it is important to note that these studies have often been avoided due to methodological reasons. This task becomes even harder when attempting to evaluate the normative impact of an institution such as the ICTY and its effective operation. Conclusions vary greatly based on how one defines effectiveness (and norms) and the methods used to evaluate it. Effectiveness is always evaluated relative to a benchmark or an ideal and thus the findings always involve some sort of comparison. Sikkink and Kim list three forms of comparison used in evaluating the effectiveness of transitional justice mechanisms: 1) comparison to an ideal, 2) counterfactual reasoning, and 3) empirical comparisons (Sikkink and Kim 279). It is crucial to mention this challenge in methodology since the academic literature encountered during this research diverged greatly depending on the evaluation method chosen. It should be stated that one method does not appear necessarily better than the other. On

one hand, the comparison of the ICTY to an ideal criminal court which would efficiently prosecute all war crimes will never be satisfied with the real-life impact of this Tribunal and will continuously strive for more progress and even better outcomes. On the other hand, counterfactual reasoning would state that the existence of the Tribunal only prolongs the hatred between the ethnic groups and funding should be placed elsewhere. The counterfactual reasoning thus encourages one to reach alternative solutions for improving the status quo.

Considering the definitions and methodological challenges surrounding analysis of ICTY's normative impacts, which of the speculated legacies would be considered as normative? This paper argues that there are three distinct normative legacies left behind by the Tribunal: 1) developing the norm of individual criminal accountability 2) facilitating reconciliation through witnessing and the establishment of a historical narrative, and 3) establishing and codifying a norm against wartime sexual violence. Through its two-decade operation, the Tribunal was able to not only define 'appropriate' behavior during wartimes but change the way in which international law is interpreted, create tools to combat denial and spur reconciliation, while also make pioneering advancements in the norm against wartime sexual violence. This is not to say there are no other normative impacts, however, for the thesis of this scope these are the areas where the ICTY's normative influence is most robust.

While this thesis is determining and evaluating the normative capacity of the Tribunal it should be noted that the legacies presented might at times overlap with what the ICTY would consider its judicial legacy. According to ICTY website, judicial legacies could be defined as those that set a legal precedent and assisted in the development of international and humanitarian law. For example, the ICTY frequently references its judicial legacy in establishing great jurisprudence in international wartime law, which has made great advancements in ending impunity of high-

ranking officials and heads of state (“Developing International Law”). However, this thesis also makes an argument that the utilization of the individual criminal accountability model is an inherently normative legacy since its deterrence effect also requires the court to establish consequences in a broader social environment in which the actors operate. With this understanding, certain legacies discussed in this thesis can, through a different lens, also be considered as judicial.

The following chapters will individually delve deeper in analyzing each of the specific normative legacies. As previously stated, more attention is given to the ICTY’s normative impact on the norm against wartime sexual violence as this has been the area that has had the greatest impact, while being the least researched.

### **Chapter 3: The Individual Criminal Responsibility Norm**

The first normative contribution of the ICTY is its role in the development of the individual criminal accountability norm. Instead of focusing on state legal accountability for human rights abuses, the ICTY investigated violations of human rights, convicted a particular individual of these violations and sentenced that individual to time in prison. The individual criminal accountability model avoided blaming entire nations for actions of a few, which tended to inhibit reconciliation. This was especially vital to the region of former Yugoslavia since the three ethnic groups involved in the conflict continued to coexist within Serbia, Croatia and Bosnia and Herzegovina. While the ICTY was one of the first international criminal courts that adopted the model this argument does not claim that the norm originated at the ICTY. Individual accountability has long been present as a dominant model in domestic legal systems. However, it was not until the Nuremberg trials that the individual responsibility model surfaced in the context of international law and one had to wait for the ICTY to clearly define the term and its scope (Greppi 541). Article 7 of the Statute of the International Criminal Court for former Yugoslavia gives a wide scope to the individual criminal responsibility by implicating all individuals that “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” (Updated Statute of the International Criminal Tribunal for Former Yugoslavia 6). Through the adoption and codification of the individual criminal accountability model the ICTY thus firmly established the model in an international legal context (Greppi 542).

The normative impacts of the individual criminal accountability model are most visible in its deterrence of potential law-breaking individuals and its impact on human rights improvements. The incorporation of the criminal model came in the wake of perceived need for

additional enforcement mechanisms in the realm of human rights. According to Sikkink, the utilization of this model and the subsequent development of the norm could be seen as the reaction of the international judicial community to the inadequate responses to human rights violations since the Nuremberg Trials (Sikkink 2009 123). The following two subsections will analyze whether the adoption of the individual criminal responsibility norm had the desired effect on the strength of the Tribunal to deter future human rights violations and improve human rights.

### **3.1 The Deterrence Effect**

The first normative effect of the individual criminal accountability model is its contribution to the Tribunal's ability to deter future international crimes<sup>2</sup>. Through the prosecution and sentencing of the individual perpetrators in the 1990s Yugoslav war, and also solely through its existence, the ICTY aimed to deter further lawbreaking in the region. When analyzing the deterrent influence of the ICTY it proves beneficial to use Hyeran Jo and Beth Simmons's concepts of 'prosecutorial' and 'social' deterrence. Since ICTY's deterrence impact is similar to the one attempted by the ICC its effectiveness can be analyzed through the wider international judicial system. According to Jo and Simmons, prosecutorial deterrence can be categorized as a "direct consequence of a legal punishment" (Jo and Simmons 444). It is recognized as effective when potential perpetrators reduce or avoid law-breaking for fear of being trailed or punished by a judicial institution (Jo and Simmons 444). Social deterrence, on the other hand, is a consequence of a broader social environment in which actors operate. It occurs when potential perpetrators calculate informal

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<sup>2</sup> Since the court is procedurally limited this only applies to the following international crimes: genocide, ethnic cleansing, war crimes and crimes against humanity.



consequences of lawbreaking (Jo and Simmons 444). It is argued that a judicial institution is at its most powerful when both, prosecutorial and social deterrence, work to reinforce one another (Jo and Simmons 445). Under these assumptions, the international criminal tribunal can be seen as an attempt to deter future violations of international law as it effectively threatens to impose extralegal costs on all individual law-breakers for their noncompliance with its legal authority.

Although the ICTY is frequently regarded as an effective deterrent to further war crimes some scholars see it as an overly moderate institution caught up in regional politics. Snyder and Vinjamuri offer the first critique to the ‘deterrence argument’ suggesting that international prosecution has a negative effect on dynamics of peacekeeping as it discourages pragmatic bargaining between conflicting parties and eliminates the use of amnesties (Snyder and Vinjamuri 6). Their work cites crimes committed in the region after the establishment of the ICTY<sup>3</sup> to suggest that trials in The Hague “did little to deter further violence” (Snyder and Vinjamuri 43). Similarly, Goldsmith and Krasner caution that international criminal tribunals could “aggravate bloody political conflicts and prolong the political instability in the affected regions (Goldsmith and Krasner 55). However, no systematic evidence has been published up to date that would support these critiques. Whether or not a conflict would end sooner without an intervention by a peacekeeping force or an international institution like the ICTY is mere speculation. In fact, Jo and Simmons have found that a government’s recognition of an international judicial body, or in their case ratification of the ICC, “tends to be correlated with a pause in civil war hostilities or reduction in human rights violations” (Jo and Simmons 445). Moreover, in that their work on the deterrence

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<sup>3</sup> Referring to the 1995 Srebrenica Massacre in Bosnia and the continuing war atrocities in Kosovo (1999).

effect of human right prosecution Kim and Sikkink assert that the deterrence theory does not suppose that judicial institutions will deter future crimes by sanctioned offenders who have already committed human right violations. Rather, it is concerned with how “sanctions affect future behavior of other (not sanctioned) actors” (Kim Sikkink 943). It is important to note there might be instances in which insistence on prosecution and judicial proceedings might inhibit the more practical resolution of a conflict. The dismissal of the critiques does not deny the possibility that carefully calibrated amnesties might in some cases be conducive to a peace deal. However, overall research has not shown that the peace versus judicial justice is anything more than a false dichotomy.

The second critique of the criminal model’s normative influence on crime deterrence questions whether the ICTY punishments present a sufficient risk for the norm-breaking offenders. The critique explicitly problematizes the strength of ICTY’s prosecutorial deterrence suggesting the institution’s punishments are too lenient. Again, Goldsmith and Krasner state that to think that ICTY saves lives is nothing more but “wishful thinking” (Goldsmith and Krasner 55). Cronin-Furman concludes that the lack of severe punishment such as the death penalty and the low probability of capture makes the institution’s deterrence effect weak (Cronin-Furman 442) <sup>4</sup>. Moreover, the scholar suggests that the geographical and temporal limitation of the ICTY is “not analogous to a criminal statute in a domestic jurisdiction that represents a real future risk of punishment” (Cronin-Furman 440). These critiques claim that the severity of punishment drives deterrence, implying international tribunals need to harshen their punishments in order to truly

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<sup>4</sup> It should be noted that all offenders listed on the ICTY perpetrator list have been reprimanded and effectively prosecuted. The scholar is here referring to the low probability of capture for future international criminal tribunals such as the ICC.

deter war crimes. However, “a growing consensus in the deterrence literature suggests that the swiftness and especially the likelihood of punishment may more effectively deter crime than the severity of the punishment” (Jo and Simmons 447). The normative contribution of the individual criminal responsibility norm to war crime deterrence does not necessarily stem from the severity of the punishments dealt but the certainty of investigations and the prosecution of even the highest-ranking officials. Moreover, the limited jurisdiction of the ICTY should not be seen as a misrepresentation of the local political realities but rather a catalyst offering regional human rights groups a set of norms to further hold governments accountable to the civil society.

### **3.2 The Effect on Human Rights Improvements**

The adoption of the individual criminal responsibility norm has also contributed to the Tribunal’s ability to improve human rights. Since its operation, the ICTY has ensured that trial proceedings and discussions vital to transitional justice do not stay in The Hague but that they are also reflected in the region. As of 2004, the ICTY began transferring some cases to national jurisdictions in the countries of former Yugoslavia, which stimulated crucial debates on the state of human rights in Bosnia and Herzegovina, Croatia, and Kosovo (“Development of Local Judiciaries”). With the help of the international community, the Tribunal strengthened regional judicial systems ensuring human rights violations that occurred during the 1990s conflict were being effectively addressed and prosecuted if found legitimate. The establishment of judicial organs such as the State Prosecutor’s Office of Bosnia and Herzegovina not only created a (local) legal capacity to prosecute war crimes but created a greater political will and dedication to human rights improvements (“Development of Local Judiciaries”). Since 1996 the region has witnessed landmark improvements in judicial equality, treatment of minorities and discrimination, however,

these should not solely be attributed to the operations of the Tribunal. Nonetheless, some correlations can be drawn between the ICTY-led development of local judicial systems and improvement of human rights in the Balkan peninsula.

More significantly, the ICTY's legacy of individual criminal responsibility can be understood in a much larger perspective where its operations carry a normative influence on the behavior of global political leaders. The accountability model not only prevents blaming entire nations for the criminal actions of a few, which often inhibits reconciliation but also acts as a deterrent for political leaders who were previously immune to prosecution. The International Criminal Tribunal for Former Yugoslavia was actually the first international criminal tribunal to raise charges against a sitting head of state ("Office of the Prosecutor"). Kathryn Sikkink and Hun Joon Kim argue that the model adopted by the ICTY provides an effective check on repressive political officials since it combines normative pressures with the threat of material punishment. The individual accountability model presents greater economic and political costs of formal sanctions (lost wages, inability to participate in elections while on trial, etc.) as well as informal social costs of the publicity surrounding the prosecution (loss of reputation or legitimacy) (Kim and Sikkink 281). Enforcement of international law, or more specifically the likelihood of sanctions, increases the cost of repression and thus makes high ranking officials reconsider the degree of repression to exert. The individual criminal responsibility model thus inadvertently contributes to less repression and human rights improvements.

While the deterrence effect of the individual criminal responsibility has been demonstrated it remains difficult to precisely determine the normative impact of the model on human rights improvements. Arguments vary greatly depending on how effectiveness is defined and which methods are used to measure it. As previously stated the study of human rights improvements

effectiveness is frequently evaluated relatively to another benchmark. In their study on the impact of human rights prosecution, Kim and Sikkink opted for the use of empirical comparisons where they contrasted transitional countries that have previously prosecuted human rights violations and compared it to other transitional countries that have not. Their study revealed that prosecutions of human rights violations have a statistically strong negative impact on levels of repression (Kim and Sikkink 280). The mean level of repression in countries that have experience with prosecutions is lower than those of countries that have not prosecuted for these violations. Additionally, the persistence and frequency of prosecutions further decrease repression. Kim and Sikkink have found that transitional countries that have experienced more prosecutions over time (and thus present a greater likelihood of punishment for past human rights violations) have better human rights practices than countries that have had fewer prosecutions (Kim and Sikkink 280). More precisely, their study shows that high-level prosecutions correlate with lower extrajudicial killing as well as a decreased use of torture (Kim Sikkink 283).

Improving and maintaining human rights practices requires that transitional countries make substantial structural changes in the nature of their domestic institutions. Thus, it is important to note that individual human rights prosecutions discussed in this section are only a small part of the many forces that can contribute to positive change. They only appear to be one of many avenues that can contribute to the institutional and political changes necessary to limit repression. The normative influence of the individual responsibility criminal model can thus be discussed in the wider global phenomenon of impacts on human rights improvements. However, there might be significant data challenges when attempting to precisely quantify the institution's effect on human rights in the region. Kim and Sikkink's research provides us with an overall trend correlating prosecutions and human rights improvements, which might be vulnerable to critiques of

generalization and the absence of a demonstrated causal link between the two processes. As it pertains to the case of the ICTY, some other independent variables to consider might include the increasing strength of local NGOs (ex. Mothers of Srebrenica<sup>5</sup>) and the expanding soft power of the European Union. Despite possible alternative claims, the question that remains is not if the ICTY normatively influenced human rights improvements but rather how much. The ICTY's adoption of the individual criminal accountability model and the likelihood of prosecutions was a valuable tool contributing to the lessening repression in the region.

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<sup>5</sup> The Mothers of Srebrenica is a Bosnian NGO lead by the female survivors of the Srebrenica genocide. Since its establishment in 1996, 'The Mothers' use nonviolent actions to determine the objective narrative of the genocide that took place in 1995 and bring those responsible to justice (Simic 221).

## **Chapter 4: Bearing Witness**

Another immense normative impact of the Tribunal is the creation of a space for survivors to tell their stories while simultaneously establishing a historical narrative of the events during the 1990s. Since the establishment of the ICTY more than 4650 witnesses have come before the Tribunal to voice their experience or share their expertise (“Witness Statistics”). Through the creation of a Victims and Witness Section, the ICTY could be regarded as providing a platform for victims to combat denial and facilitate reconciliation.

The transitional justice mechanisms unwinding at the ICTY could be seen as contributing to psychological healing and societal reconciliation in the aftermath of genocide, wartime sexual violence and armed conflict. Scholars researching trauma and memory have claimed the “disclosure of traumatic experiences is beneficial to the psychological recovery process for survivors” of the gravest human rights violations (Henry 2008, 114). In her book, Judith Herman states “remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims” (Herman 29). With a public disclosure witnesses told the global community the ‘truth’ about their experiences and established crucial facts of individual cases. By bearing witness survivors had the opportunity to “let it be known that it really happened” and regain control of the narrative (“PROSECUTOR Vs. KUNARAC ET.AL. Transcript (Witness 50)” 1247). Here the law served as a platform for storytelling and narrative. In this perspective, the witnessing experience at the Tribunal would through the retelling of traumatic experiences serve as the recovery of empowerment and dignity, while simultaneously establishing a historical narrative.

Through the two decades, the Tribunal has established beyond a reasonable doubt crucial facts related to crimes committed in the region of former Yugoslavia ("Archives"). The final assessment performed by the ICTY revealed that just the Offices of the Prosecutor left behind several million pages of evidence and the Tribunal accumulated several thousands of hours of videotaped proceedings (International Criminal Tribunal for Former Yugoslavia). The records, now kept at the Mechanisms for International Criminal Tribunal (MICT), collected through the investigations and persecutions offer insight into the motivations and causes that led to the tragic events of the 1990s. These archives have the potential to educate and inform in the interest of preventing the occurrence of future violations of international law ("Archives").

However, justice means different things to different people. While some might praise the ICTY as the beacon for human rights improvements in the Balkans, many family members of victims believe The Hague trials were too hollow. Witnesses often stated the trials could never restore their loved ones, nor could the punishment ever equal the pain and suffering left in the wake of the conflict. Due to the diversity in war experiences the international war crime prosecution has limited capacity to ensure every wartime rape victim is heard. Moreover, while the normative limitations of judicial justice might exacerbate the suffering of some, the legal process might assist others in making sense of their experiences (Henry 2008, 117). A study by the Kosova Rehabilitation Center for Torture Victims examined the experience of 160 people who have testified during the trial of Slobodan Milošević<sup>6</sup>. The study astoundingly stated only 3.7 percent of participants reported positive feelings related to witnessing. More than 62 percent felt

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<sup>6</sup> Kosova Rehabilitation Center for Torture Victims (KRCT), Study with Clients Treated at KRCT, from Witnesses and the Kosovo Population Regarding the Possibility of their Retraumatization during the Trial Process of Milošević in Hague (May 2002).



much more traumatized reporting “violent flashbacks of the traumatic event” (Henry 2008, 117). The ICTY trials revealed potential limitations of its restorative justice; namely the challenges of ‘translating’ deeply emotional experiences into objective facts, marginalization of survivor’s testimony through the fragmentation of testimony (storytelling controlled by the rules and procedures of the court) and power imbalances inherently present in cross-examinations (Henry 2008, 126). For this reason, some transitional justice scholars have started to advocate for informal, social-cultural processes that would replace formal mechanisms of justice such as the ICTY. Erin Baines claims that processes occurring outside of the purview of the state have more effective means to address social repair (Baines 413). It is important to emphasize that ICTY’s judicial proceedings never claimed to follow a victim-restoration model of justice and it might be therefore unfair to evaluate it based on these limitations. However, since the Tribunal’s objectives explicitly declare to ‘bring justice to victims’ the failure to deliver strong results in this area deserves criticism.

A vital aspect of this normative legacy that is frequently overlooked in criminal justice systems are the ‘statements of guilt’ put forth by the guilty parties<sup>7</sup>. The guilty pleas can be understood as a different aspect of witnessing since they too can provide additional information previously known to the communities or families of victims (“Statement of Guilt”). Moreover, as most pleas are also accompanied by statements of remorse these can serve as an additional normative tool of reconciliation forming a basis for a common future life of all parties involved in the conflict. Although the Tribunal cannot be understood as being a radically transformative-

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<sup>7</sup> Since 1996, 20 accused persons have pleaded guilty to the charges brought forth by the Prosecution (“Statements of Guilt”).

peacebuilding force it could definitely be viewed as one of the essential contributing factors to long-term reconciliation.

When discussing ICTY's normative impact on reconciliation effect it is crucial to not only look back to the region and attempt to evaluate the level of intercommunal violence but also establish the links between the decrease of conflict and the judicial institution. Meernik and Gutarro performed extensive research attempting to establish the link between the International Criminal Tribunal for Former Yugoslavia and reconciliation. By measuring Bosnians' attitudes towards different ethnic groups the scholars found that there is a positive relationship between individuals who exhibit greater levels of support for the ICTY and greater levels of acceptance towards individuals from other ethnic groups (Meernik and Guerrero 397). We must acknowledge that the links between judicial actions taken by the Tribunal and the attitudes of individuals (or politicians) are mostly indirect. One cannot be certain that the reconciliation occurred as a consequence of a specific judicial action rather than an action undertaken by other actors, or even that it would have not occurred in the absence of the Tribunal. In a separate study regarding the impact of judicial institutions on societal peace, Meernik found little evidence that the Tribunal has had a positive impact on the societal peace in the Bosnia and Herzegovina. With the help of the Kansas Event Data System<sup>8</sup> database Meernik measures the degree of conflict and cooperation among different ethnic groups in the country (Bosniaks, Bosnian Serbs, Bosnian Croats) (Meernik 276). In fact, the study suggested that the effect was the opposite of its initial intent in more

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<sup>8</sup> Kansas Event Data System (KEDS) is a machine coded dataset presenting new stories that involve a great number of event types that have occurred in the Balkan region. These events are distinguished amount a large number of actors that are the sources and targets of specific actions (Meernik 279).

instances than not. After several events of arrests and pronouncements of judgments, ethnic groups “responded with increased hostility toward one another” (Meernik 287). The results of this study must be viewed in conjunction with some significant data challenges. The KEDS database tends to be orientated toward the expressions of political and military positions, frequently overemphasizing the actions taken by politicians and leader of organizations rather than ordinary citizens. Thus, the study should be interpreted as a representation of the effects of the ICTY on political elites. While ICTY might be contributing to the reconciliation of the ordinary citizens this is not the case for the political leaders in the region.

Although the study performed by James Meernik reveals that the reconciliatory effect of the ICTY does not lie in its judicial proceedings, Lara Nettelfield points to the Tribunal’s normative contributions of narrative creation as well as attitudes towards justice and accountability. She unveils an argument that the Tribunal “played a role in the creation of new postwar political identities based on the rule of law and participation” (Nettelfield 15). Nettelfield’s work illustrates how the ICTY contributed to this creation by changing narratives about the past and inspiring positive attitudes about justice and accountability (Nettelfield 15). The judicial institution incorporated testimonies of thousands of survivors, thus not only giving them the opportunity to be part of transitional justice but also inspiring mobilization in the region. By creating a public forum where survivors were able to share their experience, combat denial of war atrocities and contribute to accountability, the Tribunal “facilitated the mobilization of civil society groups that lobbied for accountability, legislative changes, and financial redress” (Nettelfield 228). For example, the ‘The Mothers of Srebrenica’ continuously relied on ICTY in their struggle for greater cooperation of local governments and accountability from the UN. Through references to the evidence presented at the court proceedings, the Tribunal’s adoption of the individual

accountability model, and its goal to end impunity in the region, ‘The Mothers’ advocated for reconciliation between Muslim Bosniaks and Bosnian Serbs in Bosnia (Simic 225). The argument does not mean to insinuate the immense achievements of the NGO were only enabled by the International Criminal Tribunal. This would neglect the high respect and recognition the NGO was able to garner through its unceasing emotional appeal for reconciliation and peace not just in Bosnia but on a global scale. The analysis, however, suggests that the Tribunal acted as a mobilizing tool providing civil society in the region with resources to advance reconciliation.

This particular normative legacy of the ICTY continues to be a highly polarizing topic perhaps best illustrated in this case of witnessing. On one hand, the ICTY provided an internationally recognized platform for survivors, as well as perpetrators, to express their ‘truths’ and build up the inter-ethnic communication. While on the other hand, witnesses claimed they were often asked to synthesize their entire trauma into a short paragraph (Clark 128). They reportedly left the courtroom feeling dissatisfied with the legal process and returned home with feelings of loneliness and abandonment (Clark 129). It should be noted that the Tribunal was not mandated to provide care or continuing support to victims since this would arguably be a more appropriate task for local authorities and relevant NGOs (Clark 130). The issues arising from the unsatisfactory witnessing program perhaps only emphasizes that the legal process alone cannot sufficiently deliver ‘justice’ to the victims. Whether the ICTY actually contributes to meaningful reconciliation in the region of former Yugoslavia or if that is even its primary purpose continues to be highly debatable. Based on the reconciliatory studies in the region the judicial body made an indirect positive societal impact on attitudes of reconciliation, accountability and war crime denial on the citizens of Bosnia and Herzegovina. However, similar claims cannot be made on the political elites governing the region. In fact, as Meernik’s findings suggest arrests and prosecution

of war criminals in The Hague inspired hostile and aggressive attitudes between ethnically divided political parties.

## **Chapter 5: The Norm against Wartime Sexual Violence**

As the first court of its kind, the ICTY set many normative, and in this case judicial, precedents, leaving behind an immense normative legacy. One of Tribunal's greatest normative achievements is its development and codification of the norm against wartime sexual violence. The ICTY took groundbreaking steps to respond to the imperative of prosecuting sexual violence in the 1990s. The International Criminal Tribunal for Former Yugoslavia was the first court to bring explicit charges of wartime sexual violence and to define gender crimes such as rape and sexual enslavement under customary law ("Crimes of Sexual Violence"). Moreover, the Tribunal was also the first international criminal court to enter convictions for rape as a form of torture and for sexual enslavement as a crime against humanity ("Crimes of Sexual Violence"). It is here that the Tribunal's normative legacy is most apparent. Through the codification of the norm, the ICTY not only developed a large framework for the prosecution of the crime but strengthened the norm itself. Leading the conversation on wartime sexual violence within the sphere of international law and conflict resolution the Tribunal ultimately helped to break the silence and the culture of impunity surrounding these atrocities.

Before the ICTY officially defined wartime sexual violence as a crime against humanity, this type of violence was understood as a systemic, strategic and opportunistic form of violence that occurred in the build-up to, active fighting in and the aftermath of armed conflict (Crawford 339). Solely considering conflicts in the twentieth century (before the establishment of the ICTY) scholars estimate that the number of sexual violence victims and survivors might collectively amount anywhere between 420,000–1,754,000 (Crawford 360). Moreover, the number and scale of this type of atrocities experienced an upward trend in the twentieth century reaching its peak in

the post-World War II environment<sup>9</sup>. The seeming ubiquity of sexual violence in war during this time cemented its perception as an inevitable aspect of armed conflict and cast sexual violence as a taboo and a common by-product of the war (Askin 2003 291). This subsequently restrained effective political and legal discussion and action failing to evoke international condemnation, regardless of the knowledge of atrocities committed on a massive scale (Crawford 94).

Prior to the ICTY's norm development, there has been no record of wartime sexual violence being included in indictments under international law. During the post-war Nuremberg trials, the first modern international criminal tribunal, the court's charter did not include any forms of sexual violence nor did the court prosecute those crimes despite obtaining vast documentation of its occurrence during the war and occupation (Askin 2003 301). Similarly, the Nuremberg trials held with the support of Control Council Law No. 10 (CCL10) only made superficial references to gender violence. Meant to prosecute 'low-level' perpetrators such as medical doctors, the CCL10 handed down indictments for performing unethical experiments in concentration camps, among others forced abortion, sterilization and sexual mutilation (Askin 2003 303). While wartime sexual violence was referenced as part of crimes, they alone did not constitute a crime against humanity nor provide sufficient jurisprudence for the proceeding criminal tribunals.

However, in the early 1990s the silence that enveloped sexual violence gave way to determined calls for change. It was the UN Security Council that first brought the issue to the international stage in 1992, demanding the sexual violence being committed in the Balkans to be

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<sup>9</sup> It is estimated that anywhere between 100,000-1,000,000 people were victims of sexual violence in and around 1945, Berlin (Crawford 342).

addressed<sup>10</sup>. The systematic detention and rape of women in Bosnia and Herzegovina actually became one of the main causes for the establishment of the ICTY (UN Security Council). It is important to note that international criminal tribunals like the ones for Yugoslavia and Rwanda, although instrumental, were not the only norm developers. The norm against wartime sexual violence was a combination of an overall increased transnational advocacy on human rights, transnational mobilization around the issue of women's human rights, and collective horror at the atrocities occurring in Bosnia and Herzegovina and Rwanda (Brouwer 9). Nonetheless, it was the international criminal tribunals, the ICTY in particular, which were able to frame the atrocities as a pending security issue enabling its codification as a 'crime against humanity'.

It is important to emphasize that while the ICTY led the development and codification of the norm, the International Criminal Tribunal for Rwanda (ICTR) also helped to advance the norm on wartime sexual violence. It was the ICTR that in September of 1998 first issued a conviction of sexual violence as a crime of genocide. In the case of Jean-Paul Akayesu the Tribunal determined the accused bore responsibility for instances of sexual violence committed against women during the Rwanda genocide (*The Prosecutor v. Jean-Paul Akayesu*). The ICTY soon followed suit in November of 1998 to convict three war criminals of sexual violence as means of torture ("Celebici case"). While the ICTR stagnated in the development of international law concerning sexual violence, after its 1998 conviction the ICTY continued to build precedent to, among others, recognize sexual violence against men, expand the definition of rape and further

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<sup>10</sup> It is estimated that during the conflict in Bosnia and Herzegovina between 20,000 – 50,000 women were victims of sexual violence. Due to the lasting stigmatization of this kind of violence the number of male survivors has been difficult to quantify; estimated around 2,000 male survivors of sexual violence (Brouwer 9).



codify wartime sexual violence as a crime against humanity (Haffajee 208). During its operation, the ICTY indicted 161 individuals with charges of sexual violence and convicted 32 for their responsibility for crimes of sexual violence whereas the ICTR only successfully tried four (“In Numbers – Sexual Violence” ; “ICTR – Sexual Violence.”). Moreover, the subsequent convictions of sexual violence at the ICTR were possible only after the Rwanda Tribunal followed the trail of the ICTY prosecutors who have successfully prosecuted crimes of sexual violence by employing the joint criminal enterprise theory<sup>11</sup>. Haffajee suggests that the unequal progress in the development of the norm against sexual violence in the two Tribunals might be due to the difference in their establishing UN resolutions. As opposed to the ICTY the initial resolution establishing the ICTR did not make any references to the crimes of sexual violence committed during the Rwanda genocide. According to the Haffajee, the reasoning for this might be attributed to the inconsistent response by the UN to the sexual violence in the two areas, which she attributes to the initial focus on killing rather than rape, cultural differences<sup>12</sup> and possible other lobbying forces (Haffajee 205).

It was through the investigations, reporting and individual trials performed at the ICTY that wartime sexual violence was successfully framed as a weapon of war enabling its development into an internationally recognized norm. In late 1992, the pre-ICTY commission mandated with investigating allegations of wartime sexual violence revealed that the alleged atrocities had been carried out so systematically they strongly appeared as part of an official policy (Commission of Experts Established Pursuant to Security Council Resolution-780 55). Using the report as a

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<sup>11</sup> Joint criminal enterprise theory views rape in the context of a larger master motivating mass killings (Haffajee 202).

<sup>12</sup> During this time there existed great taboos about speaking of rape in an African context.

foundation, the Tribunal issued indictments and later performed trials, which all framed sexual violence as a deliberate part of a military policy<sup>13</sup> (55). Kerry Crawford's work on the political action in response to sexual violence contends that framing the issue as a security threat no longer made it possible to consider it "a regrettable by-product of war but a centerpiece of military strategy and an act that international community could condemn and regulate, like any other weapon prohibited by international norms and humanitarian law" (Crawford 153). By framing sexual violence as a weapon of war, the ICTY generated increased international attention to the occurrence of wartime sexual violence in Bosnia and Herzegovina and led state and organizational leaders to understand the severity of this type of atrocity. In this particular case, the "weapon of war" frame might have been limited to the Balkans region, however, it was incredibly clear, prominent, and easily understood, arguably containing all necessary attributes of successful frames. Several special hybrid tribunals established after the ICTY have followed and referenced the Tribunal's precedents to indict war criminals of wartime sexual violence; most notably the Special Court for Sierra Leone. Augustine Park states the hybrid court has relied heavily on the jurisprudence established by the ICTY, thus offering the first international opportunity for redress of sexual violence since the conclusion of the conflict in 2002 (A. Park 325). The argument here does not presume that the ICTY's work alone led to the internalization of the norm against sexual violence, however, the 'weapon of war' frame did enable stronger and more consistent international responses to wartime sexual violence. The ICTY's landmark work facilitated state and institution level discussions about sexual violence as a tactic or a weapon, which marked a

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<sup>13</sup> First landmark trial instrumental in the framing of wartime sexual violence was *Prosecution vs Duško Tadić*, which began on April 26, 1995 (Askin 2003 301).

“critical shift in the international community’s willingness and ability to respond” to these atrocities (Crawford 196).

While the normative legacy of the ICTY appears to be vast, one should make note that the legal process of norm codification was not completely isolated from political forces. Since the ICTY’s very existence was negotiated and shaped by the distribution of power and influence among states, the Tribunal’s legacy and its role as a norm diffuser might be conditional (Henry 2011, 130). Analyzing legal developments and practice that led to the recognition of sexual violence as a crime, Nicola Henry states that the proceedings of the Tribunal shape and preserve the “collective memory and the recognition of rape as a serious human rights violation” (Henry 2011, 131). This suggests that the crimes that courts recognize are the crimes that global society remembers and the experiences it validates. While at times this might be crucially beneficial to the diffusion and internalization of norms, it can also be highly problematic. Since the establishment of the ICTY and similar post-conflict justice mechanisms is by nature rooted in specific interpretations of wars, genocide, and the crimes, courts possess and perpetuate ‘selective memory’ (Crawford 396). The Tribunal’s normative legacy thus presents a specific interpretation of the events and even law, which might be contested by nations such as Serbia, which continues to discredit and undermine the court’s legitimacy.

Out of the three normative legacies emphasized in the thesis, the ICTY’s normative contribution to the development and codification of the norm against wartime sexual violence appears to be the strongest. Since the ICTY is one of the pioneers in advancing of the norm, this particular legacy serves as the best example for the analysis of ICTY’s ‘norm teaching’ capabilities. Could the international criminal tribunal be understood as a norm ‘teacher’?

## **Chapter 6: ICTY as Norm Teacher**

The analysis of the ‘weapon of war’ frame already provided a brief insight into the role of the ICTY as a norm developer, however, the Tribunal’s normative legacy goes well beyond framing. By framing the wartime sexual violence as a pending security threat and not solely a by-product of war the ICTY clearly outlined the norm and made its diffusion and internalization into similar institutions much easier. The International Criminal Tribunal for Former Yugoslavia can be regarded as a norm teacher where its standpoint and established practices have contributed to the spread of the sexual violence norm. A norm teacher is considered to be an international organization that spreads norms throughout the international system and teaches states, or as in this case other international organizations, what the appropriate behavior is in a given situation (S. Park 343). The work of norm teachers is most apparent in cases where states or other international organizations with diverging interests adopt similar policies even in an absence of state demand and need (S. Park 343). This chapter will solely focus on the ICTY normative spread to the International Criminal Court. This is not to say that the Tribunal’s influence as a norm teacher was limited to the ICC. However, as the most recent attempt at achieving international peace and justice, the ICC is not only the place where ICTY’s normative influence is the strongest but also the most crucial for the future development of the international criminal system.

As the first court of its kind, the International Criminal Tribunal for Former Yugoslavia was inadvertently assigned the role of a teacher, educating states and similar institutions on previously neglected aspects of post-conflict justice. Martha Finnemore’s analysis of UNESCO’s new science policy revealed that the reason why states adopted the policy was not demand driven from within states. Quite the opposite. It was UNESCO or rather the international organization

that took up the policy as a cause and promoted it among member states. This was not a demand-driven process but rather a reflection of a new norm elaborated within the international community (Finnemore 566). Similarly, the development of the norm against wartime sexual violence was spearheaded by the ICTY, which through adaptation of the international humanitarian law, extensive trials, and most importantly framing, promoted the norm acting as the diffuser to states and institutions like the ICC.

The ICTY has made concerted efforts to promote, educate and transfer its knowledge, thus sharing its legacy with scholars, legal practitioners, and the wider public. In 2010 the ICTY Outreach Programme established 'Legacy Conferences', a series of presentations and panel discussions which later convened annually to stimulate stakeholder discussions on the Tribunal's impact in the region as well as on the global scale ("Legacy Conferences"). Through this initiative, the Tribunal aimed to share and perhaps transfer knowledge gained through its two-decade-long operation. Conferences attempted to educate predominantly legal practitioners on the trailblazing achievements of the Tribunal and how the work done in The Hague could "feed responses to conflict-related atrocities and crimes at a national level" ("Legacy Conferences"). Each annual event had a panel discussion centering on the gender justice legacy, where the Tribunal's staff elaborated on the intricacies of norm development and identified the future challenges they foresaw in the internalization of the norm against wartime sexual violence in the region of former Yugoslavia. The ICTY thus aimed to not only share its legacy but bridge the geographical gap (between The Hague and the region of former Yugoslavia) and combine it with the insights gained at the national levels. It is reasonable to infer that the initiative was not meant to present a static assessment of the Tribunal's achievements but rather create a dynamic discourse and an open environment where its legacy could not only be continued but advanced. It is crucial to note that

many of these conferences took place in the region of former Yugoslavia (Sarajevo, Zagreb) where the diffusion of the norm would arguably be the most crucial.

However, the Tribunal's most explicit normative diffusion can be visible back in The Hague within the establishment of the International Criminal Court. In more ways than one, the ICTY inadvertently served as a trial for different rules and procedures later adopted in the ICC (Boas 268). The list of principles and practices of the ICTY that were adopted into the ICC goes well beyond the scope of this thesis; here, only sections pertaining to sexual violence will be analyzed. The Rules of Procedures and Evidence of the ICTY provided great insight and possibly guidance to the drafters of the ICC Rules on areas of procedure and evidence, from its own experience in pursuing cases of sexual violence (Boas 277). Most notably, the Tribunal influenced the ICC's sexual violence principles through its transfer of rules regarding the permissible evidence in cases of sexual assault. The ICTY's Rule 96 safeguarded the integrity of the victims of sexual violence by narrowing the permissible defenses for those crimes. Specifically, it stated that in cases of wartime sexual violence no corroboration shall be required; consent shall not be allowed as a defense if the victim was under duress; and prior sexual conduct of the victim shall not be admitted into evidence (Rules of Procedure and Evidence (ICTY) 56). The Rule was adopted into ICC's Rules of Procedure and Evidence (now Rule 79) acting as an instrument for the application of the Rome Statute (Rules of Procedure and Evidence 1). Moreover, the ICC also looked towards the ICTY Statute to enhance the participation of victims of sexual violence in court proceedings. The ICC adopted Article 22 of the ICTY Statute on the protective measures during court proceedings to safeguard victims' and witnesses' well-being, dignity and security (Updated Statute of the International Criminal Tribunal for Former Yugoslavia 12). Article 68 of the Rome

Statute provides an exception to the principle of public hearings when the witness has been a victim of sexual violence (Rome Statute of the International Criminal Court 45).

The influence illustrated here should be regarded as a tremendous sign of the Tribunal's normative power since the rules adopted by the ICC are largely absent in national systems and could thus not have been mandated by member states. The so-called rape shield law<sup>14</sup> had only been adopted by a handful of Western countries by the end of 1990s, however, none of those developed policies were as robust as the ones encountered at the ICTY. For example, although Canada was one of the first countries to adopt a soft version of the rape shield law in 1992 it was not until the 2017 amendment (Bill C -51) that the Criminal Code completely eradicated the admissibility of complainant's sexual history for other purposes of the trial (House of Commons). It is thus the ICTY that acted as a norm teacher through the influence of practices and its framing of wartime sexual violence as an inexcusable atrocity amounting to a crime against humanity.

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<sup>14</sup> Rape shield law is the law that limits the prosecution to introduce evidence of the victim's past sexual behavior in the cases of sexual violence proceedings.

## **Chapter 7: Limits of ICTY's Normative Power**

Firstly, it is important to highlight that one of the drawbacks of this normative analysis is the frequent ambiguity or rather the simultaneous influence of the ICTY and the International Criminal Tribunal for Rwanda on the ICC. The lack of direct links between the action of either of the tribunals and the shaping of the Rome Statute makes it difficult to discern, which was most instrumental in the creation of its rules and procedures. Therefore, it is difficult to speak to the contribution of the ICTY to the overall strength of the norm against wartime sexual violence. While the ICTY's normative legacy continues within the legal structure of the ICC, the full impact of the adopted principles is yet to be revealed. The delay in drastic advances in the prosecution of wartime sexual offenses can also be attributed to the uncharacteristically long duration of individual trials conducted before the ICC. As of 2018, the ICC convicted only one individual<sup>15</sup> of sexual violence as a crime against humanity with additional eleven individuals indicted for the same violation ("ICC Defendants"). Although the ICTY's specific contribution to the strength of the norm within the sphere of the international judicial system might be difficult to assess with precision, its efforts towards the creation and codification of rules and procedures governing the prosecution of these atrocities cannot be denied.

The ability of the ICTY to effectively diffuse the norm against wartime sexual violence might also have been aided by its perceived legitimacy and status as a Western judicial institution. Assessing international norm dynamics, Martha Finnemore and Kathryn Sikkink claim some

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<sup>15</sup> In March 2016, Jean-Pierre Bemba Gombo (Central African Republic) was the first individual to be convicted of crimes of sexual violence in front of the International Criminal Court (Bemba Case).



norms might have a better disposition for diffusion and internalization than others. This could be attributed to either the quality of the norm or to the status and recognition of the actors promoting the norm. Norms supported by countries regarded as successful are more likely to spread and become adopted in the international system (Finnemore and Sikkink 906). As a UN judicial institution, the International Criminal Tribunal for Former Yugoslavia is a Western institution operating in a largely liberal setting. Since its establishment in 1993, the Tribunal has enjoyed great support from all Western powers as well as the majority of non-Western partners<sup>16</sup> (Clark 129). The cultural, economic and even military prominence of its supporters thus lends its credibility to the operation of the institution. Even the symbolic location of the Tribunal in The Hague, located only a kilometer away from the infamous Peace Palace, offers normative legitimacy to the court. Following Finnemore and Sikkink's argument that Western norms are more likely to diffuse internationally, the ICTY thus already had a significant predisposition to the role as a norm teacher.

On the other hand, it is important to realize that the Western liberal setting of the ICTY could also be the basis of backlash in the region of former Yugoslavia; predominately Serbia. Since the establishment of the Tribunal in 1993 Serbia has been resistant to recognize the court as legitimate stating its inherent bias against the Serb nation. However, in the case of Serbia the resistance towards the ICTY is more likely to stem from historic feelings of victimhood persisting through the Serbian society (Saxon 566). Although through the history of the Balkan region every ethnic group has been dominated and repressed at some point in time, Serbia has turned this into

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<sup>16</sup> The establishment of the ICTY was supported by the Russian Federation as well as the United States.

“national cult of victimhood” (Saxon 566). This element of Serbian nationalism has been and continues to be manipulated by political elites, who shape nationalist sentiments into opposition to the Tribunal. The act of removing criminal proceedings from the region and facing economic sanctions for non-compliance<sup>17</sup> has only exacerbated the existing resistance to non-regional actors. The argument could thus be made that the backlash faced by the ICTY does not necessarily originate from the disdain for the Tribunal and would be present even if a judicial institution would have been established in the region of former Yugoslavia.

One crucial limitation to Finnemore’s theory of norm diffusion by international organizations is the assumption that the formal institutionalization of a norm is going to immediately lead to its internalization. Betts and Orchard warn of what they call an ‘institutionalization-implementation gap’ stating while some norms might be reflected in international treaties they might not make a significant difference for the people ‘on the ground’ (Betts and Orchard 2). It would be false to equate the ratification of a treaty with the compliance of this norm in a given society. Just because the ICTY has codified the norm against the wartime sexual violence one should not make a premature judgment that the entire international community will be compliant with the norm. According to Betts and Orchard, for the international community to become compliant with the norm, the norm itself has to be translated into “formal legal and policy mechanisms within a state or organization,” thus completing the process of ‘implementation’ (5). This is a huge consideration for theory on norm dynamics, since what the international community truly cares about is not who ratifies the treaty but rather how international

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<sup>17</sup> In 2004, when Serbia passed legislation to financially assist the ICTY detainees the US immediately halted the financial aid package citing reasons of non-compliance with the Tribunal (Saxon 567).

organizations and states that have signed on to the treaty understand, interpret and practice those international norms.

In this sense, Finnemore's UNESCO analysis underplays the agency of norm recipients. Thus, the normative legacy of the ICTY should not be understood as a clear, direct and irreversible change in the development of the norm against wartime sexual violence. The process of norm diffusion encompasses much more negotiation between the norm maker and norm recipient, which perhaps is not as evident within the ICC but might be more visible in the region of former Yugoslavia. Researching norm diffusion between transnational Asian institutions and the member states, Amitav Acharya suggests that central to norm dynamics is "the contestation between emerging transnational norms and preexisting regional normative and social orders" (Acharya 241). Thus, although the ICTY has made a significant effort in sharing its normative innovations with regional actors through conferences, these efforts might not bring drastic changes to the region. For example, the regional judiciaries have yet to implement significant safeguarding policies when indicting or prosecuting cases of sexual violence. The ICTY's contribution to the diffusion of the sexual violence norm must thus be enhanced with the understanding of intricate norm negotiation, so-called 'localization'. Acharya discusses localization as a "complex process and outcome by which norm-takers build congruence between transnational norms and local beliefs and practices" (Acharya 245). Local agents considered norm recipients, can be seen negotiating and reconstructing a norm to ensure it fits with prior local norms. Sally Engle Merry's work on mapping pathways between international human rights ideas and local communities suggest that transnational ideas get vernacularized or adapted to local institutions or meanings when they reach smaller societies (Merry 39). This would imply that the success of norm diffusion strategies and processes depends on the extent to which they provide opportunities for localization.

Jeffrey Checkel takes it one step further to suggest that norm diffusion is entirely predicated on the existence of domestic structures. Checkel goes beyond the arguments of localization to state that existing domestic structures not only determine the diffusion mechanisms<sup>18</sup> but also the initial normative impact in the domestic setting (Checkel 487). For this reason, the ICTY's contribution to norm diffusion or rather its normative legacy might be much more complex in former Yugoslavia and conditional on the Tribunal's ability (or the ability of its successors i.e. the MICT and the ICC) to frame the norm against wartime sexual violence so it aligns with prior beliefs in the Balkan region.

Norm localization in the Balkans might reveal the limitations of ICTY's ability to spread norms in regions that are most crucial to its goal of transitional justice. Researching the cultures of democracy in Serbia, Dawson suggests that the elite-led push to adopt liberal democratic institutional norms in Serbia has resulted in democratic shallowness (Dawson 4). Wishing to reach the goal of EU or NATO membership Serbia's compliance with international norms often became purely strategic choice (Dawson 87). Inglehart and Welzel state that unless the democracy is also accompanied by deeper ideas of "tolerance, trust, and participation," the state will not function as an effective democracy but continue to violate the 'adopted' norms (Inglehart and Welzel 61). As evident from the limited recognition of the ICTY<sup>19</sup> in the country, Serbian domestic actors frequently understand, interpret and use international norms for their own political purposes. A country might display signs of norm compliance; however, this might be merely superficial, acting

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<sup>18</sup> Checkel defines diffusion mechanisms as structures through which states obey the restrictions embodied in regime norms (Checkel 475).

<sup>19</sup> ICTY's recognition in the country is highly conditional on the electoral cycle and the political leadership currently in power. In the wake of elections, many political parties denounce the legitimacy of the ICTY.

as a facade to ward off international pressure while in reality, it continues domestic normative violations (Inglehart and Welzel 62). The process of norm diffusion in this region is thus intrinsically linked to domestic politics where norms are strategically appropriated and employed by the domestic actors (elites) for their personal political motives. In this respect, norms put forth by the Tribunal become warped into domestic political struggle utilized for narrow political gains. Through time they can potentially become completely detached from their original normative value and produce disconnected, if not contradictory, strategies by local actors (Subotic 31). Subotic goes as far as to claim the process of domestic use, or rather misuse, of international norms is not “an aberration by some states but an inevitable function of norm diffusion” (29).

It is important to point out that domestic norm compliance depends on the domestic demand for change. Thus, if there exists a strong local demand for change, states are more likely to comply with international norms, as domestic constituencies are able to pressure them into a change of their behavior (Subotic 31). However, in the case of Serbia there seems to be a strong local political context of normative resistance despite continuous international pressure. The Serbian state continues to only superficially comply with the Tribunal. The only way scholars have attempted to measure this compliance is through the process of surrender and extradition of indicted war criminals to The Hague. During each surrender of the suspect, the Serbian people were told the individual was being surrendered to fulfill “the requirement of the international community or in an act of patriotic duty”; however, there was little discussion on the substance of the indictments (Subotic 52). Cooperation and compliance with the ICTY and the adoption of its norms was consistently linked to prospective EU membership and Serbia’s future ability to negotiate the statehood of Kosovo. Thus, the pressure of the ICTY and its work towards normative change in the region was not translated into changes in Serbia’s understanding of its own past or

in an attempt to address past abuses in a systematic way. This can be seen in the lack of substantial policies and reforms that would attempt to address war crimes domestically. For example, Serbia failed to reform its judiciary or police to allow domestic investigations and the prosecution of war crimes. Moreover, Serbian lawmakers continue to refuse amendments to the state's law that would allow 'command responsibility', which as evident in the case of the ICTY is crucial for the redress of human rights violations (Subotic 52). The coercive approach to norm diffusion in Serbia allowed the country to go through the motions of appearing to comply with the demands set by the judicial institution "while in fact rejecting the profound social transformation that the international norms require" (Subotic 53).

Similar challenges can be seen in the diffusion of the norm against wartime sexual violence in Serbia. Coercive pressures emanating from the Tribunal and the EU produced a political bargaining dynamic insinuating that if Serbia complied with the requirements, the state would receive certain benefits. Under conditions of international coercion domestic actors have to mitigate the high international costs in cases of non-compliance and domestic audiences, which frequently perceive international demands as unjust. Since the ICTY mostly relied on the EU's coercive methods to spread its norms the Serbian political elites only complied with some international requirements (such as the establishment of the Serbian War Crimes Chamber<sup>20</sup>) and ignored others, while repackaging compliance as a necessary step that would yield great benefits for the Serbian nation. Subotic's research finds that domestic politics will not change through coercive pressure and the previously held social norms will remain intact (Subotic 33). Serbia's

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<sup>20</sup> The ICTY played a big role in helping Serbia established the Serbian War Crimes Chamber devoting special attention to capacity building initiatives (Orentlicher).

establishment of the Serbian War Crimes Chamber presented an easy institutional way for the country to acquire international benefits while simultaneously producing policy outcomes far removed from the normative ideals established by the ICTY. A recent report from Serbia's War Crime Prosecutor's Office found that over the past two years it has only focused on small-scale crimes committed by low-ranking officials, contrary to what the Serbian authorities promised the EU<sup>21</sup> (Stojanović). Ten out of the fourteen indictments did not even originate in Belgrade but were issued to Serbia from Bosnian state prosecutors<sup>22</sup>. None of the indictments have included crimes of sexual violence (Stojanović). The report makes remarks that the superficial normative change has seemingly been traded for an international reward (Stojanović). The research would lead one to conclude that while the ICTY provided a great normative contribution in the international community, this was not reflected in the region, most notably in Serbia. When discussing norm diffusion and the limitations of international judicial institutions we might also have to consider the level of receptiveness or rather the desire and willingness of the norm targets to accept the change.

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<sup>21</sup> The prosecution of Serbian high-ranking officials was one of the judiciary obligations under the action plan for EU negotiations (Stojanović).

<sup>22</sup> It should be noted that since its establishment in 2003 the Serbian War Crimes Chamber indicted approximately 170 suspects. However, until now only about 35 have reached the final verdict (Orentlicher).

## **Chapter 8: Conclusion**

It cannot be denied that the ICTY's two-decade-long operation has transformed the way in which we view the international criminal system. Through indictments, trials, prosecutions, and sentencing of war criminals, the Tribunal exerted its influence not only on the development of international law but had an arguably even bigger normative impact on areas of the war crime deterrence, human rights and transitional justice. Although the Tribunal's legacy does not amount to the revolutionary ideas set out in its founding Resolution, the ICTY's normative legacies go well beyond its contributions to the international judicial system.

The Tribunal's normative contributions are most evident in the development of the individual criminal responsibility norm and its effects, facilitation of reconciliation through witnessing and narrative creation and the development of the norm against wartime sexual violence. Firstly, the analysis illustrated that ICTY's adoption of the individual criminal responsibility model had a deterrent effect on the behavior of potential law-breaking individuals. Through its operation, the Tribunal ensured that even the highest-ranking officials met the hand of justice thus setting the precedent that no war crime will be left unpunished. Moreover, individual accountability combined with the increased likelihood of prosecution for noncompliance with international law also had an effect on human rights improvements. The Tribunal's mandate to end impunity had normative implications for the behavior of global political leaders. As Sikkink and Kim's research shows, the individual accountability model adopted in The Hague provides a check on repressive political leaders since it combines normative pressures with the threat of material punishment. Moreover, the judicial body arguably contributed to transitional justice through the



establishment of an objective timeline of the conflict, mobilization of domestic civil society as well as through its extensive efforts to incorporate victims' testimonies in the trials themselves.

It is important to mention that areas of international law, human rights and transitional justice are highly contested and thus continuously evolving. Although scholars like Sikkink, Kim, Jo and Simmons illustrate the groundbreaking potential of international organizations like the ICTY, others like Vinjamuri, Goldsmith and Krasner doubt that any transformative change can occur in international judicial institutions. This thesis attempted to show how despite the looming criticisms the ICTY should still be regarded as a success story. However, this should not undermine the value of the critiques, since only through constant re-evaluation and analysis of the weaknesses present in the international judicial system can we ensure a better quality of future tribunals.

A closer analysis of the development of the norm against wartime sexual violence provides a clearer insight into ICTY's normative capabilities. The International Criminal Tribunal for Former Yugoslavia was instrumental in framing the sexual violence committed during the 1990s Yugoslav conflict, presenting it not as an inevitable by-product of the conflict but a deliberate policy or rather a weapon of war. This frame, along with the increased international attention generated by the conflict in Bosnia, made the norm against sexual violence much clearer, prominent and thus more likely to be adopted and internalized by states. The Tribunal's work contributed to the willingness and the ability of the international community to respond to crimes of sexual violence.

As a Western liberal institution, the Tribunal appears to have had a prior disposition to the role as a norm teacher. The research revealed that the ICTY contributed to the diffusion of the norm against sexual violence through significant outreach policies in the region of former Yugoslavia. The Tribunal was found to have established a conference network, which aimed to

not only present the normative knowledge created in The Hague but engage in a meaningful discussion on how this knowledge can be incorporated and advanced on the national level. However, the research on judicial advancement and prosecutions in the region revealed the norm has not been fully adopted in Serbia. One is yet to see significant attempts to redress the sexual war crimes committed during the 1990s. The research brought forth some crucial limitations to the success of norm diffusion, suggesting that this process largely depends on the successful localization or framing of the norm and the willingness by the norm recipient to enact a change. The ICTY's lasting normative legacy is thus mainly centered on the international level of similar international judicial institutions rather than the levels of prosecutorial changes in the region of former Yugoslavia. Most notably, its historic codification of wartime sexual violence has been replicated in the founding procedural documents of the ICC, where it will continue to impact international humanitarian law.

Since the analysis discovered that the power of the norm against wartime sexual violence is very difficult to measure, the paper cannot make definitive statements concerning ICTY's isolated contribution to the strength of the norm. However, it can be stated that the influence of the Tribunal expanded the norm's scope and the legal codification of the norm ensured its continuation. It might be up to ICTY's successors to utilize and build on the Tribunal's normative legacies. Perhaps we should not view the International Criminal Tribunal for Former Yugoslavia as a revolutionary institution but the first stepping stone on the long path towards effective post-conflict justice.

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