Chapter 9 The International Criminal Tribunal for the former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC

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1. Introduction

As the first international tribunal of its kind,¹ the International Criminal Tribunal for the former Yugoslavia (ICTY) has been a groundbreaking institution in many respects. While the Tribunal's work has principally focused on carrying out investigations, issuing indictments, and conducting trials and appeals, there has been, somewhat understandably, less attention given to its impact on the former Yugoslavia itself and particularly on the ICTY as an instrument of transitional justice. Nonetheless, in creating the ICTY, the UN Security Council clearly linked the Tribunal's judicial activity to establishing the basis for peace and reconciliation in that region.² Indeed, the Security Council specifically expressed its conviction that the establishment of the ICTY would not only bring about justice but would also contribute to the restoration and maintenance of peace³ in the region. Thus, the question of how the ICTY has contributed as an institution to these goals is important in terms of evaluating

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1 While the Nuremburg Military Tribunal (NMT) is clearly a predecessor to the ICTY and other international courts and tribunals, such as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), the ICTY was the first such tribunal established by the United Nations and thus in a number of important respects is the first of its kind.


3 Ibid., at para. 9.

its overall performance as well as learning lessons for future international courts and tribunals.

The ICTY’s mandate gives it ‘the power to prosecute persons’ who committed war crimes, crimes against humanity, and genocide in the territory of the former Yugoslavia since 1991. While the ICTY’s jurisdiction is concurrent with national jurisdictions, it is nonetheless clear that the Tribunal, which was given primacy over national authorities, was intended as the principal purveyor of justice over these crimes. Over time, that mandate has been altered to apply to the prosecution of only the most senior leaders accused of committing the most serious crimes during the relevant time period in the region.

This shift in responsibility foreshadowed the approach taken by the UN in establishing other international and hybrid courts and tribunals, such as the Special Court for Sierra Leone (SCSL), which explicitly limits the role of that court to the prosecution of those individuals ‘bearing the greatest responsibility’ for the relevant crimes. Moreover, the International Criminal Court (ICC) Statute adopted a system of ‘complementarity,’ which essentially limits that court to prosecuting those persons which national authorities are ‘unwilling or unable’ to bring to justice, thus leaving the ICC to focus on the most serious perpetrators and crimes.

As the ICTY’s responsibility has shifted from a broad approach of prosecuting all individuals accused of committing the relevant crimes to a more narrow focus, i.e., concentrating only on those individuals who are most responsible for the most serious crimes, a division of labour between the ICTY and national prosecutors and courts has emerged. This process has been driven from the ICTY side, in large part, by its Completion Strategy, which provides target dates for the completion of its investigations, trials, and appeals. As a part of that Completion Strategy, the ICTY proposed transferring certain individuals, denominated as ‘lower and mid-level accused,’ whom it indicted to courts in the region, subject to the oversight of the ICTY Chambers itself and to monitoring by the ICTY Prosecutor. The transfer of these cases, which primarily have gone to the State Court in Bosnia-Herzegovina, a ‘hybrid’ court established under Bosnian law with the assistance of international organisa-

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5 Ibid., Article 9(2).
9 Ibid., Article 17.
11 Ibid., para. 7.