

## **The Legacy of the ICTY as Seen Through Some of its Actors and Observers**

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## Abstract

This article proposes an exploration of the ‘legacy’ of the ICTY through the experience of some of its actors and observers. It is based on material provided by a dozen interviews and written in the spirit of understanding the tribunal's legacy as a collection of complex individual narratives of what the tribunal stands for, what it did well, and what it might have done better. The legacy of the ICTY as an international criminal tribunal on the one hand, and as a device for transitional justice on the other hand are considered. Although a tension is found to exist between a more ‘forensic’ and a more ‘transitional’ view of its role which is particularly manifest in determining the tribunal's constituencies and policies, the two are also linked. There is broad consensus about the tribunal's importance, but on the eve of its closing, also a sense of the limits of what international criminal justice can aspire to achieve.

## A. Introduction

This article is an attempt to think about the legacy of the ICTY by letting some of its actors and close observers speak. It is based on 10 interviews conducted in the fall of 2011. An effort was made to strike a balance between persons who have worked for or at the tribunal in various capacities, and persons in the former-Yugoslavia who either had some direct involvement with the tribunal or worked on transitional justice issues. The selection is meant to be loosely representative, not in a controllably scientific way. About half the interviewees were ‘internationals’ working in the Hague, whilst the other half were more closely related to the former-Yugoslavia. Choice of interviewees also inevitably reflected availability and willingness to speak. The interviews were conducted in the spirit of a conversation, gently prodding interviewees when the interviewer thought that more could be said, but also largely driven by the interviewees’ own interests and agendas.

The interview format was chosen as part of an effort to engage in more dialogical scholarship, and push the formal boundaries of what can be published in an international law journal (although this is obviously not the first interview based article to be published in this way, nor is the format one close to the canon of international legal scholarship). In that respect, I am grateful to the dynamic editorial staff of the Goettingen Journal of International Law for being so open and enthusiastic about my early

suggestion to proceed in this direction. But the interview format also seemed particularly suited to an article on a tribunal's *legacy*. Legacy is not a legal term of art or a specifically legal term, although it is one that seems very important for the particular circumstances of an institution such as the ICTY that will have been relatively short-lived in time (two decades), and which is now contemplating its quasi-imminent shutting down. A legacy is not something cast in stone for all times; rather it is an evolving intellectual relationship that we construct with an object receding in the past (to the point of it being strange to speak of legacy whilst the tribunal is still in activity), and that we are condemned to reinterpret on the basis of changing circumstances and assumptions. It thus seemed important to foreground the extent to which the tribunal's legacy is already an intense locus of discussions, even struggles, about its definitive meaning for the history of international law, our understanding of criminal justice in post-conflict situations, or the fate of the former-Yugoslavia.

In many ways, it quickly appeared from my interviews that the tribunal means very different things for different people. In the course of discussions, I realized there was a very significant convergence on some of the fundamentals of what the ICTY will be remembered for; yet one's perception of the its legacy will inevitably be shaped by the nature of the work one did for it, how one was personally affected by it, or what one hoped it would achieve in the first place. There were definitely differences in sensitivity, which often came down to what the interviewee chose to emphasize at the expense of other things. The idea of legacy is also captured quite well by a series of interviews because so much of the legacy of a tribunal is also about memories that one has of it, and in that respect there is no replacing actors speaking in their own voice. Opening to several voices also makes for an approach to the legacy that is more open and less suspect of wanting to foist a particular message on the reader or of reducing what is inevitably a complex narrative to something.

To the extent that I am interested in the subjectivity of perceptions of the ICTY's legacy, I should probably also disclose my own relationship to the topic. I worked for UNPROFOR from July to December 1995 in the French Battalion in Sarajevo. Soon after that, as a student of international law, the ICTY seemed a natural counterpoint to the frustrations of peacekeeping, and I have remained a curious but distant observer ever since, frequently talking to tribunal participants including, with the passage of the years, some of my former students, and once catching a glimpse of Slobodan Milosevic in the courtroom. My relative distance from the tribunal, the fact that I am not privy to the many anecdotes that insiders

invariably seem to share, made me particularly keen on getting the story straight from some of its actors. My attitude in researching this article was overwhelmingly one of curiosity, of finding out more seriously what to make of these decades of activity, dozens of cases, and considerable efforts by so many involved.

An institution's legacy may on the long term turn out to be as if not more important than its actual activity, because that legacy stands for what can be accomplished. This is also what makes it interesting, the fact that the meaning of that legacy will inevitably become something controversial in at least some respects. I begin with a short 'atmospheric prologue' (I), before considering the ICTY both as an international criminal tribunal (II) and as a device for transitional justice in the former-Yugoslavia (III).

## B. Atmospheric Prologue

Soon enough, the legacy of the ICTY will be what it is remembered for. In that respect the tribunal will be remembered as an intellectual, legal or political object of sorts. But its legacy will also lie in a range of more subtle and intimate recollections of a certain atmosphere, of a certain moment in history. One question that I asked all interviewees, therefore, and that can serve as a sort of prologue to this article is what they think their most vivid memory of the tribunal will be. When all is said and done, a certain 'image' of international criminal tribunals may be worth many long discourses (I am reminded for example of the famous black and white, cross-section picture of the defendants at Nuremberg that became emblematic of the trial – Hess with his sunglasses, the Military Police soldier with a white helmet standing guard), and has since been used time and time again to represent it. In many ways, each person's most vivid recollection reflected the particular gaze of their function, but also pointed more concealed ways in which they have been "touched" by the tribunal's activity.

Payam Akhavan, formerly of the ICTY Office of the Prosecutor and who was involved in the prehistory of the tribunal (notably a mission in a September-October 1992 CSCE mission to Yugoslavia under Hans Correl which, for the first time, recommended the creation of an international criminal tribunal) reminisced about the ICTY's very improbable beginnings with a sense of awe at how far it had moved on since:

"My most vivid moment was April 3rd of 1994 when I entered the Aegon building (note: Aegon is a Dutch insurance company

which previously occupied the building which the tribunal has occupied since its beginnings), and walked into a physical structure that was only the hypothetical home for a tribunal that existed on paper only, at a time when the leading war criminals were still in positions of power, were seemingly invincible, untouchable, the international community was negotiating with them, ethnic cleansing was ongoing, and the prospect that this tribunal would be anything more than a paper tiger was far from a foregone conclusion. [...] I had never imagined that our proposal would be taken seriously and that the tribunal would be created. Having been in Bosnia, having witnessed the complete impotence of UNPROFR in the face of ongoing atrocities, and after imagining this institution in purely conceptual term, here was a physical structure. And there were 5 of us in a huge wing of that building; I came for only three months. Even Cassese kept saying ‘we are going to find out. Maybe this is going to be a fiasco.’ But there were others such as Graham Blewitt whose *naïveté* was refreshing, and who said that ‘of course this tribunal is going to work because the UN established it, they must intend to make it work.’”

Michael Wladimiroff, the first counsel to appear before the ICTY, pointed to a remarkable atmosphere of cooperation, borne from circumstances:

“When I started in April 1995, I had no clue whatsoever about international humanitarian law. I had always focused on white-collar crime. But I remember very well that, learning as I went, it was a relief to see that the other judges (with the exception of Cassese) and prosecutors were facing the same difficulties. We were all learning on the job, sailing uncharted water and that created a sort of bond between participants. This was something which I had not faced in any other jurisdiction before. When we were faced with an issue we first discussed it within the defense team, but often then just called the prosecution and discussed with them how they would approach it, until we came to an agreement. And if not we would direct ourselves either together or *ex parte* to the judges and ask how they felt. It was very odd, people coming from different areas, not knowing the law of the

place where they worked but eager to resolve all the issues that arose.”

Judge Pocar was the President of the tribunal from 2005 to 2008. He spoke of an experience of empathy with victims:

“I will never forget the first case in which I was sitting as a trial Judge, which is a quite different experience as compared with appeals because one hears the direct testimony of the witnesses. And I will never forget the persons that were brought as witnesses who at the same time were victims. It happened 12 years ago but I don't need photos to remember some of the witnesses and their demeanor, the way they came with their thoughts before the tribunal, is something one will have difficulty in forgetting. It's an extremely interesting experience from the legal point of view as well as from the human point of view [...] It is also quite a difficult exercise to be involved, and at the same time to keep one's distance in order to make a good judgment, without being influenced emotionally by the facts that are brought to one's attention by the victims. Live testimony is really quite different from reading about atrocities in a book.”

For others, it was perhaps the surprising power of international criminal justice and the way the trial could create conditions of real leverage against the powers that be. Peter Robinson, a defense attorney who has assisted the defenses of both Radovan Karadzic, the former President of the Bosnian Serb Republic and Dragoljub Ojdanic, the former Chief of Staff of the Yugoslav Army, remembers being startled by one hearing:

“I would have to say that my most vivid memory was probably a hearing that we had with the 11 States of NATO in which I was representing general Ojdanic and we were seeking wiretap intercepts. We asked for them from NATO and all their member States that were involved in the course of the war. We had a very crowded hearing in front of the trial chamber where all the States and their representatives came and we all argued about whether we were entitled to these wiretaps. [...] What was striking was the fact that the ICTY has a power to summon all of these States and NATO to explain why they wouldn't give this material to an accused person at the tribunal. It was a test of the

fair trial rights of an accused (regardless of the fact that the trial decision in our favor was subsequently overturned by the appeal chamber).”

For yet others, the ICTY was the occasion for strange cultural-judicial experiences as worlds collided. Zoran Pajic, for example, recalls how he was a little startled by his counter-interrogation in court as an expert witness:

“[...] the most striking experience to me was that the defense lawyer of Mr. Blaskic who was an eminent, distinguished, Croat advocate in fact had a counsel from California, an American whose primary task was to discredit the expert witness. And I was taken aback by that, it took me five to ten minutes to realize what was going on. And then I was telling myself ‘okay, calm down, calm down there is nothing substantial here, he is just producing a show.’ That was something that I really didn't expect.”

These various snapshots can begin to capture the diversity of perspectives that make up the ICTY as a place where legal and political logics collide, where viewpoint informs perception, and where power, violence and emotions intersect. But what of the ICTY as a legal object?

## C. The ICTY as International Criminal Tribunal

The ICTY is perhaps first and foremost an international criminal tribunal. That is its name and its *raison d'être*, part of the broader legacy of international criminal justice, the first such tribunal after Nuremberg and Tokyo. In that, it is also a hybrid, part *international* tribunal in that it is created and operates internationally, but also part *criminal* tribunal in that its day to day courtroom operation is much closer to a domestic criminal court than, for example, the functioning of the ICJ.

### I. An International Tribunal

#### 1. The Tribunal's Creation and the Issue of Judicial Review

As is well known, the circumstances of the creation of the ICTY were unusual and somewhat controversial at the time. It had never been

particularly anticipated that the Security Council could create a subsidiary judicial body, although nor had it been excluded or had many things that the Council has engaged in the last 60 years been specifically mandated. What was even more controversial perhaps was the fact that the ICTY decided that it had the competence to review the legality of its own creation. This was of course a foundational event for the ICTY, one that was supposed to establish its credentials as a legitimate international judicial institution. But it also anticipated by perhaps a decade a whole range of issues linked to the possible judicial review of Security Council actions, seen as something of a Grail for the idea of an international rule of law. As Marko Milanovic put it:

“This was the first real attempt at reviewing the actions of the Security Council. This is an issue we are faced with today, for example in the domain of targeted sanctions. But it may have been less influential than one might have thought so far. The whole posture of the case resembles *Marbury v. Madison*, where the Supreme Court said ‘by the way, we have the power to review the constitutionality of laws passed by Congress, but in this particular case we think Congress acted constitutionally.’ This is a tried and tested maneuver for a court to take a power for itself, and then to say we do not need to use it now. And that is what happened in *Tadic*: ‘by the way, we have the power to review the actions of the Security Council constitutionally, but the Council acted lawfully.’ The European Court of Justice and the European Court of Human Rights today try to interpret Security Council resolutions so as to make them compatible with their legal orders. So there has not been a showdown yet, but I have no doubt that when it comes – and it will come – that court will cite *Tadic*.”

## 2. International Criminal Law and the Fragmentation of International Law

According to Marko Milanovic, perhaps one of the most unexpected legacies of the ICTY was that it became fully part of what would soon become known as the problem of the “fragmentation of international law”, i.e.: the separation of general international law into several more or less self-contained regimes. This occurred famously when the ICTY sought to define the conditions of imputability of the acts of non-State actors to States, nominally for the purposes of characterizing a conflict as international or

non-international but in ways that seemed to clash head on with the ICJ's own criteria for State responsibility. The Tadic case was "one of the most cited examples of the phenomenon of fragmentation [and] caused an enormous ruckus". It was a "major contribution because that particular issue resonates throughout some of the main contemporary issues of international law, such as the *jus ad bellum*. What is the right standard of attribution for saying whether the acts of terrorists are attributable to the State, or whether an armed attack occurred?" The ICTY, led by Cassese, sought to change the law but was rebuked by the ICJ. At least, however, the decision "generated an enormous debate" on the standard of responsibility for non-State actors, even though the "overall control test" has not become part of general international law beyond the specific context of international humanitarian law. It introduced new ways of thinking about some old issues of international law.

Another area where a form of international criminal law separatism has manifested itself is in the doctrine of sources. What was particularly interesting to Judge Pocar was that a new substantive law also entailed a new approach to the sources of international law:

"The treaties, the Geneva conventions were not *prima facie* complete in terms of the criminal norms because the conduct was provided but not the sentences, nor the modes of responsibility for instance, and all this had to be completed on the basis of customary law by the tribunal. And when I say customary law, I take it in a wide perspective, as including to a large extent recourse to principles of law affirmed in domestic legislation and domestic legal orders, which are formally a different source of international law. So having worked to a large extent on customary law which is by itself a difficult assessment and principles of law is something that is probably new in terms of international law not because this has never been done by other calls including the ICJ, but because the extent to which the tribunal has done this is a new and significant contribution to international law and international adjudication."

In other words, the exercise of uncovering a largely new law at the ICTY in its turn took quite novel routes. Although perhaps less

controversial than the issue of attribution to the State, this is a change that potentially has deep implications for the development of international law.

### 3. The Development of International Humanitarian Law and the Question of Impunity

One would expect the legacy of the ICTY to be a certain culture of international prosecutions, a highly specific form of know-how about how to prosecute persons suspected of having committed atrocities. In that respect, the ICTY acted as a sort of laboratory. Its judges were granted considerable leeway to develop rules of procedure and adapt them as they went. They were given the extraordinary opportunity to contribute jurisprudentially to a branch of international law where much still needed to be decided. The ICTY thus became the site of many *premières* in international humanitarian law. For Judge Pocar:

“The most important contribution of the ICTY is that it was the first court to have considered international humanitarian law, both customary and treaty law, from the angle of the individual criminal responsibility of the actors. Of course, up to the ICTY international humanitarian law had been scrutinized and examined from the point of view of those who conduct military operations, those who are victims of violations of the rules governing military operations, but never from the point of view of the responsibility that we attached to individuals in connection with such violations. Although the Geneva conventions provide for criminalization of grave breaches of the conventions, this was almost never done. In fact, cases before the domestic courts were very limited, because most States did not actually implement the Convention from that point of view, and the tribunal had to do this as of the beginning by making recourse to international customary law.”

Beyond specific contributions by the tribunal to international law, there is of course the issue of the tribunal being in and by itself a contribution to international law. The ICTY was credited by several interviewees as having made the point that international criminal justice was viable, at least to a greater extent than typically thought possible before that. Several also emphasized the role that the ICTY had had in paving the way for the ICC. Payam Akhavan spoke of a “*cultural* transformation” rather

than an “immediate impact on the propensity of genocidal leaders across the world to cease and desist from all further atrocities because of fear of punishment”, and of a “culture of impunity gradually being transformed into a culture where there is ever greater degrees of accountability”. In effect, the ICTY:

“[...] stole the thunder from everything that came afterwards, simply because it was unprecedented. The most significant accomplishment is political rather than legal. The question of setting up a tribunal that can administer fair justice, jurisprudence that is reasonably sophisticated and coherent, all of those are secondary to the fact of having arrested and prosecuted people.”

Akhavan particularly emphasized the powerful symbolic connotations of the “image of once untouchable tyrants as defendants in the dock answering to the world”. What is really striking is that “policy and decision makers not normally engaged with human rights issues, that would not really see those soft issues as being anywhere except on the margins of realpolitik actually shifted their perception and saw the tribunal as an important instrument of post-conflict governance.”

At the same time, the existence of the tribunal also underscored some of the difficulties that would inevitably beset any international criminal jurisdiction relying on State cooperation. Mark Harmon, a prosecutor at the ICTY for more than a decade and one associated with some of its leading cases, suggested a strong word of caution:

“When I worked as a (US) Federal Prosecutor, I had access to coercive instruments such as subpoenas and subpoenas duces tecum to collect the evidence. But in the ICTY statute, the regime was cooperation, States had an international legal obligation to cooperate with the tribunal. That was all good and well but when trying to request documents from States which were complicit in the crimes, you simply did not get their cooperation. In the Blaskic case, after repeatedly failing to obtain the requested documents from Croatia, the OTP issued a subpoena duces tecum to Croatia to compel it to produce documents, which provoked huge litigation [...] In the end, Croatia actively hid documents that would have proved their

involvement and helped us to establish the existence of an international armed conflict and the guilt of the accused. Some defendants were clearly getting cooperation from states intent on protecting their interests. In the Blaskic case, Croatia's obstruction had an impact on later appellate proceedings."

## II. A Criminal Tribunal

Aside from being an international tribunal, the ICTY, in its day-to-day operation, decorum and professional roles is perhaps first and foremost a *criminal* tribunal, something which became clearer with the years once many of the foundational international law questions had been addressed. It was, no doubt, a tribunal endowed with specific characteristics. Mark Harmon particularly emphasized "how hard trials at the ICTY are. They are endurance contests; they are grueling marathons. Domestic trials are considerably shorter, considerably fewer witnesses, and by and large don't merit large amounts of public attention." Part of this has to do with the weight of jurisdictional elements. Harmon pointed out the considerable challenge of jurisdictional and threshold requirements for certain crimes (e.g.: widespread or systematic attack for crimes against humanity, existence of an international armed conflict for grave breaches of the Geneva Conventions). Harmon insisted that one of the ways of making sure that indictments were legally and factually sound was to have a rigorous system of indictment "peer review process" within the OTP based from the start on a standard of "beyond reasonable doubt" (that of culpability) rather than aim simply for the lower "*prima facie*" standard of confirmation of indictments and then somehow hope that further investigations would provide incontrovertible evidence. The complexity of proceedings nonetheless inevitably raised numerous challenges for the integrity of trials.

### 1. Due Process

The ability of the ICTY to grant a fair trial to the accused has perhaps been one of the most constant *motif of critique*. Probably no one is better placed to ascertain fairness to defendants than defense attorneys. In that respect, Peter Robinson made the case that things were complicated and nuanced.

Peter Robinson: "I think the most challenging aspect of standing up for the rights of the accused in the face of sometimes of

presumption of guilt. So, it seems like the tribunal as opposed to some domestic practices, they really want to get on with things and to take judicial notice of adjudicated facts from other cases to admit testimony from other trials without the right of cross examination. And so, probably the most challenging part has been to stand in front of the train with my hand forward protecting my client from this train that just wants to roll over him.”

FM: “And did you ever have the impression that the train was just too strong, it was sort of effectively rolling over you?”

Peter Robinson: “Definitely.”

FM: “Is that because there is a mismatch of power between the tribunal and the defense or maybe between the defense and the prosecution? Is that what the train metaphor refers to?”

Peter Robinson: “Yes, I feel that every day at the ICTY, when you go into the building there are bunch of signs on door that say people with red passes are not allowed to enter. The people with red passes are the defense, so there are large parts of the tribunal that we can't go to, the defense is not an organ of the tribunal (note: nor should it be Robinson emphasized when later asked). So for example we are not allowed to go to any of the press briefings that the prosecution and the registry hold. We can't have press interviews within the building, we have to meet the journalists outside on the lawn and those are just examples of sort of some of the cosmetic things which show that there is not so much equality in – but in the real important part the resources between the prosecution and the defense especially are really overwhelmingly lopsided.”

However, Ekkehard Withopf, a former Senior Trial Attorney with the ICTY, disagreed that the inequality in means was decisive. He noted that “There is a difference between having to prove a case beyond a reasonable doubt and simply showing a doubt, poking holes in the prosecution case. It flows naturally from the fact that the OTP has a higher burden of proof that it has more employees, more resources, and more money.” At any rate, the defense attorneys I spoke to, insisted they felt their clients had gotten a fair

trial. Peter Robinson mentioned that “the most striking thing about the ICTY is the professionalism of the people that are working there and the judges and the prosecution, defense on the registry. And I think that is what results in them trying to be fair on the daily basis, even though some of the rules and procedures can just really lend themselves to a conviction”. Problems highlighted by defense counsel had to do with a number of more or less discrete issues (disclosure, accessibility of evidence, lack of provisional release), rather than any fundamental concern with the tribunal’s independence or impartiality.

## 2. The Fairness of Substantive Law

Unfairness need not only be procedural. It can also be substantive. In that respect perhaps the oldest fear is that, precisely because of the fast-paced character of international criminal law’s development under the ICTY’s watch, the principle of legality (*nullum crimen sine lege*) may be stretched. I specifically asked Judge Pocar how individuals in the heat of battle in 1993 were expected to understand the law if it took so long and so many expert lawyers to ascertain it? He was unmoved by the suggestion:

“In my view this goes more to the accessibility of the law than its substance. Even in domestic criminal law, the question is not that the alleged perpetrator have actually known the law, but that it be accessible in theory (the fact that it is published in the official journal, does not mean that people know it). Customary law may be less accessible than statutory law, but it is nonetheless accessible. The problem is whether that customary law existed or not, not whether the accused knew its content. Of course, it is true that there is a margin of appreciation in determining the content of customary law, but I don’t think the tribunal went beyond the law, it tried to stick to solely interpreting the law. But interpretation, assessment, development of the law are sometimes borderline notions, and different people will disagree on what is going on especially when the law is in flux. In addition, there were precedents that have not been followed as not being in conformity with customary law. For example, in terms of command responsibility there was the Yamashita decision which went

beyond what the ICTY, which has been quite prudent, decided was the law.”

Nonetheless, the tension between a fast developing international criminal law and traditional principles of criminal punishment proved a source of concern for lawyers at the Tribunal. Michael Wladimiroff emphasized that a lawyer trained in the continental tradition of “*lex certa*, where there is a code with all the crimes and elements of crimes so that one always knows that the elements are and the only challenge is to prove them. Here not even the core crimes were properly defined.” The judges typically did not tell the parties what they thought of the issue until the verdict, making it difficult to understand what to prove. Marko Milanovic did point to the risk, in this context, of “compromising the legality principle”. In the short term, this may help secure convictions to develop international criminal law dynamically but it is true that for “many criminal lawyers, particularly from the continent, were left with a bad aftertaste.” This may explain the subsequent tendency to create a “much more formalized system with the ICC, with an influx of old doctrinal theories from Germany about liability issues”.

Another area of substantive law that caused concern according to some interviewees was the recurrent suspicion that the nets of criminal liability in the ICTY Statute and case law are cast so wide as to make it very difficult to prove one’s innocence, even in a context of procedural due process. Peter Robinson mentioned the case of Serbian General Ojdanić, a Kosovo Serb, who was found guilty of aiding an abetting because he sent troops in Kosovo and had reason to believe that they would be involved in expelling Kosovars. For Peter Robinson this case shows that “[...] the jurisprudence of the tribunal is so broad that it ensnares people who themselves aren’t in my opinion criminally culpable, and makes them into criminals [...] it is almost automatic that if crimes happened on your watch you can be found guilty if a Chamber wants to”. Ekkehard Withopf, as a Prosecutor, also said that he had some sympathy for how difficult things could be for the defense. Payam Akhavan explained in detail what his sense of the dangers was when already expansive modes of liability are combined with a certain form of judicial activism:

“[...] in terms of the judiciary, there was a political sensibility that this tribunal, because it has a unique opportunity to implement international humanitarian law after all these decades

of impunity, must expand the law. No one becomes a hero in our profession by being a conservative judge. Our sympathies are with the victims and we believe that justice is so rare that when the opportunity presents itself we have to interpret the law in an expansive way to maximize the prospects of conviction, to make it easier for the prosecution to prove its case. We have now reached a point where must be asking whether the tribunal has not gone too far in this direction, and whether by using devices such as JCE (joint criminal enterprise) very broadly defined, often in combination with the notion of ‘persecution’ as part of crimes against humanity which is a sort of a basket in which you can throw multiple acts without really specifying what is the basis of persecution, then you have created a kind of ‘magic bullet’ for the prosecution which makes it easier to convict.”

Miodrag Majic, a judge at the Appellate Court in Belgrade, suggested that command responsibility was not as familiar to the criminal law in Serbia as it was to international criminal law, and also noted he had some reservations with what he saw as a more general prosecutorial drive to establishing guilt:

“[...] under the flag of transitional justice it sometimes seems as if we need more and more accused and convicts, as if the machine feeds on this. In fact, only conviction of the guilty is explicitly stated as a goal of transitional justice efforts: but what about protection, even affirmation of the innocence of the innocent? Maybe this is too obvious to mention, but there is an imbalance in the goals.”

### 3. The Role of Victims

One aspect of international criminal justice that is currently undergoing significant transformation is the role of victims. The ICC, for example, has made this into a central plank of its legitimacy. Yet victims before the ICTY only appeared as witnesses if at all. Could things have been done differently? Was this a weak point in the ICTY’s legacy? Views on the matter differed starkly. Mark Harmon emphasized that testifying was hardly a minor role and provided some of the tribunal’s most powerful moments: “Our relationship at one level was purely functional, but those in the

courtroom could not help but be moved by testimonies. There were days when all of us had tears in our eyes.”

Judge Pocar was doubtful, however, that an ICC type victim participation regime would have been of benefit to the tribunal he presided over:

“Frankly, I believe that the absence of victims as parties from proceedings – which has been criticized actually – is a non-problem, and the current work of the ICC in this respect gives room for pause. The ICC is to a large extent prevented from functioning because when you have mass crimes it is almost impossible to have the victims participate in the proceedings. Furthermore, only some will participate, but who? The representatives of victims, NGOs? But NGOs may have their own agenda, may manipulate things. Victims mostly participate as witnesses and the ICTY had thousands of those. So participation was there. What is lacking, it is true, is a system of reparation, but this does not necessarily need to go through participation. When it comes to mass crimes it is more a matter of finding ways and means of granting reparations to large numbers of victims that sometimes are very hard to identify correctly because the entire population was victimized. It is a good thing that the ICC has a Victim Trust Fund, but we should not be wasting funds for participation, which does not add anything to the proceedings and could lead to additional delays.”

Yet Ekkehard Withopf, having worked for both the ICTY and the ICC saw things differently, even suggesting that, with the benefit of hindsight, the ICTY could have benefited from a more victim friendly regime:

“What happened on a few occasions is that witnesses who were prosecution witnesses only; they had the feeling, which the expressed occasionally, that they were instruments in the hands of the Prosecution rather than independent individuals in the court proceedings. If I compare this with the ICC situation where I have seen victim participation in practice, I very much take the view that victim participation is a positive aspect in international criminal proceedings. I know of the concern that very many of my colleagues had and continue to have that

victim participation delays proceedings, but what I have seen so far at the ICC does not vindicate that fear. If it is dealt with properly by the trial chamber and certain limits are put to victim participation, it is absolutely necessary and would have helped address some of the shortcomings of the ICTY.”

Among these shortcomings may be, precisely, the limitations of the tribunal’s impact on the region due to a lack of direct involvement of some of its core constituents in its activity.

#### D. The ICTY as Transitional Justice Device

One criticism that might emerge from listening to interviewees talking about the contribution of the ICTY as an international criminal tribunal, perhaps an easy one but one that bears careful scrutiny, is that the tribunal has been more important for international law or the idea of criminal justice than the region it was supposed to have an impact on. It of course remains a possibility that this was actually intended, that the ICTY was merely a stepping stone for the broader project of creating a permanent international criminal court. Yet there would seem to be something ultimately awkward and circular about justifying the creation of international tribunals on the basis of how they may have helped create more tribunals. The question of the impact on the former-Yugoslavia, it seems, is not one that any of the interviewees wanted to elude, although they differed quite markedly on what it had been.

For example, whilst there was a sense that the tribunal had hardly single-handedly brought about international peace and security in the region, it had certainly helped create the conditions and consolidate such a situation. For Payam Akhavan:

“One of the immediate effects of the tribunal, which has little to do with subtle and long term shifts of people’s perception of history, is the removal of certain individuals from the political space. And that is a very immediate and tangible effect: you take someone, who is a demagogical leader, who is responsible for violence, who cannot be trusted to conduct politics in any way except to incite hatred, and you remove that person. In criminological terms, it is a form of incapacitation, which in itself is extremely valuable. Combined with economic aid, conditionality and other incentives, the ICTY significantly

contributed to moderate the political space, despite recurrent tensions.”

From many of my interviewees, nonetheless, I heard a note of strong caution about investing too high a hope in what the tribunal could achieve. For Judge Pocar, who at one point in the interview emphasized that “from a court you can’t expect more than doing the work of a court”:

“It is certain that the resolutions which established the tribunal contained a number of references in the preamble to reconciliation process and stressed the importance of rebuilding the society and establishing the rule of law in the countries concerned. Now, it's certain that this contribution cannot be complete, I do not think that a judicial body can do all these things alone, it is clear that other measures are necessary in this respect. A judicial body like the ICTY can only deal with a limited number of cases - although at the end we will have dealt with 161 cases. But I do not think that further transformation can be brought about without a more generalized adjudication of all these cases, or a different treatment through procedures like truth commissions.”

Yet simply because we agree that the tribunal could not do everything, does not mean that we cannot speculate about what it did do. The question of whether the ICTY has had an impact on the former-Yugoslavia is central to understanding its legacy, not only for the region but even for the promise of international justice itself.

## I. The Tribunal and its Constituencies

One interesting way of thinking about the ICTY and its larger role is in terms of having a series of “constituencies”. Its impact can then be evaluated by how each constituency has been affected by its work. Refik Hodzic put it most starkly by suggesting that defining the tribunal’s constituency depends on what one’s idea of the goal of the tribunal is:

“Of course there are many constituencies in international justice. We cannot forget that there are funders, there is the ‘international community’ as abstract as that notion is, and also a number of other circles (academic and legal,) but ultimately if

one wants to determine what the real constituency is we need to deconstruct why the ICTY was created. Why was it setup? What was its purpose? What was its mandate? Its mandate was, as defined by the UN Security Council resolution that established it, to contribute to a lasting - to establishment and maintenance of a lasting peace where in the former Yugoslavia. So if *this* is the mandate then of course the constituents are the people that you are supposed to establish and maintain this peace for. These are the same people who appear in the legal process or trial as defendants, victims, witnesses. These are the people who will be affected by the outcome of the trials.”

That, at least, is the theory. A constant theme in Refik Hodzic’s thinking about the issue is the extent to which the obviousness of that constituency was not necessarily the most shared thing at the tribunal:

“Unfortunately I have to say that this interpretation was far, far, far from accepted at the tribunal and around the tribunal because most presidents, most people who worked for the tribunal, decision makers saw New York, Washington, Berlin, London, Paris, Moscow as their constituents. That is where they looked for approval or support and - of course, I understand that they had to in order to make the tribunal work and make sure that it receives funds and all that. At the same time, I have to say that in the end this resulted in the sort of alienating gap where basically developing international law was far more important to many of the people, many of the presidents of the ICTY, many of the judges, many of the prosecutors than the communities that they were supposed to serve.”

Refik Hodzic, who served for several years as Tribunals spokesman and outreach coordinator for Bosnia and Herzegovina, nonetheless insisted that we should take seriously the idea of the tribunal as a Chapter VII measure “to restore international peace and security” beyond the “immediate task of prosecuting and judging”.

## 1. Defendants

One perhaps not so obvious but interesting place to start in terms of ICTY constituencies might be the defendants themselves. After all, they are

the tribunal's primary "clients", what of *their* views on its process? Some of these views (most notably Milosevic's) have been amply publicized in court and clearly saw nothing in the process but political justice; but it is not always evident to know what goes on behind the closed expressions of defendants in court, tie and suited, sometimes looking like the shadow of their former belligerent selves. It also struck me that if international criminal justice were to encourage genuine sentiments of repentance from those convicted this might go a long way to stimulate reconciliation efforts. Was there ever at least a grudging recognition that the tribunal stood for a fundamental aspiration to justice in the wake of atrocity?

Zoran Pajic, now an academic at King's College but who worked as an expert with the Office of the High Representative in Bosnia, did at least know of people who "upon being released from the prison in the Hague or somewhere else, just wanted to be left alone, go home in peace and rejoin their families". Yet beyond that sort of wariness (which could be explained in a variety of ways and is not necessarily a manifestation of atonement), the interviewees, particularly defense counsel, insisted that the ICTY had swayed few defendants in their views. For Peter Robinson it was axiomatic that:

"[...] almost all of the people who appeared before the ICTY think the court is political, whether they are Serbs, Bosnian or Croat. I think that's the very, very common view that's held and the only difference is how they deal with that. So, some of them accepted that that's the way it was and they just tried to mount a conventional defense and hope that things will fall in their favor. Others wanted to fight politics with politics and have their trial be conducted on a more political level. So, I think that's the difference in the way people handle their defenses, but it's pretty common that the accused think that the ICTY is a very political institution. [...] As a counsel, I tell my clients that, even if it is political, which I also believe, it is they who are in a UN jail and so the best thing to do for them is to try to use the tribunals rules and their procedures to their advantage as much as possible. It's really futile to just say this is a political court and refuse to participate or boycott; otherwise, the case will just be conducted without them and they will gain nothing from that. So my advice to my client is basically to try to make the best they can under the circumstances, and that is what most of them have done."

That evident lack of remorse extended to individuals such as Biljana Plavšić who had pleaded guilty before the tribunal, and went on to give interviews from her jail in Sweden in which she watered down her plea and presented it as tactical. One exception was Erdemovic whose guilty plea during his trial for his participation in Srebrenica, Marko Milanovic pointed out, “was very emotional. But he was a low level guy, and it did not produce any cathartic effect.”

## 2. Public Opinion(s)

If not defendants, then at least public opinion in the former-Yugoslavia might have been significantly influenced by the proceedings before the ICTY. Initially, the ill-feeling towards the tribunal was such that not even defense counsel seemed to be welcome even when they were there to defend members of a certain community. Michael Wladimiroff remarked that “one would expect that a lawyer acting on behalf of a Bosnian Serb would be at an advantage to travel in the area because people would like what he was doing, but the reality was the opposite. I was treated in a very unfriendly way at times because I was seen as a representative of the tribunal.”

One measure of how the tribunal may have influenced public opinions would be the degree to which ICTY convictions contributed to the ostracization of those convicted when they eventually returned to the region. If anything, the effect seemed to be quite the opposite, “People are going home, they served their sentences be it 8 years, 10 years, 12 years, and they're welcomed as heroes in their own communities and they feel like heroes” (Zoran Pajic). Zoran Pajic stated his view very simply: “I think that the Hague tribunal has alienated itself from people in the region. It has done a remarkable job, but that job was ‘somewhere else’, from the point of view of local people and local communities in the former Yugoslavia.” Hasan Nuhanovic pointed out that “the Hague tribunal is far from Bosnia, it is 2000 kilometers away. And the only thing that people know about it is from some media reports, unless it is prime news or on the front page of daily newspapers. Otherwise, it will pass unnoticed. There is no continuous flow of information from the Hague to Bosnia Herzegovina.” Worse than that, almost two decades after the conflict surveys carried out by the Belgrade Centre for Human Rights show that in some parts of the region a vast majority of the population still denies that crimes happened, or is prone to

strongly relativize them. As Hasan Nuhanovic noted “Remember that there is a constituency to bury the issue of war crimes, to sweep it under the carpet, especially in Republika Srpska. The prevailing view is that it is history, we should start looking at history from the day the Dayton agreement was signed, since the agreement legitimizes *Republika Srpska*.”

Might the smaller ‘public opinion’ of legal professionals in the region have been more influenced than general public opinion? After all, even if the general public did not “get” the ICTY with its removed and foreign usages, at least advocates, judges and legal academics might serve as more effective relays. Marko Milanovic made it clear that:

“The legal communities, notably in Belgrade and Zagreb, divided very early on, at the very beginning (1989-1990) into those legal scholars and academics who supported the nationalist regimes; and those who were more of civil society, human rights orientation. And certainly the nationalist cohort dominated, everywhere and to a large extent up to this day. They immediately instrumentalized the whole issue of the ICTY and its legality as something that is an enemy of the people. They deployed all arguments, plausible and implausible, to denigrate the ICTY, producing a lot of confusion in the process. There was until a couple of years ago an official textbooks in international law at the University of Belgrade Faculty of Law which said that the ICTY was illegal, that it was established in violation of international law. The heading concerning the ICTY described it as ‘tribunal’ in inverted commas.”

### 3. Victims

Finally, I wondered about victims, perhaps the most obvious constituency for the Tribunal. Zoran Pajic pointed out the difficulty of understanding sentences handed out in the Hague for some victims, alluding to General Blaskic’s sentence that was reduced from 42 years to 9 years on appeal. These sentences were not only less than those that would be handed in the domestic courts of the region, they were often seen as “confusing” and even a “mockery of justice.” The absence of capital punishment was also hard to understand for some among victims.

Yet unsurprisingly victims were a very strong constituency of the tribunal something that was clear if nothing else in the dangers they were willing to defy to come and testify. For Mark Harmon:

“especially in the early days, victims who came to testify were exceptionally courageous people. They came from communities in which the perpetrators were still at large, they had to go back to villages where perpetrators, who did not like the tribunal, and with no witness victim protection beyond the courtroom.”

Hasan Nuhanovic pointed out that as far as many victims he knew were concerned, such was the demand for justice that the tribunal could have gone on working for years. At the same time, victims could not be conceived of as an entirely separate constituency, removed from the rest of society. Nuhanovic made it very clear that lack of recognition in *Republika Sprska* of the crimes committed during the war made it difficult to fully turn the page, even when verdicts had been handed down by the tribunal which vindicated all or part of the victims’ narrative. Refik Hodzic also made it clear that we should not:

“[...] fall into the trap of thinking that international criminal justice is only about the victims, even though they are a very important group and the one that is most invested in the process and in its success. It is also about the rest of the community. Ultimately if we look at what this mechanism is supposed to deliver to victims, it is not only some sort of personal satisfaction at seeing the perpetrator sent off and locked away, but also contribution to victims’ rehabilitation, to the acknowledgment of their suffering and ultimate integration as equal citizens. That can only be achieved if the rest of the community and especially the community that as it were supports the perpetrator is also invested in the process and accepts the process and accepts its outcome.”

## II. Competing Philosophies of the Tribunal’s Role

The fact that the impact on several constituencies in the former-Yugoslavia has been uneven and generally limited may ultimately be traceable to a crucial divide between what one might call an ‘internal’ or ‘forensic’ vision of international criminal justice in the Hague – one focused on the specifics of each crime and courtroom drama – and a more “external” or “strategic” vision of how that justice might be perceived in the region and

provoke certain reactions (or fail to do so). Refik Hodzic had obviously spent much time mulling over this division. Here is what he had to say:

“When it comes to fulfilling its mandate, there were always two schools of thought. One school of thought that was led by some judges at the tribunal as well as others who have worked for or been involved in it in different ways basically preached that the tribunal's only task was to provide fair trial in accordance with the highest international standards [...] but anything that happens outside the tribunal is not its concern, and the impact that it has on core affected communities which are what I would call its constituents, the only real constituents of the tribunal is secondary – not even secondary but simply something that they were not concerned with or should not be concerned with.”

Zoran Pajic was even more specific when it comes to describing that ‘school’:

“Let me give you an example. I have spoken with many judges in the past 15 years in the Hague some of them are my good colleagues and friends, and I asked them about their expectations and more specifically whether they had any idea how their verdict were going to resonate on the ground back home so to speak, how they may contribute to the process of co-existence of different ethnic groups in the former Yugoslavia and the process of reconciliation in the future. And many of them said to me, ‘look we are not interested, we are Judges, we are here to hear a case, to hear the evidence, to establish the level of responsibility and guilt and that's it. Otherwise, our independent judgment would be jeopardized.’ I can understand that. But this gives you an idea of the huge gap between what people were expecting of the tribunal and what the tribunal was able to achieve.”

All along, Refik Hodzic argues, the second school of thought, saw things very differently:

“[...] in order for the tribunal to fulfill its broader mandate it should go further and not forget that many founding documents including the Secretary General's report, which was the basis for

the tribunal's establishment went beyond this, and spoke about the reconciliation that this tribunal was supposed to help and support and rule of law that it was supposed to contribute to and so on and so forth.”

Payam Akhavan was also of the opinion that “[...] prosecuting war criminals wasn’t just morally desirable but that it was a political necessity in order to stabilize the Balkans”. However, this approach to international criminal justice remained very much in the minority, and depended on key individuals without ever being strongly endorsed institutionally. Successive Presidents of the tribunal, according to Refik Hodzic:

“[...] very often paid nothing more than lip service to the role that it had in terms of its responsibility to constituents in the former Yugoslavia and the impact that it had on the ground. They were very eager and ready to present this to general assembly and the Security Council that there was – the tribunal was reaching out to victims and so on and so forth, but the fact on the ground were not exactly supporting this because we know that the outreach program of the tribunal, which was in a way the sole mechanism for maintaining this relationship with the constituents in the former Yugoslavia along with some other developments, was never on the budget of the tribunal and it was never treated as part of the core mandate of the tribunal not only by the founders, the Security Council but not even by the decision makers in the tribunal.”

These deeply structuring views of the core mission of the tribunal have contributed to shape its attitudes on a range of policies.

## 1. The Paucity and Poverty of Outreach

It seemed that if interviewees from the region shared on regret, it was the paucity and poverty of outreach. Refik Hodzic credited Tribunal president Gabrielle Kirk McDonald for being one of the few to realize the importance of outreach “on the basis of the reaction to the Tadic judgment in the communities where the crimes were committed northwest of Bosnia around Prijedor, which had led to a direct and comprehensive denial of the facts established in the Tadic judgment so that ‘something had to be done’ if the tribunal’s broader mandate was to be ever achieved”. But for the rest,

the tribunal's approach to outreach had been "very superficial", with "little understanding of the dynamics in the former Yugoslavia". Zoran Pajic described outreach efforts as "very, very poor" and deplored the fact that "there were no persistent effort of the tribunal to hold sessions, even occasional sessions, in the region; no persistent efforts to get local NGOs involved in the conversation, in discussions". Vesna Terselic, a peace activist involved in efforts to memorialize some of the atrocities committed, insisted that inhabitants in the region did not even know basic facts about the tribunal.

Specifically, Zoran Pajic gave the example of the trial of General Gotovina, whose fate was closely watched in Croatia as long as he was on the run, but dramatically less so by the time he was brought to the Hague and prosecuted so that by the time public opinion had caught up and Gotovina was sentenced to 20 years in prison "that was a shock for people in Croatia because they simply did not know what crimes he was answering for." For Refik Hodzic, this begs the question: "How is it possible that after all this time, after all the effort that the tribunal invested such pervasive denial exists?" asks Refik Hodzic. One of the problems, he suggested, is the excessively narrow understanding of what outreach entails:

"I have to say that unfortunately the concept of outreach has been severely limited in its interpretation and implementation. First of all, by the term itself. The term outreach functions only in English language. All other languages have great problems in translating it and then defining what it means, which betrays a larger problem and that is the understanding of what the concept is about. In my understanding outreach is about the relationship between the court and the community that it is serving and I strongly believe that goes far beyond public relations, far beyond what communication experts can deliver, i.e., making these courts look good in the communities, make people accept their judgments. It is about far more than that, and we can see outreach potentially unfolding on many different levels. In a sense everything that an institution of this kind does can be seen as a form of outreach. The way it investigates and engages with potential witnesses is outreach, the announcements that courts make is outreach, the conduct in the courtroom is outreach, the judgments. This is where I have a problem with the term itself because it is so limiting and it can even serve as a good excuse to those who never saw it as part of the core mandate of the

ICTY, and see it as something unnatural, something that lawyers have sort of a natural aversion to and that is the job of journalism and communication and media.”

It is definitely highly interesting that, for some key observers in the region, what turns out to have been the most important dimension is something that most courts and judges would not consider to fall within their judicial remit. Why was outreach not more prominent? Why did the ICTY fail to be as crucial a building block in the overall effort at transitional justice as it could have been? Observers from the region had no shortage of leads.

The problem was and continues to be that on the domestic side there were, in a sense, many efforts at “outreach” of a very different sort, which ended up drowning what might have been the ICTY’s message. So rather than “create a sense of ownership of the tribunal in the communities of the former Yugoslavia”, local constituencies “were very often neglected and left to be influenced by a hostile propaganda coming from different regimes whether Milosevic or Tadjman, and including academic and religious elites or communities loyal to their nationalist causes” (Refik Hodzic):

“What that meant was that tribunal's judgments were just one voice among many voices targeting these communities in offering a version of events, and you can judge for yourself who had bigger chances of success: the tribunal with its feeble voice from the Hague saying ‘oh, this is what we established in these trials’, or the powerful propaganda machines of the state, relayed by intellectual and academic elites, the media, religious institutions, everybody repeatedly bombarding these communities with messages such as ‘These crimes have not happened. Anybody who says that they did happen is trying to actually perpetrate a great injustice upon you, they are trying to prosecute our heroes who have defended you, they are trying to revise our history; we were the victims not perpetrators and this is simply a tool in the hands of imperialist powers trying to subjugate you so reject it, don't accept it, don't ever believe them.’”

Some went as far as to suggest that the poverty of outreach may have been intentional. For Hasan Nuhanovic, maybe the tribunal thought that “if they bombard the people in Bosnia with information from the Hague, it will

not help the process of normalization, people will live in the past rather than look to the future.” On a different note, Refik Hodzic was particularly irked by the argument from those inclined to a narrow judicial understanding of the ICTY’s mandate (“we are only responsible for what happens in the courtroom, not outside”) that after all national courts never have to “communicate and explain themselves”. The comparison is at the very least problematic:

“I think that we have to understand the situation in which ordinary crimes are prosecuted is very different. From primary school constituents will have been subjected to a form of outreach about these courts. They learn about the legal system, how it functions or why and what is the social role courts, what role in the government they play. When it comes to the general public, the media as a matter of course report on what is going on in these courts. There is an entire branch in journalism that is called court reporting dedicated to making sure that what happens in courtrooms comes out. The courts are organically parts of society which appoints the judges. So these national courts have an entire system behind them that does what outreach programs for international courts are supposed to do. So to draw the comparison with national courts and point that they do not engage in outreach is misleading.”

Might things be different in the future? Perhaps if outreach was not seen so much as an appendix or even as something that is done simply for constituents, but as very useful to international tribunals themselves. “Institutions act in their interests”, Refik Hodzic pointed out, and this is why it is important to understand that a quality outreach policy “will make investigations much more successful, it will facilitate access to witnesses and subsequently and consequently to evidence, not to mention the fact that the ultimate outcome, the judgment will be accepted by the communities in a much greater degree, than when they don't feel these institutions as their own but some sort of foreign body that has been imposed upon them”. Yet, in the ultimate analysis, Pesnic cautioned that “one very important lesson is whenever an international court is to work do not expect that countries where crimes have been committed will make any serious effort to distribute the information.”

## 2. Prosecutorial Discretion and “Distributive Justice”

The dialectics of individual and collective guilt are among the most interesting features of the ICTY. At one end of the spectrum, the temptation by communities, even when they eventually acknowledged that crimes had been committed, was that they were the product of a few “bad apples”. Vesna Terselic noted that this was one of the greatest breaks on the tribunal communicating its message in Croatia for example “People in the region actually think that crimes have been committed, but they see those as individual crimes committed by individual members of the Croatian forces, for example, during operation Storm. However, there is a tendency to see these crimes as disconnected from those forces, and not see them as part of a pattern or a joint criminal enterprise.” One of the problems is a disconnect between individuals who committed crimes directly and those who did so indirectly:

“When it comes to Mirko Norac (a Croat officer involved in the Gopsc massacre of Serbs), there was actually some understanding because he was the first to shoot and kill a woman. So, the perception with the public was this is okay, he was a General of the Croatian Army, he has committed the crime, he personally killed a woman and that's why he is serving a sentence. But with the case of Gotovina, and Markac, you do not have someone who personally killed somebody. These are the sort of differences about which people are sensitive. I do not condone this of course, I just note that it is public perception.”

At the same time, individual guilt inevitably tends to taint the communities from which it originated, and is very much perceived as such. From the outset, the ICTY has often been perceived as engaging in a form of “distributive justice” between the different communities that compose the former-Yugoslavia. Certainly, Serb public opinion was very sensitive, as has been seen, to the fact that most defendants were Serbs. One of the problems is the difficulty of separating individual guilt from issues of collective responsibility. Even though the international criminal tribunals focused heavily on the former, it was often hard for people in the region not to see prosecutorial decisions as reflective of a judgment about the latter. I asked Professor Ljubo Bavcon, Professor of International Criminal Law at the University of Ljubljana, Slovenia, whether he thought the trials had been of individuals, States or communities:

“In my opinion, it is very difficult to divide the responsibility of Milosevic or Tadjman from the responsibility of their subalterns, and even from the responsibility of *States*. By State, I mean the whole population. Almost all Croats were particularly touched by the indictment of Croat Generals, and almost all Serbs were touched by the arrest and conviction of Serb leaders. With time, these emotions have waned a little. But it is very difficult to disentangle legal questions from political ones. Milosevic’s arrest was also seen as a symbolic condemnation of people who supported him, those who supported his policies *vis-à-vis* Bosnia and Croatia.”

If that is the case, then was and should there be a more deliberate effort to play on that dimension and apportion blame in a way that somehow fairly reflects a share of the blame? In the initial stages the disproportion, to the extent that there was one, could be attributed to issues of cooperation. As Michael Wladimiroff pointed out, when the Office of the Prosecutor began its work it relied on the already accumulated evidence of the Bassiouni Commission and the fact that the government of Bosnia Herzegovina was willing to cooperate with the tribunal where Serbia was not. Nonetheless, on the long run, there seemed to be a balancing of indictments. What was interesting is that some of my interviewees considered it implausible that this was the result of a deliberate effort, whilst others were quite willing to see it as such. For example Ekkehard Withopf, in investigating and prosecuting the few cases involving Bosnian Muslims, was not oblivious of the impact this might have on observers:

“It was quite interesting to see that there was a perception that the Bosnian Muslims are *the* victims, or the *only* victims. It was interesting to see how people reacted occasionally when they realized that the ICTY was also investigating and prosecuting Bosnian Muslims. Because this was contrary to the general and widely accepted perception that the perpetrators were Serbs or Croats only.”

However, that is a very different thing from thinking that prosecutions were decided on the basis of a conscious effort to prove the tribunal’s impartiality by giving each group their “fair share” of guilt as it were. For Ekkehard Withopf:

“That may have been the result and hopefully it was, but I do not think there was ever a ‘politically driven’ decision along these lines. The ICTY has investigated the crimes where the evidence took it, and there was evidence that Bosnian Muslims committed crimes. This may have been perceived if there had been a political will that all sides be prosecuted, but to my knowledge there was certainly no conscious decision of that sort.”

Conversely, Payam Akhavan, who defended Gotovina, thought that there was an attempt to engage in “distributive justice,” and that it had occasionally had “mixed results” for the tribunal. Distributive justice is understood as implying that, “in order to avoid a suspicion of victor’s justice, for example, if all the defendants in the dock are Serbs, that the tribunal would indict individuals from other ‘ethnic factions’.” He warned that there is a:

“[...] very delicate balance between demonstrating impartiality and letting prosecutorial decisions be driven by the facts on the ground. Whether it was deliberate or not, there were many political considerations, especially when it came to prosecutorial discretion, because at some point you have to exercise discretion in ways that ordinarily are unimaginable. For example in a murder case domestically, there is very little prosecutorial discretion: you have to investigate at least and prosecute (discretion is only for lesser offences). However, internationally things are very different: any discretion that you exercise means that some very serious international crimes will go unprosecuted, this is the dilemma of international criminal justice, you can only prosecute a very small handful of perpetrators. In the case of Yugoslavia, 20 years and billions of dollars later, that means about 200 people, which is a very small number. I think that in certain instances the ICTY, as a result of prosecutorial decisions, spent a disproportionate amount of time on certain cases in an effort to achieve ‘distributive justice’. For example the prosecution of Naser Oric was not worth the resources spent by the tribunal. The crimes were relatively trivial and he was only condemned to three years on the basis of command responsibility, and that that did not justify the massive

expense of resources, at a time when major crimes went unpunished.”

Regardless of whether there was a deliberate attempt to engineer blame apportioning or whether that was the net result of following evidence, it was often perceived as such in the region, but for the wrong reasons. As Hasan Nuhanovic points out, the complaint from the Serbs is that “the statistics show that 80% of those convicted are Serbs. This means that something wrong is going on, the ‘West’, the ‘lobbies’, the Vatican are simply biased against the Serbs. There is nothing between the lines about this, it is very open.” Yet as Payam Akhavan pointed out, this may simply be because some sides committed much more crimes than others. For example, the fact that most prosecutions concerned Serbs is arguably based “on the facts on the ground which shows that one side was overwhelmingly responsible for the atrocities”.

However, beyond the issue of prosecutorial discretion, distributive notions could also find an interesting echo in how prosecutions might have been organized. Ekkehard Withopf pointed out the difficulties that arose from having investigating teams assigned to examining a particular ethnic group. This was then later inevitably reflected in the trials themselves, which were mostly mono-ethnic, concentrating on the crimes committed by a particular group in a given area. This in turn occasionally lead to what Ekkehard Withopf described as “flip side” cases – concerning crimes committed in the same geographical reason at the same time, but prosecuting the crimes committed by another group. Withopf always thought that:

“Ethnic specific investigations and trials were very artificial. With hindsight, one could have divided investigations along geographic lines. For example what happened in the Lavsa valley in 1993. One would have avoided all kinds of procedural problems of repetition, which meant that witnesses had to be called repeatedly, and the problem that the perpetrators in the one case were the victims in the other case. It crossed my mind several times, that if one were to have done one thing differently, it could have been to have complex trials of particular events involving members of different groups. Technically it would have caused problems, but it would also have solved others, in terms of overlap. And it would also have better reflected realities.”

### 3. Between Primacy and Complementarity

From the start, one of the limitations on the impact of the tribunal in the region was its very international character. Whilst their professionalism was hardly ever in question, lawyerly professionalism is not all, and Zoran Pajic pointed out that:

“There is indeed a real problem of translation, but the problem is much broader than the issue of translating the documents or translating statements or analysis. The problem of course is that the Judges are coming from all over the world except from the region of the former Yugoslavia. In 80% of cases they are people who have no idea about the social cultural background of society in the former Yugoslavia. They are ignorant about the history, they are ignorant about relationships that had been established for generations in the region. And these things cannot simply be picked up from the literature. They can never become judges’ ‘intellectual property’. For people who hear the cases, it is hard to understand how those mostly affected by the war will react to the sentences or to the evidence exposed in the courtroom.”

Michael Wladimiroff also spoke of judges and prosecutors who for the most part “had no insight in the area, who spoke of Bosnia as of a far flung country, and had no opportunity of travelling in the country”.

This may explain the increasing importance that the tribunal’s strategy of reverting cases to the former-Yugoslavia eventually attained. Judge Pocar was particularly keen on focusing on this aspect of his work as a key part of the tribunal’s legacy, via what he described as the “rediscovery of complementarity” hidden in the tribunal’s primacy over domestic courts:

“What the tribunal has done, and this is a relatively recent approach of the last 5 years that was not a concern beforehand, is to better take in to account the tribunal’s own limitations, and of the need for the ICTY to operate in a way that its activity will not be lost when we close our doors. When I was president, this is what I called transforming the so-called completion strategy demanded by the Security Council into a *continuation* strategy. We need to have a continuation of the activity of the tribunal in the region and in order to do so we put in place a number of

partnership and cooperation programs with local judiciaries in order to ‘transfer our technology.’ The idea is that they should continue the activity of the tribunal following the same kind of approach that the tribunal has shown throughout these years. So these are actions we are conducting together with international organizations, particularly OSCE, the UN, etc. We have established a manual of our practice which is the basis for using our methodology in dealing with crimes against humanity in the region. With all the support we have for this program we are now starting to see some impact, and if local judiciaries take action and become those who are continuing our work this will be in my view a major legacy of the Tribunal because without the action of the local judiciaries the rule of law definitely cannot be re-established in these countries. If this tribunal succeeds in perpetuating its action locally, then in my view it would really have met the expectations of the resolutions of the Security Council because.”<sup>1</sup>

This significance of this international/domestic nexus was confirmed by Miodrag Majic, a judge in the Belgrade Chamber of Appeal. Of course, there were differences in legal culture and the process of translation of international criminal law into domestic law was not without its points of friction. For example, the notion of command responsibility had no equivalent in Serbia and its introduction in the criminal law was sometimes problematic. Nonetheless:

“One of the most significant contributions of the ICTY in the region is an accelerator. It broke new grounds by introducing the idea that one should be liable for international crimes both internationally and domestically. It really started things, prosecuting step by step, which changed many peoples’ minds at the national level, that something should be done. So above all it was a trigger, bringing an end to a long history of not being accountable, and not just in the former-Yugoslavia.”

<sup>1</sup> Readers interested in this dimension are encouraged to access Judge Pocar’s article on the issue. F. Pocar, ‘Completion or Continuation Strategy?’, 6 *Journal of International Criminal Justice* (2008) 4, 655-665.

But was this perhaps a case of the right remedy coming too late? Might not the ICTY have started putting pressure on domestic courts earlier, without simply being prompted to do so by the Security Council as part of a desire to implement a ‘completion strategy’? The interviewees all expressed skepticism that cases could have been deferred much earlier. Judge Pocar suggested that the war made this impossible, and that even a mixed court would not have worked, so that it was safer “to do things ourselves”. Complementarity, as he put it, “cannot — and this is also true for the ICC — work completely by itself. It can work only if the local judiciary is assisted by international community.” The important thing, Vesna Terselic noted, was that “the exchange between the ICTY and domestic courts functions well and I would say that there is respect for each, other and that there are open channels of communication and co-operation — even though, unfortunately, the public often does not know that this is happening.”

#### 4. Conclusion

There is a clear imbalance between the respect in which the tribunal is held at the international level as an essential step towards the realization of a form of universal justice, and some of the skepticism that has surrounded its activity in the former-Yugoslavia. Professor Ljubo Bavcon was the most forthcoming about this:

“Although in many respects the ICTY undoubtedly represented an important step forward in the development of international law, the idea that it could create peace and security in the region was utopian and unrealistic. Emotions ran too strongly between Serbs, Croats and Muslims. It took other things: time, an international intervention, even an armed one, to finish this atrocious war. So there is no doubt that the creation of the tribunal did more for international justice and international criminal law generally than for the former-Yugoslavia.”

The tribunal’s local impact may in the end be mostly legal and judicial, via for example the return of cases to national jurisdictions, rather than more deeply engaged with the region’s political fabric. This is perhaps an appropriate legacy for a judicial institution, one that is in the end mostly formal and legal.

It also became evident in the course of my exchanges with interviewees that there is a more intimate connection between what happens

in the courtroom and what happens in the region than often thought, so that minute variations in the procedural or substantive makeup of the tribunal may have quite an effect on the ground. For example, the fairness of trials will influence the way they are received; outreach is not simply a communications operation, but a way of being *vis-à-vis* constituents; broad modes of imputation of liability, according to Akhavan, “create a disincentive for the prosecution to do its job properly, [...] and if the function of the tribunal is also to uncover the truth” then that is less than ideal; having focused trials based on geographic happenings involving all parties rather than ethnically segmented trials both makes sense in terms of resource allocation and the need to show the reality of conflicts as complicated and not one-sided.

In the course of the interviews, several ‘dissonant’ notes emerged that may go some way to understanding some of the ICTY’s limitations. One of the more interesting was suggested by Hasan Nuhanovic in the form of reluctance to ever see the UN’s *own* role in allowing mass crimes to be committed at the time. Speculating as to why he had never been called as a witness despite being a survivor at Srebrenica, he mentioned his case against the Dutch State and hinted that his testimony “would be incriminating for the UN Peacekeepers rather than the Serbs”. “At the same time”, he went on:

“I understand the position of the ICTY. They are located in the Hague, the capital of the country that I am suing. Moreover, the ICTY is a UN body, it was probably politically difficult for the tribunal to talk about that issue, although that does not mean that they should not have looked at the case on purely legal grounds. Why only citizens of the former-Yugoslavia? There was never an investigation of the wrongdoings of UN peacekeepers in Potočari [...]. The problem is not with ‘what the UN did not do.’ This is the official line ‘we stood by and watched, we should have done more, but we could not, because of the mandate, etc.’ But this is totally wrong, they actually actively participated, conducted by themselves the expulsion of 5,000 people from the UN compound. The Serbs would not even enter the compound, it was the Dutch who did it.”

Another nuanced line of critical questioning was suggested by Vesna Terselic, who pointed ways in which the ICTY’s work could only remain limited, and the need for international criminal justice efforts to ultimately

connect with other local initiatives to memorialize the crimes that were committed:

“I hope that in 30 years you will not be able to distinguish what is the legacy of the international tribunal and what is the domestic legacy. Because at the end of the day, why would you really want to distinguish what is there thanks to the international tribunal and what is there because of domestic prosecution. I really hope that eventually we will not be discussing such things because the domestic and the international will have converged. The problem which we have with narratives of war is that the mainstream narratives, including the international one, are simplified, they interpret a complex war reality into something relatively simple. There are clear cases. For example, when you say the Yugoslav Army artillery bomb Dubrovnik, that's very clear. But then you have many places in Croatia where beside aggressions of the Yugoslav Army and defense there were also elements of civil war, even though this is very difficult for the Croatian public to follow. The important thing that we need to remember and discuss is that there are victims on both sides of war, and that we have to find a way to at least remember them because not all war crimes will be prosecuted (unfortunately because you don't have all that material evidence, all the organizational capacity, witnesses, etc.). It's a process in which tribunal played a major role. But now that the tribunal is about to complete its work we are advocating for a regional commission to establish facts. No government has even hinted that they might be interested (apart from Montenegro).”

Finally, Payam Akhavan wished to question our idealization of all things international and worried about what he saw as the occasionally dubious quality of investigations undertaken by the tribunal. Maybe this is “because the tribunal is a sort of sacred cow that we do not want to criticize because we stand for international justice, so much so that we are sometimes not sufficiently critical about whether the institutions resources were spent properly and by qualified people”. Mark Harmon also found that there were problems but he attributed them directly to the uneven support provided by the international community. The rigidities associated with the United Nations administrative regulations, for example, made it difficult at times to

retain the most competent staff (“no private law firm could run a litigation under such conditions”). The completion strategy, at critical times, “decimated” OTP trial teams leaving them “understaffed and under-resourced.” Harmon contrasted the Oklahoma city bombings, in which 168 people died, and following which the prosecution had 2500 FBI agents working on the case during the first year alone. By contrast, he pointed out, “when I did the Srebrenica case at the high watermark the highest number of investigators was 5. Having 5 investigators for a crime like Srebrenica is obviously insufficient”. The net result is that:

“The international community expects us to prosecute these crimes efficiently and competently on the one hand, and on the other hand we do not have the tools to do so. States expect a perfect justice with limited resources. But with justice on the cheap, you get what you pay for. But for the superhuman efforts of the prosecution staff and investigators, and their exceptional dedication, working 7 days a week, 15 hours or more a day, the truth about what happened at Srebrenica would not have been revealed at the Tribunal.”

Yet for all these limitations, there was by and large a recognition that the contribution to peace in the former-Yugoslavia was significant. First, my attempts to tempt interviewees with a counterfactual scenario showed that even the most skeptical had no doubt that the region was better off with the tribunal than without it. I specifically asked what would have happened if in 1993 the international community had pushed for a blanket amnesty for all international crimes in the former-Yugoslavia. Zoran Pajic was prompt to turn the question on its head:

“Let me give you another example as an illustration. After the Second World War, which saw much fighting between groups in Yugoslavia, there were only two trials for war crimes, one against General Milanovac on the Serbian side and the other one on Bishop Stepinac on the Croatian side. And then Tito came with the idea of brotherhood and unity and basically said ‘okay there was a war, we all suffered, let's build the brotherhood and unity, let's sweep the past under the carpet.’ It didn't work [...] I mean it did work for 50 years. But, you know, generational memory simply produced this cycle of violence again.”

In effect, the ICTY may well have broken the cycle of impunity in the former-Yugoslavia for good. Akhavan had no doubt that removing certain key individuals from power (to which they could have easily clung were it not for the tribunal) was a much better scenario than legitimizing them there. The rest, as he said, “will take time, maybe generations, just as the denazification process did after a period where an overwhelming number of people saw Nuremberg as victor’s justice. But at least the mothers of Srebrenica “feel that they had some recourse, however inadequate, that someone is listening to them, that some have been called to answer”. We cannot, he emphasized, “take all these things for granted, if Karadzic and Mladic and others had simply been allowed to stay in power, we would be in a far worse situation.” Hasan Nuhanovic remarked that “the Hague” (the expression commonly used rather than ‘ICTY’) “became a symbol for justice. People are not disappointed, they believe in what the tribunal did, and their only regret is that the tribunal will be closed soon even though it is far from done. Justice is still far from being done.”

Second, even if the full extent of responsibilities was far from being recognized in the region, a record had been built which could eventually provide a basis for a more lasting legacy. In particular, Vesna Terselic credits the tribunal for making everyone accept that at least offences were committed, although by who often remains a matter of debate.

“One of the great legacies of the tribunal are, quite simply, the verdicts which have already passed appeal level. The facts that are presented in such verdicts are something which hardly anyone disputes. I cannot recall the last time I have seen in any kind of important daily or weekly or in electronic media that somebody would put in question what was established in the verdict, on the level of fact. For example there is some debate in Croatia on whether the military authorities actually knew that killings were happening in Vukovar (Terselic has no doubt that they knew). But what is not disputed is that people have been killed there. This is an important source for historical interpretation, even though it is not a full source. The facts are practically not disputed. Even with Srebrenica, many Serbs will acknowledge that many people were killed, although for various reasons they may resist calling what happened genocide. That factual legacy is very important.”

Another reason for hope was the extent to which, slowly, the ICTY had help 'de-ethnicize' some of the political issues in the former-Yugoslavia, either to repoliticize or individualize them. Payam Akhavan emphasized that it was ultimately a revolt in Serbia that provoked the ouster of Milosevic, showing that extreme nationalism in Serbia was hardly inevitable. Mark Harmon found "inspiration" in the fact that he never heard victims "who had suffered terribly during the war, and had to recount painful events that would have destroyed many people say bad things about other ethnic groups, despite their immeasurable pain."

Third, there was remarkable support for the idea that the tribunal had gotten its core mission right and that, beyond simply "developing international law" it actually rendered justice. Peter Robinson, perhaps interestingly for a defense counsel, was perhaps the most emphatic:

"I have to say that in most of the cases, when it comes to finding guilty people guilty and not guilty people not guilty, the Tribunal seems to have gotten it right in the end which is, after all, its main function. So, it seems like they did hear both sides, speaking very generally, and in the end came to a result that seemed to be pretty accurate, in contrast my experience with the ICTR."

Moreover, the ICTY did not just get individual cases right, it also did a good job of getting some kind of intra-communal balance right since it "prosecuted all sides to the conflict, which the ICTR failed to do", and its legitimacy "in the minds of people in the region and others is very high" whereas the ICTR's is not.

The legacy of the ICTY is a question that will continue to remain current for a very long time. But this glimpse of the views of a number of persons who have been either quite invested in it or watched it closely, suggests a tribunal whose legacy lies as much in some of the questions it asked than the answers it brought.