

The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims

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Table of Contents

A.	Introduction.....	1094
B.	Situating the Victims in the Development of the Completion Strategy	1097
C.	The Completion Strategy and its Impact on Victims who Testified before the ICTY	1100
I.	Meeting Deadlines or Target Dates? The Limited Participation of the Victims as Witnesses.....	1101
II.	‘Target Dates’ and the Protection of the Victims Called to Testify	1105
III.	Witnesses and the Residual Mechanism.....	1108
D.	All other Victims	1111
I.	Referral of the Cases: Strengthening National Jurisdictions .	1112
II.	The Symbolic Value of Archives of the Tribunal.....	1116
E.	Final Remarks	1120

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Abstract

Even though not clearly spelled out in its constitutive instrument, one characteristic of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is its temporary character. This characteristic presents the ICTY with a significant challenge, the complexity of which is increased by the fact that the tribunal has a multi-faceted mandate. This article examines the effects of the completion strategy of the ICTY on the victims of the crimes under its jurisdiction. Initially, it considers the impact of the completion strategy on the victims who participated, as witnesses, in the proceedings before the ICTY. It argues that the pressure to comply with the timeframe established by the Security Council has resulted in the reduction of the victims to their forensic usefulness. The victims were considered primarily in light of their instrumental relevance to the proceedings. Then, the article suggests, through the analysis of the referral of cases to domestic courts and the value of the archives of the ICTY, that the completion strategy can or might have a positive effect on the implementation of the rights of the victims who have not had direct contact with the ICTY. In this context, this article argues that the termination of the ICTY does not necessarily mean that the struggle for the implementation of the rights of the victims has finished.

A. Introduction

One of the characteristics of the *ad hoc* international criminal tribunals, even though not clearly spelt out in their constitutive instruments, is their temporary character.¹ With regard to the International Criminal Tribunal for the Former Yugoslavia (ICTY), Judge Theodor Meron, former President of the ICTY has noted that “[t]he Tribunal has always been mindful that its role is not that of a permanent court, but of an *ad hoc* entity intended to complete a task that is finite, albeit large and complex”². This

¹ G. Acquaviva, ‘‘Best Before the Date Indicated’’: Residual Mechanisms at the ICTY’ (1 November 2009) available at <http://ssrn.com/abstract=1503923> (last visited 23 December 2011), 2.

² Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc

temporary character presents a significant challenge to the ad hoc international criminal tribunals.

The complexity of the challenge faced by the ad hoc international criminal tribunals is increased by their multi-faceted mandate.³ It is reasonable to expect that not all objectives will be achieved at the same time. More importantly, different stakeholders might have different views about the completion of a certain task.⁴ In this context, one needs to ask who determines that the objectives of the ad hoc international criminal tribunals have been completed or when they need to be completed. Is it the Security Council, the ad hoc international criminal tribunals, the States, the prosecutor, the judges, the international community or the victimized communities? All these stakeholders are interested in the work of the ad hoc international criminal tribunals.⁵ All of them are interested in the design of a strategy for closing down the tribunals that does not undermine their legitimacy.

Nonetheless, not all of them have participated in the process that designed the completion strategy of the ad hoc international criminal tribunals.⁶ With regard to victims, unfortunately, an unbroken continuity can be perceived: their views had a peripheral role in the establishment and work of the ad hoc international criminal tribunals as well as in the design of their completion strategy and establishment of the residual mechanism. The victims had however to deal with the consequences of the completion

S/2004/420 (24 May 2004), Enclosure I, [ICTY Completion Strategy Report May 2004], 3.

³ The ICTY was conceived as a means of doing justice, deterring further crimes, and contributing to the restoration and maintenance of peace. See: First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 to the Security Council and the General Assembly, UN Doc A/49/342-S/1994/1007 (29 August 1994), [First Annual Report of the ICTY], 11. The various objectives of the ICTY are also discussed in the literature; see, for instance, L. A. Barria & S. D. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR', 9 *The International Journal of Human Rights* (2005) 3, 349, 357.

⁴ On the confusion surrounding the completion strategy of the ad hoc international criminal tribunals, see the views of Damaska in M. B. Harmon, 'Discussion', 6 *Journal of International Criminal Justice* (2008) 4, 681, 702.

⁵ K. J. Heller, 'Completion Strategies and the Office of the Prosecutor' (26 June 2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1425923 (last visited 23 December 2011).

⁶ *Id.*

strategy. This article examines the impact of the completion strategy of the ICTY on the victims. The focus on victims follows the understanding that the crimes under the jurisdiction of the ICTY affected not only the interests of the international community and the accused, but also the interests of individual victims. It can be expected, therefore, that the closing down of the institution created for “the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia”⁷ will also affect the victims of these crimes.

To explore the effects of the completion strategy on the victims, this article is divided into four sections. Section B provides a brief overview of the development of the completion strategy of the ICTY. It clarifies which stakeholders have had a central role in the design of the completion strategy. In addition, it examines whether the interests of the victims of the crimes committed in the former Yugoslavia have been taken into account in the design of the tribunal’s completion strategy and its further development. In this context, it is suggested that the completion strategy of the ICTY has changed gradually in order to include post-closure issues,⁸ creating a promissory space for the consideration of the interests of the victims and implementation of their rights.

Section C illustrates the impact that the completion strategy had on the victims that have taken part in the proceedings before the ICTY, i.e. the victims called to testify before the tribunal. Section C.I. analyses the (unintended) consequences that the amendments carried out to the Rules of Procedure and Evidence (RPE) of the ICTY to increase the efficiency of the proceedings have had on the participation of witnesses. This section draws attention to the inherent conflict between initiatives aimed at speeding up proceedings and the desire to allow the victim’s voice to be heard in the proceedings. Section C.II analyses the impact of the completion strategy on the ICTY’s perception of protective measures. It highlights the instrumental

⁷ SC Res. 827, 25 May 1993, para. 2.

⁸ The term, post-closure issues, is used to refer to residual issues and legacy projects. “Residual mechanisms refer to tribunal functions that need to continue even after the tribunal is formally terminated, such as supervising the sentences of convicted defendants and ensuring the continued protection of tribunal witnesses. Legacy projects refer to longer-term post-completion projects, such as creating tribunal archives and continuing outreach to affected communities”, Heller, *supra* note 5, 2.

approach that has informed the discussion of protective measures in the first completion strategy reports. It suggests that this approach has changed with the acknowledgement that the privacy and safety of the witnesses need to be protected even after the tribunal has been formally terminated.

Section D discusses the consequences of the completion strategy more broadly. It considers the impact of the strategy on victims of war crimes who might have not had direct contact with the ICTY. Section D.I highlights the potential created by the referral of cases to domestic courts for the continued implementation of victims' access to justice. Section D.II draws attention to the symbolic value of the archives of the tribunal and their relevance to the victims.

It is acknowledged that various other completion issues and residual functions might have affected the victims, their rights, interests and expectations. The measures discussed in this article aim to point out that the termination of the ICTY does not necessarily mean that the struggle for the implementation of the rights of the victims has finished. In this context, it is argued, in accordance with the suggestion of Judge Fausto Pocar, that the completion strategy of the ICTY should be understood as a continuation strategy.⁹

B. Situating the Victims in the Development of the Completion Strategy

Although the ICTY was intended to have a finite life-span, no formal consideration was given to completion issues when the tribunal was established.¹⁰ The development of a completion strategy was triggered by a report of the former President of the ICTY, Judge Claude Jorda, to the Security Council in 2000.¹¹ At that time, it was estimated that if the pace of the tribunal's work and the Prosecutor's penal policy were maintained, all

⁹ F. Pocar, 'Completion or continuation strategy? Appraising problems and possible developments in building the legacy of the ICTY', 6 *Journal of International Criminal Justice* (2008) 4, 655.

¹⁰ Acquaviva, *supra* note 1, 2; Heller, *supra* note 5, 9.

¹¹ Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 to the Security Council and the General Assembly, UN Doc A/55/273-S/2000/777, 7 August 2000 [Seventh Annual Report].

trials would be disposed of not before the year 2016.¹² The tribunal would, then, need to deal with the appeals.

In August 2003, the Security Council made the completion strategy official with Resolution 1503. Resolution 1503 called on the tribunal to “take all possible measures” to complete investigations by 2004, first-instance trials by 2008, and all work by 2010.¹³ Less than two months later, Judge Theodor Meron, then President of the ICTY, reported to the United Nations General Assembly that it would not be possible “to accommodate any new indictments within the timeframe indicated by the Council”.¹⁴ Reporting to the Security Council, the Prosecutor concurred with that assessment and stated that the Office of the Prosecutor (OTP) would review new indictments to determine which ones should be tried at The Hague and which could be transferred to domestic jurisdictions.¹⁵

The Security Council responded in 2004 by enacting Resolution 1534.¹⁶ In this Resolution, the Security Council reiterated the completion schedule previously provided in Resolution 1503. It called on the Prosecutor “to review the case load of the ICTY [...] with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions”¹⁷. In addition, it instructed the ICTY “to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes”¹⁸ within its jurisdiction. Resolution 1534 also required the ICTY to provide 6-monthly reports to the Security Council setting out in detail the progress made towards the completion of its work. Since then, the ICTY has submitted 15 reports, the latest in May 2011.

In accordance with Resolution 1534, the ICTY amended its RPE. Rule 11*bis* was amended in 2004 to permit the referral of cases to national

¹² *Id.*, 5.

¹³ SC Res. 1503, 28 August 2003.

¹⁴ ICTY, Address of Judge Theodor Meron, President of The International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly (10 October 2003) available at <http://www.icty.org/sid/8181> (last visited 23 December 2011).

¹⁵ ICTY, Address by Ms. Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council (10 October 2003) available at <http://www.icty.org/sid/8180> (last visited 23 December 2011).

¹⁶ SC Res. 1534, 26 March 2004.

¹⁷ *Id.*, para. 4.

¹⁸ *Id.*, para. 5.

jurisdictions in the former Yugoslavia. Rule 28(A) was also amended to review new OTP indictments. According to the current version of Rule 28(A), “[o]n receipt of an indictment for review from the Prosecutor [...] [t]he President shall refer the matter to the Bureau, which shall determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal”. These amendments are part of the efforts undertaken by the ICTY to expedite the trial process.¹⁹

The analysis of the first reports on the completion strategy indicates that both the Chambers and the Prosecutor focused on issues related to the work of the tribunal prior to its termination. They referred to aspects related to the allocation of space, maintenance of personnel, cooperation by member States with respect to the arrest of fugitives, access to evidence and the granting of waivers of immunity to enable witnesses to provide statements or testify before the ICTY and contempt cases.²⁰ In addition, they considered the referral of cases involving lower and intermediate rank

¹⁹ See Seventh Annual Report, *supra* note 11, para. 288. The report refers to the creation, in September 1999, of a Judicial Practices Working Group to gather all those involved in the trial to discuss, evaluate and, if necessary, amend the Tribunal’s judicial practice to ensure the effective operation and functioning of the ICTY.

²⁰ See ICTY Completion Strategy Report May 2004, *supra* note 2, para. 78; Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc S/2004/897, 23 November 2004, Annex I, [ICTY Completion Strategy Report November 2004], paras 21-24; Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2005/343, 25 May 2005, Annex I, [ICTY Completion Strategy Report May 2005], Sections A, B and D; Assessment and report of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc S/2005/781, 14 December 2005, Annex I, [ICTY Completion Strategy Report December 2005], paras 47, 49; Assessment and report of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2006/353, 31 May 2006, paras 52-54, [ICTY Completion Strategy Report May 2006]; Assessment and report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc S/2006/898, 16 November 2006, Annex I, [ICTY Completion Strategy Report November 2006], Section A.

accused to national courts.²¹ It was only in the completion strategy report of May 2007 that express reference was made to residual functions, i.e. the judicial functions that need to remain in place following the closing of the tribunal.²² It is suggested in sections A.II and B that the inclusion of post-closure concerns in the completion strategy reports was paramount to the interests of the victims.

Nonetheless, victims are mentioned in all completion reports. In general, the references to victims can be divided into two categories: those related to the victims that have taken part in the proceedings and those related to victims in general. Drawing from this division, Section A explores in more detail the impact of the completion strategy on the victims called to testify before the ICTY. Section B focuses on victims more broadly.

C. The Completion Strategy and its Impact on Victims who Testified before the ICTY

Judge Patrick Robinson, President of the ICTY, estimated in his completion strategy report of May 2011 that “more than 6,900 witnesses and accompanying persons from all over the world have been called to appear before the Tribunal”²³. The report does not clarify the number of victims that actually testified before the ICTY. It seems, nonetheless, reasonable to expect that they represent a significant part of this estimate.²⁴ Two aspects of the completion strategy seem to have had a direct impact on

²¹ See ICTY Completion Strategy Report May 2004, *supra* note 2, para. 20. ICTY Completion Strategy Report November 2004, *supra* note 20, para.6; ICTY Completion Strategy Report May 2005, *supra* note 20, Section C; ICTY Completion Strategy Report December 2005, *supra* note 20, para. 27, ICTY Completion Strategy Report November 2006, *supra* note 20, Section C.

²² Assessment and report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc S/2007/283, 16 May 2007, Annex I, [ICTY Completion Strategy Report May 2007], para. 34.

²³ Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2011/316, 18 June 2011, Annex I, [ICTY Completion Strategy Report June 2011], para. 88.

²⁴ According to Klarin, writing in 2004, “more than 1.000 victims have passed through the Tribunal’s courtrooms, to give evidence of the horrors that were visited upon them”. M. Klarin, ‘The Tribunal’s four battles’, 2 *Journal of International Criminal Justice* (2004) 2, 546, 557.

the victims as witnesses. The first, which is discussed in Section I, encompasses the measures adopted to speed up the proceedings before the ICTY. The second, considered in Section II, regards the maintenance of a safe and non-hostile environment, i.e. the maintenance of the conditions that ensure the respect of the privacy and safety of the victims who testified before the ICTY.

I. Meeting Deadlines or Target Dates? The Limited Participation of the Victims as Witnesses

The procedural framework established for the ICTY limits the communicative engagement of the victims in the process to their participation as witnesses. The relevance of the victims to the ad hoc international criminal tribunal is related to their ability to clarify the specific actions of the accused and, as a consequence, to assist in the determination of the responsibility of the accused. In this context, the ICTY has adopted a very narrow definition of victim. A victim is only “[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed”²⁵. By focusing on direct victims, the ICTY increases the chances of first-hand accounts of the crimes.

Nonetheless, the participation of the victims in the proceedings as witnesses has not been considered only as an important source of information for assessment by the judges of the impact of the crimes on the victims and, more broadly, on the community. It has been argued that the testimony of the victims “exposes the events from the human side and, as a result, it fosters public support for international justice, it permits people, NGOs and the public to understand what happened on the ground and to people like them and to appreciate why international justice is important”²⁶. In addition, the participation of the victims has also been said to have some therapeutic function. In this regard, it has been said that:

“War crimes trials must address the needs of three key parties: the perpetrators, the victims and the community affected by the war. To accomplish this, the court must find a way to help the victims accept, understand, and verbalize what has happened to them. The victims must be given an opportunity to articulate and

²⁵ ICTY Rules of Procedure and Evidence, Rev. 45, 8 December 2010 [RPE], Rule 2.

²⁶ Harmon, *supra* note 4, 690.

visualize their experiences. Anger and sadness have to be expressed in a public arena²⁷.

Despite these possible benefits, the scope for victims' participation as witnesses in the ICTY has been reduced considerably in an attempt to cut down on the excessive length of the proceedings. Whilst it would be mistaken to affirm that the amendments to the RPE that limited the participation of the victims were a direct result of the completion strategy,²⁸ the strategy had a considerable impact on the number of victims that could participate as witnesses in the proceedings as well as on the length of their participation. This is illustrated, for instance, by Rule 73bis.

In 1998, the ICTY introduced Rule 73bis, which obliged the prosecution to estimate the length of its case-in-chief and the number of witnesses it would call, and allowed the pre-trial judge to invite the prosecutor to shorten the estimated length of examination-in-chief for some witnesses and to reduce the number of witnesses. Even though this rule predates the completion strategy, it has not been immune to the pressure imposed by the completion strategy. Rule 73bis was amended in 2001, allowing the pre-trial judge to determine the number of witnesses the prosecution could call, and the time available to the prosecution for presenting evidence. In 2006, one of the strategic uses of Rule 73bis was mentioned in the ICTY completion strategy report. Judge Fausto Pocar, then the President of the ICTY, asserted:

“The International Tribunal has long been aware that the length of its trials also depends on the complexity and breadth of the indictments. The philosophy behind the Prosecution's pleading practices is its obligation to victims. In practice, the length of the Prosecution case has meant that in order to accord the accused due process, Judges have had to allocate a comparable amount of time to the Defence case. *The solution for the Judges, therefore, is to limit the length of the Prosecution's case to require the Prosecution to focus at trial on the strongest part of its case. This in turn will lead to a shorter Defence case.*

²⁷ N. Paterson, 'Silencing Victims in International Courts: Neglecting a Solemn Obligation', 4 *Georgetown Journal of International Affairs* (2003) 1, 95, 97.

²⁸ Such amendments have taken place since 1998.

One recommendation of the Working Group for implementing this proposal is wider use of Rule 73bis, which allows the Trial Chamber [...] to call upon the Prosecution to shorten the estimated length of the examination-in-chief of some witnesses and to determine the number of witnesses the Prosecution may call as well as the time available to the Prosecution for presenting evidence. Further, the Trial Chamber may fix the number of crime sites or incidents comprised in one or more of the charges with respect to which evidence the Prosecution may present. Greater use of the provisions of this Rule by the Judges has had the practical effect of limiting the Prosecution's case.²⁹

Another example of amendment to the RPE that has had an impact on the victims is Rule 90(A), on the presentation of evidence. In December 2000, Rule 90(A), which favored oral testimony, was deleted from the RPE. In the same revision of the RPE, two rules were introduced: Rule 89(F) and Rule 92bis. The former permits the trial chamber to receive evidence either orally or, in the interests of justice, in written form. The latter allows written statements to be admitted so long as they do not go to establishing the actions with which the defendant has been charged. Rule 92bis has not been used as a complete substitute for oral evidence, but to cut down on time spent in examination-in-chief. For this purpose, the ICTY designed a procedure in which “whenever a witness discussed a point that seemed to be contested by the accused [...] the witness was required to appear for cross-examination”³⁰. The prosecution would read into the record a summary of the statement of the witness and then turn the witness over to the accused for cross-examination. This procedure creates an opportunity to contest the claims made by the witnesses and provides them with an opportunity to clarify, justify or expand on their claims.

Nonetheless, as the witnesses are called to participate only if their testimonies are contested, this procedure has limited the relevance of the testimony of the witnesses to their epistemic function. The public space where the witnesses could articulate their experiences more freely has been

²⁹ ICTY Completion Strategy Report May 2006, *supra* note 20, paras 28 and 29 (emphases added).

³⁰ G. Nice & P. Vallières-Roland, ‘Procedural Innovations in War Crimes Trials’, 3 *Journal of International Criminal Justice* (2005) 2, 354, 367.

significantly reduced. In addition, the procedure established by Rule 92*bis* reinforces the power discrepancies between the questioners and the witnesses, whose participation in the trial is limited to answering questions. It creates a context in which witnesses felt constantly challenged.

The changes that these rules have brought about have been explained by the Prosecutor in her completion report of May 2007:

“An objective comparison between trials at the Tribunal in the early years and at present would show dramatic changes. Much more written evidence is being presented. Evidence of the commission of crimes, regarded as routine in the Tribunal, is presented by the prosecution wherever possible in writing in lieu of live testimony of witnesses. Even when witnesses are brought to court, the policy of the Office of the Prosecutor is to rely on written statements for most of the evidence-in-chief, and to restrict the examination of witnesses to key points before cross-examination. It is now a feature of all trials that strict time limits are set and accepted for the length of the parties’ cases and for the examination of individual witnesses. These time limits are closely monitored and adjusted as trials progress.”³¹

Rules 73*bis*, 89(F) and 92*bis* are part of the attempts of the ICTY to complete its work within the timeframe stipulated by the Security Council.

“Concerns about how many witnesses remain to be heard and how long this will take are not only perfectly legitimate; they are positively necessary.”³² Nonetheless, it is important that, when dealing with time constraints, the implications that new regulations can have for victim-witnesses are not overlooked. “Judicial ‘effectiveness’ may mean for them [the victims] that significant events and emotions are glossed over”³³.

The substitution of oral testimony for written testimony also has an impact on the public, as it makes it more difficult to follow the

³¹ Assessment and report of Carla Del Ponte, Prosecutor of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of resolution 1534 (2004), UN Doc S/2007/283, 16 May 2007, Annex II, [The Prosecutor Completion Strategy Report May 2007], para. 11.

³² M. Dembour & E. Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’, 15 *European Journal of International Law* (2004) 1, 151, 159.

³³ *Id.*

proceedings.³⁴ “The public no longer hears the victims, no longer sees the victims”³⁵. As recalled by the Prosecutor in her observations to the report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the ICTY, the credibility of the ICTY among the international community and the victims “partly depends upon whether their proceedings are seen to have a powerful impact in bringing home the responsibility of individuals for horrendous crimes”³⁶.

Unfortunately, the completion strategy reports of the ICTY seem to have overlooked the implications of these measures to the victims and the public. The reduction of the space provided for the victims to articulate their experiences has been presented in the completion reports of the ICTY as a history of success. The ICTY perceived these amendments as time-saving measures. The reports of the prosecutors have been more cautious. Nonetheless, their careful approach does not seem to have been motivated primarily by the negative impact that these measures can have on the victims, but on their possible impact on the independence and discretion of the OTP.³⁷

The amendments to the RPE reflect an instrumental approach to the testimony of witnesses. The participation of the victims depends not only on its usefulness to the overall strategy of the prosecution or the defense, but also on its impact on the ability of the ICTY to complete its work within a specific timeframe. The following section indicates that an instrumental perspective has also informed the discussion of protective measures.

II. ‘Target Dates’ and the Protection of the Victims Called to Testify

Art. 22 of the Statute of the ICTY provides that “[t]he International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses”. In drafting the rules related to the protection of witnesses, the judges of the ICTY took into account that

³⁴ Harmon, *supra* note 4, 691.

³⁵ *Id.*

³⁶ Comments on the report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc A/54/850, 27 April 2000, Annex I, para. 54.

³⁷ See, for instance, The Prosecutor Completion Strategy Report May 2007, *supra* note 31, para. 10.

“the unbearable abuses perpetrated in the region have spread terror and deep anguish among the civilian population. It follows that witnesses of massacres and atrocities may be deterred from testifying about those crimes or else be profoundly worried about the possible negative consequences that their testimony could have for themselves or for their relatives.”³⁸

Attempting to incorporate the concerns of witnesses, the ICTY established a Victims and Witnesses Section (VWS) to provide protection and support to all witnesses who appear before them, whether called to testify by the prosecution, the defense or the judges. The services provided by the VWS include: (1) counseling and assistance for victims and witnesses; (2) ensuring that the safety and security needs of witnesses are adequately met; (3) informing witnesses of the proceedings and their rights; (4) making travel, accommodation, financial and other logistical and administrative arrangements for witnesses and accompanying persons; and (5) maintaining a close contact with the trial teams regarding all aspects of the witnesses' appearances before the tribunal. In some instances the Section also assists victims and witnesses to relocate, sometimes abroad. To this end, the ICTY has entered into relocation agreements with cooperating States. Various other measures have been adopted by the ICTY to ensure that participation by victims as witnesses does not amount to a second round of victimization.³⁹

As witnesses who fear for their security could decide not to testify, the provisions on protective measures in the constitutive instruments of the ICTY can be seen as a means of securing the work of the tribunal.⁴⁰ They are instrumental to the work of the ICTY. This seems to have been the primary understanding of protective measure that informed the first completion strategy reports of the ICTY.

The threats faced by the victims and the inability of the local legal system to deal with them were perceived and presented as threats to the ability of the ICTY to complete its work through the transfer of the cases of

³⁸ First Annual Report of the ICTY, *supra* note 3, para. 75.

³⁹ See RPE, Rule 75.

⁴⁰ A. C. Lakatos, 'Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights', 46 *Hastings Law Journal* (1994-1995) 909, 920.

low and middle rank accused to different jurisdictions of the former Yugoslavia.⁴¹ The protection of the witnesses, one of the conditions needed for the successful prosecution of the cases transferred, could not be guaranteed by the competent national jurisdictions. As a result, the ICTY had to engage in a variety of training initiatives to develop the capacity of the national courts to process war crimes cases.⁴²

The need to deal with allegations of intimidation of witnesses and the illegal disclosure of confidential information of witnesses were also presented as an obstacle to the completion strategy. Contempt cases were said to consume time additional to that used by the trial to which they relate. Furthermore, they were said to “place an additional burden on the already heavy workload of the permanent and *ad litem* Judges, who must conduct these contempt proceedings in addition to their primary cases”⁴³.

It seems unduly restrictive to consider protective measures exclusively from an instrumental perspective. If situated in a broader legal framework, protective measures can be considered to be part of the gradual recognition of the interests and needs of the victims by the ICTY. They attempt to create a procedural framework that is fair not only to the defendant, but also to witnesses. In other words, they attempt to design an international criminal process in which the rights to life, security and liberty of those called to testify are not imperiled.

Fortunately, the understanding that the protection of witnesses is a function that needs to continue after the ICTY is formally terminated has (re)situated the privacy and safety of the victims that testified before the tribunal in the center of the debates on protective measures. The discussion

⁴¹ See, for instance, the Assessment of Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2004/42, 24 May 2004, Enclosure II, para. 35, [The Prosecutor Completion Strategy Report 24 May 2004] and ICTY Completion Strategy Report May 2004, *supra* note 2, para. 29.

⁴² Reference to training related to the protection of witness is found, for instance, in the ICTY Completion Strategy Report December 2005, *supra* note 20, para. 28; ICTY Completion Strategy Report November 2006, *supra* note 20, para. 24; ICTY Completion Strategy Report May 2007, *supra* note 22, para. 26.

⁴³ Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 November 2008 to 15 May 2009, UN Doc S/2009/252, 18 May 2009, Annex 1, [ICTY Completions Strategy Report November 2008], para. 35.

of the protective measures outside the legal proceeding represented the recognition of the human value of the victims called to testify before the ICTY. It avoided the reduction of the witnesses to instruments whose utility is considered and finished with the proceedings.

This recognition certainly requires a great degree of institutional responsibility towards victims and witnesses. It is this responsibility that the Residual Mechanism for Criminal Tribunals, created by the Security Council Resolution 1966,⁴⁴ will need to assume.

The following section considers some of the challenges that the judges of the Residual Mechanism will face to ensure that the victims are treated with concern and respect to which they are entitled not because they are valuable participants in the prosecution of war crimes, but in virtue of their humanity.⁴⁵

III. Witnesses and the Residual Mechanism

The Residual Mechanism established by the Security Council has two branches, one for the ICTY and one for the ICTR. The ICTY branch of the Mechanism will begin functioning on 1 July 2013. Among the various functions attributed to the Mechanism, two of them seem to have a direct impact on victims that testified before the ICTY: the prosecution of contempt and false testimony cases and the protection of witnesses.

The power to prosecute contempt and false testimony cases is established by Article 1(4) of the Statute of the Mechanism. According to this provision, the Mechanism is competent to prosecute any person “who knowingly and willfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals, and to hold such person in contempt”⁴⁶. It is also competent to prosecute “a witness who knowingly and willfully gives or has given false testimony before the Mechanism or the Tribunals”⁴⁷. The power of the Mechanism to prosecute contempt and

⁴⁴ SC Res. 1966, 22 December 2010. On the negotiation history of the residual mechanism, see: T. W. Pittman, ‘The road to the establishment of the international residual mechanism for criminal tribunals: from completion to continuation’, *9 Journal of International Criminal Law* (2011) 4, 797.

⁴⁵ P. Roberts, ‘Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication’, in A. Duff *et al.* (eds), *The Trial on Trial*, Volume II (2006), 41.

⁴⁶ Art. 1(4)(a) of the Statute of the Residual Mechanism, SC Res. 1966, 22 December 2010, Annex I, [Statute of the Residual Mechanism].

⁴⁷ Art. 1(4)(b) of the Statute of the Residual Mechanism.

false testimony cases reflects the understanding that “the continued protection of victims and witnesses and the effective administration of justice require a judicial capacity to sanction any breaches of [...] [ICTY’s] orders”⁴⁸.

Trials of contempt and false testimony cases are the only cases where new indictments may be issued by the Mechanism.⁴⁹ However, Article 1(4) of the Statute of the Mechanism provides that “before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State [...] taking into account the interests of justice and expediency”. This provision is in line with the preamble of Resolution 1966, which emphasizes that the “international residual mechanism should be a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions”⁵⁰.

Article 1(4) raises various legal and practical questions.⁵¹ One of these questions concerns the grounds for the exercise of such extra-territorial jurisdiction by the national courts. It has been argued that only the nationality principle and the passive principle are relevant for the determination of the jurisdiction in these cases.⁵² From the witnesses’ perspective, it could be argued that the nationality principle seems more favorable in cases of false testimony, as it might result in the case being tried by a tribunal to which the witness accused of false testimony has greater connections. The witness would not have to overcome any language barrier or to travel to The Hague, the seat of the ICTY branch of the Residual Mechanism. It could be argued, on the other hand, that in contempt cases initiated to punish, for instance, the willful disclosure of the identity of a protected witness, the passive nationality principle would be more favorable to the witness who has been the victim of the wrongful conduct.⁵³

⁴⁸ Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals, UN Doc S/2009/258, 21 May 2009, [Report of the Secretary-General], para. 23.

⁴⁹ See Art. 1(5) of the Statute of the Residual Mechanism.

⁵⁰ Preamble of SC Res. 1966, 22 December 2010.

⁵¹ C. Denis, ‘Critical overview of the ‘residual functions’ of the mechanism and its date of commencement’, 9 *Journal of International Criminal Law* (2011) 4, 819, 827.

⁵² *Id.*

⁵³ It is acknowledged that the principle of passive nationality is controversial and might offer a weak basis for the determination of the jurisdiction of the national courts.

From the witnesses' perspective, this would be the case if they were to be heard in the proceedings. In these cases, practical aspects could facilitate their attendance and participation.

It is, nonetheless, unclear which principle(s) will inform the Residual Mechanism's decisions on referral. Actually, one might argue that, in light of the nationalist character of the conflict in the former Yugoslavia, the determination of the jurisdiction of the national courts to prosecute contempt and false testimony cases in accordance with the nationality of the victim or the nationality of the perpetrator might not be in the interest of justice. Decisions reached by national tribunals in contempt and false testimony cases might be perceived as biased.

In this context, the prosecution of contempt and false testimony cases by the Residual Mechanism might be a better option. From the witnesses' perspective, the competence of the Residual Mechanism has its benefits. It is expected that the judges will be more familiar with the constitutive instruments of the ICTY, its practice and case law.⁵⁴ This background knowledge facilitates the assessment of the wrongful conduct of the witness who gave false testimony as well as its impact on the administration of justice. In contempt cases, this background knowledge also assists in the analysis of the impact that a violation of a protective order might have had on the protected witness. Concerns related to the transferal of the proceedings to the national courts have also been indicated as an aspect that might impede the expedite prosecution of the case,⁵⁵ and, as a consequence, have a negative impact on the right of the accused to a speedy trial.

The Residual Mechanism also has the power to protect victims and witnesses in relation to the ICTY and the Mechanism.⁵⁶ As of 1 July 2013, the Mechanism will provide for the protection of victims and witnesses who have testified before the ICTY or witnesses who will testify before the Mechanism.

“With more than 1400 witnesses at the ICTY [...], it is anticipated that this function will form an important part of the work of the Mechanism, including its various organs: the Registry, the Chambers and the Office of the Prosecutor, which may be directly involved in the protection of some witnesses.”⁵⁷

⁵⁴ See Art. 9(1) of the Statute of the Residual Mechanism.

⁵⁵ Denis, *supra* note 51, 827.

⁵⁶ See Art. 20 of the Statute of the Residual Mechanism.

⁵⁷ Denis, *supra* note 51, 831.

With regard to the victims called to testify before the Residual Mechanism, the chambers will need to ensure their safety, physical and psychological well-being in order to reduce the impact of coercion and intimidation in the legal proceedings. With regard to the victims who testified before the ICTY, the chambers of the Residual Mechanism will need to ensure that the protective measures ordered by the ICTY are being enforced and to deal with requests to vary or rescind protective measures. In dealing with these requests, they will need to carefully assess the veracity and reasonableness of the fears adduced by the witnesses at that moment and, therefore, the adequacy of the protective measures previously ordered. The legitimacy of the decisions that rescind, vary or augment protective measures by the Mechanism will rely on the witnesses' views being considered in the proceedings and their consent sought.⁵⁸

Possible changes to the protective measures ordered by the ICTY will impact directly on the protected witnesses, but it might also have an indirect impact on all those victims that did not participate in the proceedings. Judicial records previously classified as confidential due to the protective measures adopted might, with the rescission of the measure, become available to the public.⁵⁹ These documents might clarify not only the issues discussed in that specific procedure, but also be relevant to the understanding of broader aspects of the conflict. A certain degree of coordination between the protective measures and the management of the archives⁶⁰ of the ICTY is, therefore, required.

D. All other Victims

Created by a Security Council Resolution, the ICTY was expected to contribute to the restoration and maintenance of peace in the former

⁵⁸ See Rule 75(H) of the RPE of the ICTY.

⁵⁹ See Section D.II below.

⁶⁰ Three categories of ICTY records were identified in the Secretary-General's Report of 21 May 2009: (a) judicial records related to cases, such as: transcripts, exhibits, orders, decisions, judgments; (b) records not part of the judicial records but nonetheless generated in connection with the judicial process, such as: records of plenary meetings of judges and of other sub-organ or inter-organ meetings, diplomatic meetings, data on witnesses and detainees, contracts and commercial agreements, press releases, and interviews; and (c) administrative records – including human resources and financial records associated with managing the staff and the organization as a whole. Report of the Secretary-General, *supra* note 48, paras 44-50.

Yugoslavia. To the extent that this objective has been understood as enabling some sort of reconciliation,⁶¹ it has required the ICTY to assist in the recognition of the humanity of all those involved in the conflict, including the victims.⁶² This recognition, it has been said, transforms not only the individual victim, but also the traumatized society.

It was expected that the ICTY would contribute to reconciliation by expressing the international community's disavowal of the wrongdoing that violated the rights of the victims and harmed them. The ICTY would reject the devaluation of the victim.

“The ascertainment and public recognition of indisputable facts before an impartial tribunal will help counter the distortions of demonization and ethnic hatred fomented by certain political élites in the former Yugoslavia. The truth will demonstrate that there was nothing inevitable or irreversible about the eruption of ethnic violence and that interethnic harmony is both possible and desirable.”⁶³

Nonetheless, the remoteness of the ICTY from the region has made it difficult for the truth established by tribunal to become a shared truth “– a moral or interpretive account – that appeals to a common bond of humanity transcending ethnic affinity”⁶⁴. This section discusses how the completion strategy of the ICTY might have a positive impact on the further implementation of the rights of the victims and, ultimately, contribute to reconciliation.

I. Referral of the Cases: Strengthening National Jurisdictions

The outreach program of the ICTY was created soon after the tribunal started to work to reduce the overall misinformation about its mandate and

⁶¹ The goal of national reconciliation, which is specifically mentioned in Resolution 955, is unique to the ICTR. It, nonetheless, can also be considered a precondition to a permanent peace; Barria & Roper, *supra* note 3, 362.

⁶² K. Campbell, ‘The Trauma of Justice: Sexual Violence, Crimes against Humanity and the International Criminal Tribunal for the Former Yugoslavia’, 13 *Social & Legal Studies* (2004) 3, 329, 340.

⁶³ P. Akhavan, ‘Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’, 20 *Human Rights Quarterly* (1998) 4, 737, 741.

⁶⁴ *Id.*

work. It attempted to guarantee that information related to the proceedings reached, at the very least, the victims of the crimes under their jurisdiction. In other words, it aimed at making its work more comprehensible to a non-specialized and distant audience.

Whilst the relevance of the ICTY outreach program is uncontested, the success of its activities has been debated. It has been argued that the outreach activities of the ICTY have failed to provide the victims with information about the general work of the tribunal and, more specifically, about the development of the cases in the tribunal. It has been stated that the outreach program has “failed to bridge the gap in knowledge and appreciation of its work at the grass-roots level”⁶⁵. The general misinformation and misunderstanding about the role of ICTY have not only questioned its ability to foster reconciliation, but have also provoked genuine anger and consternation among victims groups.⁶⁶

There are, nonetheless, various references to the outreach program in the completion strategy reports of the ICTY. The outreach initiatives mentioned in the reports refer not only to those aimed at making the work of the tribunal accessible to the victims, but also to those aimed at developing the capacity of national courts to process war crimes. These capacity-building activities were, in practice, motivated by the completion strategy, i.e. by the need to assist in the development of local legal systems capable of prosecuting the cases transferred by the ICTY.⁶⁷ One could say that the diversion of resources from the outreach initiatives directed to the victims to those focused on national justice personnel might have contributed to failure of the ICTY in making its work accessible to the victim. Nonetheless, it seems important to note that the victims might also benefit from these capacity-building activities, once they bring justice closer to them.

In this context, it is worth recalling that the ICTY, in its Seventh Annual Report, the document that triggered the development of the completion strategy, has already acknowledged the potential benefit of the

⁶⁵ *Id.*, 541.

⁶⁶ R. Zacklin, ‘The Failings of the Ad Hoc International Tribunals’, 2 *Journal of International Criminal Justice* (2004) 2, 541, 544.

⁶⁷ See ICTY Completions Strategy Report November 2008, *supra* note 43, para. 37; Assessment and report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 May to 15 November 2009, Un Doc S/2009/589, 13 November 2009, [ICTY Completion Strategy Report November 2009], paras 50-54.

local prosecution of war crimes. In that Report, the tribunal stated that the referral of cases to national jurisdictions might be useful for national reconciliation, as it would bring international justice closer to the peoples concerned and it would make case management more transparent to the local population.⁶⁸ However, at that time, the ICTY considered the idea of transferring part of the Tribunal's case load to national jurisdictions premature. It was suggested that "national courts lacked the capacity to try the ICTY's cases, and that the judicial systems of the former Yugoslav republics would have to be 'reconstructed on democratic foundations' before cases could be transferred from the ICTY"⁶⁹.

Nonetheless, already in 2002, the ICTY had to reconsider its perception of the national courts.⁷⁰ The referral of certain cases to national courts was considered necessary by the ICTY to achieve the objective stated in Judge Claude Jorda's report, i.e. to complete all trial activities at first instance by 2008.

The Security Council endorsed this understanding with Resolution 1534, which urged the Prosecutor of the ICTY to review the case load of the tribunal with a view to determining which cases should be transferred to competent national jurisdictions.⁷¹ As a result, "the ICTY developed a prompt and strong interest in the capacity of the local legal systems"⁷². There are various references to capacity-building activities and training initiatives developed by the Prosecutor and the ICTY in the completion strategy reports. These initiatives indicate that the ICTY has assumed its position as "one element of a much broader institutional constellation"⁷³

⁶⁸ Seventh Annual Report of the ICTY, *supra* note 11, para. 338. See also D. Raab, 'Evaluating the ICTY and its completion strategy: efforts to achieve accountability for war crimes and their tribunals', 3 *Journal of International Criminal Justice* (2005) 3, 82, 98.

⁶⁹ *Id.*

⁷⁰ Letter dated 10 June 2002 from the President of the International Criminal Tribunal for the former Yugoslavia addressed to the Secretary General, UN Doc S/2002/678, 19 June 2002, Annex.

⁷¹ Drumbl indicates that comments by observers and some dissonance from local communities also contribute to the progressive change of the ICYT approach to the national institutions. M. A. Drumbl, 'Looking Up, Down and Across: The ICTY's Place in the International Legal Order', 37 *New England Law Review* (2003) 4, 701, 706.

⁷² A. Chehtman, 'Developing Bosnia and Herzegovina's capacity to process war crimes cases: critical notes on a 'success story'', 9 *Journal of International Criminal Justice* (2011) 3, 547, 558.

⁷³ Drumbl, *supra* note 71, 703.

responsible for prosecuting the atrocities committed in the conflict in the former Yugoslavia.

As a result of the completion strategy, the ICTY has already referred a total of eight cases, involving 13 accused of intermediate or lower rank to national jurisdiction.⁷⁴ The last report of the ICTY available states that no cases eligible for referral according to the seniority criteria set by the Security Council remain before the ICTY.⁷⁵ It continues by stating that “[o]f the 13 persons transferred to national jurisdictions, proceedings against 12 have been concluded”⁷⁶. The trial of the remaining accused has been suspended until the outcome of a determination as to whether he is fit to stand trial. The Prosecution continues to monitor this case.⁷⁷

The successful prosecution of the cases transferred by the ICTY required a national criminal justice system with the capacity to deal with complex cases. It required a criminal justice system able to conduct a trial in accordance with international human rights standards. In this context, it can be said that the efforts of the ICTY to strengthen relevant national criminal justice systems contributed to the creation of institutions capable of bringing justice closer to the victims. The condemnation of the crimes suffered by the victims will be expressed not only by the ICTY, but also by national courts, opening the scope for the recognition of the different victimization processes that took place during the conflict.

As part of the process of bringing justice closer to the victims, it is important to note that the completion strategy reports of 2009 and 2010 have urged the Security Council to consider the legal basis for the implementation of the right of the victims to reparation.⁷⁸ The references to the victims’ right to reparation recognize the wrongfulness of the harm inflicted on them, they acknowledge the losses the victims have suffered. In

⁷⁴ ICTY Completion Strategy Report June 2011, *supra* note 23, para. 81.

⁷⁵ *Id.*, para. 82.

⁷⁶ *Id.*, para. 83.

⁷⁷ *Id.*

⁷⁸ ICTY Completion Strategy Report November 2009, *supra* note 67, para. 57; Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2010/270, 1 June 2010, para. 69; Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May 2010 to 15 November 2010, UN Doc S/2010/588, 19 November 2010, Annex I, [ICTY Completion Strategy Report November 2010], para. 78.

addition, they draw attention to the fact that, even though the ICTY has not been able to implement victims' right to reparation, such aspect should not be forgotten. Such references support the understanding of the completion strategy as a continuation strategy. As stated in the completion report of November 2010:

“The Tribunal has received a wellspring of positive responses to this initiative from the victims of the atrocities that were committed during the destructive dissolution of the former Yugoslavia during the 1990s. On behalf of the victims, an appeal is again made to the Security Council to take action to implement paragraph 13 of the Declaration [of Basic Principles for Victims of Crime and Abuse of Power]. The failure to properly address this issue constitutes a serious failing in the administration of justice to the victims of the former Yugoslavia. The Tribunal cannot, through the rendering of its judgements alone, bring peace and reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved, and one such remedy should be adequate reparations to the victims for their suffering.”⁷⁹

Among the various forms of reparations,⁸⁰ the following section explores the potential of the archives of the tribunal as a means of providing the victims with some sort of satisfaction. In other words, it draws attention to the symbolic value of the archives and their importance to the long-term memory of the conflict.

II. The Symbolic Value of Archives of the Tribunal

An authoritative description of the injustice to which the victims have been submitted has been considered necessary for the healing process. During the Security Council deliberations on the establishment of the ICTY, the Venezuelan representative suggested that the establishment of an authoritative description of the crimes committed in the former Yugoslavia should be one of the objectives of the tribunal. He proposed that the

⁷⁹ ICTY Completion Strategy Report November 2010, *supra* note 78, para. 78.

⁸⁰ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, 16 December 2005.

Prosecutor “should not confine himself to bringing cases before the Tribunal, but should also present an overall report on all of the violations of international humanitarian law that come to his knowledge, which will provide him with an historical record of great importance”⁸¹.

Even though the proposal was not accepted, the role of the ICTY in the construction of an historical record has not been negated. In fact, the ICTY seems to have endorsed this objective, stating that: “[o]ne should not be blind to the fact that, *from the victim’s point of view*, what matters is that there should be public disclosure of the inhuman acts from which he or she has suffered”⁸². The establishment of an accurate record of the atrocities committed in the former Yugoslavia has been considered important to avoid the denial, in the future, that the crimes occurred.⁸³

The denial of the atrocities committed in the former Yugoslavia is mentioned in the Prosecutor’s completion strategy report of November 2004:

“A serious problem [...] is the general political climate throughout the region, which is fostered by some media outlets which are obviously serving the interests of alleged war criminals. These are often presented as national heroes, while neither the victims nor the crimes receive much attention, when the latter are not simply denied. In such a negative atmosphere, witnesses, in particular insider witnesses, refuse to testify for fear of reprisals.”⁸⁴

The archives, in particular judicial records related to cases, can provide a historical record which offers information about the circumstances in which the atrocities committed during the conflict in the former Yugoslavia occurred. As stated by M. Joinet, in his report on the Question of the impunity of the perpetrators of human rights violations (civil and political), “the knowledge of the oppression it has lived through is part of a

⁸¹ In P. Akhavan, ‘Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’, 20 *Human Rights Quarterly* (1998) 4, 737, 783.

⁸² First Annual Report of the ICTY, *supra* note 3, 18. See also W. Richard, ‘Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia’, 29 *Human Rights Quarterly* (2005) 3, 908 (emphasis added).

⁸³ M. Schrag, ‘The Yugoslav War Crimes Tribunal: An Interim Assessment’, 7 *Transnational Law & Contemporary Problems* (1997) 15, 19.

⁸⁴ ICTY Completion Strategy Report November 2004, *supra* note 20, para. 29.

people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right⁸⁵. For the victims, this information might help to contextualize their experiences and, as a consequence, alleviate their suffering. The archives might have information capable of vindicating their memory and status.⁸⁶ In addition, they might provide information about the fate of persons that disappeared during the conflict. In other words, access to the archives might assist in the implementation of the victims' right to the truth.

Therefore, it is never too much to emphasize the relevance of guaranteeing victims' access to the tribunal's archives. The address of Judge Pocar to the United Nations General Assembly from 2008 remains pertinent today. In that opportunity, he stressed the importance of ensuring that the public information contained in the archives is made easily accessible to the victims. In his words:

“irrespective of the political decision on the physical location of the Tribunal's archives, it is of critical importance that open access to these archives be guaranteed. For this purpose, a suggested approach would be the creation of memorial centres in the main cities of the region, offering access to archives, historical information on the Tribunal's proceedings and cases, as well as interactive debates on international criminal justice and reconciliation in the former Yugoslavia. This would not only meet the primary objective of the archives project, which is easy and open access to our work by the interested public. It would also guarantee the seamless continuation of the longstanding work and achievements of the Tribunal's outreach programme.”⁸⁷

The relevance of easy access to the tribunal's archive seems to have been acknowledged by the Security Council. In the Resolution that created

⁸⁵ M. Joinet, 'Question of the impunity of perpetrators of human rights violations (civil and political) (1997) UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

⁸⁶ M. C. Bassiouni, 'International Recognition of Victims' Rights', 6 *Human Rights Law Review* (2006), 203, 261.

⁸⁷ ICTY, Address of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly, Press Release, (13 October 2008) available at <http://www.icty.org/sid/9989> (last visited 23 December 2011).

the Residual Mechanism, the Security Council requested “the Tribunals and the Mechanism to cooperate with the countries of the former Yugoslavia and with Rwanda, as well as with interested entities to facilitate the establishment of information and documentation centres by providing access to copies of public records of the archives of the Tribunals and the Mechanism, including through their websites”⁸⁸. It is argued, nonetheless, that the symbolic value of the archives requires a more pro-active attitude of the ICTY and the Mechanism. Both institutions should, whenever possible, promote the establishment of information centers in each of the concerned countries in order to facilitate the access to the documents by those who have been directly affected by the crimes. Such approach seems particularly relevant if one takes into account that “the wars in Croatia and Bosnia were above all a story of betrayal and denial that can only be fully repaired within the family, community and society at large”⁸⁹.

The access to the tribunal’s archive requires, nonetheless, a careful identification of confidential documents by the Mechanism. The ICTY has received confidential documents and material on the presumption that they would not be made public, or, at least, not without the consent of the providers.⁹⁰ In addition, documents concerning protected witnesses might also have been classified as confidential upon judicial decisions. As discussed in Section C.III, the declassification of confidential documents concerning protective measures requires a judicial decision. This decision should take into account the safety, physical and psychological well-being of the witnesses concerned. In no circumstances, the fact that the archives of the ICTY have been considered property of the United Nations by the Security Council⁹¹ should not lead to the automatic declassification of confidential decisions related to the protection of witnesses.⁹² The judicial character of these documents requires the balance between ensuring the documents’ availability to the public and the protection of witnesses to be achieved in relation to each specific case.

⁸⁸ SC Res. 1966, 22 December 2010, para. 15.

⁸⁹ E. Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague* (2007), 145.

⁹⁰ Denis, *supra* note 51, 835.

⁹¹ See Art. 28 of the Statute of the Residual Mechanism.

⁹² *Id.*

E. Final Remarks

Judge Claude Jorda's report, which led to the development of a completion strategy, estimated that with changes in the work of the tribunal and the Prosecutor's policy, the ICTY would be able to accomplish its mission by about year 2007.⁹³ Since then, various measures were adopted by the ICTY to allow the tribunal to achieve its objective of completing all trial activities at first instance by the end of 2008. The latest report submitted by the ICTY in accordance with Security Council Resolution 1534 is from May 2011 and proceedings are still taking place before the tribunal. This does not mean that the measures adopted by the ICTY were inefficient. It, nonetheless, reminds us that our ability to predict the future is limited. The ICTY could not foresee and avoid, for instances, the cases of contempt that it had to deal with nor the various procedural issues that written evidence could raise.

This article has suggested that, similarly, the ICTY could not predict all possible effects that the measures adopted under its completion strategy could have had on the victims. In particular, it has indicated that the ICTY has not fully considered the consequences that the measures aimed at speeding up the proceedings might have had on perceptions of the legitimacy of the trials conducted before the tribunal. For the victims who felt they had a moral obligation to testify, these measures have not only limited the amount of information they could provide to the ICTY, but also limited their ability to "set the record straight about the suffering of their families and communities in the presence of the accused"⁹⁴. Ultimately, such limitation indicates that, as witnesses, the relevance of the victims to the tribunal has been related exclusively to their ability to clarify the facts under judgment.

The perception of the victim as an instrument that could assist in the prosecution of the crimes committed in the former Yugoslavia has also been reflected in the discussions of protective measures. The need to ensure the protection of witnesses was presented as an impediment to the completion of the work of the tribunal in the timeframe established by the Security Council. It was only with the discussion of the protective measures in the context of the residual functions that the privacy and safety of the witnesses were at the center of the concerns of the ICTY. Therefore, the seriousness

⁹³ Seventh Annual Report, *supra* note 11, 5.

⁹⁴ Stover, *supra* note 89, 126.

with which the Residual Mechanism will consider the protection of witnesses will be essential to ascertain the inherent value of the victims that testified before the ICTY.

This article has also drawn attention to the broader impact that the measures adopted to facilitate the closing down of the ICTY might have on victims. The capacity-building initiatives of the ICTY aimed at allowing the referral of low and middle rank accused cases strengthened the national legal systems. National courts are able to judge not only the cases transferred by the ICTY, but all other war crimes that are pending or under investigation today. In the long term, the capacity-building initiatives of the ICTY might have assisted in bringing justice closer to the victims.

As part of this process of bringing justice closer to the victims, this article has also considered the relevance of the adoption of measures aimed at redressing the harm suffered by the victims. Among these measures, Section C.II highlighted the importance of the archives of the ICTY to victims. Complemented by the facts established by the courts of the former Yugoslav republics, the facts established by the ICTY will provide a significant overview of the conflict. The archives of the ICTY might also have a more specific role: they might provide the family members of disappeared victims with information about the fate of their loved ones. It is, therefore, important to reiterate the need to provide easy access to the archives of the ICTY.

The measures analyzed in this article indicate that the completion strategy of the ICTY had an impact on the victims. The pressure to complete the trials in the timeframe established by the Security Council has, in some cases, led to the *instrumentalization* of the victims. This article has argued, though, that the closing down of the ICTY does not need to affect negatively the victims. The rights and interests of the victims need, nonetheless, to be duly taken into account by the Residual Mechanism to ensure that the multi-faceted mandate of the ICTY continues to be legitimately implemented.